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The ***ICRC***, which gave rise to the Movement, is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict or unrest it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of international and non-international armed conflict and internal disturbances and tension.

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Announcement

From 1998 the *International Review of the Red Cross* will be published quarterly instead of every two months. This decision has been taken as a cost-cutting measure. The editors will endeavour to make the *Review* even more interesting by offering a rich and varied selection of items and contributions by a wide range of authors.

We trust that the *Review* will continue to attract the same loyal readership.

International Committee of the Red Cross

A note from the Editor

This issue of the *Review* is devoted to two aspects of ICRC action in behalf of conflict victims: the implementation of international humanitarian law, notably as regards criminal prosecution at the international level, and recent developments within the International Red Cross and Red Crescent Movement.

In June of this year a United Nations diplomatic conference will be held in Rome to discuss and, hopefully, to decide on the establishment of an international criminal court — the first ever to be instituted on a permanent basis. The court would have jurisdiction to try serious violations of international humanitarian law and would thus make a valuable contribution towards ensuring greater respect for at least the minimum standards of humanity in times of war. Much will be at stake in Rome for all those who deplore the current lack of mechanisms capable of guaranteeing the implementation of humanitarian law and the punishment of serious violations thereof. The present issue includes an article by the head of the ICRC's Legal Division, who sets out the organization's position regarding the United Nations' proposal for the creation of such a court. A further article, based on historical research, draws attention to the remarkable suggestion made in this respect by Gustave Moynier as early as 1872. Other authors explore the difficult issue of impunity as a factor in the restoration of peace and attempt to clarify the scope of criminal responsibility in the law applicable to internal conflicts.

One of the fundamental objectives of any humanitarian activity is to ensure that all parties to an armed conflict respect their obligations under humanitarian law. An article entitled "Promoting norms to limit violence in crisis situations: challenges, strategies and alliances", explores different ways of achieving this goal.

Another article on the use of chemical weapons during the Italian invasion of Abyssinia in 1935-1936 and the ICRC's subsequent response opens a little-known chapter in the history of humanitarian law.

The second part of the issue contains the resolutions adopted by the Council of Delegates at its meeting from 25 to 27 November 1997 in Seville, Spain. It also includes the text of the *Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement.* This "partnership agreement" sets the framework for future relief operations in aid of conflict victims. In an article entitled "The ICRC looks to the future", the *Review* publishes the first results of the organization's debate on the future of humanitarian work and thus on the future of the ICRC itself.

The Review

Promoting norms to limit violence in crisis situations: challenges, strategies and alliances

by Marion Harroff-Tavel

Promoting norms to limit violence: some original initiatives

In Somalia, a group of young actors, musicians and scriptwriters are working on a play which is to be produced, filmed and distributed in the form of a video throughout the country. One scene shows a young militiaman boasting of how he has terrorized the population and the reaction of the woman he loves. She evokes the suffering caused by his conduct and refuses to marry a man who has disregarded the code of honour of his clan. This creative work contains a message for young militiamen about the effect of unbridled violence on both its victims and its perpetrators.

In India, a national research centre is running a programme to promote international humanitarian law at the universities of Delhi and Bangalore. This gives the country's future political, financial and military elite, and tomorrow's legal experts, an opportunity to discuss the rules to be observed in situations of conflict. These rules, enshrined in humanitarian law, govern both the conduct of hostilities and the proper behaviour to be adopted vis-à-vis those who are not, or no longer, taking part in the fighting.

Marion Harroff-Tavel is head of the ICRC's Division for the Promotion of International Humanitarian Law. She previously occupied various posts, including that of Deputy Delegate General for Eastern Europe and Central Asia.

Original: French

In Central Asia, the armed forces organize manoeuvres during which soldiers are faced with situations where international humanitarian law applies. The ICRC takes part in the practical exercises, playing its own role.

In the Russian Federation, journalism students attend a course on the media and war. Among other topics, they discuss protection for journalists and the responsibility of the media in crisis situations. Their discussions cover both legal and ethical issues.

In Guatemala, representatives of the Maya community are seeking points of convergence between the customs of the Maya and the rules of international humanitarian law. Artists, journalists, members of academic circles, government officials and representatives of non-governmental organizations (NGOs) are all involved in this joint project, which makes it possible to tailor the means used for promoting international humanitarian law to the context.

These few examples illustrate the widely diverse nature of the groups that have to be targeted for the promotion of the humanitarian reflex: combatants, of course, but also decision-makers, those who bear political responsibility for a conflict or who may be able to influence its course, economic circles, opinion-makers (the media and intelligentsia), teachers, young people and many others. They also illustrate the variety of situations in which this task of "disseminating"[1] the humanitarian message is performed, whether as a preventive measure or to avoid the recurrence of acts condemned by the international community.[2] Finally, they demonstrate the creative spirit inherent in dissemination, both as concerns the teaching methods applied and the communication tools used.

But why must we promote international humanitarian law? What is the purpose? What is the context? What message should be put across and what strategic approach adopted? What working principles must be

[1] In this article, the terms "dissemination" and "promotion of international humanitarian law" are used synonymously. The word "dissemination" appears in the Geneva Conventions; it denotes action taken to spread knowledge of the content of the humanitarian treaties. However, the term "promotion" is more appropriate to encompass the whole range of the ICRC's activities aimed at improving understanding and acceptance of humanitarian law.

[2] The *International Review of the Red Cross* recently devoted the major part of an issue to the dissemination of international humanitarian law (No. 319, July-August 1997, pp. 357-454).

respected? These are some of the questions this article will address, offering some avenues for reflection.

The problem

There is no need to embark on lengthy descriptions of the suffering caused by violations of humanitarian law in armed conflict, no matter who the culprits: the pictures beamed from Rwanda, Bosnia-Herzegovina and Afghanistan have brought us face to face with such suffering in recent years.

Nor is there any point in dwelling on the numerous attacks on humanitarian workers. For the ICRC, already traumatized by the murder of three delegates in Burundi, the assassination in Chechnya of six of its staff as they slept in the hospital where they were working, followed by the death of three others in Cambodia, Sri Lanka and the Democratic Republic of the Congo, created shock waves whose reverberations will be felt for a long time to come. But the ICRC is not the only institution to be targeted. Members of other organizations, including National Red Cross and Red Crescent Societies, have been killed, kidnapped or threatened, paying the price for their commitment to the humanitarian cause.

Apart from instances where they have actually come under attack, humanitarian agencies frequently see their activities hampered. The obstacles they encounter are often the result of the image they project: they may be perceived as purveyors of Western values, destabilizing the host society, as instruments of the foreign policy of "wealthy" States or of the economic interests of the private sector. In the eyes of some, humanitarian programmes merely salve the conscience of those who are at the root of their problems. Humanitarian agencies working for political ends — or politicians launching humanitarian operations? In short, humanitarian workers are often considered as foreigners who decamp as soon as the violence escalates; visitors who spread messages of tolerance whereas, during the course of history, they have all too frequently displayed a great deal of intolerance. There is no need to go on: rightly or wrongly, the image of humanitarian agencies can become a prism in which everyone sees reflected his or her particular vision of the world.

Whether this perception of humanitarian action is based on actual fact or whether it is engineered by the perpetrators of violence in order to stigmatize unwelcome witnesses or to discredit the international community, the basic issues remain the same. Access to the victims depends to a large extent on this image.

The *raison d'être*

How could the promotion of international humanitarian law and the principles of humanitarian action — in other words, dissemination — possibly rise to all the challenges outlined above?

First of all, dissemination alone does not claim to be able to reverse the logic of total war, curb the atrocities caused by spiralling hatred, or even prevent conflicts.

To question the *raison d'être* of humanitarian law because it is not observed, and hence to question the value of dissemination, as certain disillusioned observers sometimes do, is to believe that the usefulness of a rule is measured by the extent to which it is respected. That is false reasoning; it is actually the contrary which is the case. First, there are tasks, such as combating torture, which failure renders all the more urgent; secondly, behaviour and attitudes can be influenced not only at group level but also at the level of the individual. Beyond the phenomenon of collective violence there are acts of humanity which will never be acknowledged. Success in this area cannot be quantified. Finally, anyone who has ever listened to victims of conflict knows that, once an individual's basic needs in terms of food, access to medical care, safety and shelter have been satisfied, his primary concern is that the oppression to which he has been subjected might be repeated and afflict the next generation. Of course, a victim's dearest wish is that humanitarian attitudes be encouraged among his adversaries, but in time, once the conflict is over and passions have abated, thoughts on humanitarian action in time of war extend to the victim's own environment.

The protagonists

The dissemination of international humanitarian law is an obligation for all States party to the Geneva Conventions, who must "include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces ...".[3]

[3] Articles 47/48/127/144 respectively of the four Geneva Conventions of 12 August 1949; Article 83 of Additional Protocol I and Article 19 of Additional Protocol II of 8 June 1977.

It is also a responsibility for the ICRC which, in accordance with the Statutes of the International Red Cross and Red Crescent Movement, has a duty to maintain and disseminate the Movement's Fundamental Principles (humanity, impartiality, neutrality, independence, voluntary service, unity and universality) and work for the understanding and dissemination of humanitarian law. A precondition for effective protection of those who are not, or no longer, taking part in the hostilities is that the parties to the conflict must be familiar with the rules which afford such protection.

Thus the ICRC has to do everything in its power to ensure that States fulfil their obligations as concerns dissemination of the law. This involves not only offering advice or sharing expertise, but also more tangible support, for example when a State does not have the human or financial resources it needs to fulfil its obligations. The ICRC may even temporarily act as a substitute for a State if the latter is sceptical about the usefulness of disseminating humanitarian law, in the hope that it can demonstrate that it is in the authorities' interest to follow its example.

The objective

The objective pursued in promoting international humanitarian law and the principles of humanitarian action is to secure respect for this body of law and to gain access to the victims which it protects. In other words, promotion of the law is one of the instruments which make it possible to influence the attitudes and behaviour of all those who are or may be in a position to ensure that, in situations of armed violence, restrictions are placed on the means of warfare used, that victims are treated humanely, and that humanitarian activities can be carried out on their behalf. The steps taken by humanitarian organizations and States to secure compliance with the law, and the pressure of public opinion orchestrated by the media, to cite just two examples, pursue the same aim.

Some people will say that trying to establish a relationship between knowledge of a rule on the one hand and respect for that rule or changes in behaviour inconsistent with it on the other is too ambitious a goal. Indeed, this is a legitimate question. In the field of dissemination among the armed forces, it is recognized that formal teaching has to be backed up by incorporation of the law in military instruction. Hence the efforts made to translate the law into directives which can then become part of military regulations. Hence also the ICRC's concern to remain in contact with the armed forces, even beyond teaching activities, so as to maintain

with their members a dialogue which will help facilitate humanitarian action. Teaching alone is not enough.

How should we view the effects of dissemination among young people? Does it have any chance of influencing their behaviour when they are faced with violence, not only here and now but above all at the time when they might be called upon to apply humanitarian law? Once again, a degree of modesty is in order. There is no automatic cause-and-effect relationship here. Proceeding from an analysis of a conflict situation and the response the law can offer for the problems to which it gives rise, the aim is to provide the adolescent with the means to reflect on the mechanisms of violence and to gain a better understanding of the forces behind it. All this is a necessary prelude to "acceptable" behaviour when violence erupts.

In short, even though the ultimate objective of dissemination is to influence attitudes and behaviour, it is important to remain aware that multiple factors converge to shape them; for example, the extent to which the basic needs of the individual are met in a context of violence, the psychological effects of the trauma experienced, fears of punishment or expectation of reward, to mention just a few. When the individual finds himself in a situation in which he is fighting for his very survival, showing respect for a rule of law or a moral imperative may well become a secondary matter.

Even if, for the reasons given above, the impact of dissemination on behaviour is difficult to assess, dissemination does have one essential merit: it places individuals squarely before their responsibilities by making them aware not only of what the international community expects of them — for some this is the least of their concerns — but also of the dividing line recognized by what we call, for want of a better expression, "the universal conscience" between what is acceptable and what is not. Like a mirror held up before us, it reflects an image of ourselves. Whether or not the individual assumes his responsibilities when called upon to do so is a choice, a reflex even, in which numerous criteria come into play. If the person concerned knows what those criteria are and has given them some thought, this is already quite an achievement. Indeed, it is the primary function of dissemination.

The context

The context in which dissemination is carried out is a world which is changing at several levels. Among recent developments there are three

which have a major impact on the promotion of humanitarian law: the weakening of the State, the changing nature of conflicts, and the globalization of information, at least among the more privileged members of society.

On the global scale, the international system founded on the nation State as a sovereign power is losing ground. The nation State is being undermined by the assertion of religious, ethnic, tribal, clan and geographical identity. The State is also becoming less powerful in the face of the globalization of society, accelerated by that of the economy and by the information age. Lastly, the very foundations of the State are eroded when individuals try to assume its functions by accumulating executive, legislative and judicial powers. The weakening of the nation State, characterized by a lack of confidence on the part of the governed in those who govern them, the declining credibility of State institutions, and even the attempts of some citizens to exclude others from mainstream society may all have repercussions on international humanitarian law, a product of the nineteenth century which places obligations first and foremost on the State or the structured entity opposing it, obligations which the State is not always able to fulfil.

The nature of conflicts is also changing, as the following features of civil wars demonstrate.

- While there are still instances of conventional internal conflicts in which government armed forces are pitted against an organized opposition, there are also extreme situations in which the violence arises from relations between individuals, perhaps between neighbours. Even so, war is not a spontaneous eruption of violence sparked by a breakdown in interpersonal relations; it may be the result of months of propaganda and meticulous preparations. Once the violence of war is unleashed it is no longer possible to make a distinction between civilians and combatants.
- An increasing number of children are being enlisted into irregular armed groups.
- In some conflicts triggered by issues of identity, the argument of collective responsibility resurfaces. Refugees belonging to an ethnic group considered guilty of crimes are hunted down by people convinced that theirs is a just cause; humanitarian law — and refugee law — go by the board.
- Some conflicts become "privatized", with oil, mining or gas companies or major landowners playing a significant role in the recruitment

of armed militia to ensure their own security or to influence the outcome of the conflict.

- The mercenary dimension of war is increasing, the importance of drug trafficking equalled only by that of the illicit arms trade. War provides fertile ground for criminal activity.

Finally, there is the revolution in communication technology. The effects of the cybernetic age and the possibilities it offers are far from being fully appreciated. Computers are a formidable tool for promoting humanitarian law, at least among the more privileged sectors of society. Every individual should be able to demand respect for this body of law, no longer leaving States alone to bear responsibility for its implementation, since they frequently prove to be incapable of meeting that obligation.

The message

Although the message in situations of conflict is a universal one, focusing on the protection of those who are not, or no longer, taking part in the hostilities, the manner in which it is put over differs depending on the way in which problems are analysed, on the person for whom the message is intended, or on the time and place: the language used to address an American soldier fighting in the Gulf war cannot be the same as that used to talk to child soldiers in Liberia. The language appropriate for a teacher will not be the same as for an adolescent.

Next, the message should as far as possible be associated with a practical activity and illustrated by that activity. For example, by purifying the water in all the areas of a town, especially the neighbourhoods most severely affected, a sanitary engineer can demonstrate the principle of impartiality. All humanitarian workers, whether doctors, nurses, logistics experts or prison visitors, must receive training in communication skills and know what points to make in a given context.

In practice, the ideas conveyed are very simple. What has to be put across is not so much the whole range of provisions of the Geneva Conventions and their Additional Protocols — which are often highly detailed and complex — but essential rules which express their basic content. For the operational delegate responsible for spreading knowledge of humanitarian law in a country in conflict, the broad lines of the existing law are quite sufficient. However, a legal specialist will bear in mind that this law is also a set of rules which can be invoked in order to protect victims, and which has to be developed wherever shortcomings are identified.

Finally, it would be a mistake to believe that the message is a product delivered to its addressee in a one-way relationship. The act of communicating involves exchange, dialogue, listening, questioning, give and take, and attempts to reach mutual understanding. Even the way in which the individual who is speaking behaves is a message in itself. The mere fact of taking an interest in the culture of one's audience and being ready to talk about humanitarian issues creates a space for dialogue, an opening which can lead the way to a more structured message about the law when the time is ripe.

Strategies

To succeed in such an ambitious undertaking, a strategy is essential. Otherwise there is a great risk of becoming bogged down in short-term initiatives with no future. This strategy hinges on three main concepts.

Forging links with the local culture

Let us take an example, similar to the Maya project mentioned earlier: in Somalia, the ICRC appointed local historians to conduct a study on the sources of past conflicts, traditional ways of settling disputes, and the respect due to women, children and the elderly in Somali custom. The study gave rise to a series of radio programmes produced with the BBC on "the clan system and war", "women and war" and "war: the viewpoint of community elders". A cartoon strip intended for young militiamen was also created on the basis of this research, and plays were performed by several local theatre groups. All these productions convey a humanitarian message that is in line with contemporary humanitarian law but stems from the country's own traditions.

This is an interesting approach which is currently being taken up by the ICRC in Rwanda. The delegation's national employees have held group discussions throughout the country to seek points of convergence between international humanitarian law and local codes of conduct in conflict situations. A historian is in charge of the study.

However, such attempts to link the message of international humanitarian law with local culture are open to discussion, as the following few examples illustrate.

- Some authors cast doubt on the idea that culture is a corpus of perceptions, beliefs or symbols which dictate specific opinions, attitudes

or behaviour.[4] Does such a corpus, which supposedly remains stable over time, actually exist? Surely societies are permanently interacting with their environment? These same authors put us on our guard against inventing tradition as an invention of modernity, and against the risk of instilling, through constant repetition, certain values and standards of behaviour which refer explicitly to the past.

- African staff of the ICRC are asking themselves whether the new forms of conflict should lead the organization to invoke traditions which they consider to be antiquated. They point out that many African ethnic groups have a purely warrior tradition and consider killing to be proof of bravery. So why should the universal message of humanitarian law be watered down at the very moment when the globalization of information by means of the Internet gives the African elite access to that message? What is more, they say, where is the common cultural tradition to which the message of humanitarian law can be linked when 400 different ethnic groups coexist in one country?
- Other staff members, also in Africa, are enthusiastic about the idea of highlighting the humanitarian traditions which existed in their countries even before humanitarian law came into being. They see this as a means of giving young people a sense of historical continuity and of promoting recognition of Africa's cultural heritage. It is, moreover, a way of restoring to their proper status the traditional leaders whose influence was beneficial to the community, but who lost all their power when conflict caused the social fabric to disintegrate.

The approach, therefore, has to be tailored to each specific country, or even each region. Sometimes it is necessary to distinguish between substance and form, for example by using the sayings of minstrels in Mali or the stories of Kivu as a means of conveying a universal message. The golden rule is always to find out what the expectations of the target population are before formulating the message to be passed on, often by some of its own members.

Whatever the approach chosen, seeking to develop these links, which for want of a better word we describe as "cultural", is an essential strategy of dissemination, which implies working with local partners to spread knowledge of a body of law whose content has universal value.

[4] Jean-François Bayart, *L'illusion identitaire,* Editions Fayard, 1996, 306 pp.

Forming alliances

Six well-known African singers accompanied the ICRC on a tour of conflict zones so that they could witness the effects of war for themselves: displaced populations, children mutilated by landmines, young widows struggling to bring up their families alone, child soldiers, and so on. The fruit of this harrowing journey was a song — "So why?" — which sounds a warning to the young people of Africa, invites them to reflect upon ethnic conflicts, the suffering of civilians, and the destruction of an entire generation, and urges them to react. The tour, which was the subject of a documentary film, also provided the material for a book, with a preface written by President Nelson Mandela.[5]

This a recent example of forming alliances. In this case it is the individuals who have the greatest influence on young Africans — their idols — who do the talking. The ICRC withdraws into the wings, giving centre stage to these new ambassadors of the humanitarian cause.

Another example is a project in the Caucasus, where the ICRC is working with national educational experts under the auspices of the respective ministries of education on an educational programme for 12-year-olds, carried out by teachers in schools. Local specialists are scanning their countries' literature for texts which will encourage these young people to think about the limits which must be placed on violence.

A final illustration comes from Ethiopia, where, with the support of the Red Cross, circus performers are conveying humanitarian messages on a wide range of subjects (AIDS prevention, hygiene, the Red Cross and Red Crescent principles, respect for the emblem, etc.).

The International Red Cross and Red Crescent Movement is in itself a unique network, and cooperation between the National Societies, the International Federation of Red Cross and Red Crescent Societies and the ICRC should be given the highest priority. The ICRC is working in this direction, involving National Society staff in its own dissemination programmes or providing support for such programmes launched by the National Societies themselves. This pooling of expertise is beneficial to all the partners.

In short, the time has come for a genuine mobilization of all concerned — States, political, academic and economic circles, the Movement, UN

[5] *Woza Africa! Music goes to war*, Jonathan Ball Publishers, Johannesburg, 1997, 96 pp.

agencies and NGOs — so that international humanitarian law, which contains rights and obligations both for parties to conflict and for individuals, can regain the prestige that is its due.

At a time when some industrialized States are wondering about the relevance of emergency assistance as the sole — but essential — response to conflicts, their political and diplomatic support for such a mobilization around universal ethical principles, and not around Western values, would be more than welcome.

Development of strategies for communicating with the new perpetrators of violence and those who have a direct or indirect influence on their behaviour

Strategies for communicating with the new perpetrators of violence can only be devised on a local basis. Such strategies require a thorough understanding of the motivating forces behind the behaviour of those to whom the message is addressed, whether they are groups involved in organized crime, paramilitary groups connected with economic interests, children — often on drugs — or others.

Achieving this understanding takes time and the ability to listen. It could be facilitated by more systematic recourse to ethnologists, anthropologists, sociologists and psychologists in the country concerned. Indeed, for the message to be not only understood but also remembered and assimilated by the person receiving it, it is essential to find the linguistic, visual or symbolic vehicle which is sure to have an effect on the listener, or the argument which will appeal to his reason. This message may stray a long way from legal language, but it is very close to reality. Just as knowledge of a rule is not necessarily enough to ensure that it is respected, there are contexts in which that rule has scarcely any sense since all rules are flouted. Perhaps, in such cases, a link must be found between the message and the actual experience of the audience, and arguments devised more systematically on the basis of an understanding of the interests of those to whom the message is addressed rather than on humanitarian, legal or political considerations.

The field of social science is full of potential. Learning the lessons it can offer should be seen as a priority.

Finally, it is important to approach the political or economic decision-makers, military commanders or leaders of armed groups, and the opinion-makers who foment a conflict or influence its course. To that end, a chart showing the formal or informal power structure in a society must be drawn up so that contact can be made with those who will exert

a real influence on respect for the law, on acceptance of humanitarian activities and on the security conditions in which they are carried out.

Working principles

There are three principles which should govern any dissemination activity.

The identification of needs by or with the beneficiaries

Are the ICRC's efforts to promote humanitarian law and the Fundamental Red Cross and Red Crescent Principles a response to an external demand? This is rarely so, except where the success of an initiative generates such a demand, as was the case with dissemination at universities in Colombia. Generally, the projects launched by the ICRC are spontaneous.

Dissemination should preferably meet an expectation, particularly in peacetime or in post-conflict situations. Just as representations to authorities on behalf of prisoners are based on a relationship of trust with those same authorities who have permitted the ICRC visits, a dissemination project should, if possible, be undertaken to meet specific needs or in response to requests made by political, military, academic, educational or other authorities.

Clearly, such consultation is frequently impracticable in the midst of a conflict, and in such situations it is first and foremost those guilty of violations of humanitarian law who must be reached. When a society's structure has broken down to the point where the authorities are not in a position to give their consent to a dissemination project, or they themselves are resistant to the humanitarian message, recourse to the media or networking is the only remaining option.

Support for those who want to learn how to teach

Training people to teach humanitarian law and encouraging the incorporation of this law in military instruction is the right course to follow; in other words giving support rather than standing in for others.

Without being fundamentally altered, the message can then be adapted and re-invented, not so much for the sake of authenticity, but because it will emanate from the very depths of the society concerned, and will thus be all the more meaningful for those to whom it is addressed.

Evaluation

Dissemination is an enterprise which requires innovative ideas and whose corollary is the right to make mistakes, provided that they are not repeated. Hence the importance of an assessment process whereby ongoing projects can be more closely monitored and adjusted as they proceed, completed projects can offer valuable lessons, and future projects can be better planned.

Certain targeted assessments have been carried out, for example of the mine-awareness programmes in Azerbaijan, Bosnia-Herzegovina and Croatia. Evaluating the results of the teaching component of programmes (whether it is appropriate in terms of the objectives sought) and the way they are conducted (strategy and resources) makes it possible to improve their quality. As for evaluating their impact, which is certainly more difficult (how can the impact of talks about violence be evaluated in adolescents?), it remains a challenge which will require careful consideration in the future.

Conclusion

Although at the global level the number of large-scale conflicts seems to have declined, crisis situations are arising with growing frequency and deadly conflicts are dragging on, for example in Afghanistan, Sri Lanka, Rwanda, Burundi, and Sudan, not to mention the tragedy that is unfolding in Algeria. The number of victims of these situations is also on the increase.

The way in which conflicts develop is still often unpredictable, whether they are of an ethnic, political or socio-economic nature. Hotbeds of tension or conflicts initially confined to relatively small geographical areas can set entire regions ablaze, as proven by the recent events in the Great Lakes region of Africa.

So what is to be done? The urgency of needs means that food and medicines have to be provided and the victims of excesses have to be protected. At the same time an attempt has to be made to analyse *as far as possible* the probable effect that this assistance will have on the evolution of the conflict and efforts to build peace[6] — *as far as possible,*

[6] Mary B. Anderson, *Do no harm: Supporting local capacities for peace through aid,* Cambridge, Local Capacities for Peace Project, 1996, 61 pp.

since there are humanitarian emergencies in which several aims (helping a population in distress and restoring peace) cannot easily be pursued simultaneously.

All this is not enough. Hence the strong interest shown in conflict prevention by the community of States which supply and fund emergency assistance. The term "conflict prevention" is not clearly defined, but covers the measures taken when a specific situation seems likely to degenerate into violence in the foreseeable future.[7] One of these measures is preventive diplomacy, which aims to influence *decision-makers* who might opt for confrontation in a situation of "unstable peace". Another is the action taken with regard to *situations* diagnosed as being pre-conflict, which implies the existence of an early warning system.[8] Such action can take various forms: diplomatic consultations, cultural exchanges, military, economic or social measures, education for peace, and support for local crisis-management mechanisms.

The promotion of international humanitarian law is one of the instruments of the ICRC's preventive action.[9] One of its special features is that it is not restricted to situations of unstable peace or pre-conflict situations. It covers the whole spectrum of situations (peace, crisis, conflict, post-conflict) and looks to the long term. On the other hand, its content is very narrowly defined: as we have seen, it aims to influence attitudes and behaviour so as to ensure that when armed violence breaks out the principles of humanitarian law are respected. In peacetime, the promotion of international humanitarian law is an educational act, which may be described as "advance preventive action". Once a crisis has erupted, it aims to regulate behaviour and could be called "immediate preventive action".

Another interesting feature of the promotion of international humanitarian law is that it pursues specific objectives and is carried out according

[7] In the literature available to us the concept of conflict prevention does not generally cover crisis management once violence has erupted, nor conflict management, conflict mitigation or peace-making. On the topic of conflict prevention, see *Preventing a violent conflict: A study*, Ministry of Foreign Affairs, Stockholm, 1997, 67 pp. (in particular pp. 35 and 36).

[8] Maurice Bertrand, "Vers une stratégie de prévention des conflits?", *Politique étrangère,* Spring 1997, pp. 112-123.

[9] On this subject, see Jean-Luc Chopard, "Dissemination of the humanitarian rules and cooperation with National Red Cross and Red Crescent Societies for the purpose of prevention", *International Review of the Red Cross,* No. 306, May-June 1995, pp. 244-262.

to the same principles as those of technical cooperation.[10] It contributes in various ways to the construction of a strong civil society.

- Programmes for the dissemination of international humanitarian law in educational and academic environments contribute to the training of leaders who will analyse the political scene in the light of ethical considerations, especially in conflict situations. By leaders we mean not only individuals who exercise political responsibility at national or international level, but also members of religious communities, teachers, journalists, businessmen, members of political parties and NGO representatives.
- Dissemination work carried out with National Red Cross and Red Crescent Societies boosts their institutional capacity. Indeed, offering support for local NGOs which have direct knowledge of needs and possibilities is an essential component of any technical cooperation programme.
- Finally, the dissemination of international humanitarian law is a decisive factor for the reinforcement and expansion of the "rule of law", which is indispensable for the construction of civil society not only at the national but also at the transnational or even international level.

In today's changing world, promoting rules to limit violence in crisis situations is a responsibility of the "global village" which is taking shape, comprising a network of State, economic and political entities, organizations, associations and citizens.[11] Awareness of this common responsibility is a decisive step towards greater respect for humanitarian law - a body of law which is all too frequently perceived as an unattainable ideal, or, when it is violated, as an inadequate set of rules,[12] whereas in fact countless lives are saved because one day States or individuals decided to comply with it.

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[10] *DAC principles for effective aid*, Development Assistance Manual, OECD, Paris, 1992.

[11] An independent commission comprising 28 international leaders has drawn up a report on this topic, which we recommend to the reader: *Our global neighbourhood*, Report of the Commission on Global Governance, Oxford University Press, 1995, 410 pp.

[12] Olivier Russbach, "Une justice internationale à la carte", *Politique internationale*, No. 67, Spring 1995, 13 pp.

The establishment of a permanent international criminal court

ICRC expectations of the Rome Diplomatic Conference

by Toni Pfanner

Violations of international humanitarian law are not a new phenomenon. Nor is the establishment of an international criminal court to counter such violations a new idea. The first project creating a link between violations of a humanitarian treaty — that is, the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field — and penal sanction by a permanent international judicial body was drawn up by Gustave Moynier, one of the founders of the ICRC.[1] Like so many other projects, it did not materialize, however.

International humanitarian law already provides for a repression mechanism that imposes on States the obligation to initiate legal proceedings and to search for persons alleged to have committed grave breaches,

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[1] Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute/ICRC, Geneva, 1985, pp. 197-218; Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, No. 11, April 1872, pp. 122-131; Gustave Moynier, *Etude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Cherbuliez, Paris, 1870, pp. 299-311.

wherever they may be. If this mechanism were duly applied, it would guarantee efficient and impartial repression of breaches in all circumstances. It must be acknowledged, however, that the reality is quite different.

It is important to set up mechanisms of accountability to ensure that those responsible for violations are not given blanket amnesties. Justice must be rendered for the sake of the victims, but it is also part of a series of measures that must be taken to prevent as well as put an end to violations. If it is to be taken seriously, the law must not only exist, it must be enforced. Hence the crucial need to establish an international criminal court to change the current pattern of impunity.[2]

In conducting its activities, the ICRC is confronted with atrocities which are all too often left unpunished. This situation simply cannot continue and the international community must ensure that those responsible are made accountable for their acts. Repression mechanisms are important not only because penal sanctions form an integral part of any properly constituted legal system, but also because they serve as a deterrent.

Since 1996, six meetings of State representatives have taken place to prepare a draft statute for an international criminal court, to be submitted to a diplomatic conference convened by the United Nations and scheduled to take place in Rome from 15 June to 17 July 1998,[3] which should eventually bring this long-standing project to fruition. Before adopting the statute, however, States must resolve such complex legal problems as the definition of crimes falling within the competence of the court (see below, Section 1); the complementarity between the proposed international criminal court and national criminal courts (Section 2); the court's automatic, or inherent, jurisdiction (Section 3); and the trigger mechanism (Section 4).

The following comments on some crucial issues regarding the draft statute of the court relate directly to international humanitarian law. It is essential to find satisfactory solutions to these problems if the international community is to establish a court empowered to take appropriate and effective action towards putting an end to impunity.

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[2] See "The administration of justice and the human rights of detainees: Question of the impunity of perpetrators of human rights violations (civil and political)", Final Report by Mr. Joinet, pursuant to Sub-Commission decision 1996/119, 26 June 1997, UN doc. E/CN.4/Sub.2/1997/20.

[3] UN General Assembly resolution 52/160 of 15 December 1997.

1. Definition of war crimes

In carrying out its mandate, the ICRC often encounters extremely serious crimes, in particular war crimes, crimes against humanity and the crime of genocide, in the face of which the international community as a whole cannot remain passive and indifferent. The definition of war crimes remains a particularly contentious issue. Several proposals have been put forward to define such crimes for the purpose of inclusion in the statute of the court. The ICRC considers it very important to maintain coherence between the war crimes defined in legal instruments already endorsed by a large majority of States — in particular the Geneva Conventions of 1949 and their Additional Protocols of 1977 — and those set out in the draft statute. The court should be given jurisdiction at least over the crimes which are most prevalent in today's conflicts.

(a) The commission *per se* of war crimes has already been recognized as unacceptable and has prompted the creation of international tribunals, namely those of Nuremberg and Tokyo and the tribunals for the former Yugoslavia and Rwanda. Never did these tribunals require that, in order to be considered as such, war crimes had to be committed in a widespread and systematic manner. To add any further requirement to the list of war crimes would therefore not only be superfluous, but it would also risk blurring the very notion of such crimes.

(b) The 1949 Geneva Conventions and their Additional Protocol I have established a list of what are known as "grave breaches" or acts which have been widely accepted as representing the most serious violations of international humanitarian law; these are violations of such gravity as to impose upon States the obligation to prosecute or extradite those alleged to have committed or given the order to commit such crimes, regardless of the State on whose territory they were perpetrated or of the nationality of the accused. The ICRC considers that the notion of "war crime" should also include the grave breaches set out in Protocol I additional to the Geneva Conventions. Indeed, 150 States are now party to Protocol I, and most of the grave breaches listed therein are considered as having crystallized customary international law.

Grave breaches are regarded as war crimes. They are, however, not the only crimes that fall within this category. "Other serious violations of international humanitarian law" are also recognized as constituting war crimes. They encompass, for example, violations of treaties such as the Fourth Hague Convention of 1907 or of customary rules regulating warfare. To the list of grave breaches of the Geneva Conventions and

Additional Protocol I, the ICRC has proposed adding other serious violations of humanitarian law applicable in international armed conflicts. These include violations of the laws and customs of war which, although not mentioned in the Conventions and Additional Protocol I, relate to means and methods of warfare that are considered unacceptable or are regarded as clear violations of the rules of customary international law. Most of the prohibitions involved date back to the beginning of the twentieth century.

(c) Since the majority of armed conflicts today are internal in nature, it is imperative to ensure that the court's jurisdiction extends to serious violations committed in *non-international* armed conflicts, namely violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. A total of 140 States are now party to Protocol II additional to the said Conventions, an instrument specifically designed to apply in non-international armed conflicts. It will be noted that the ad hoc International Tribunals for Rwanda and for the former Yugoslavia deal, in full or in part, with situations of internal conflict. The proposed permanent court must have jurisdiction over all serious violations of humanitarian law.

War crimes committed during non-international armed conflicts are therefore of particular concern to the ICRC. Violations of the most fundamental principles as codified in Article 3 common to the Geneva Conventions, as well as crimes considered as totally inadmissible whether perpetrated in international or in non-international armed conflicts should form part of the list of war crimes. As stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife".[4]

2. Complementarity between national and international jurisdiction

As mentioned earlier, the Geneva Conventions enjoy almost universal acceptance, and practically every State is bound by the duty to prosecute or extradite persons alleged to have committed, or to have ordered the commission of, grave breaches.[5] States have also agreed to take all

[4] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR-72. Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), p. 64, para. 119.

[5] Articles 49/50/129/146 of the four Geneva Conventions of 12 August 1949.

requisite steps to enact legislation providing for effective penal sanctions against the perpetrators and to suppress all acts contrary to the Conventions. Hence, the duty to prosecute exists, regardless of the State on whose territory the acts in question were committed or of the nationality of the accused.

It is not the role of the proposed international criminal court to act as a substitute for national courts and thus to detract from the existing obligation of States to repress such crimes at the national level. Pursuant to the complementarity principle, the international criminal court would leave the primary responsibility for action to States and would institute proceedings only in cases where national courts had failed to do so. It is therefore necessary to endow the court with the powers required to ensure its effectiveness and its ability to provide an adequate judicial response to crimes of international concern which have not been suppressed by States. In this connection, it should be pointed out that the ICRC intends to continue to contribute to the efforts being made to strengthen implementation of international humanitarian law at the national level through its Advisory Service, recently set up for that purpose.[6]

However, in cases where trial procedures in national criminal justice systems are not available or ineffective, a permanent international criminal court would have an especially vital role to play. An efficient, widely accepted court offering maximum guarantees of fair trial, free of any political pressure, and designed to complement national justice systems, would send a clear message, both to the perpetrators of serious crimes under international law and to their victims, that immunity from prosecution will no longer be tolerated.

3. Requirement of State consent

Another issue of concern to the ICRC is the regime which requires the consent of the custodial and territorial — or other — States before the court can exercise its jurisdiction. In order for the court to serve as an effective complement to national courts (since it would exercise its jurisdiction only in the event that States had failed to act), it should not be impeded by extra obstacles, such as the requirement of State consent.

[6] Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *International Review of the Red Cross*, No. 312, May-June 1996, pp. 338-347.

Under the existing principle of universal jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other State.[7] This principle simply reaffirms the fundamental notion that war criminals are not immune from prosecution; those responsible for committing war crimes are accountable for their acts and must be brought to justice, wherever they may be. Hence, if the court is to act only when States have not done so, and if yet another hurdle — that of consent — is imposed on the court before it may exercise its jurisdiction, that goal will never be achieved. Additional conditions, such as obtaining the consent of the State on whose territory the crime was committed, that of the State of which the victims are nationals, that of the State of which the presumed perpetrator is a national, and that of other States concerned, would make it difficult for the court to function or might even give it a *de facto* optional character. If, by establishing an international criminal court, the objective is indeed to ensure the effective prosecution and suppression of crimes of international concern, the proposed court must have inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.

4. Independence and impartiality of the court

The last matter of close concern to the ICRC is to ensure that the court will offer all the necessary guarantees of independence and impartiality. One proposal provides that while the United Nations Security Council is dealing with a situation covered by Chapter VII of the UN Charter, no prosecution arising from that situation may be commenced — unless the Council otherwise decides. It seems difficult, however, to reconcile the principle of an independent and impartial court with the fact that, in certain cases, the court would be dependent on the Security Council or subordinated to its action, and might thus be prevented from performing its duties freely.

In order to ensure respect for the basic principle of law that a court must be impartial and independent, prosecutions should not be subordinated to a prerogative conferred on the Security Council to prevent or delay prosecutions when it is dealing with a situation under Chapter VII of the Charter. Hence, the Prosecutor should be empowered to initiate investigations and institute proceedings *ex officio*.

[7] See note 5 above.

Conclusion

Acting as it does as a neutral intermediary between warring parties in order to assist and protect the victims of armed conflict in close co-operation with the parties concerned, the ICRC seeks to prevent violations of international humanitarian law, but it does not take part in judicial proceedings so as not to jeopardize its operational activities during armed conflicts.[8] It is neither an investigating body nor a judicial body competent to deal with violations of humanitarian law.

On the other hand, the ICRC also has the mandate to promote respect for international humanitarian law and to enhance its implementation. It is convinced that an independent and impartial international criminal court would be able not only to strengthen compliance with humanitarian law but also to ensure more effective application of its provisions. The obligation of States to prosecute violations of humanitarian law is often either ignored or very inadequately fulfilled in practice. It is therefore of prime importance to establish a permanent international court which will make certain that the perpetrators of war crimes, crimes against humanity and the crime of genocide are brought to justice. The momentum gained so far must not be lost, and it is vital that the proceedings of the forthcoming diplomatic conference in Rome should come to a successful and rapid conclusion.

It is equally crucial that in the near future States show the firm political will to ensure that persons suspected of having committed war crimes are duly prosecuted, whether at the national or at the international level. This would lend credibility to the international community's desire to eliminate crimes under international law. An independent and efficient international criminal court would serve as a serious deterrent, saving countless persons in the future from the horrors and suffering caused by such crimes. The objective is clear: the atrocities must cease, those responsible for them must be held accountable, and all necessary measures must be taken to achieve this goal.

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[8] María-Teresa Dutli and Cristina Pellandini, "The International Committee of the Red Cross and the implementation of a system to repress breaches of international humanitarian law", *IRRC*, May-June 1994, No. 300, pp. 240-254.

Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts

by Thomas Graditzky

Two prominent events that occurred midway through this century had a great impact on international criminal law. The first milestone in this area was the trials of the major war criminals held in Nuremberg and Tokyo in the wake of the Second World War. They highlighted the principle of individual criminal responsibility for certain serious violations of the rules of international law applicable in armed conflict; the terms "crimes against the peace", "war crimes", and "crimes against humanity" found formal recognition. The second event, following closely on the first, was the adoption of the four Geneva Conventions of 12 August 1949 for the protection of war victims. These instruments established a specific framework for the prevention and punishment of the most serious violations of the provisions they contain; the technical term "grave breach" was coined.

However, these well-known developments concerned only international armed conflicts.[1] In 1949 it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be

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Original: French

[1] With the exception of the internal dimension of crimes against humanity.

viewed as an unacceptable encroachment on State sovereignty. When the Protocols additional to the Geneva Conventions were adopted, on 8 June 1977, States had not changed their stance in this respect. Furthermore, newly independent countries feared that their new partners would take advantage of any potential opening provided by the adoption of Protocol II (relating to non-international armed conflicts) to justify excessive interest in their internal affairs.

Today, however, the majority of armed conflicts are non-international, and there is nothing to suggest that the classification of a conflict as international or non-international under international law has any effect on the conduct of the parties involved. Alas, history offers all too many examples of wantonly destructive behaviour in civil wars, with Cambodia, Somalia, and Rwanda springing to mind. Faced with such events, the international community can no longer turn a blind eye. There is a growing determination to see all perpetrators of atrocities committed in the course of armed conflict held responsible for their acts; and developments in human rights law have already made inroads into the argument of sovereignty which has blocked such aspirations in the past.

The confluence of these trends highlights the pressing need for formal recognition of universal jurisdiction for the repression of serious violations of international humanitarian law applicable in non-international conflicts. But what is the current situation? Does international law as it stands today give States jurisdiction to prosecute and try the perpetrators of such violations? If so, what form does this jurisdiction take and how is it framed?

Among the traditional range of offences incurring individual criminal responsibility in the context of international armed conflict are two that do not require lengthy consideration here, since it is now generally acknowledged that universal jurisdiction does exist for prosecution of the perpetrators. These are *genocide* and *crimes against humanity.*

With regard to genocide, it will suffice to recall briefly that the customary nature of the principles forming the basis of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 has been recognized since the 1950s;[2] that Article 1 of this instrument

[2] See the Advisory Opinion of the International Court of Justice concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion of 18 May 1951, *Reports of Judgments, Advisory Opinions and Orders* (hereinafter ICJ *Reports*), 1951, p. 23.

states that genocide is a crime under international law "whether committed in time of peace or in time of war"; and moreover that the International Court of Justice recently confirmed that the duty incumbent on States in terms of prevention and repression pursuant to the Convention is no different whether the conflict is international or internal.[3]

As for crimes against humanity, it is noteworthy that the report by the United Nations Secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicates that they can occur in the course of an internal conflict or an international conflict.[4] This assertion was reinforced by the adoption of the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (the first expressly stipulates, in Article 3, that both categories of conflict are covered by this provision, and the second mentions crimes against humanity in Article 3), and received formal recognition from the Appeals Chamber in the *Tadic* case, which stated: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict".[5]

Since crimes against peace (today crimes of aggression) are a matter involving a different set of issues, we shall now turn to all the other violations of international humanitarian law applicable in non-international armed conflict and consider whether some of them have, on account of the importance attached to them by the Community of States, been established as crimes whose perpetrators incur international criminal responsibility. Can offences committed during internal conflicts be classed as "war crimes"? Does the term "grave breach" have any meaning within the context of non-international armed conflict?

Application of international obligations to individuals

Today there is no longer any doubt as to the existence of treaty-based and customary rules applicable in internal conflicts. Moreover, with regard

[3] *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina *v.* Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para. 31 (not yet published).

[4] UN Doc. S/25704, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, p. 13, para. 47.

[5] International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Dusko Tadic a/k/a "Dule": Decision on the defence motion for interlocutory appeal on jurisdiction*, Decision of 2 October 1995, Case No. IT-94-1-AR72, p. 72, para. 141.

to the question of whether the rules of humanitarian law are binding only on States — which would thus be held solely responsible in the event of non-observance — or whether they also apply to individuals, who could violate them directly by their conduct, it would seem that the second option clearly outweighs the first, regardless of whether the conflict is internal or international in nature.

It is worth briefly noting here that the substance of the rules contained in Article 3 common to the four Geneva Conventions of 1949 and in Protocol II additional to the Conventions (for example, Article 4 relating to fundamental guarantees) makes frequent reference to the acts of individuals;[6] that there is an obligation to disseminate the rules (Protocol II, Article 19); and that the obligation to "ensure respect" for the provisions of humanitarian law (in this regard the State is required not only to ensure that its own agents respect these provisions, but also to ensure that all the people under its jurisdiction do so) is also applicable in internal conflicts.[7] All these observations point to the fact that the law applicable in such conflicts also governs the conduct of individuals.

In this connection, it would be remiss not to mention the following assertion made by the International Military Tribunal at Nuremberg: "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced".[8]

International criminalization of violations of international humanitarian law

Points at issue

If the rules of international humanitarian law applicable in internal conflicts do in fact govern the conduct of individuals, it remains to be determined whether violation of those rules incurs individual criminal

[6] See T. Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, 1995, pp. 559-562.

[7] See *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, ICJ *Reports*, 1986, paras 220 and 255, pp. 114 and 129.

[8] Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, p. 447.

responsibility and, more specifically, whether such responsibility emanates from international law as it stands today.

First, there is broad consensus that the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations of its rules. Common Article 3 has nothing to say in this respect, and Protocol II does not provide for any system similar to the mechanism for dealing with grave breaches established by the 1949 Conventions and supplemented by Protocol I.

The report by the Secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia refers only to international armed conflict when it introduces the article concerning grave breaches of the 1949 Geneva Conventions.[9] In a similar vein, the ICRC expressed the following view: "According to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law, and the relevant obligations, have been established only in respect of international armed conflict".[10] In connection with the *Tadic* case, the ICTY Appeals Chamber stated: "Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[11] Thus it too rejects the idea that the scope of the provisions of the Geneva Conventions relating to grave breaches could currently be considered as extending to common Article 3.

Does this entirely rule out international criminal responsibility for serious violations of humanitarian law applicable in internal conflicts (other than those amounting to genocide or crimes against humanity)? Even recently, the answer to this question would most likely have been in the affirmative. For example, the final report issued by the United Nations Commission charged with examining and analysing information relating to serious violations of international humanitarian law in the former Yugoslavia stated, with regard to the law applicable in non-international armed conflict, that "in general (...) the only offences committed in internal armed conflict for which universal jurisdiction

[9] *Op. cit.* (note 4), p. 11, para. 37.

[10] UN Doc. A/CONF.169/NGO/ICRC/1, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, *Statement of the International Committee of the Red Cross*, 30 April 1995 (Topic IV), p. 4.

[11] *Tadic* decision, *op. cit.* (note 5), p. 48, para. 84.

exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification".[12] Likewise, the literature has also quite recently tended towards this view on a number of occasions.[13]

However, on 2 October 1995, the ICTY Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadic* case did not restrict itself to making a simple finding nor to giving a definitive ruling on the fact that common Article 3 is not subject to the system of grave breaches. This is a matter we shall come back to later.

We shall now move on to examine the elements that might indicate a trend in the area in question, by looking for a hypothetical customary rule providing for international criminalization. The International Military Tribunal at Nuremberg emphasized that individuals could be prosecuted for particularly reprehensible conduct in violation of international law, by means of a customary rule grafted onto those which deal with such conduct. After examining the jurisprudence, declarations by States and other elements, the Tribunal reached the conclusion that the conduct punishable under its Statute already entailed individual criminal responsibility at the time of the commission of the offences for which the accused were being tried.[14]

State practice and opinions

1. State declarations

We shall begin this section by taking a look at State declarations, focusing first of all on those made within the Security Council following the unanimous vote on resolution 827 (1993) approving the report by the Secretary-General on the establishment of the ICTY. Statements illustrative of a move towards the affirmation of individual criminal responsibility for violations of the rules applicable in non-international conflicts included that of the United States representative, who expressed the view that "the 'law or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common

[12] UN Doc. S/1994/674 (annex), *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, 27 May 1994, p. 13, para. 42.

[13] For example: E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue belge de droit international*, 1992, pp. 574-575.

[14] Judgment of the International Military Tribunal, *loc. cit.* (note 8), pp. 445-447.

Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions".[15] Before making this statement, she had remarked that other members of the Security Council shared this view. Indeed, the French representative seemed to be thinking along the same lines when he asserted that this same expression "law or customs of war" "covers specifically, in the opinion of France, all the obligations that flow from the humanitarian agreements in force in the territory of the former Yugoslavia at the time when the offences were committed".[16] While the British statement was not as clear-cut, since there was no reference to all obligations under the treaties,[17] Hungary stressed "the importance of the fact that the jurisdiction of the Tribunal covers the *whole* range of international humanitarian law and the *entire* duration of the conflict *throughout* the territory of the former Yugoslavia",[18] and the Spanish representative also envisaged a very broad scope of jurisdiction in his reference to "the conflict or conflicts in that area".[19] These statements, together with the repeated assertion that current international law has to be applied, show that for these States universal jurisdiction did indeed exist for the repression of serious violations committed in the course of internal conflict; or, in the case of some of the statements, show at least that the jurisdiction of the tribunal was considered extensive and that there was absolutely no question of deliberately restricting it.[20]

Still on the subject of the ICTY, the United States went even further. In its *amicus curiae* brief submitted in connection with the *Tadic* case, it actually asserted that the provisions concerning grave breaches of the Geneva Conventions (referred to in Article 2 of the Statute of the Tribunal) also covered non-international armed conflicts.[21]

A number of joint statements by European Community member States concerning the situation in the former Yugoslavia address the issue of

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[15] Statement by Mrs Albright (United States) during the 3217th meeting of the Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 15.

[16] Statement by Mr Mérimée (France) at the same meeting, *ibid.*, p. 11.

[17] Statement by Sir David Hannay (United Kingdom), *ibid.*, pp. 17-18.

[18] Statement by Mr Erdos (Hungary) (italics added), *ibid.*, p. 20.

[19] Statement by Mr Yañez-Barnuevo (Spain), *ibid.*, pp. 39-40.

[20] On these statements see also the *Tadic* decision, *loc. cit.* (note 5), pp. 44-45, para. 75, and p. 54, para. 88.

[21] See *Submission of the Government of the United States of America concerning Certain Arguments made by Counsel for the Accused in the Case of* The Prosecutor of the Tribunal *v.* Dusan Tadic (Case No. IT-94-I-T), 17 July 1995, pp. 35-36.

individual criminal responsibility. They progress from a single express reference to the system of grave breaches provided for in the Geneva Conventions[22] to the assimilation of all serious violations, which, it becomes increasingly clear, include those committed in internal conflicts.[23] Furthermore, on the subject of Rwanda, an extract from the joint position defined by the Council reads as follows: "The European Union stresses the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent further violations of human rights".[24] It can thus be observed that there seems to be general recognition of universal jurisdiction over serious violations of humanitarian law applicable in internal conflict.

Although they are of the greatest interest with a view to the possible establishment of an *opinio juris*, these statements must be backed up by evidence of actual practice.

2. Military manuals

Since all armed conflict naturally involves action by armed forces or groups, it seems logical to continue our discussion with a brief look at the rules that purport to govern their conduct, in other words, the content of the relevant military manuals currently available.

Starting with the most recent of them, it is interesting to note that the 1992 German military manual includes references to Article 3 common to the Geneva Conventions and Protocol II when it gives a non-exhaustive list of grave breaches of international humanitarian law.[25] Likewise, the

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[22] Joint Statement of 6 August 1992, *Official Journal of the European Communities*, Commission, No. 7/8, 1992, pp. 108-109.

[23] Joint Statement of 5 October 1992, *op. cit.*, No. 10, 1992, pp. 91, and Joint Statement of 2 November 1992, *op. cit.*, No. 11, 1992, p. 102.

[24] Council Decision 94/697/CFSP concerning the common position adopted on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, *op. cit.*, No. 10, 24 October 1994, p. 48.

[25] (Deutsches) Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten*, Handbuch, August 1992, para. 1209 (also in English: Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts*, Manual, August 1992). However, a commentary on this manual specifies that Protocol II does not provide for a system of grave breaches and that the repression of violations of the rules of Protocol II ensues solely from national criminal law. Rüdiger Wolfrum, "Zur Durchsetzung des humanitären Völkerrechts", in D. Fleck, ed., *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, Munich, 1994, paras 1201 and 1209 (also in English: D. Fleck, ed., *Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995). The limits imposed by German criminal law on prevention and punishment are discussed below.

Annotated Supplement to the US *Commander's Handbook on the Law of Naval Operations* makes several references to Protocol II when providing examples of "war crimes".[26] The 1991 Italian military manual uses a lapidary formula to introduce a list of examples of grave breaches, indicating that such violations of the Conventions and Protocols also constitute war crimes.[27]

Several military manuals, taking a different approach, group all violations of the law of armed conflict under the term "war crimes". While undoubtedly excessive in the strictest sense of international law, this conception does allow an interpretation whereby grave breaches of humanitarian law applicable in non-international armed conflicts can be included within the operative scope of the legal notion of "war crimes". Examples of this can be found both in earlier manuals, such as those issued in Great Britain in 1958[28] and in the United States in 1956,[29] and in more recent documents such as the draft manual prepared by Canada.[30]

However, while the more recent of these manuals are probably indicative of a new trend in favour of the criminalization of serious violations of humanitarian law applicable in internal conflicts, or leave the door open to such a course by the general nature or imprecision of their definition of war crimes, the legal framework for any resulting prosecution is another matter. While very useful, even essential, for understanding the rules governing the conduct of troops in the theatre of operations, something often difficult to define with precision, military manuals are considerably less pertinent when it comes to more visible elements linked to the repression and punishment of violations of such rules. Therefore, before examining the jurisprudence in this regard, we shall take a look at the

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[26] *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, NWP 9 (REV.A)/FMFM 1-10, Washington D.C., 1989, para. 6.2.5. Issued by the Office of the Judge Advocate General and consisting mainly of legal references added to the text of the handbook itself, this supplement is not an official publication of the Department of the Navy or the United States government. Moreover, it will be recalled that the United States is not party to the Additional Protocols.

[27] "Sono considerati crimini di guerra anche le infrazioni gravi alle Convenzioni internazionali ed ai Protocolli aggiuntivi alle stesse." Stato Maggiore della Difesa, *Manuale di diritto umanitario* (Vol. I: *Usi e Conventioni di Guerra*), Rome, 1991, p. 28, para. 85.

[28] War Office, *The Law of War on Land*, Part III of the *Manual of Military Law*, 1958, para. 626.

[29] Department of the Army, *The Law of Land Warfare*, FM 27-10, 1956, para. 499.

[30] Canadian Forces, *Law of Armed Conflict Manual*, Second Draft, 1988, paras 1701-1704.

relevant legal instruments, that is, laws applying the Geneva Conventions (and the Protocols thereto), general criminal law, and military penal codes.

3. National legislation

Among the instruments of national legislation, one of the most significant for our discussion is undoubtedly the Belgian law of 16 June 1993 regarding grave breaches,[31] heralded as a "world legal first" by publicists who believe that *Belgium* has become "the first State to specifically classify as 'war crimes' certain serious violations of international humanitarian law committed in the course of a non-international armed conflict".[32] Offences considered to constitute grave breaches are the acts or omissions listed under Article 1 (paras 1 to 20) when committed against persons protected by the Geneva Conventions or their Additional Protocols. Article 7 of the same law specifies that the jurisdiction of Belgian courts is not territorially limited, and there is no requirement relating to nationality. Although the original bill made no reference to Protocol II, the scope of application was extended to conflicts governed by the latter with government approval and on the basis of the following justifications put forward by the authors of the amendment: the need to fill a potential legal vacuum; reasons of morality and image in respect of public opinion; and, above all, the absence of any particular legal problems, since the adoption of the amendment was in line with current trends in humanitarian law.[33]

Given the provisions of this law and the terms it uses, its adoption would seem to point to formal recognition of the international criminalization of serious violations of the law applicable in non-international conflict. However, it is worth noting that a commentary on the law specifies that "there is no rule of international law (except, perhaps, in respect of certain specific offences such as torture and hostage-taking) that defines the acts referred to in the law of 16 June 1993 as international breaches when they are committed in the context of a non-international conflict".[34] According to the

[31] "Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (16 June 1993)", in *Moniteur belge*, 5 August 1993, pp. 17751-17755.

[32] A. Andries, E. David, C. Van Den Wijngaert, J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", *Revue de droit pénal et de criminologie*, 1994, p. 1133, para. 2.24 (ICRC translation).

[33] E. David, "La loi belge sur les crimes de guerre", *Revue belge de droit international*, Vol. XXVIII, 1995, pp. 668-671.

[34] *Op. cit.* (note 32), p. 1174 (ICRC translation).

same authors, the new jurisdiction granted to Belgian courts can, however, be considered compatible with the rules of international law, provided that the prosecution of acts or omissions committed abroad by a foreigner in an internal conflict situation respects the principle of legality; in particular, the act in question must be an offence both in the country where it is prosecuted and in the country where it was committed.[35]

In any event, at this stage it will suffice to raise two further points in relation to this law. First, there is still some doubt as to the threshold of the non-international conflicts considered (owing to the uncertainty as to whether there can be grave breaches of Article 3 common to the Geneva Conventions, whose threshold of application is lower than that of Protocol II).[36] Secondly, certain acts carried out in the context of a non-international conflict could be considered as crimes under the Belgian law even when there are no provisions prohibiting them in international humanitarian law.[37]

Thus Belgium has adopted a legal instrument that is innovative on more than one count. However, *Spain* follows closely on its heels. With the recent adoption of a new penal code,[38] it has taken a step in the same direction. The chapter dealing with the law of armed conflict opens with an article enumerating the persons protected thereunder and continues with various provisions detailing punishable acts. Article 608 includes among protected persons those who are protected by virtue of Additional Protocol II of 1977.[39] The penal code does not stipulate any special restrictions with regard to jurisdiction *ratione personae* or *ratione loci*. On the other hand, the 1985 law on the judiciary[40] indicates that the jurisdiction of Spanish courts may extend to offences committed by anybody anywhere, if the acts in question can be classified under Spanish

[35] *Ibid.*, pp. 1174-1175.

[36] The answer should nevertheless lean towards conflicts covered by Protocol II alone. See E. David, *op. cit.* (note 33), p. 671, and A. Andries *et al.*, *op. cit.* (note 32), pp. 1134-1135.

[37] The judge should therefore pay particular attention to the principle of *nullum crimen sine lege* when exercising jurisdiction over acts committed by a foreigner outside Belgian territory.

[38] *Código Penal,* Law 10/1995, of 23 November.

[39] Cases of internal armed conflict more broadly covered by common Article 3 are apparently excluded.

[40] *Ley orgánica 6/1985*, of 1 July, of the Judiciary, Art. 23, para. 4.

criminal law as offences that should be prosecuted in Spain pursuant to international treaties and conventions. It should also be noted that no adverse distinction is made in regard to situations covered by Protocol II and that, on the contrary, they seem to be fully integrated in the articles governing armed conflict in general. Further, these articles are among the provisions grouped under the heading "*Delitos contra la Comunidad internacional*".

Although it provides a less precise, less structured description of acts that amount to criminal conduct, the *Finnish* penal code is equally noteworthy. It effectively encompasses all armed conflict situations and all violations of treaty and customary rules of humanitarian law, qualifying all these offences as war crimes. Moreover, Finnish courts have jurisdiction over such acts wherever and by whomever they are committed.[41]

Similarly, Section 11 of Chapter 22 of the *Swedish* penal code clearly regards any serious violation of international humanitarian law (treaty or customary) as a crime against international law, whether committed during a war or during any other type of armed conflict. Such acts fall within the jurisdiction of Swedish courts even if they are committed in another country by non-nationals and against non-nationals (Chapter 2, Section 3, para. 5).[42]

Article 1, para. 3, of the *Netherlands* Criminal Law in Wartime Act (*Wet Oorlogsstrafrecht*) plainly states that civil war should be included under the term "war", while Article 12 gives Dutch courts universal jurisdiction.[43] A case relating to the conflict in the former Yugoslavia, which we shall discuss below, recently clarified the scope of these provisions.

The *Swiss* military penal code also grants national military courts jurisdiction to hear cases involving violations of humanitarian law applicable in non-international armed conflicts, even if such violations are

[41] *Penal Code of Finland* (translated by M. Joutsen), in *American Series of Foreign Penal Codes*, Vol. 27, Wayne State University Law School, Rothman/Sweet&Maxwell, Littletown (Colorado)/London, 1987, Chap. 1, Art. 3, para. 2.1, p. 17; Chap. 13, Arts 1 and 2, pp. 48-49. See also L. Hannikainen, R. Hanski, A. Rosas, *Implementing humanitarian law applicable in armed conflicts: The case of Finland*, Nijhoff, Dordrecht/Boston/London, 1992, pp. 116-118.

[42] *Swedish Penal Code*, National Council for Crime Prevention, Stockholm, 1986, pp. 9 and 68.

[43] *Wet Oorlogsstrafrecht, Nederlandse Wetboeken*, Suppl. 226, 1991, pp. 161-167.

committed in another country and do not directly affect the interests of the Swiss Confederation. In general terms, all violations of international conventions or other laws and customs of war are punishable; whether they amount to a "crime" under national law depends on the seriousness of the offence. There is just one limitation: the second paragraph of Article 108, which permits extension to non-international armed conflict, provides only for violations of international agreements, thus excluding customary rules. The military courts are given relatively broad jurisdiction under Article 2, para. 9, which states that in peacetime persons who can be prosecuted under the military penal code include "civilians who, in the course of an armed conflict, commit offences against the law of nations",[44] with references to the relevant articles of the code. As in the case of the Netherlands, we shall return to this subject later.

Under the heading "*Delitos de carácter internacional*", Article 551 of the *Nicaraguan* penal code adopts a very comprehensive approach to the prosecution of any violation of humanitarian law, whether committed, in the words of the provision itself, in time of international war or civil war. Article 16, para. 3(f), of the code gives Nicaraguan courts jurisdiction over offences included under this heading, irrespective of who committed them and where.[45]

A recently adopted amendment to the *United States* War Crimes Act of 1996 extends the jurisdiction of national courts to violations of Article 3 common to the Geneva Conventions, classifying them as "war crimes".[46] At first sight, the current position of the United States on this matter therefore seems clear. However, it could be argued that the wording of the text is such that it implies that this term is used to refer solely to US domestic legislation and does not mean that the US considers the concept of "war crimes", as understood in international law, valid for internal conflicts. Nevertheless, it does seem significant that violations of common Article 3 are accorded the same status as grave breaches of the Geneva Conventions. Unlike another draft amendment presented at the same time,

[44] *Code pénal militaire*, Federal Law of 13 June 1927, 321.0, Federal Chancellor's Office, 1995 (ICRC translation).

[45] *Ley de Código penal de la República de Nicaragua*, Bibliografías Técnicas, 1997, pp. 4 and 148.

[46] *War Crimes Act of 1996*, Public Law 104-192, 21 August 1996. For the 1997 amendment see also: *Congressional Record — Senate*, November 9, 1997, p. S12362 and *Congressional Record — House*, November 12, 1997, p. H10728.

this text did not provide for application of the principle of universal jurisdiction, with the result that US legislation still falls short of the system established by the Geneva Conventions for grave breaches. However, due note should be taken of the US government's support for the idea of removing the limitations imposed on the jurisdiction of national courts by the requirement that either the victim or the perpetrator must be a US national or a member of the US armed forces, also in regard to violations of common Article 3.

While the new German military manual seems rather progressive, the *German* penal code fails to meet expectations in this regard. Indeed, none of its provisions refers specifically to armed conflict. The question of the different categories of violations of international humanitarian law incurring individual criminal responsibility is considered to be covered by the normal provisions of criminal law.[47] With the exception of the case of German servicemen outside Germany, to whom the *Wehrstrafgesetz* extends the applicability of the penal code as a whole,[48] the only grounds of any interest for broadening the scope of application of the provisions to acts committed abroad refer to those "which are made punishable by the terms of an international treaty binding on the Federal Republic of Germany".[49] The extraterritorial jurisdiction of German courts over serious violations of humanitarian law applicable in non-international armed conflicts therefore seems far from guaranteed because of the need for a treaty provision attributing individual criminal responsibility for such acts. However, there is nothing to prevent criminal charges being brought against perpetrators of serious violations of the rules applicable in internal conflicts committed in the context of a conflict occurring on the national territory.[50]

When read together, Articles 12 and 356 of the new *Russian* Penal Code of 13 June 1996 lead to similar conclusions. Indeed, while Article 356 refers in very general terms to conduct prohibited by treaties to

[47] See R. Wolfrum, *op. cit.* (note 25), p. 433.

[48] *Wehrstrafgesetz*, Art. 1, para. a, in G. Erbs, M. Kohlhaas, eds., *Strafrechtliche Nebengesetze*, Vol. IV, Munich 1990.

[49] *Penal Code of the Federal Republic of Germany* (translated by J. Darby), *American Series of Foreign Penal Codes, op. cit.*, (note 41), Vol. 28, Art. 6, para. 9, p. 50.

[50] For a discussion of the problems relating to internal conflicts on the territory of States without specific provisions, see M. Bothe "War crimes in non-international armed conflicts", *Israel Yearbook on Human Rights*, Vol. 24, 1994, pp. 243-244.

which the Russian Federation is a party (thus excluding the rules of customary law), without specification as to the type of conflict, Article 12 allows the jurisdiction of the Russian courts to be extended beyond the national territory and to non-nationals if the interests of the Russian Federation are affected or in the event that such an extension of jurisdiction is provided for in an international agreement. The case of nationals, stateless persons, and servicemen is dealt with in the preceding paragraphs of the same article.[51]

Generally applicable in time of war, armed conflict, and occupation, Articles 241 and 242 of the *Portuguese* penal code cover some aspects of humanitarian law (war crimes against civilians and the destruction of monuments, respectively). However, Article 5 extends jurisdiction beyond the national territory and to non-nationals only in certain specified cases, which, curiously enough, include only the second of the above-mentioned articles, or when such jurisdiction is imposed by international treaty provisions.[52]

Other legal instruments that should be briefly mentioned include the penal codes of *Ethiopia* (1957),[53] *Yugoslavia* (1990; also adopted by *Bosnia-Herzegovina* in 1992),[54] and *Slovenia* (1995),[55] which all provide for the criminalization of certain acts classed as war crimes, regardless of the type of conflict. The *Norwegian* military penal code penalizes all violations of the rules protecting persons and property that are set out in the four Geneva Conventions and the two Additional Protocols thereto,[56] and the Irish Geneva Conventions Act of 1962 makes all violations of the Conventions of 1949 punishable, including, therefore, common Article 3. This legal instrument provides for jurisdiction over acts committed abroad

[51] *Criminal Code of the Russian Federation*, No. 63-FZ of 13 June 1996, Garant-Service, 1996, Arts 12 and 356.

[52] *Código Penal Português* (anotado e comentado: M. Maia Gonçalves), Livraria Almedina, Coimbra, 1996, pp. 93, 727-728.

[53] *Penal Code of the Empire of Ethiopia*, Proclamation No. 158 of 1957, in *Negarit Gazeta*, Gazette Extraordinary, Addis Ababa, 1957, Arts 282-284, pp. 87-88.

[54] *Penal Code of the Socialist Federal Republic of Yugoslavia*, 1990, Art. 142-143. On this point, see: *Tadic* decision, *loc. cit.* (note 5), para. 132, pp. 76-77.

[55] *Penal Code of Slovenia*, 1 January 1995 (unofficial translation by the Ministry of Justice), Chap. 35: Criminal offences against humanity and international law, pp. 117-118, Arts 374-377.

[56] *Militaer Straffelov* of 22 May 1902, No. 13, Art. 108 (as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65).

by non-nationals, although the scope of that jurisdiction is limited to cases of grave breaches of the Conventions. The Irish Act does not, however, explicitly rule out the hypothesis of the commission of grave breaches in relation to common Article 3.[57]

4. Jurisprudence of national courts

In addition to the War Crimes Act of 1996 and the *amicus curiae* brief submitted to the ICTY in connection with the *Tadic* case,[58] a third element, this time of a jurisdictional nature, should be mentioned to illustrate the position of the US. In a torts claim filed by Bosnian victims against Radovan Karadzic, a US court of appeal had to give a ruling on the issue of war crimes in an internal conflict. Although this was a civil action, the line of reasoning followed by the court provides points of interest that are relevant to our discussion. The court considered it necessary to establish clearly that the acts in question constituted violations of international law, so as to establish whether the matter fell within the jurisdiction of the US courts pursuant to the Alien Tort Act of 1789. To this end, the court examined the question of attributing individual responsibility for violations of the law of war under international law. Under the heading of "war crimes", the court measured the alleged acts against the requirements contained in common Article 3. It clearly situated its reasoning in the context of non-international armed conflict and acknowledged the existence of individual responsibility, referring in particular to the judgment delivered by the International Military Tribunal at Nuremberg. In reaching its ruling, the court incidentally touched on matters of criminal law. On the basis of this individualization of responsibility, and setting aside its primarily criminal aspect, the court inferred that national courts had jurisdiction in civil actions relating to acts constituting war crimes. In regard to the principle of universal jurisdiction, the court acknowledged its relevance to war crimes, essentially in relation to criminal law, but used it as a basis for asserting that "international law also permits states to establish appropriate civil remedies".[59] In any event, the court seemed

[57] *Geneva Conventions Act*, 1962, No. 11, Sections 3 and 4.

[58] See note 21 above.

[59] Court of Appeals for the Second Circuit, Decision of 13 October 1995 in the case of S. Kadic *v.* R. Karadzic, in *International Legal Materials*, Vol. 34, 1995, p. 1601. See also pp. 1604-1605. Other decisions relating to this case: US District Court for the Southern District of New York, Decisions of 7 September 1994 and of 2 December 1997 in the case of Jane Doe *v.* R. Karadzic.

convinced that the notion of war crimes, together with the principle of universal jurisdiction, also covered certain violations of the law applicable in non-international armed conflicts.

A case in which a Bosnian Serb was accused of committing acts including deportation, murder and rape in Bosnia-Herzegovina in June 1992 raised several interesting points in connection with the interpretation of the relevant provisions in *Netherlands* legislation. The military division of the district court of Arnhem, Netherlands, was required to rule on whether there was sufficient basis in law to proceed with the prosecution by military courts of a non-national for acts committed outside the national territory. Classifying the hostilities in question as civil war, and invoking the fact that this type of conflict falls within the definition of "war" within the meaning of the Criminal Law in Wartime Act (Article 1, para. 3), the court pointed out that there was no requirement to establish a link with the national territory (Article 12, para. 1), adding that the notion of a link with the Netherlands State is required only in very specific cases, none of which applied in this instance (Article 1, para. 2). Consequently, it acknowledged the jurisdiction of the Netherlands courts, military courts in the first instance. Following an initial appeal to the Supreme Court, the case was remitted to the district court for reconsideration because of a procedural irregularity. This time round the military division of the Arnhem district court took the opportunity to rule in favour of granting jurisdiction to ordinary courts. A second appeal finally led to confirmation by the Supreme Court that the jurisdiction of the Netherlands courts is not subject to any limitations relating to territory or nationality (of victims or perpetrators). It expressed the opinion that an accurate interpretation of Article 3 of the Criminal Law in Wartime Act, concerning the jurisdiction of the national courts, implies the non-validity of any restriction imposed by the terms of Article 1. Nevertheless, the Supreme Court remitted the case to the military courts.[60]

In April 1997 a case concerning war crimes was brought before a *Swiss* military court for the first time. It involved a Bosnian Serb accused of violence to the physical and mental well-being and outrages on the personal dignity of prisoners and civilians interned in the camps of Omarska and Keraterm. In this particular case, the court finally acquitted the ac-

[60] Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 21 February 1996; Hoge Raad der Nederlanden, Strafkamer, Decision of 22 October 1996; Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 19 March 1997; Hoge Raad der Nederlanden, Strafkamer, 11 November 1997.

cused for lack of conclusive evidence. Two points are worth highlighting here. First, the indictment refers explicitly (but not exclusively) to Additional Protocol II and to Article 3 common to the Geneva Conventions, even though the alleged acts were committed outside the territory of the Confederation and did not involve a Swiss national. Secondly, although in its judgment the court expressed the view that the conflict in the former Yugoslavia should be considered globally and therefore classified as an international conflict, it also implied that, even if the conflict were otherwise classified, this would not have a decisive effect on jurisdiction by virtue of Articles 108 and 109 of the military penal code.[61]

In *Denmark*, a Bosnian Croat was indicted on numerous charges of ill-treating, and even causing the death, of persons held in a prison camp. He was tried and found guilty on various counts on the explicit basis of the articles relating to grave breaches of the Third and Fourth Geneva Conventions, together with the relevant articles of the Danish penal code.[62] It is interesting to note that, while the offences all took place in July and/or August of 1993 in the context of a conflict that was, on the face of it, non-international, the court did not rule on the nature of the conflict, from which it can be deduced that it did not consider this question pertinent to the application of the system of grave breaches.[63]

The same line of reasoning seems to have been followed in *France*, without, however, reaching the stage of a judgment on the merits. Replying to a request filed by Bosnian nationals alleging ill-treatment in a Serb-run detention camp in the town of Kozarac, the High Court of Paris found that it did not have jurisdiction in regard to the charges of genocide and crimes against humanity, but that it did have jurisdiction over charges of torture and war crimes. With regard to the latter, the court examined the articles relating to grave breaches, without considering the nature of the conflict and inferring its jurisdiction from the obligation stipulated in those articles that defendants have to be committed to the national courts (or have to be extradited).[64] The Public Prosecutor lodged an appeal and

[61] Divisional Military Court No. 1, Decision of 18 April 1997 in the case of Judge Advocate *v.* G. Grabec.

[62] Ostre Landsret (Eastern Division of the Danish High Court), Court 3, Decision of 25 November 1994 in the case of Prosecutor *v.* R. Saric.

[63] On this point see the *Tadic* decision, *loc. cit.* (note 5), p. 46-47, para. 83.

[64] Tribunal de grande instance de Paris, Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of E. Javor, K. Kussuran, M. Softic, S. Alic et M. Mujdzic *v.* X.

the decision was overturned. With regard to war crimes, jurisdiction was rejected on the grounds that the provisions of the Geneva Conventions that were invoked were not directly applicable because of their wording, and that there was no text adapting French legislation to those provisions. The criminal division of the Court of Cassation subsequently confirmed this ruling.[65]

In *Belgium*, a case involving a Rwandan accused of having committed, in Rwanda, crimes defined as grave breaches of international humanitarian law by the Belgian law of 16 June 1993 gave various courts the opportunity to confirm the jurisdiction of Belgian courts over acts punishable under that law, even if they are committed in an internal conflict outside the national territory and do not involve Belgian nationals.[66]

Required to rule on the constitutionality of a bill concerning the procedure for the repression of criminal offences committed during the events of 1956 and, more specifically, on the question of their imprescriptibility, the *Hungarian* Constitutional Court stated that violations of common Article 3 could be subject to imprescriptibility under Hungarian constitutional law, which provides for an exception to the rules on statutory limitations in respect of war crimes and crimes against humanity as defined by international law. Having made this assertion, the court itself classified violations of common Article 3 as crimes against humanity, but without precisely delimiting the concept. However, the reasons given for reaching this conclusion clearly revealed that the court did not consider such violations to constitute grave breaches within the meaning of the Geneva Conventions of 1949. In this respect, it drew attention to the confusion that could result from the wording of Article 2 of the bill under examination, provided indications as to a possible interpretation, but refrained from declaring it unconstitutional (which it did in respect of Article 1). Subsequently, the Hungarian Parliament incorporated the wording of Article 2 intact in a new law and the Constitutional Court, called upon once again to rule on the matter, annulled the legislative text in its entirety on the grounds of the unconstitutionality of this article as

[65] Fourth Indictment Division of the Paris Court of Appeal, Appeal against an Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of E. Javor, K. Kussuran, M. Softic, S. Alic et M. Mujdzic *v.* X; Criminal Division of the Court of Cassation, Decision of 26 March 1996 (same case).

[66] Brussels Court of Appeal, Indictment Division, Decision of 17 May 1995 in the case of V. Nt.; Court of Cassation, Second Chamber, F., Decision of 31 May 1995 (same case); District of Brussels Court of First Instance, Council Chamber, Order of 22 July 1996 (same case).

it stood. In its reasoning, it reiterated its position on the absence of a link between violations of common Article 3 and the provisions concerning grave breaches. The fact that the contested article of the national law established such a link was one of the considerations that prompted the court to declare it unconstitutional.[67]

Finally, we should mention the few cases involving rebels or members of the Nigerian army who were tried on the basis of the "Operational code of conduct of the Nigerian armed forces", adopted in 1967 during the civil war against the Biafran rebels.[68] They clearly reveal a trend towards criminalization of certain types of conduct that violate the rules of humanitarian law applicable in internal conflicts, but the narrow scope of application limits the significance of these examples.

Other sources

1. Security Council resolutions

Other elements that might point to the existence of an *opinio juris* on international criminalization of flagrant violations of humanitarian law applicable in internal conflicts include two resolutions adopted unanimously by the Security Council concerning events in Somalia. In these resolutions the Security Council asserts that those committing or ordering the commission of violations of humanitarian law shall be held individually responsible.[69] Certain resolutions adopted in connection with the conflicts in Rwanda and Burundi contain assertions along the same lines.[70] Similarly, a few resolutions concerning the former Yugoslavia are relevant to this discussion insofar as they address internal conflict situations.[71]

[67] Constitutional Court of the Republic of Hungary, Decision No. 53/1993 (X. 13.) AB and Decision No. 36/1996 (IX.4.) AB.

[68] See paras 106, 125, and 130 of the *Tadic* decision, *loc. cit.* (note 5), pp. 58, 67 and 68.

[69] See resolutions S/RES/794 (3 December 1992) and S/RES/814 (26 March 1993).

[70] For Rwanda, see S/RES/935 (1 July 1994), S/RES/955 (8 November 1994) and S/RES/978 (27 February 1995). For Burundi, see S/RES/1012 (28 August 1995) and S/RES/1072 (30 August 1996).

[71] S/RES/787 (16 November 1992), S/RES/808 (22 February 1993), S/RES/819 (16 April 1993), S/RES/820 (17 April 1993), S/RES/827 (25 May 1993), S/RES/859 (24 August 1993), S/RES/913 (22 April 1994), S/RES/941 (23 September 1994), S/RES/1010 (10 August 1995), S/RES/1019 (9 November 1995), and S/RES/1034 (21 December 1995).

The adoption of such resolutions shows that the Security Council clearly considers the criminal responsibility of individuals committing or ordering the commission of the violations in question (in the context of an internal conflict) to be an issue of international concern, and suggests that this principle of individual responsibility is already well established. Although one may occasionally be perplexed by the terms used, because of their rather imprecise nature or because of the range of violations covered, in general it seems that what the Security Council is addressing in these resolutions is what we call "serious violations" of humanitarian law (applicable, in this case, in non-international armed conflicts).

2. Statutes of the two ad hoc international criminal tribunals

The Statute of the International Tribunal for the former Yugoslavia, the result of a rather cautious drafting procedure, does not actually come down in favour of or against the possible criminalization of serious violations committed in internal conflicts. However, the circumstances of its adoption by the Security Council, the task entrusted to the Tribunal by the latter, the competence *ratione tempori* defined in Article 1 of the Statute, and the Council's awareness of the mixed nature of the conflict (involving elements of both an international and an internal conflict), suggest "that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts".[72] However, even if we can infer that the Security Council wished to move in this direction, what we do not have (by the simple fact of the adoption of the Statute) is a clear assertion as to the state of the law in this regard.

The adoption of the Statute of the International Criminal Tribunal for Rwanda is another matter. Indeed, "in that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime".[73] With the adoption of Article 4 regarding serious

[72] *Tadic* decision, *loc. cit.* (note 5), p. 44, para. 78.

[73] United Nations, *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994)*, 13 February 1995, UN Doc. S/1995/134, pp. 3-4, para. 12.

violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Security Council effects what could be regarded as an act of faith in respect of the existence of a law attributing individual criminal responsibility. This sudden development could very well have been anticipated in the light of the preliminary report by the Commission of Independent Experts for Rwanda, which readily classified the situation as a non-international armed conflict, going on to address the issue of individual responsibility.[74] Although somewhat vague in the report, the link could easily be established.

3. Work of the International Law Commission

The International Law Commission (ILC), which is an ideal forum for expounding legal doctrine, incidentally had occasion to approach the issue under discussion from two different angles. The need to frame a statute for an international criminal court (a draft was adopted before the draft code on crimes against the peace and security of mankind, even though work on it was begun later) led the Commission to examine the question of non-international conflicts with a view to defining the scope of the jurisdiction of the future court.

In addition to crimes against humanity, genocide and crimes of aggression, the court would also exercise jurisdiction, according to the draft, over serious violations of the laws and customs applicable in armed conflicts and crimes that are defined as such or are governed by the treaties enumerated by the ILC. This list excludes Protocol II because it does not meet the criteria established by the ILC, one of which requires "that the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the crime, or both, thus clearly recognizing the principle of international concern".[75] The commentary on the subparagraph referring to serious violations of the laws and customs applicable in armed conflicts gives no clear indication as to whether it is intended to cover the notion of "war crimes",[76] nor

[74] United Nations, *Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UN Doc. S/1994/1125, 4 October 1994, p. 20, paras 89-91.

[75] United Nations, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10, p. 78. However, the exclusion of Protocol II leaves aside the question of possible "grave breaches" of common Article 3, which could, in this respect, fall within the jurisdiction of the court.

[76] The ILC believes, for example, that conduct classified as a "grave breach" (and therefore to be regarded as a "war crime") would not necessarily constitute a "serious violation" within the meaning of this article. *Ibid.*, pp. 74-75.

whether non-international conflicts are also included (which the text itself seems to imply). On this last point, the ILC makes particular reference to its draft code on crimes against the peace and security of mankind, as adopted on first reading. The commentary on the latter explains that: "The expression 'armed conflict', on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the 'rules of international law applicable in armed conflict' covered both conventional law and customary law, as well as *all types of armed conflict*, to the extent that international law was applicable to them".[77]

The second ILC draft that interests us here is precisely the draft code on crimes against the peace and security of mankind. After some hesitation on this point,[78] the Commission finally adopted a draft that dealt, in paragraph (f) of the article entitled "War crimes", with acts committed in violation of humanitarian law applicable in internal conflicts.[79] In its commentary on this article, it stresses that there is now general recognition of the principle of individual criminal responsibility for such violations.[80] The above-mentioned paragraph (f), not content with following the current trend of developments in the law, went even further, moving in the direction of the possible recognition that crimes against the peace and security of mankind, in the eyes of the ILC an extremely serious category which incurs application of the principle *aut dedere aut judicare*, can be committed in the context of internal conflicts.[81] In a distinctly innovative vein, the Commission specifies in its commentary that paragraph (g) of Article 20 (damage to the environment) should be understood as encompassing both international and non-international conflicts, even though it admits to not being totally convinced that this is necessarily a war crime under the law as it currently stands.[82]

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[77] Report of the International Law Commission on the work of its forty-first session, in *Yearbook of the International Law Commission*, 1989, Vol. II, Part 2, p. 53, para. 105 (our italics).

[78] After the above-mentioned comment (note 77), the Commission backtracked briefly. See for example the *Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995)*, UN Doc. A/50/10, p. 54.

[79] UN Doc. A/CN.4/L.532, 8 July 1996.

[80] *Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996)*, UN Doc. A/51/10, pp. 118-119.

[81] *Ibid.*, pp. 116-117.

[82] *Ibid.*, pp. 119-120.

Terminological aspects

Before concluding, it is important to draw attention, once again, to the lack of uniformity in respect of the vocabulary used: should one talk of "war crimes" or can the term "grave breaches" be used in cases of conduct substantially covered by the treaty provisions relating to this category of violations?

The decision of the Tribunal for the former Yugoslavia in the Tadic *case*

The Appeals Chamber of the ICTY was required to rule on this issue in its decision of 2 October 1995 in the *Tadic* case, and we shall begin with a brief account of its reasoning and conclusions.

As one of the grounds for its appeal, the defence filed a motion contending that, owing to the internal nature of the conflict in question, Articles 2 (Grave breaches of the Geneva Conventions of 1949), 3 (Violations of the laws or customs of war), and 5 (Crimes against humanity) of the Statute were not applicable. With regard to Article 2, the Appeals Chamber states that the system of grave breaches to which it refers is confined to the persons and property protected by the Geneva Conventions and can in no way be considered as applying to situations covered by common Article 3. It adopts an apparently very strict position on this point, asserting that this is in fact the only possible interpretation of the pertinent provisions. However, referring to the *amicus curiae* brief submitted by the US, it qualifies its position, stating that "a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize".[83] With regard to Article 3 of the Statute, it begins by pointing out that it should be interpreted as a "general clause" intended to cover any law meeting the enumerated criteria.[84] It goes on to examine in depth a number of customary rules relating to internal conflicts and then addresses the issue of individual criminal responsibility. On this point, it admits the existence of a customary rule, and this leads it to the following conclusion: "In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary

[83] *Tadic* decision, *loc. cit.* (note 5), p. 47, para. 83.

[84] To be liable to prosecution under Article 3, the conduct in question must contravene a rule of international humanitarian law that is of a customary nature (or a treaty rule, depending on the conditions), must constitute a serious violation and must entail the individual criminal responsibility of the perpetrator. *Ibid.*, pp. 54-55, para. 94.

international law, the Appeals Chamber concludes that, under Article 3, the international Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict".[85]

Although it does not actually use the term, the Chamber therefore seems to take the view that today "war crimes" can exist in the context of internal conflicts. However, in view of the current state of the law, it refuses to admit that "grave breaches" can be committed in such situations.

While this is the majority position of the Chamber, Judge Abi-Saab issued a separate opinion, stating "on the basis of the material presented in the Decision itself, that a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict".[86] In order to explain the shift from the "traditional" interpretation of "grave breaches" towards the new scope of this term, two possibilities are considered (the first being preferable): (1) the "subsequent practice" and *opinio juris* of the States party to the Conventions have led to a new teleological interpretation whereby non-international conflicts have come to be included in the system of "grave breaches"; (2) the new normative substance has established "a new customary rule ancillary to the Conventions, whereby the regime of 'grave breaches' is extended to internal conflicts".[87]

State practice and opinions

As far as vocabulary is concerned, it has to be admitted that the expression "grave breach" is used with considerable frequency. We have taken note of the position of the United States as set out in its *amicus curiae* brief submitted in connection with the *Tadic* case, the texts of German and Italian military manuals, the Belgian law of 16 June 1993, the decision reached by the High Court of Paris, and the judgment handed

[85] *Ibid.*, p. 71, para. 137. It can be noted that in its judgment of 7 May 1997, the court of first instance essentially declared Tadic guilty on the charges of crimes against humanity and violations of common Article 3. International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Dusko Tadic a/k/a "Dule": Opinion and judgment*, 7 May 1997, Case No. IT-94-1-AR72, p. 300.

[86] International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Dusko Tadic a/k/a "Dule": Separate opinion of Judge Abi-Saab on the defence motion for interlocutory appeal on jurisdiction*, 2 October 1995, Case No. IT-94-1-AR72, p. 5.

[87] *Ibid.*, p. 7.

down by the Danish Supreme Court. It is by no means coincidental that all these texts are dated later than 1990.

However, every one of these contributions has a weak point: the US position is not underpinned by any tangible element; the German manual is not supported in its ambitions by the legislative framework; and the French decision and the Danish judgment are not explicit as to the nature of the conflict concerned. Hungary stands out on its own with its unequivocal opposition to the use of the expression "grave breaches", its Constitutional Court favouring the term "crimes against humanity".

In any event, the position most commonly adopted (although sometimes implicitly), and perhaps the most convincing in many cases, is to place serious violations under the broader terminological umbrella of "war crimes", even when the acts in question could also be classified as grave breaches if committed in the context of an international conflict.

Although from the terminological point of view the balance therefore seems to be tipped in favour of the generic term "war crimes", one must be careful not to overlook the importance of the real meaning States attribute to the terms they use. It is worth pointing out here that when it is clearly a question of grave breaches according to the "traditional" concept, States also sometimes adopt a circumspect and original approach. In any event, and in particular following the adoption of Protocol I, which marked an important move towards bringing what is known as "the law of The Hague" and "the law of Geneva" into line with each other (or the gradual inclusion of one in the other), it is becoming increasingly difficult to make any distinction between the two notions on the basis of the range of behaviours they encompass. In point of fact, it is probably their respective mechanisms of repression that most clearly differentiate one from the other.

In this regard, one point is evident: even though some States assume the right to prosecute non-nationals for serious violations of international humanitarian law applicable in internal conflicts committed in other countries (and even though the work of the ILC and the statutes and jurisprudence of the ad hoc international criminal tribunals are also based on the principle of universal jurisdiction), it still seems very difficult to conclude that a sufficiently significant number of States initiate prosecutions by virtue of a hypothetical obligation to do so. It cannot therefore be asserted that a system of grave breaches currently exists for situations of internal conflict.

Conclusion

In the last analysis, it does not seem unreasonable to assert that serious violations of humanitarian law applicable in internal conflict do in fact constitute "war crimes" under international law as it stands today, the corollary to this change in status being the principle of universal jurisdiction.

Furthermore, doctrine, which serves as a subsidiary means for the determination of the rules of international law, appears to substantiate that opinion.[88] Indeed, very recent developments seem to support the idea that the customary rule we are seeking has now clearly emerged. Indeed, in mid-February 1997 the ICRC submitted a rather circumspect working paper on war crimes to the Preparatory Committee for the Establishment of an International Criminal Court. After considering grave breaches and other serious violations of international humanitarian law applicable in international armed conflict, the document devotes a third section to what the ICRC, in the statement attached thereto, describes as war crimes committed in the course of non-international armed conflicts.[89]

This paper, presented by New Zealand and Switzerland and supported by several other delegations, was initially selected, along with the US proposal (which also contained a section on non-international conflicts), as a basis for discussion and as one of the sources for a draft consolidated text on war crimes.[90] At the beginning of December 1997, the Preparatory Committee pursued its examination of the issue. A new draft article on war crimes (Article 20C), which includes numerous options, contains two sections devoted to non-international armed conflict. Section C deals with

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[88] For example: M. Bothe, *op. cit.* (note 50), p. 247; C. Meindersma, "Violations of common Article 3 of the Geneva Conventions as violations of the laws or customs of war under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia", *Netherlands International Law Review*, Vol. XLII, 1995, p. 396; T. Meron, *op. cit.* (note 6).

[89] ICRC, *War Crimes*, working paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, 4 pp., and ICRC, *Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court*, New York, 14 February 1997, 2 pp.

[90] See: United Nations, Preparatory Committee for the Establishment of an International Criminal Court, Working group on the definition of crimes, *Written proposal submitted by New Zealand and Switzerland*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.2, *Written proposal submitted by the United States*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.1, *Draft consolidated text*, 20 February 1997, UN Doc. A/AC.249/1997/WG.1/CRP.2.

serious violations of common Article 3, and section D enumerates several other violations of the law applicable in internal armed conflicts.[91]

Many States were agreeable to the inclusion of the first or both sections (with minor divergences as to the content of the second). Only a small number were reticent, and very few were totally opposed to the inclusion of any provisions at all relating to internal armed conflict. Further, the objections raised by these States did not necessarily refer to the pertinence of the notion of war crimes in non-international armed conflict.[92] They might well be linked solely to the scope of the future court's jurisdiction.

In any event, there is no disputing that during the past five years developments in this area have moved extremely rapidly towards the attribution of individual criminal responsibility to perpetrators of serious violations of international humanitarian law committed in the course of non-international armed conflicts.

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[91] *Ibid.*, *War Crimes*, 12 December 1997, UN Doc. A/AC.249/1997/WG.1/CRP.9.

[92] It is noteworthy that major States such as India and Indonesia are clearly moving in this first direction.

The first proposal for a permanent international criminal court

by Christopher Keith Hall

On 15 June 1998, a diplomatic conference in Rome will open a five-week session to remedy one of the long-standing gaps in the implementation system for international humanitarian law by adopting a treaty to establish a permanent international criminal court.[1] Although the current effort within the United Nations to set up a permanent court began half a century ago with a proposal in 1947 by Henri Donnedieu de Vabres, the French judge on the International Military Tribunal at Nuremberg,[2] it is not widely known that the first serious such proposal appears to have been made more than a century and a quarter ago by Gustave Moynier, one of the founders, and longtime President, of the International Committee of the Red Cross. He wrestled with many of the same problems which will face the drafters of the statute at the 1998 diplomatic conference and the strengths and weaknesses of his proposal still have relevance today. This short essay describes that proposal and its origins, reviews the reaction to it of his contemporaries and its impact on subsequent history and concludes with an assessment of the merits of Moynier's plan.

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[1] United Nations General Assembly resolution 52/160, of 15 December 1997.

[2] On 13 May 1947, Mr Donnedieu de Vabres, as France's representative on the UN General Assembly's Committee on the Progressive Development of International Law and its Codification, proposed the establishment of an international criminal court, and submitted a memorandum on the subject two days later. (Memorandum submitted by the delegate of France, Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction, UN Doc. A/AC.10/21 (1947)).

Until Moynier suggested a permanent court, almost all trials for violations of the laws of war were by *ad hoc* tribunals constituted by one of the belligerents — usually the victor — rather than by ordinary courts or by an international criminal court. The earliest *ad hoc* international criminal court appears to be the tribunal of judges from towns in Alsace, Austria, Germany and Switzerland, established in 1474 to try Peter de Hagenbach for murder, rape, perjury and other crimes in violation of the "laws of God and man" during his occupation of the town of Breisach.[3] Nevertheless, it appears that nearly four centuries were to elapse before anyone seriously considered the idea of a permanent international criminal court.

Gustave Moynier was not originally in favour of establishing a permanent international criminal court. Indeed, in his 1870 commentary on the 1864 Convention concerning the treatment of wounded soldiers,[4] he considered whether an international court should be created to enforce it. However, he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that "a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but, in this respect, the Geneva Convention shares an imperfection that is inherent in all international treaties".[5] Nevertheless, he believed that public criticism of violations of the Geneva Convention would be sufficient, "because public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down. . . . The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments, and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other."[6] He also hoped that each of

[3] For a short account of this trial and references to other accounts, see Georg Schwarzenberger, *International law as applied by courts and tribunals*, Volume II, Stevens & Sons, London, 1968, pp. 462-466.

[4] Convention for the amelioration of the condition of the wounded in armies in the field, of 22 August 1864 ("the Geneva Convention").

[5] *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne*, Paris, 1870, p. 300. (English translation of the quotations in: Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross*, Henry Dunant Institute, Geneva, 1963, p. 282.)

[6] *Ibid.*, pp. 301-302.

the States parties to the Geneva Convention would enact legislation imposing serious penalties for violations. He was to be disappointed on both counts.

Several months later, the Franco-Prussian War broke out. The press and public opinion on both sides of that conflict fanned atrocities. Moynier was forced to recognize that "a purely moral sanction" was inadequate "to check unbridled passions".[7] Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation. Therefore, he presented a proposal for the establishment by treaty of an international tribunal at a meeting of the International Committee of the Red Cross on 3 January 1872. His proposal was published in the *Bulletin international des Sociétés de secours aux militaires blessés* (the predecessor of this *Review*), under the title: *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève.*[8]

Moynier was not discouraged by the failure of other proposals to establish international criminal courts because they were designed to enforce ill-defined customary law, rather than a convention. It was not surprising that the model for the new international criminal tribunal was the arbitral tribunal which had been established the year before in Geneva pursuant to the Treaty of Washington of 8 May 1871 in order to decide claims by the United States against Great Britain for damage caused to American shipping by the Confederate raider, the *Alabama*, and which would hand down its decision on 14 September 1872. Although this model had the advantage of being familiar to governments and the general public, as an *ad hoc* body designed to resolve disputes between States, it was not entirely suited for a criminal court. Nevertheless, it would be unfair to criticize Moynier for following one of the few models available. Those drafting the statute for a permanent international criminal court today have the examples of four *ad hoc* international criminal tribunals, more than a dozen other international courts and dozens of proposals for a permanent international criminal court over more than a century to consider, as well as an international organization in which to place the new institution; apart from arbitral tribunals, Moynier had only a few examples of international

[7] Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, p. 122. (Translation of the quotations by the author.)

[8] *Ibid.*, pp. 122-131. - For the text of the draft convention see the annex to this article.

judicial or quasi-judicial institutions, such as the tribunals established in 1831 concerning free navigation on the Rhine,[9] or of mixed claims commissions.

In developing his proposal, he examined in turn legislative, judicial and executive powers related to criminal law before concluding that an international institution was necessary to replace national courts. Since the States had been reluctant to pass the criminal legislation which he believed that they were morally obligated, as parties to the Geneva Convention, to enact in order to prevent violations, he argued that the creation of international criminal law was necessary, noting the analogy of recent copyright treaties. He did not think that it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they could at any moment be subjected to pressure. An international institution composed of judges from both belligerent and neutral States, or exclusively neutral States, would, theoretically at least, offer better guarantees of impartiality, and this would encourage belligerents to use it. He argued that the governments themselves had nothing to fear from such a court since they would not be directly implicated in the violations. Indeed, "it would be absurd to imagine a superior order in contempt of international obligations formally recognized".[10] The executive function of carrying out sentences, however, should be left to States.

The proposal consisted of ten short articles. The tribunal would have been, in effect, a permanent institution, which would be activated automatically in the case of any war between the parties (Article 1). The President of the Swiss Confederation was to choose by lot three adjudicators (called *arbitres*, but performing functions closer to those of judges than arbitrators) from neutral States party and the belligerents were to choose the other two (Art. 2, para. 1). If there were more than two belligerents, those that were allied would select a single adjudicator (Art. 2, para. 3). If one of the neutral States which had nominated an adjudicator were to become a belligerent during the war, there would be a new selection by lot to replace that judge (Art. 2, para. 4). There would be no permanent seat for the tribunal, but the five adjudicators would meet as quickly as possible at the location chosen provisionally by the President of the Swiss Confederation (Art. 2, para. 2). The judges would decide

[9] See the Conventions of Mainz of 1831, B.F.S.P., 2, p. 52, and of Mannheim of 1868, B.F.S.P., 18, p. 1076.

[10] *Loc. cit.* (note 7), p. 126.

among themselves the place where they would sit (Art. 3, para. 1), thus permitting the tribunal to sit at the place most convenient to the defendants and witnesses.

The proposal left it to the adjudicators each time the tribunal was convened to decide upon the details of the tribunal's organization and the procedure to be followed (Art. 3, para. 1). Certain aspects of the procedure were to be the same, however, in all cases. The tribunal would conduct an adversarial hearing (Art. 4, para. 3) and it would reach its decision in each case by a verdict of guilty or not guilty (Art. 5, para. 1). The complainant State would perform the role of prosecutor. If the guilt of the accused was established (suggesting that the burden of proof remained on the complainant), the court would hand down a sentence, in accordance with international law, which would be spelled out in a new treaty separate from the Geneva Convention (Art. 5, para. 2).

Only "interested governments" were to be permitted to file complaints (Art. 4, para. 1) as Moynier feared that the court would be overwhelmed by frivolous complaints. If any person with a complaint against the enemy were to have the right to address the tribunal directly, "the claims would multiply to infinity, and the adjudicators would risk becoming the playthings of those who would not be ashamed to instigate frivolous investigations". Therefore, it was essential to require that governments submit their nationals' complaints for preliminary examination, and to bring only those complaints before the tribunal which were determined to be sufficiently well founded.[11] He recognized that this requirement would mean that "not all complaints would necessarily be considered by the tribunal. But what is more important is that when a foreigner was concerned, he could not be deprived of the international tribunal's protection" because governments were required to submit all cases involving foreigners to it (Art. 4, para. 2).[12] Thus, the tribunal would have exclusive jurisdiction in all cases involving a foreigner. When the complainant, the accused and the judges were all of the same nationality, there would be no prejudice to anyone requiring international action "but the obligation to go before the adjudicators must be imposed in every other situation".[13]

Recognizing that the terms of the Geneva Convention were inadequate to impose criminal responsibility, Moynier proposed defining violations

[11] *Ibid.*, p. 128.

[12] *Ibid.*

[13] *Ibid.*

and penalties of its provisions in a separate instrument (Art. 5, para. 2), but did not attempt this difficult task himself.

The court was to determine innocence or guilt in each individual case (Art. 5, para. 1) — thus rejecting collective punishments — after an adversarial inquiry (Art. 4, para. 3). All participating States, particularly belligerents, were required to provide "every facility" to the tribunal (Art. 4, para. 3). The penalties, to be specified in a separate convention, would have to be "in accordance with the principles of international criminal law" (Art. 5, para. 2), thus excluding the possibility of different penalties for the same acts, based on different national laws, such as the law of the country in which the crimes occurred or of the accused's or victim's, country of origin. The tribunal would send copies of the judgments to the interested governments, which would be required to carry out the penalty imposed (Art. 6).

In addition to imposing punishment, the court could award victims compensation, but only if the complainant government sought compensation (Art. 7, para. 1). The government of the offender would be responsible for implementing the award (Art. 7, para. 2). Moynier explained that the obligation for the person responsible for a wrong to pay damages was fundamental and found in the laws of most States. He argued that, similarly, a violation of the Geneva Convention could give rise to a claim for damages, with interest, and "what could be more natural than to confer on the international tribunal the power to decide such a claim and to determine the amount of the award?"[14] Moreover, it was appropriate in such a case that the government of the offender should shoulder the responsibility for payment of the award "because the Convention could scarcely be violated but by the agents of authority. In addition, one could say that governments are the cause of all the evils of war, and they ought to face the consequences. It would not be fair for victims to be deprived of compensation by the personal insolvency of those responsible. And, finally, it is no bad thing that governments have a direct and pecuniary interest in the Convention being faithfully observed by their nationals."[15]

As a deterrent, the tribunal would send copies of the judgment to all States party to the Geneva Convention, which would, "where necessary, translate them into their national language and publish them as soon as

[14] *Ibid.*, p. 127.

[15] *Ibid.*

possible, in its official gazette" (Art. 8, para. 1). In addition, the tribunal would do the same with "any decisions which the adjudicators consider should be publicized in the interests of their work, in particular those relating to the penalty and the payment of damages and interest". Moynier explained that he wished "to ensure the widest possible publicity for the work of the tribunal" as that was the way "to shape and enlighten public opinion, which would serve as a base of support for the tribunal".[16]

The court's expenses were to be paid as they were incurred by the belligerents, rather than on a more secure long-term basis by all States (Art. 9, para. 1). The financial accounts of the tribunal would be the subject of a final report which would be publicized in the same manner as the judgments (Art. 9, para. 2) and the tribunal's archives would be amalgamated with those of the Swiss Confederation (Art. 10).

Moynier's proposal led to a flurry of letters from some of the leading experts in international law, including Francis Lieber, Achille Morin, de Holtzendorff, John Westlake and both Antonio Balbin de Unquera and Gregorio Robledo on behalf of the Central Committee of the Red Cross of Spain. All were published with a commentary by Gustave Rolin-Jaequemyns a few months later in the *Revue de droit international et de législation comparée*.[17] Although some of these experts welcomed Moynier's initiative to strengthen implementation of the Geneva Convention, most of them argued that the proposal to establish an international criminal court would not be as effective as other methods and all were critical of various aspects of the proposal. Some of the experts criticized the very idea of an international criminal court, preferring other methods. Lieber supported traditional arbitration between States and called for a large international meeting of experts to fill the existing gaps in international law. De Holtzendorff and Rolin-Jaequemyns argued that the priority should be to establish international commissions of inquiry and strengthen the protection for humanitarian aid societies. De Holtzendorff emphasized the importance of teaching in the rules of the Geneva Convention. Lieber argued that the absence of a police force to implement the tribunal's decisions was fatal and Westlake questioned whether it would be possible to force military witnesses to appear during a war. Morin emphasized the

[16] *Ibid.*, p. 128.

[17] Gustave Rolin-Jaequemyns, "Convention de Genève: Note sur le projet de M. Moynier, relatif à l'établissement d'une institution judiciaire internationale, protectrice de la convention", *Revue de droit international et de la législation comparée*, IV, 1872, pp. 325-346.

importance of distinguishing between accidental, minor violations, where the tribunal should make a civil finding of fault; and serious, criminal violations, to be defined in a supplementary convention, where he said the tribunal should issue a declaration concerning criminal responsibility, leaving it to the government of the accused's country of origin to carry out the penalties specified in the convention. The Central Committee of the Spanish Red Cross, on the other hand, fully approved of the proposal, though it stated that it would be difficult to impose a requirement on governments to guarantee the payment of compensation, that all the adjudicators should be neutrals and that the role of convening the tribunal should not be left to the President of the Swiss Confederation. In addition, Rolin-Jaequemyns reported that one of the major European powers was, after careful examination, prepared to sign a convention along the lines suggested by Moynier. Given the cool reception by the legal experts, however, no government publicly took up the proposal.

The direct impact of Moynier's proposal on subsequent history is difficult to trace. The idea of creating an international tribunal to deal with violations of the laws of war was discussed at a meeting of the *Institut de droit international* (Cambridge, 1895), but the proposal was not followed up.[18] However, apart from that renewed initiative, it seems to have been largely forgotten. Some of the leading advocates of a permanent international criminal court who came after Moynier and most of the major histories of the development of proposals for a permanent international criminal court do not even mention Moynier's proposal.[19] Indeed, the ICRC has not even referred to the proposal in its recent statements at the United Nations Preparatory Committee on an International Criminal Court.[20]

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[18] Benjamin Ferencz, *An International Criminal Court: A Step Toward World Peace — A Documentary History and Analysis*, 1980, p. 6.

[19] See, for example, M. Cherif Bassiouni, *Draft Statute: International Criminal Tribunal*, 1993, pp. 1-45; Ferencz, *loc. cit.* (note 18), pp. 1-7; Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime", in *The Law of War Crimes: National and International Approaches*, Timothy L.H. McCormack & Gerry J. Simpson (Eds), 1997, pp. 31-63; Memorandum by the Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7/Rev.1, 1949; Vespasian Pella, *Towards an International Criminal Court*, American Journal of International Law, Vol. 44, 1950, p. 37.

[20] It has not been entirely forgotten by the ICRC. See, for example, Pierre Boissier, *loc.cit.* (note 5), pp. 281-284, for a brief account of the proposal. It was also mentioned in an article by André Durand, "The role of Gustave Moynier in the founding of the Institute of International Law (1873)", *IRRC*, No. 303, November-December 1994, pp. 543-563.

After more than a century of rapid development in humanitarian law and international judicial institutions, it is difficult to assess the merits of Moynier's proposal in the light of his own time. Moreover, a brief proposal consisting of ten articles should not be judged as if it were a carefully drafted treaty emerging after years of preparation and negotiation in a diplomatic conference. Moynier explained that he would be satisfied "if the proposal merely leads to a serious study by competent men of the question I have raised".[21] Nevertheless, the following preliminary observations, even if to some extent anachronistic with respect to the late nineteenth century, may have some relevance to current discussions concerning the shape of the proposed permanent international criminal court.

It is not easy today to understand what a radical departure the proposal for an international criminal jurisdiction was. Although there may have been dozens of politicians, legal scholars and other writers, such as Rousseau, who mentioned before 1872 the idea of a permanent international court to resolve inter-State disputes — usually only in passing and often to reject it as impractical — it appears that Moynier's proposal was the first serious effort to draft a statute for a permanent international criminal court with jurisdiction over violations of humanitarian law. Moreover, the proposal contained many progressive ideas, some of which are still in advance of the views of many governments today, such as exclusive jurisdiction over certain cases and compensation for victims.

Although it had the advantages of familiarity to governments and the general public, the choice as a model of an arbitration tribunal, rather than a court, led to problems in the structure of the institution, some of which are echoed in the draft statute prepared by the International Law Commission. For example, the tribunal would not have been an institution with permanent judges, prosecutor, registrar and staff. Perhaps this decision reflected the optimism of the late nineteenth century that wars were largely a thing of the past which in the future would be rare and between European powers with shared values in maintaining the existing system of international law and relations, regardless of the differences concerning distribution of power between them. The lack of permanent tribunal personnel, however, would have meant that there would be no continuity or institutional memory and there would be significant delays each time the tribunal was convened, thus decreasing its deterrent value before wars broke out.

[21] *Loc. cit.* (note 7), p. 129.

One significant weakness, which would no doubt have been remedied had the proposal been considered seriously by governments, was the failure to accompany the proposal with a draft of the convention defining violations of the Geneva Convention as crimes and specifying the penalties. Of course, this would not have been an easy task. Indeed, despite more than a century spent developing a broad and nearly comprehensive body of humanitarian law and human rights law (e.g. the prohibitions on torture, genocide and crimes against humanity) the architects of the permanent international criminal court are still wrestling with the problems of defining violations of humanitarian law in a way which satisfies the principles of legality and appropriate penalties.

It is perhaps understandable that his proposal was cautiously limited to the immediate problem of imposing international criminal responsibility for violations of the Geneva Convention in wars between States. Governments of the day might not have been willing to consider extending jurisdiction much further. Nevertheless, it is disappointing that the court would not have had jurisdiction over violations of customary law either during international armed conflicts, or, despite the horrors of the American Civil War a few years before (exemplified by the Andersonville trial) during internal conflicts.[22] Indeed, it would have been easier to draft a proposal to give the tribunal jurisdiction over violations of humanitarian law in internal armed conflict as this law, set out in the Lieber Code,[23] had been used as the basis for national criminal prosecutions, was already widely accepted as reflecting customary law for internal armed conflict (and had a major impact on the development of humanitarian law governing international armed conflict) and could have been easily adapted for use by the tribunal. The States were not willing at that time to impose international criminal responsibility for violations of humanitarian law in internal armed conflict. Indeed, it was only with the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda that it has generally been accepted that such violations incur international criminal responsibility. However, Moynier did note that it would be advantageous to extend the jurisdiction of the court to other

[22] The Confederate Major Henry Wirz, who was the commandant of a military prison in Andersonville, Georgia, where approximately 14,000 Union prisoners died of disease, inadequate shelter and malnutrition, was convicted by a United States military commission for causing the deaths. See 8 House Exec. Docs., No. 23, serial No. 1381, 40th Cong., 2d Sess. 764 (1868); 8 *Amer. State Trials* 666, J.D. Lawson ed., 1918.

[23] Otherwise known as Instructions for the Government of the Armies of the United States in the Field, by Order of the Secretary of War, Washington, D.C., 24 April 1863.

treaties, particularly to the 1856 St Petersburg Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight, and that it would be likely that in time, once such a tribunal was established, it would be given jurisdiction over other treaties. However, he did not include a provision in his proposal for amendment. The present-day Preparatory Committee is considering a Danish proposal for a review procedure to consider whether crimes under international law apart from genocide, other crimes against humanity and serious violations of humanitarian law should be added to the court's jurisdiction once it is established.

Although the provision stating that the tribunal would determine its own rules of procedure (Art. 3, para. 1) had the merit of flexibility in responding to differing circumstances as wars and international law evolved, the arbitration model meant that the rules lacked any certainty, a serious flaw in an international judicial institution. It would be entirely possible for the tribunal to have an almost completely different structure and a different procedure each time it was convened in successive wars or even in wars taking place at the same time. A defendant might have the right to cross-examination, to free legal assistance and the exclusion of hearsay in one war, while another defendant in a different war could be denied them, leading to a not guilty verdict in one and a conviction in the other, both based on similar facts.

At a time when there was no widely accepted international body of law and standards concerning the right to fair trial, and only a few general principles of criminal law, such as *nemo debet esse judex in propria causa* (no one ought to be a judge in his or her own case), it is not entirely unexpected that the proposal had almost no guarantees of the right to a fair trial which are today considered indispensable.[24] Nevertheless, it is disappointing that Moynier did not attempt to identify some of these general principles or to spell out certain aspects of the procedural guarantees of fairness in criminal cases which would be the subject of great controversy and emotion. Such principles were just beginning to be identified in claims by States exercising diplomatic protection, on the basis

[24] These standards are found in the provisions of a large number of international instruments, including Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; the United Nations Standard Minimum Rules for the Treatment of Prisoners; the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the United Nations Declaration on the Independence of the Judiciary; the United Nations Basic Principles on the Role of Lawyers and the United Nations Guidelines on the Role of Prosecutors; as well as in regional human rights treaties.

of an emerging doctrine of an international standard of justice, on behalf of their nationals who had been denied justice for injuries suffered in other countries.[25] Moreover, the use of the term "inquiry" suggests something more akin to the informal procedure before a commission of inquiry than that of a trial. A failure to set out adequate fair trial guarantees is, however, also found in most of the subsequent proposals before the current drafting effort.[26]

Unfortunately, Moynier limited complaints to interested governments (Art. 4, para. 1). He could not have been expected to predict that States would almost never use the State complaint mechanisms of twentieth-century human rights treaties to address violations of the rights of individuals, whether their own citizens or not.[27] One danger of limiting complaints to "interested governments", presumably those whose nationals or residents have been victims, was that since most such governments would be belligerents, there might be a shared incentive to refrain from bringing complaints in situations in which both sides had committed violations, in favour of diplomatic solutions at the expense of the rights of victims. To some extent, this problem was addressed by requiring the participating States to submit to the tribunal any cases they wished to pursue and all cases in which a foreigner was involved (Art. 4, para. 2), but the proposal

[25] See, for example, Lord Palmerston's famous speech to the House of Lords on 25 June 1850 during the Finlay and Pacifico controversy with Greece rejecting the argument that States could not object when their nationals were tortured or persecuted by other States who did the same to their own citizens. 112 Hansard's Parliamentary Debates, 3rd Ser., 1850, 381-388. For further information concerning this incident and the history of the concept of denial of justice from the thirteenth century until Moynier's proposal, see Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights*, 1973, pp. 23-58.

[26] For a discussion of the inadequacy of the procedural guarantees in the International Law Commission's draft statute, see Amnesty International, *The international criminal court: Making the right choices — Part II: Organizing the court and guaranteeing a fair trial*, AI Index: IOR 40/11/97, 1997, pp. 42-92.

[27] As of 30 January 1998, no states had used the State complaint procedures in Art. 41 of the International Covenant on Civil and Political Rights; Art.21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 45 and 61 of the American Convention on Human Rights or Art. 47 African Charter on Human and Peoples' Rights. Only 12 complaints have been filed by States pursuant to Articles 24 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since 1951, when the Convention for the Prevention and Punishment of the Crime of Genocide entered into force, only one State has submitted a dispute to the International Court of Justice pursuant to Art. IX claiming that citizens of another State had committed genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, filed 20 March 1993.

left it to the States themselves to determine whether a case fell within the jurisdiction of the tribunal and whether a foreigner was involved. The requirement that all participating States, particularly belligerents, were to provide "every facility" to the tribunal (Art. 4, para. 3), was a remarkably forward-looking provision concerning State cooperation. An attempt at the December 1997 session of the Preparatory Committee to insert a clause in the draft statute for a permanent international criminal court imposing a general obligation on all participating States to cooperate with the court was one of the most contentious issues of the session.

Today, there is an increasing recognition that the obligations of humanitarian law are obligations *erga omnes*, which all States have a duty to repress although there are some governments on the Preparatory Committee attempting to restrict the States allowed to file complaints to "interested states", i. e. the States having custody of the accused, the State where the crime occurred, the State of which the accused is a national and the State of which the victim is a national. As a result of the perceived problems arising from allowing only States to bring complaints, many governments, independent observers and non-governmental organizations have argued that there should be an independent prosecutor, like the prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, who is authorized to initiate investigations and prosecutions, subject to appropriate judicial review, based on information from any source.[28]

One radical aspect of Moynier's proposal was that the tribunal would have exclusive jurisdiction over any case falling within its jurisdiction which the complainant State wished to pursue and any case in which a foreigner was involved (Art. 4, para. 2), although the only remedy if an interested State failed to submit such a case to the tribunal would be if another interested State did so itself. The statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the International Law Commission's draft statute for the permanent international criminal court provide for concurrent jurisdiction, but they also provide that in cases where the States are unable or unwilling to investigate

[28] Art. 18 of the Statute of the International Criminal Tribunal for the former Yugoslavia provides that "the Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed." Art. 17 of the Statute of the International Criminal Tribunal for Rwanda is identical.

and prosecute persons suspected of crimes, international tribunals or courts could exercise jurisdiction.[29]

Another significant aspect of Moynier's proposal was that the tribunal could award victims compensation, but only if the complainant State included a demand for damages and interest in the complaint (Art. 7, para. 1). Although the proposal did not expressly state that the tribunal would award the damages directly to the victim or the victim's heirs, it is clear that Moynier intended that the victims should not be disadvantaged by the insolvency of the guilty party. The International Law Commission's draft statute left the issue of reparations for victims and their families to national courts, but it is hoped that the Preparatory Committee will recommend that the permanent international criminal court have the power to award reparation.

Moynier recognized that the tribunal would be a more effective deterrent if its work were widely known. The requirement that the judgments, decisions and financial report must be published in the official gazette of each State party (Articles 8 and 9, para. 2) was an important way of ensuring that these decisions would be known to government officials, legislators and the press. Although all judgments and many decisions of the International Criminal Tribunals for the former Yugoslavia and for Rwanda are now published on the Internet, these bodies could consider requiring that their judgments and decisions be published in the gazettes of all States, thus giving them official recognition and making them more accessible to the public. The Preparatory Committee could also propose that the statute of the future permanent international criminal court contain a similar requirement applicable to all participating States and request that other States publish them as well.

One serious problem with Moynier's proposal was that the court's expenses were to be paid as they were incurred by the belligerents, rather than on a more secure long-term basis by all States (Art. 9, para. 1). Given experience with arbitral tribunals, where the States concerned paid, without major difficulties, the costs of the arbitrators and their own costs out of self-interest, it was not unreasonable for Moynier to assume that this method of financing would be sufficient. Nevertheless, with hindsight it

[29] See Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 10 (2); Statute of the International Criminal Tribunal for Rwanda, Art. 9 (2); draft statute for an international criminal court, Art. 42 (2), Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN GAOR Supp. (No. 10), p. 43, UN Doc. A/49/10 (1994).

seems that this approach could have led to serious problems, particularly in a conflict in which there were large numbers of violations requiring extensive investigation, as the adjudicators and staff could not make plans for their temporary employment with any degree of certainty that they or the necessary expenses of the tribunal would be promptly paid. The Preparatory Committee has yet to resolve the problems of financing the future permanent international criminal court. Some States have argued that, somewhat as with Moynier's tribunal, complainant States should finance the court. Others have argued that all participating States should do so, while still others argue that long-term, secure financing for the court should be ensured as part of the regular United Nations budget (as with the International Court of Justice) and perhaps supplemented by the peace-keeping budget (when cases are referred by the Security Council) or by voluntary contributions to a trust fund.

Despite the weaknesses of Moynier's proposal, had it been adopted, even in modified form, States would no doubt have agreed at the 1899 and 1907 Hague Peace Conferences to give it jurisdiction over violations of the Hague Conventions. Such a step could have had a significant impact on public attitudes, as well as on planning for war by military commanders and civilian leaders and the conduct of troops during the wars that have plagued the twentieth century. One can only speculate on the impact that an international criminal court with jurisdiction over the Geneva Convention of 1864 and the 1907 Hague Conventions would have had on the behaviour of troops in the Russo-Japanese War, the Balkan Wars and the First World War, and the development of humanitarian law in civil wars and other internal armed conflicts.

A century and a quarter after Gustave Moynier's daring proposal, the prospects are increasingly bright that the international community will adopt a treaty establishing a permanent international criminal court. In dramatic contrast to the response of leading international law experts in 1872, more than three hundred non-governmental organizations throughout the world have joined forces in an NGO Coalition for an International Criminal Court to mobilize public support for the prompt establishment of an effective court. Nevertheless, the Preparatory Committee is considering a draft statute that has yet to resolve some of the problems which Moynier faced. It will be up to the public to ensure that government representatives at the diplomatic conference draft a statute worthy of Moynier's vision.

Annex

Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention[30]

by Gustave Moynier

Geneva, 1872

Article 1

In order to ensure the implementation of the Geneva Convention of 22 August 1864, and of its additional articles, there will be established, in the event of a war between two or more Contracting Powers, a tribunal to which may be addressed complaints concerning breaches of the aforementioned Convention.

Article 2

The tribunal will be set up as follows:

As soon as war has been declared, the President of the Swiss Confederation will choose by lot three Powers which are signatory to the Convention, excluding belligerents.

The governments of these three Powers, as well as those of the belligerent States, will each be invited to nominate an adjudicator. The five adjudicators chosen will meet, as promptly as possible, at a place which will be notified to them, on a provisional basis, by the President of the Swiss Confederation.

If the conflict involves more than two sovereign States, those which are on the same side will consult on the selection of a single adjudicator.

If, during the war, a neutral State which has provided one of the adjudicators itself becomes a belligerent, a new selection by lot will be held to replace the adjudicator nominated by that State.

[30] Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, pp. 129-131. — Translated from the French original by the ICRC.

Article 3

The adjudicators will decide on the definitive choice of the place where they will sit. The details of the organization of the tribunal, and the procedures to be followed, will be left to their discretion.

They will also decide when it is possible to end their activities.

Article 4

The tribunal will only deal with breaches which are the subject of complaints addressed to it by interested governments.

The latter must defer to the tribunal all those cases which they wish to pursue and in which foreigners are involved.

The tribunal will submit all facts to an adversarial inquiry, which must receive every facility from governments signatory to the Convention, and in particular from the belligerents.

Article 5

The tribunal will present its decision, for each individual case, as a verdict of guilty or not guilty.

If guilt is established, the tribunal will pronounce a penalty, in accordance with provisions of international law. The latter shall be the subject of a treaty which is to be complementary to the present Convention.

Article 6

The tribunal will notify its judgments to interested governments. The latter shall impose on those found guilty the penalties which have been pronounced against them.

Article 7

Where a complaint is accompanied by a request for damages and interest, the tribunal will have the competence to rule on this claim and to fix the amount of the compensation.

The government of the offender will be responsible for implementing the decision.

Article 8

The tribunal's judgments will be communicated to all governments which are signatory to the Convention, which will, where necessary,

translate them into their national language and publish them, as soon as possible, in their official gazette.

The same will apply to any decisions which the adjudicators consider should be publicized in the interests of their work, and in particular those relating to the penalty and payment of damages and interest.

Article 9

The costs of the tribunal, including the adjudicators' salaries and travelling expenses, will be provided in equal parts by the belligerent States which must, as and when required, provide the tribunal with the necessary funds.

The financial accounts of the tribunal will be covered in a final report which will receive the same publicity as the tribunal's decisions.

Article 10

The tribunal's activities will be amalgamated with those of the Swiss Confederation at Berne.

Restoring a just order in post-conflict situations in the light of the social teachings of the Catholic Church

by Giorgio Filibeck

We should start by noting that, even today, not all post-conflict situations are marked by a return to true peace. A situation of latent conflict often persists, ranging from isolated hostile acts, sometimes terrorist in nature, to sporadic military operations which maintain a climate of aggressivity. In such situations, it may be hard to ensure the security conditions which are so vital to the proper functioning of justice. Effective justice is thus conditioned by an essentially political factor: without a real consensus on ending armed conflict, it is impossible to restore an order in which justice can be seen as a realistic goal. However, if there is no political will to punish those responsible for behaviour that is morally unacceptable, quite apart from being legally criminal, it will be impossible to pave the way for authentic peace.

We know full well that peace cannot be defined as the absence of war, but is based on justice; this fact must, however, be emphasized. In terms of our reflection, justice goes hand-in-hand with truth, another precondition for justice.

Two thousand years ago, in a "political" trial in Jerusalem that was to become famous, the representative of the colonial power of those days, the procurator Pontius Pilate, listened distractedly as the accused, a Jew, a certain Jesus Christ, told him that he had come to bear witness to the

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Original: French

truth. The puzzled procurator answered him almost as if reflecting out loud: "What is truth?" (John 18:38). This question is both deeply troubling and crucial, and takes on its full significance in relation to the issue concerning us here, for it refers essentially to each person's responsibility, at whatever level it may be, and covers not only actions but also omissions.

We all know that the trial just mentioned ended with a death sentence. The Roman procurator, who exercised a type of "supra-national jurisdiction" in those days, thought that the accused was innocent, but condemned him for reasons of political expediency, at the request of the "national jurisdiction", following a kind of trial by the people — yet another reason, by the way, for reservations on the ability of a national legal system always to judge objectively!

Truth is also a force for peace, for only knowledge of the facts can help to bring about a climate in which it is possible to defuse the antagonisms that smolder under the shadows of suspicion, to overcome the aggressivity that feeds on the desire for revenge, and to choose the response best able to further the quest for mutual understanding. Such a response can be "just" even if it is not strictly "judicial". It may seem somewhat inappropriate to introduce the notion of equity into this context, but I should like to paraphrase Pascal: "Equity has reasons which justice does not understand." This is not to deny the principle of legality that underlies modern criminal law, nor to whitewash the guilty, but to suggest that there are certain contexts where an approach other than legal proceedings may be possible, or a judge may be granted equitable leeway in applying the law. It is not a question of relativizing the law, but of keeping in mind the old wisdom of Roman jurists who stressed that *summum ius, summa iniuria*; in other words, if the legalistic approach is carried to extremes, it leads precisely in the opposite direction from that intended, that is the defence and promotion of human dignity and peace.

In situations where there have been deep rifts in the social fabric of a nation or an ethnic community, dignity that has been trampled on and peace that has been shattered cannot be restored solely through legal procedures. In any case, the legal process must be complemented by in-depth education. We should not cherish the illusion that condemnation — and I would say above all if this entails capital punishment — is enough to eliminate crimes against humanity. Penal sanctions must be accompanied by an investment in education, and this is also true for common crimes (although I would recall that any murder is fundamentally an act against a human being, against his or her right to life — from conception until natural death — and thus against humanity). Actually, when we speak

of a "culture of impunity", it is a clear sign of the importance of the educational dimension.

In situations where crimes against humanity have been committed, it is particularly important that *post factum* punishment be accompanied by action designed to change hearts and minds. In some cases, judicial proceedings can help to bring about this change, while in others the outcome can be better achieved by other measures. The two approaches may also be complementary, depending on the gravity of the crimes.

To prosecute or not to prosecute? That is not the question! Rather, we must consider the causes of a conflict, and the conditions in which criminal behaviour erupted. If such behaviour is to be permanently eliminated, its roots must be dug up, and the path of reconciliation must be travelled. This is a hard road to follow, because it requires a change of heart. It is quite simply a matter of moving from hatred to love. These words may sound out of place in a legal perspective, but if we lack the courage to look at the ultimate goal of our efforts, then there is a danger that our commitment will be vain. "Evoking the past" in order to exorcise its ghosts is necessary, but it is not sufficient.

It is also important to act on the level of consciences, and here the South African experience after the establishment of the *Truth and Reconciliation Commission* seems especially worthy of note. In the final analysis, every law is born or dies in the human conscience. And this is precisely the dramatic situation of international humanitarian law: highly developed in terms of legal instruments, but widely flouted in practice.

Dissemination of these legal instruments is not sufficient. It must be accompanied by appropriate education in the principles underlying and inspiring international humanitarian law, above all the eminent dignity of every human being, at all stages of existence. Within such a pedagogical process, motivations of a religious order can play a significant role in orienting the conscience towards behaviour in keeping with legal provisions. Therefore, programmes of instruction in international humanitarian law would greatly benefit if they were drawn up in cooperation with religious authorities.

Some people have reservations concerning the positive role that religion can play in providing solid motivations for respect for international humanitarian law: they use the argument of armed conflicts of a religious nature. However, this argument is based on a superficial reading; in-depth analysis reveals that the root cause of such conflicts is a struggle for power which exploits religious identity to reinforce the reasons for fighting.

Now that progress is being made towards the establishment of an international criminal court, despite some resistance, it seems useful to recall that the Catholic Church has encouraged such a step for quite some time. I refer in particular to a speech made by Pope Pius XII on 3 October 1953 to the participants in the Sixth International Congress on Criminal Law. In surprisingly contemporary tones, considering how long ago it was, the Pope took up the question now under consideration. For Pius XII, "protecting individuals and peoples from injustice and violations of the law by drawing up an international penal code is a noble aim". He referred to the tragic experience of two world wars, in which the enemy "was in general no longer thought of as a human being," an attitude that led to criminal behaviour. For the Pope it was "imperative that all the guilty, whoever they may be, be called to account and punished, and that nothing should shield them from punishment for their deeds, neither victory, nor even the plea that they were acting on higher orders". He hoped to see the adoption of "clearly defined coercive legal norms which will be ratified in formal treaties, and thus be binding on the signatory States". The object of these norms should be "particularly serious crimes" — the only ones for which "it is possible to establish a uniform penal code for all countries".

The Pope gave objective criteria for identifying the particularly serious crimes to be prosecuted, listing first of all the case of a war "that does not entail the unconditional need for self-defence", and declared: "The community of nations must reckon with criminals without conscience, who are not afraid to unleash total war in pursuit of their ambitions". He also gave a list of criminal acts, ranging from the shootings of innocent people in reprisal to mass deportations.

He then discussed the sentences to be imposed, noting that "where a criminal game is played with human life, and where hundreds and thousands of people are subjected to great suffering, a simple withdrawal of civil rights is a mockery of justice", and said that sentences "should fit the seriousness of crimes". He recommended an agreement to ensure that sentences be uniformly applied, while noting that "those who live by injustice cannot contribute to the setting up of laws".

The Pope stressed the importance of legal guarantees for defendants, noting that "sending someone to a concentration camp and keeping him there with no regular trial is a mockery of law". He particularly emphasized the prohibition on physical and psychological torture, and cited Pope Nicholas I who, in reply to a query from the Bulgarian King in 866, clearly proclaimed the inadmissibility of such a practice under both divine and human law.

Pius XII also stressed the need to guarantee "the possibility for the accused to defend himself properly, and not just as a matter of form", as well as the "impartial composition of the court of justice ... which is especially important when international relations are involved in criminal trials"; in such cases, "it may be necessary to resort to an international court, or at least allow the possibility of appealing from a national court to an international court" so as to avoid the deplorable sight of "the victor judging the vanquished for war crimes, even though the victor is guilty of similar actions against the vanquished".

Pius XII touched lastly on the difficult question of establishing guilt and responsibility, and confirmed the moral and legal validity of the principle *in dubio standum est pro reo*. He was well aware that armed conflict raises the delicate problem of orders issued by "higher authorities", and he reiterated the moral rule that "no higher authority is entitled to order an immoral action", suggesting that this rule be translated into an appropriate legal form.

In the Pope's view, "a positive law presupposes a set of fundamental requirements borrowed from the ontological order", and consequently "all public law and all human rights have a clear, solid and lasting foundation in common human nature". Despite age-old polemics, the structure of law continues to rest on this "natural" base. This is especially true for international humanitarian law, as is illustrated, for example, by the famous "Martens clause".

The ontological dimension basically means that human dignity is a transcendent value inasmuch as it provides a yardstick for any human action. If humanitarian law does not take root in the conscience in all circumstances, its respect will ultimately depend solely on the will of the strongest, and attempts to codify it will thus fail.

The topic has carried us a long way: reconciliation is costly; above all, it is not an alternative to justice. Pope John Paul II made this point very clearly in his Message for the 1997 World Day of Peace: "Another essential requisite for forgiveness is *justice*, which finds its ultimate foundation in the law of God and in his plan of love and mercy for humanity. Understood in this way, justice is not limited to establishing what is right between the parties in conflict but looks above all to re-establishing authentic relationships with God, with oneself and with others. Thus there is no contradiction between forgiveness and justice. Forgiveness neither eliminates nor lessens the need for the reparation which justice requires, but seeks to reintegrate individuals and groups into society, and States into the community of Nations. No punishment can

suppress the inalienable dignity of those who have committed evil. The door to repentance and rehabilitation must always remain open."

If it is true that the search for compromise is a feature of peace negotiations, this does not mean that all is up for bargaining. It is important to know how to base the negotiations on elements capable of furthering the great process of peace that opens up once agreements have been reached, because the struggle against impunity requires intervention on different levels.

Force versus law: The International Committee of the Red Cross and chemical warfare in the Italo-Ethiopian war 1935-1936

by Rainer Baudendistel

"Caritas inter arma" *is no longer possible: this is all-out war, pure and simple, with no distinction made between the national army and the civilian population, and it is inevitable that the poor Red Cross is drowning in the flood.*

Sidney H. Brown, ICRC delegate, 25 March 1936[1]

M[lle] Odier: (...) *How can we reconcile the obligation to remain silent with the dictates of human conscience? That is the problem.* President: *We kept silent because we did not know the truth.*

Minutes of ICRC meeting, 3 July 1936[2]

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[1] *"Il n'y a plus de possibilité de* "caritas inter arma", *c'est la guerre à outrance pure et simple, sans distinction aucune entre l'armée nationale et la population civile, et quant à la pauvre Croix-Rouge, il est bien naturel qu'elle soit engloutie dans les flots."* Archives of the International Committee of the Red Cross, Geneva (hereafter "ICRC Archives"), *Rapports des délégués*, No. 13, 25 March 1936. - Note: all translations of original French extracts from ICRC Archives by the author.

[2] "Mlle Odier: (...) *Comment concilier le devoir du silence et celui d'exprimer les avis de la conscience humaine? Tel est le problème.* Le Président: *Nous nous sommes tus parce que nous ne connaissions pas la vérité."* ICRC Archives, *PV Séances plénières*, 1935-36, 3 July 1936.

During World War I, chemical warfare agents were widely used for the first time on all major fronts with an unprecedented number of casualties, and immediately after the war attempts were made to outlaw this latest weapon. Responsibility for the drafting of specific laws fell to the League of Nations, reflecting the belief that this was a matter of concern for the whole world, not just for the victors in the war. On 17 June 1925, the Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare was signed by 26 States.[3] It contained a categorical prohibition to resort to chemical and biological warfare. The signature of the Protocol raised high hopes of an effective ban on chemical warfare, but adherence progressed slowly. A number of States, visibly not trusting the Protocol to be implemented in the forthright manner suggested by the text, made major reservations.

At the outbreak of the Italo-Ethiopian war in October 1935, 41 States were party to the Protocol, including Italy and Ethiopia. However, few in the so-called civilized world really believed in the sole protection of the law, at a time when the rule of force was becoming an increasingly threatening feature of international relations. In the absence of the abolition of war itself, the only realistic protection was thought to come from the capacity to retaliate in kind towards an enemy. This form of *Realpolitik* was more likely than a convention or the ailing collective security system of the League of Nations to guarantee protection against the threat of gas warfare. A serious problem would, in turn, arise for those who did not possess a credible capacity for retaliation. Ethiopia would learn this lesson the hard way in seven months of bitter war.

The ICRC's involvement with modern chemical warfare dated back to the first use of poison gas in World War I. The institution was so appalled by its effects on combatants that it launched a public protest in early 1918 against the "barbarous innovation" of poison gas. Worried about the never-ending race for more powerful chemical weapons and the alarming prospect of their use against the civilian population, the ICRC spoke out "with all our heart and soul against this method of warfare which we can only describe as criminal".[4] Equally, the ICRC proposed that an

[3] For the sake of convenience, "1925 Geneva Protocol" or "1925 Protocol" is generally used in this article. Also, instead of the technically correct "chemical warfare agent", the more familiar "poison gas" is the term used whenever appropriate.

[4] *Le Comité international de la Croix-Rouge aux Belligérants, Appel contre l'emploi des gaz vénéneux*, 6 February 1918, ICRC Archives, CR 210, 1125.

international agreement be concluded, possibly under the auspices of the Red Cross, for a total ban on poison gas. After the war, the ICRC followed up its commitment to this cause with representations to the League of Nations and through work within the Red Cross Movement. When the Geneva Protocol was signed in 1925, the ICRC could look back with satisfaction to the conclusion of a campaign behind which it had thrown all its prestige and moral weight.

For the next decade chemical warfare became a top-priority issue for the whole Red Cross Movement, with the ICRC acting as lead organization. Officially mandated by four successive International Conferences of the Red Cross, the ICRC assumed a prominent role in promoting the ratification of the 1925 Protocol. However, growing tensions in Europe in the early 1930s made the ICRC realize that governments were not prepared to leave such important matters in the hands of the Red Cross. Issues related to chemical warfare had become the exclusive concern of national governments, who jealously guarded them under a veil of secrecy. As a consequence, the ICRC was able to produce only meagre results. In autumn 1935, it was clear that the ICRC's pioneering role was coming to a close and that the services of the humanitarian institution were less in demand. Despite this, the mandates relating to chemical warfare were very much part of the institution in 1935, a view which was shared by the Red Cross Movement and the general public.

Italy used poison gas, mainly through its air force, during four of the six months, for which the war with Ethiopia lasted. During this period Italian warplanes dropped 330 tonnes of chemical warfare agents out of an overall total of 1829 tonnes of explosives.[5] Bombing raids using chemical weapons, normally combined with regular explosive and incendiary bombs, took place almost daily with, on one occasion, a record of 12 tonnes in a single day. The aim was to create fear and terror primarily among the Ethiopian army, but gas bombs often hit the civilian population indiscriminately as well.

The most widely used chemical warfare agent was yperite or mustard gas, well known from World War I. It is a vesicant which causes characteristic blistering and burning of the skin with devastating consequences for the unprotected. J.W.S. MacFie, one of the British Red Cross field

[5] The two main sources for this calculation are Giorgio Rochat, "L'impiego dei gas nella guerra d'Etiopia 1935-1936" in *Guerre italiane in Libia e in Etiopia*, Pagus Edizioni, Paese, 1991, pp. 157-168, and Roberto Gentilli, *Guerra aerea sull'Etiopia 1935-1939*, EDAI, Firenze, 1992, pp. 95 and 100.

hospital's physicians, gives a poignant description of his first encounter with gassed victims:

> "On closer inspection the patients were a shocking sight. The first I examined, an old man, sat moaning on the ground, rocking himself to and fro, completely wrapped in a cloth. When I approached he slowly rose and drew aside his cloak. He looked as if someone had tried to skin him, clumsily; he had been horribly burned by mustard gas all over his face, the back, and the arms. There were many others like him: some more, some less affected; some newly burned, others older, their sores already caked with thick brown scabs. Men and women alike, all horribly disfigured and little children, too."[6]

Beside burning the skin, mustard gas often had a painful blinding effect, normally temporarily, because it made the eyelids swell and close.

The Ethiopians had nothing with which to oppose this onslaught of poison gas and were unable to retaliate. They had very little protective equipment and lacked proper medical care, which could have mitigated the effects, as the experience of the later years of the First World War had shown. Unwilling and unable to fight an enemy using such demoralizing methods, many soldiers preferred to run the risk of being caught as deserters rather than to die under such circumstances.

For want of reliable information, it is impossible to pinpoint the number of people killed as a result of chemical warfare waged by Italy. Red Cross sources record a little less than 1,000 gas casualties treated, but this figure gives an incomplete picture. It has to be kept in mind that the 12 Red Cross field hospitals — basically the only medical service available to the Ethiopian army — displayed disparities in terms of organization, staffing and equipment. More importantly, they managed to get close to the war fronts only relatively late in the war. And very often, when their services were most required, the units were in retreat themselves, like the defeated soldiers. Available information suggests that, for about 90% of the chemical warfare, there was little or no access to modern medical care.

Beyond doubt, Fascist Italy's unleashing of chemical warfare made the humanitarian disaster in the war zones much worse. John Melly, the courageous leader of the British Red Cross field hospital, was scandalized

[6] J.W.S. MacFie, *An Ethiopian diary: A record of the British Ambulance Service in Ethiopia*, Hodder and Stoughton, London, 1936, p. 77.

by the extent of human suffering encountered on the northern war front and summarized it in his own very trenchant style: "This isn't a war — it isn't even a slaughter — it's the torture of thousands of defenceless men, women and children, with bombs and poison gas."[7]

Immediately after the outbreak of the war in October 1935, the ICRC offered its services to the two conflicting parties, in line with the Statutes of the International Red Cross. Italy, the aggressor condemned by the League of Nations, rejected any assistance outright, while Ethiopia, poorly prepared as it was, accepted it without hesitation. An international medical relief operation, supported by an unprecedented 28 National Red Cross Societies, got under way. In order to ensure that relief supplies reached the victims of the conflict, the ICRC decided to send two Swiss delegates to Ethiopia. The head of the delegation was Sidney H. Brown, a lawyer who had been working for the ICRC secretariat since 1929. He was assisted by a newly recruited young surgeon, Marcel Junod.[8]

This first ICRC delegation in the modern sense had the task of co-ordinating the activities of the Red Cross field hospitals, six from the Ethiopian Red Cross and six from European National Societies. In addition, it had to assist the inexperienced local Red Cross founded just three months before the conflict. This, in turn, allowed the ICRC delegates to get first-hand information on the development of the conflict and the ensuing humanitarian crisis. Thus, the headquarters in Geneva received valuable information from its own sources and it found itself unexpectedly at the heart of the controversy over humanitarian questions in the Italo-Ethiopian war.

Lack of vision at ICRC headquarters

The first reports from the field delegates about the use of chemical weapons by Italy were noted in Geneva, but not considered worthwhile to be followed up. When they became more frequent and insistent, in early March 1936, the ICRC's attention was fully absorbed by the preparations for its high-level delegation's impending visit to Rome. Its aim was to discuss with the Italian authorities the procedures for an inquiry into

[7] Letter from John Melly to K.N., 12 April 1936, in K. Nelson and A. Sullivan, *John Melly of Ethiopia*, Faber & Faber, London, 1937, p. 240.

[8] Sidney H. Brown (1898-1970) left the ICRC under unclear circumstances after his mission, while Marcel Junod (1904-1961) made a career in the ICRC, first as a delegate and later as member and vice-president of the ICRC.

alleged violations of the 1929 Geneva Convention on the wounded and sick in the field, in accordance with Article 30 thereof.[9] Both parties to the conflict had already agreed to this inquiry, at least in principle. In the very carefully drafted preparatory documents for the Rome meetings, there was only a brief reference to gas. Obviously it was not yet a source of concern for the institution. This did not change after interviews with two former Ethiopian Red Cross employees, both Polish nationals, who had been taken prisoner by the Italians. After Doctor Stanislaw Belau and his assistant Tadeusz Medinsky were released from captivity, they went to Geneva. They informed the ICRC of what had befallen them and of their experience with gas. In this respect, Belau's testimony is particularly interesting. He had already known poison gas as a Polish officer in World War I and clearly identified mustard gas, plus two other chemical agents which were unknown to him, as having been used in Ethiopia. Belau's deposition was given to the ICRC delegation leaving for Rome, together with Junod's striking telegram about the Korem incident, when he witnessed mustard-gas bombing by Italian warplanes. Thus, when President Max Huber, Vice-President Paul Logoz, Carl Jacob Burckhardt and Jacques Chenevière left for Rome on 24 March 1936, they were carrying in their luggage "hot" first-hand information about the use of gas in Ethiopia.

From the ICRC's point of view at the time, the Rome trip was very successful and was crowned by a brief audience with Mussolini in the Palazzo Venezia on 30 March 1936. The ICRC had gained the Italian's agreement to the procedures for the planned inquiry concerning the misuse of the emblem. But what about the issue of gas? In the ICRC documents no mention of gas can be found. Italian sources confirm that the delegation did not raise the question during the meetings with Baron Pompeo Aloisi, the *Chef de cabinet* in the Ministry of Foreign Affairs, or with Filippo Cremonesi, the President of the Italian Red Cross. In a simple and calculated move, the Italians pre-empted a possible ICRC initiative to raise the question officially. Aloisi informed the ICRC in the first meeting that the subject of the inquiry was limited to questions coming under the Geneva Conventions. This meant that methods of warfare such as the use of poison gas were simply excluded. The ICRC could do little to oppose this since it came from one of the belligerents, who were free to lay down their own conditions for the inquiry.

[9] The ICRC had proposed this inquiry after both sides had accused each other of misusing the Red Cross emblem.

If official channels were blocked, could not the question have been raised informally? Here again, it seems that no mention of gas warfare was made, though not for want of a suitable occasion. One such opportunity could have been the meeting with the President of the Italian Red Cross, Cremonesi, during which a survey of relevant ICRC concerns was made. These included the bombing of Red Cross field hospitals and the question of prisoners of war. It seems that Cremonesi himself was surprised that the matter was not brought up. At the end of his report to the Ministry of Foreign Affairs he made a specific remark that no other subjects were discussed between the ICRC and the Italian Red Cross.

There was one occasion, however, not without importance, when the issue of poison gas was touched upon. Chenevière relates that Max Huber made an allusion to gas warfare during the short audience with Mussolini. Talking of Huber's introduction at the beginning of the meeting, Chenevière recalls: "All the essentials were there: reprisals prohibited, even if apparently justified; immunity and care guaranteed for anyone *hors de combat.* In passing, I even caught the explosive words "mustard gas". The Duce was startled. Very calmly, Max Huber continued: 'Just a general comment on methods of warfare'. Was he moved? Perhaps, but this may have been no bad thing."[10] The audience lasted precisely ten minutes. It was obviously too short to allow a serious discussion, especially on a controversial subject such as poison gas.

This is the only recorded reference to gas warfare — a very general one at that — during the ICRC's visit to Rome. The silence is all the more puzzling as the delegation knew from various telephone conversations with Geneva that gas warfare in Ethiopia had become a very urgent and serious issue. In addition, a confidential cable had been sent from Geneva to the delegation via the Swiss Ministry of Foreign Affairs concerning another occasion when poison gas was used, this time reported by the Norwegian Red Cross in the Sidamo region. Even if there was never any question of a formal representation, why did the ICRC President not take this golden opportunity at least to request some clarification of a matter regarding which it possessed reliable information and good grounds for intervention?

[10] Jacques Chenevière, *Retours et images*, Éditions Rencontre, Lausanne, 1966, p. 254. Translation by the author. — Burckhardt, in his own account of the meeting with Mussolini, described the audience quite differently and did not mention Huber's reference to poison gas. Carl J. Burckhardt, *Vom Krieg und Frieden*, Festschrift der Universität Zürich zum 70. Geburtstag von Max Huber, Schulthess & Co AG, Zürich, 1944, pp. 260-261.

In the absence of documented evidence, two main reasons explain the ICRC's timidity in Rome. First, the inquiry into alleged violations of the 1929 Geneva Convention had top priority. For the first time the inquiry procedure, considered to be an important achievement of the new Conventions, was due to be applied. The ICRC had no desire to compromise its chances of success, least of all over the matter of poison gas, which was an extremely sensitive subject for the Fascist régime. Secondly, like the delegates in the field at the beginning, the ICRC in Geneva distrusted the reports on the use of poison gas. It seemed simply impossible, and appeared to many as just another coup in Ethiopia's anti-Italian campaign. Why should Italy, the cradle of European civilisation, fail to act in good faith and employ a banned weapon in violation of the 1925 Protocol to which it had solemnly adhered?

Obviously one cannot reproach the ICRC for being unaware of something the historian discovers later, namely that the Italian authorities already knew of Junod's message concerning his experience of mustard gas: they had intercepted the telegram which the ICRC delegation carried to Rome,[11] but had made no further use of it. Or that Mussolini, the day before the meeting with the ICRC delegation, had again authorized the commander of the Italian forces, Badoglio, "to use gas of any type and on any scale".[12] The question is whether the ICRC should not have shown greater insight and been more daring in view of the first-hand information it possessed. Quite clearly, the delegation missed the first opportunity to defend the interests of victims on whose behalf it had made a commitment.

The League of Nations and the ICRC: collective security and humanitarian concerns

Until the Italo-Ethiopian war, the paths of the League of Nations and the ICRC rarely crossed. The two institutions, and their aims and methods, were very different. The League was engaged in international politics, trying to set up a new world order, facilitated by the period of peace in Europe of the 1920s and early 1930s. It had a large staff at its disposal

[11] The Italians monitored not only the internal communications of the Ethiopians through the military authorities in East Africa, but also foreign telegram traffic to and from Addis Ababa through the Ministry of Internal Affairs' special listening service. Most ICRC telegrams, including the one mentioned, can be found in Archivio Centrale dello Stato (thereafter ACS), Ministero dell'Interno, Roma, P.S. 1936, Busta 1 A.

[12] ACS, Fondo Graziani, Busta 18, Fasc. 21/6, 29 March 1936.

and impressive buildings in Geneva. The ICRC, by contrast, was a little-known institution dealing with humanitarian matters in times of war, a phenomenon which was thought to be — if not overcome — at least contained by a series of treaties and the progress of civilized nations. In view of this, some over-optimistic individuals even felt that the founding organization of the Red Cross had lost its *raison d'être*. The Committee itself was composed of less than 20, some more active than others, voluntary members primarily drawn from protestant and liberal circles in Geneva society. They had attempted to shake off the image of a *"comité de quartier"* (local committee), as the Swiss Foreign Minister Giuseppe Motta had put it disparagingly before he and some other distinguished Swiss joined it. It was assisted by a handful of professional staff, working in a villa on the shores of Lake Geneva. Since World War I, the small but active institution had dealt mainly with matters of humanitarian law, and it had managed to establish a special position in the international Red Cross movement, which was reorganized in 1928.

In the Italo-Ethiopian war, the relationship between the two institutions underwent a radical change. A fledgling League grappled with the challenges which Fascist Italy had thrown down to the international community, while the ICRC was deeply involved in its first humanitarian operation in a war since 1918. The situation had suddenly changed. From being a player on the fringes of the international scene, the ICRC now occupied centre stage. It was just a matter of time before the respective roles of the two organizations would have to be clarified. The occasion was provided by Italy's waging of gas warfare in Ethiopia.

During the stormy deliberations on the conduct of hostilities held within the League of Nations' Committee of Thirteen in early April 1936, it was felt that precise information was required on what had happened on the battlefields in the Horn of Africa. In view of Italy's refusal to cooperate with the world body on its alleged use of chemical weapons, the League turned to the ICRC. Its delegate was reported in the press to have witnessed the use of poison gas close to the northern Ethiopian town of Korem, and the institution was known to have received other relevant information from the staff of National Red Cross Societies. In a letter, Joseph Avenol, the Secretary-General of the League, requested information from the ICRC on this issue.[13] A response was expected for the same

[13] Joseph Avenol to the President of the ICRC, 8 April 1936, ICRC Archives, CR 210, 1042.

afternoon in order to allow deliberations in the Committee of Thirteen to continue.

The request placed the ICRC in a very uncomfortable position between the League of Nations and Italy. The institution was given the unwanted role of an arbiter, which could jeopardize the continuation of its work in the field. It now became an authoritative eyewitness in a modern war fought not only with all available military means but also in the spotlight of international public opinion. In essence, the League's request placed the ICRC in the classic dilemma with which it has been confronted until today: having to choose between speaking out against an injustice and bringing relief to war victims.

After consulting President Max Huber by telephone, the Committee was in no doubt that it had to reject the League's request. Documents and information held by the ICRC were not to be used for political ends, and this would inevitably happen when they were handled by the Committee of Thirteen. Curiously, the ICRC did not put forward this reason in its hurried and ill-conceived answer to the League, but justified its refusal by reference to the planned inquiry into alleged violations of the Geneva Convention "relating in part to the same facts". Secondly, the ICRC said that it could not share its delegates' reports with the League because they were strictly reserved for Red Cross purposes. Finally, the ICRC informed the League that it was up to governments or the National Red Cross Societies to decide whether or not to disclose information in their possession.[14]

Not surprisingly, the League of Nations felt offended by the negative reply from the small humanitarian institution. The President of the Committee of Thirteen, Salvador de Madariaga, took it upon himself to respond. He exposed a flaw in the ICRC's reasoning, sharply pointing out that the League's inquiry covered questions such as gas warfare which were not included in the ICRC inquiry. Therefore, the existence of the latter could not be invoked as a reason for withholding relevant information. The ICRC's second argument was considered an affront to "a body which is acting in the name of the League of Nations".[15]

[14] Guillaume Favre to the Secretary-General of the League of Nations, 9 April 1936, ICRC Archives, CR 210, 1054.

[15] Salvador de Madariaga to the President of the ICRC, 18 April 1936, ICRC Archives, CR 210, 1102.

The League's angry response necessitated another reply from the ICRC, made imperative since the League had published the exchange of letters. The matter had been brought into the public arena, where it was immediately picked up with keen interest. This time, the ICRC response was carefully constructed, well reasoned and to the point. It was prepared by the accomplished lawyers Huber and Logoz, who pitched the response at the fundamental level of the Red Cross ideals and the Statutes of the ICRC. In accordance with its role, the ICRC needed to remain outside any action of a political nature; this was the real reason for its refusal to cooperate. Furthermore, the ICRC had to maintain its neutrality in relation both to the Geneva Conventions and to other Conventions aimed at safeguarding humanitarian interests in times of conflict. And finally, the ICRC came to the essential point:

> "The purpose of the ICRC is purely humanitarian and apolitical: the Committee must first and foremost do everything it can do to relieve the sufferings of victims of war. To do so, it must adhere scrupulously to a line of conduct enabling it to maintain relationships of trust with parties to a conflict (...). The International Committee also considers itself unable to depart from these principles even in the events of conflicts where the right to go to war is in dispute."[16]

Thus, the ICRC had established its independence from the League of Nations and demonstrated that political and humanitarian organizations had their respective rights and duties, which might differ at times. The reactions to this stance were immediate and sharp. The Ethiopians, who had requested the ICRC to share their documentation with the League, were deeply disappointed. Junod noticed that working relations with them deteriorated into "strong opposition" after the ICRC's negative response. Government officials close to Emperor Haile Selassie accused the ICRC of ill will and of being pro-Italian. Later judgements by eyewitnesses such as John H. Spencer, the young American adviser to the Ethiopian Ministry of Foreign Affairs, went even further. Commenting on Huber's refusal vis-à-vis the League of Nations, he wrote: "By his signature on this disgraceful and futile attempt to cover up an international crime which, by then, had become widely known and which was never denied by Italy, he prostituted his own reputation and that of international law to the call of political convenience."[17]

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[16] Max Huber to Salvador de Madariaga, 24 April 1936, ICRC Archives, CR 210, 1123.

[17] John H. Spencer, *Ethiopia at bay*, Reference Publications, Michigan, 1984, p. 50.

Disappointment on one side, satisfaction on the other: upon hearing of the Committee of Thirteen's request to the ICRC, the Italian Red Cross delegate in Geneva, Count Guido Vinci, rushed to the ICRC to find out what its response would be. His close relations with the institution allowed him to gather reassuring news: the ICRC was not going to comply with the League's request. He immediately informed the Italian Red Cross President, anxious for news and perfectly aware of the crucial role which the ICRC was playing at this moment with regard to Italy's image in the world. President Cremonesi was relieved to hear of the ICRC's refusal, and so was the Ministry of Foreign Affairs. After the war, in a speech made to the Duce who was visiting the Italian Red Cross premises, Cremonesi even went so far as to attribute the ICRC's refusal to the visit made by its members to Rome at the end of March 1936!

Equally pleased, about this decision, but for different reasons, was Giuseppe Motta, the Swiss Minister of Foreign Affairs and a member of the ICRC. In his view, the ICRC's negative answer to the Committee of Thirteen had defused a controversial subject containing potential dangers for Swiss-Italian relations, which were complicated enough. The humanitarian institution in Geneva had rendered a precious service to Switzerland. By defending the neutrality of the Red Cross it had indirectly defended Swiss neutrality as well.[18] For the very same reason, the Swiss minister in Rome, Paul Ruegger, expressed satisfaction at the increased prestige enjoyed in Italy by the ICRC, "whose neutral and impartial attitude, demonstrated once again in the correspondence with the Committee of Thirteen, reflects upon our country".[19]

The dispute with the League of Nations must be evaluated from several angles. By omitting to inform the National Societies of its stance and coordinate a response with them, the ICRC missed the chance to get the Red Cross Movement to speak with one voice. Upon receiving a request from the League of Nations similar to the one made to the ICRC, several National Societies complied. This showed that other components of the Red Cross had their own loyalties and policies which might be detrimental to the Red Cross spirit as a whole. If the ICRC was serious about fulfilling

[18] Giuseppe Motta to Légation de Suisse, Rome, 19 June 1936, Bundesarchiv Bern, E 2200 Rom 22, Schachtel 9, Question de la Croix-Rouge.

[19] Paul Ruegger to Giuseppe Motta, 14 April 1936, Nachlass Paul Ruegger, Archiv für Zeitgeschichte, ETH, Zürich, III, 15.3.3. Paul Ruegger, a student and a friend of Max Huber, joined the ICRC later and served as its President from 1948 to 1955.

its leadership role in such cases, it should have made sure that the Movement adopted a unanimous position as far as possible.

From an internal point of view, the dispute exposed a serious flaw in the working mechanisms of the institution. Max Huber, the President of the ICRC, was living in Zürich and came to Geneva only for important meetings, usually for a few days. His physical absence from ICRC headquarters, where decisions were made, proved to be a disadvantage. This was especially the case when urgent and important matters needed to be considered. Communication with the President by telephone did not compensate for his absence. If President Huber could have been reached easily, the initial reply to the League, hastily written and poorly thought out, would not have been sent in that form. Had the ICRC based its answer from the beginning on the ground it put forward subsequently, the real issues separating the two institutions would have appeared immediately. Some of the misinterpretations would probably not have arisen. Moreover, and perhaps more importantly, the presence of the ICRC President in Geneva would have allowed a face-to-face discussion with the League's representatives during which the ICRC position could have been explained more clearly than it was in an impersonal letter.

Turning now to the substance of the dispute, one has to admit that the ICRC's decision to refuse the League access to its documents was right on two counts. First, there was the political angle. At the time of the dispute, it was becoming clear that the League was powerless to stop the Italian aggressor, already victorious on the battlefields. If the ICRC had complied with the League's request, it would at best have been a gesture of goodwill, but at worst it would have created unnecessary complications with one of Europe's great powers, not only for the short remaining period of the war in Ethiopia, but also for a considerable time to come. Second, from the point of view of its principles, the ICRC was right to separate its humanitarian action from the political activity of the League. Mixing the two together would only lead to the politicization and undesirable weakening of Red Cross activities. A strong and credible Red Cross was essential in a Europe where the clouds of war were rapidly gathering on the horizon.

However, our analysis cannot stop here. Clearly, each belligerent drew its own political conclusions from the ICRC's decision. If the matter remained as it stood, it would play into the hands of the Italian government. Silence over the use of poison gas on which the humanitarian organization had first-hand information was protecting an illegality. The negative reply to the League's request increased pressure on the ICRC to

respond to Italy's use of gas in one way or another. What action was it going to take to maintain true neutrality and impartiality? How was it going to avoid falling into the trap of appearing to be pro-Italian?

Underlying the situation was another important question. True enough, the ICRC needed "relationships of trust" with the belligerents for its work, but this was not at any price. If a belligerent did not help to create such a relationship and resorted quite openly to illegal means of warfare, could the ICRC simply close its eyes? Obviously there were limits. Otherwise would the ICRC not be accused of political naivety or even complicity in a crime, seen from the viewpoint of a scrupulous party to an armed conflict?

The ICRC caught between the spirit of 1918 and the letter of the law

Undoubtedly, the ICRC was confronted with a serious breach of an international convention with which it had been deeply involved for 18 years. Violations of Conventions had already occurred in World War I. Then, the ICRC had issued a protest to the belligerents, the strongest measure it could take, on four occasions. One of these was the 1918 appeal against the use of poison gas. The common denominator in the protests was the existence of indisputable facts of particular gravity resulting from a government's open and deliberate policy. In addition, the violation in question threatened the legal system of protection itself.[20] Should the ICRC maintain its past approach in the case under consideration?

Three different opinions clashed with each other in the Committee. The first and smallest group consisted of those who either doubted that gas was used in the war or felt that it was unduly exaggerated by press reports. Until 8 April 1936 this point of view was supported by the ICRC secretariat and by Vice-President Georges Patry.[21] It was cut short by

[20] François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, p. 126.

[21] ICRC Archives, *Commission d'Éthiopie*, PV 61, 8 April 1936, p. 3. The head of the secretariat, Etienne Clouzot, doubted Italy's waging of chemical warfare despite the fact that he had access to all relevant first-hand news from the field and to restricted information at headquarters. He was considered by Vinci as "our friend", ACS, Croce Rossa Italiana (CRI), Busta 189, Fasc.10. In this context it is interesting to note that in November 1935, one month after the outbreak of the war, Clouzot was awarded the order of "Cavaliere Ufficiale de la Corona d'Italia" in honour of his service within the ICRC and the International Relief Union. ACS, CRI, Busta 189, Fasc.1.

Doctor Junod's detailed report on the events near Korem which reached the ICRC one day later.

The second group of ICRC members included Vice-President Guillaume Favre, Edmond Boissier, Rodolphe de Haller and the only woman involved in the Ethiopian operation, Lucie Odier. This group wanted to maintain the tradition of the 1918 appeal. Then the ICRC had denounced chemical warfare out of its humanitarian duty. In fact, Odier already initiated deliberations on an ICRC protest against Italy while the ICRC leadership was still in Rome. Patry blocked this with the argument that there was insufficient proof, but the heated discussion resumed upon the delegation's return to Geneva in early April. Boissier, the only remaining ICRC member who had signed the 1918 appeal against gas (together with Paul Des Gouttes who did so in his capacity as Secretary-General), argued as follows: "In 1918 the ICRC protested against the use of poison gas, even though no mandate in this regard had been conferred on it and no protocol prohibiting the use of gas had yet been signed. Can the ICRC remain passive now if the use of gas in the Italo-Ethiopian conflict is proven?"[22] This group received support from Louis Demolis, the ICRC's technical adviser on chemical warfare. Referring to the different reports on the use of gas in Ethiopia and recalling the specific mandates given by the Red Cross Movement to the ICRC, he urged the ICRC to make its voice heard once more and condemn such a practice unreservedly.

On the other side of the debate was the lawyers' group, with Max Huber, Paul Des Gouttes and Paul Logoz, who were joined by Jacques Chenevière. They based their argument on the fact that the ICRC had no legal grounds for intervening in issues relating to methods of warfare, but was specifically concerned with humanitarian affairs coming under the Geneva Conventions. The two matters were quite separate and should not be placed together. To this, Huber added the decisive fundamental argument that "the ICRC does not have to take a stand for or against a given method of warfare: it has to concern itself with relieving the suffering caused by war".[23] To these two Red Cross arguments came a circumstantial one of Italian making. When the discussion in the League's Committee of Thirteen on Italy's use of gas became inevitable and an inquiry by the League of Nations a strong, but undesirable probability, the Italian diplomatic corps suddenly proposed that the ICRC should be instructed to

[22] ICRC Archives, *Commission d'Éthiopie*, No.61, 8 April 1936, p. 2.

[23] ICRC Archives, *PV Séances plénières*, 1935-36, 23 April 1936, p. 2.

conduct an extended inquiry. It should not only cover the Geneva Conventions, as expressly desired by Italy and agreed in Rome with the ICRC delegation, but should also deal with all violations of relevant international Conventions. This meant a complete reversal of the previous Italian stance. Under the circumstances, the Italians clearly felt that an ICRC inquiry which included methods of warfare was preferable to one conducted by the League of Nations. This astute move tied the hands of the ICRC. Indeed, just by agreeing to consider an extension of the proposed inquiry, it had to refrain from any public comment that could be interpreted as anticipating the conclusions of the planned commission of inquiry.

At the heart of this debate were two conflicting views of the ICRC's role in times of conflict. They had been inherent in such situations since the foundation of the Red Cross at the battlefield of Solferino, and were two sides of the same coin. One was the revolting fact of human suffering, made worse in this case by a deliberate breach of an international convention to which one could not remain indifferent. The other was legitimate concern for the ability to bring relief to persons in need, and this called for restraint and circumspection. The choice was this: to express indignation and accept the consequences, or to keep quiet and continue the humanitarian work. The spirit at the heart of the 1918 appeal was at odds with the letter of the law. In this unsolvable dilemma, the ICRC of 1936 chose the latter course. The strictly legalist approach of the small but important group of lawyers in the ICRC prevailed. But the situation in 1936 was obviously different from that of 1918. It was more threatening from an ICRC point of view. In April 1936, an aggressive, arrogant Fascist Italy was on the point of winning the war with Ethiopia and the blame would have had to be put squarely on its government alone. This would have exposed the ICRC much more than it wished. Its protest eighteen years earlier had been directed at *all* warring parties which were using poison gas. It had been easier, in this respect, to protest and, at the same time, to stay neutral in 1918 than it was in 1936. A more forceful response now would have required a lot of courage.

This leads to another important difference: there were distinct personalities at the helm of the ICRC. In 1928 Max Huber had replaced the charismatic and forceful Gustave Ador, who had known the ICRC since the beginnings of the Red Cross. Huber was a prestigious and widely respected judge whose sincerity and integrity were beyond question, but he was hesitant, giving more attention to weighing the merits of a case

than to what needed to be done.[24] This attitude left its mark on the decision taken by the ICRC in April 1936.

Representations via the Italian Red Cross: a futile course

In the midst of these intense discussions and at a time when uproar in Europe over Italy's use of poison gas was at its height, Vice-President Favre proposed, with the support of some of his colleagues, that the ICRC should express "its emotion and its anxiety" to the Italian Red Cross. Such a step became even more imperative since the ICRC had refused only days earlier to share information in its possession with the League's Committee of Thirteen. The humanitarian institution realized that the Red Cross Movement and public opinion in general were focusing on its conduct, and that it was obliged to adopt an initiative of its own.

The letter of 12 April 1936 to the President of the Italian Red Cross reflected the ICRC's internal divisions at the time. It recalled the concern which the International Red Cross — not the ICRC — had felt with regard to chemical warfare since 1925, and listed the various accusations from Red Cross sources on the use of poison gas. Junod's testimony concerning the mustard gas attack on the Korem plain was included. But the institution carefully avoided implicating itself in any form and concluded the letter without a specific request, contrary to the intention of the initiators, stating: "We think we should bring these statements to Your Excellency's knowledge. The use of a prohibited weapon is such as to arouse feelings whose gravity you cannot fail to appreciate. According to our delegate, such conduct might even paralyse all work by the Red Cross in the regions affected."[25] The ICRC was definitely not at ease in this matter and unable to make a clear point.

In this timid and excessively polite form, the letter could hardly satisfy the initiators. It was a far cry from expressing emotion and anxiety. No wonder Odier and de Haller voiced their disappointment when they learned about the version sent to Italy. Chenevière, most probably the author of the letter, replied with the lawyers' argument that the ICRC had no legal basis for intervention, since poison gas was not a subject covered by the Geneva Conventions.

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[24] Letter from Max Huber to Carl J. Burckhardt, 25 May 1936, Nachlass Max Huber, Zentralbibliothek Zürich, 2.75, Umschlag IV/1936.

[25] Max Huber to Filippo Cremonesi, 12 April 1936, ICRC Archives, CR 210, 1073.

Close examination of this letter reveals that it only repeated reports which were already public knowledge. The (very veiled) request for information from the Italian government was nothing new after the representations which the League's Committee of Thirteen had made on 23 March, a full twenty days earlier. Nor was the letter even addressed to the government responsible, but to a subservient Italian Red Cross. Seen in this light, the ICRC's initiative marked no new progress, it came late in the day and was directed at a body which had no competence to deal with the matter. Throughout this crucial period the ICRC's attitude was passive and reactive. And it is striking that when it had to take action itself it was always one safe step behind the League of Nations.

It is possible to take the matter even further. Mussolini was clearly struck by the international outcry against Italy's gas warfare in Ethiopia. One day after the impassioned debate in the Committee of Thirteen, he ordered Graziani to refrain from using chemical weapons until further notice. He monitored the execution of this order closely, and even when the storm over the matter had calmed down towards the end of April, he prohibited the use of mustard gas, at least for some time to come. Equally, Mussolini's handling of the ICRC in Rome had shown that he was enough of a politician to avoid provoking the Red Cross unnecessarily, given the undisputed prestige which it enjoyed. In view of Mussolini's sensitivity in these matters, the question must be asked whether more forceful representations by the ICRC, even if restricted by confidentiality, might not have helped to persuade Mussolini to be more circumspect in his use of an outlawed weapon. This is an important issue, as chemical warfare did not cease on 27 April 1936, the last time it was seen in the Italo-Ethiopian war. Between early May 1936, when Addis Ababa was occupied, and March 1939, Fascist Italy continued to use mustard gas against the Ethiopian rebels,[26] without receiving any international attention at all. In April 1936, the ICRC missed a second chance of adopting a position and making it known publicly.

The ICRC letter was immediately forwarded by the Italian Red Cross to the Ministry of Foreign Affairs, but the Italian government was visibly unimpressed and did not consider it a matter of urgency. The President of the Italian Red Cross, Cremonesi, did not respond to the ICRC until

[26] Some 100 tonnes of mustard gas bombs were used during this period, according to a detailed breakdown made by Gentilli, *op. cit.* (note 5), pp. 182-183. In the ICRC documents consulted, there is no mention of continuing chemical warfare in Ethiopia after 5 May 1936.

one month later, after a reminder from the ICRC. In the meantime, the situation in Ethiopia had changed dramatically. Marshal Badoglio had entered Addis Ababa at the head of his troops, Emperor Haile Selassie had fled the country to take temporary asylum in Jerusalem, and Mussolini had triumphantly proclaimed the foundation of the *"Impero fascista italiano in Africa Orientale"* from the balcony of the Palazzo Venezia. The Italian Red Cross response was a verbatim repetition of the relevant parts of an earlier reply to the League of Nations, namely that the Italian government abided by the 1925 Geneva Protocol, "bearing in mind, however, that this does not exclude exercising the right of reprisal in order to repress such abominable atrocities as those committed by Ethiopian troops".[27] Cremonesi himself added that Red Cross units were of course excluded from being targets of reprisals.

Although it came late, the response was still important. The Italians finally admitted to the ICRC itself that poison gas had been used in the war, albeit in reprisal for Ethiopian atrocities.[28] When the ICRC discussed Cremonesi's latest answer, it realized that it had to reply. Given the sensitivity of the matter, President Huber took it upon himself to draw up the first draft.

Three weeks had elapsed since the official end of the war with Ethiopia when the letter was dispatched.[29] In it, the ICRC made the point that, since it lacked the necessary authority, it was unwilling to go into the legal grounds on which the Italian argument was based, i.e. to discuss whether Italy was justified or not to resort to a banned weapon in taking reprisals. Instead, its reasoning was based on the less controversial humanitarian grounds "that it is essential to ban chemical warfare absolutely". Finally, the ICRC commented with satisfaction on Cremonesi's guarantee that "the units of the Red Cross — that is to say, all its staff, the wounded, the sick and the equipment enjoying the protection of the Geneva Convention" would not be the object of reprisals.

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[27] Filippo Cremonesi to Max Huber, 11 May 1936, ICRC Archives, CR 210, 1203. — Original: Italian.

[28] In fact, this justification was a pure lie. The possibility of chemical warfare had been envisaged from the beginning when the first preparations were made. During the war, Mussolini justified the use of gas "as *ultima ratio* to overcome enemy resistance" (27 October 1935), "for supreme reasons of defence" (16 December 1935) and even just "in case of necessity" (9 January 1936). Arguments such as "the enemy's methods of war" were not used until 28 December 1935. Rochat Giorgio, *Il colonialismo italiano*, Loescher editore, Torino, pp. 168-169.

[29] Max Huber to Cremonesi, 26 May 1936, ICRC Archives, CR 210, 1249.

It is interesting to compare this final version with Max Huber's draft,[30] in which there are two main differences: First, Huber had raised some pertinent legal points regarding the law of reprisals and had voiced the Red Cross' concern about it: "Recourse to this means of repressing unlawful acts always runs the risk of undermining all the rules that have been worked out so labouriously to impose at least some limitation on the horrors of war. From the humanitarian point of view, reprisals perpetrated against individuals (...) should be regarded as particularly dangerous." Secondly, Huber noted that irrespective of any legal considerations, "any use of poison gas can only be deeply deplored by the Red Cross". Clearly, the ICRC President felt that it needed to adopt a firm stance, but these remarks were probably deleted by Logoz, whom he had asked to review the draft.

It would have been interesting to see the reactions of the National Societies concerned — let alone those of the Ethiopian Red Cross [31] — whose staff had been exposed to Italian gas bombs, if this exchange of letters had been sent to them. Unfortunately this did not happen. Huber himself was worried about a possible negative reaction from the National Societies. He commented on the latest move somewhat regretfully: "The new wording goes even less far than the original version, but it is not unacceptable to the Italians. Maybe the National Societies will find it too weak."[32]

This second letter to the Italian Red Cross closed the final chapter of the ICRC's handling of the issue of chemical warfare in Ethiopia. No further representations were made. The Italian Red Cross did not bother to reply. With this letter the ICRC did the very least that it was obliged to do. It merely repeated what the 1925 Protocol had said, i.e. that the use of gas was absolutely prohibited. Once again, it refrained from using stronger terms and it carefully avoided any wording which might have upset the Italians. This is difficult to understand, because the Italians, after all, were in breach of an international agreement. They had finally acknowledged that poison gas had been used after vehemently denying it for so long. Admittedly, it was too late at this point to envisage making other representations, for example to the Italian government. Such a step

[30] 19 May 1936, ICRC Archives, CR 210, 1237.

[31] As soon as the Italians reached Addis Ababa, the fate of the Ethiopian Red Cross Society was sealed. It ceased to exist officially on 3 June 1936.

[32] Note by Max Huber, 25 May 1936, ICRC Archives, CR 210, 1243.

should have been taken at the time the gas was actually used, not when the war was over.

The ICRC at a crossroads

The Italo-Ethiopian war of 1935-36 constitutes a turning point for the ICRC. On the one hand, it marked the end of a period when the ICRC was preoccupied with theoretical, legal and organizational issues concerning the institution itself and the Movement. On the other hand, it heralded the beginning of a decade of war in which the ICRC was to be confronted with human suffering on an ever increasing scale, both in internal and international conflicts. It was time to resume its original role, with full involvement in the operational sphere.

The war itself was uneven, with an Italian army possessing everything that contemporary armament could offer against Ethiopian forces that were traditional in style, poorly trained and ill-equipped. Italy's prestige as a major power in Europe was at stake. It had to erase the humiliating defeat it suffered at Adua in 1896. Ethiopia, in the midst of a vast modernization process, became engulfed in a struggle for national survival. Against this background, the ICRC opened its first delegation on the African continent. Inevitably, it got drawn into some of the tragic events of the war, and these rocked the small institution to its foundations.

One such event was the waging of chemical warfare by Italy in breach of the 1925 Geneva Protocol. It raised fundamental questions to which the ICRC had to find answers, both for itself and for the League of Nations. These answers would leave their mark on the institution throughout the years of war to come, and have continued to do so to some extent even until today. Firstly, gas warfare led to a limitation of the scope of the ICRC's role. The ICRC decided that it was concerned only with matters pertaining to the Geneva Conventions. Methods of warfare such as the use of gas were considered to be outside its competence. Consequently, it decided to drop the whole issue of chemical warfare, once a source of such great concern.This went so far that in 1938, in the general report to the International Conference of the Red Cross on its activities during the Italo-Ethiopian war, the ICRC did not make a single reference to gas warfare, as if it had never had anything to do with the matter.

Secondly, the content of the ICRC role was formulated more precisely. In Max Huber's view, the ICRC's role was to alleviate suffering, not to express protest. In April 1936, the institution was deeply divided for some weeks over the issue. The ICRC President's "Good Samaritan" stance

prevailed and left its stamp on the ICRC for several decades to come. It was shared by influential members of the Committee such as Carl J. Burckhardt, who even said later that expressing of protest was a sign of weakness rather than strength, in private and in public life. Protesting only made sense if it was based on the conclusions of a legally binding inquiry.[33]

The new definition of the scope and content of the ICRC role represented a withdrawal into its unassailable core activities — a withdrawal comprehensible in a situation of overwhelming pressure, such as the final phase of the Italo-Ethiopian war. But the ICRC was strangely unaware of the moral authority which it possessed and which could have been put to good use. Its passive and reactive attitude carried the serious risk that it might be less receptive to other humanitarian needs. It is this receptiveness which was at the heart of the 1918 appeal against the use of poison gas. There was a balance to be preserved between the two aspects of the ICRC's role in order to avoid both insensitivity to victims' needs and political partiality. Throughout the Second World War, especially with regard to the Nazi concentration camps, the ICRC was faced with this serious problem. It carefully stuck to its role *stricto sensu*, as defined during the Italo-Ethiopian war, but it had to face highly embarrassing questions when the full extent of the Holocaust became known.[34]

The other essential result of gas warfare in Ethiopia was the clarification that emerged between the League of Nations and the ICRC. The dispute with the League established an independent ICRC which was not subordinated to the all-encompassing claims of the international body. Humanitarian affairs were declared to be separate from political issues. However, this radical stance tended to overlook both organizations' shared interest in stopping the use of an outlawed means of warfare. It did not give enough consideration to the interconnections between politics and humanitarian affairs. The ICRC was not operating in splendid isolation, but needed political bodies such as the League of Nations which could

[33] Carl J. Burckhardt to Felix Moeschlin, 12 February 1940, Carl Jacob Burckhardt Archiv, University of Basel, B II 46 a).

[34] With respect to gas warfare, ICRC policy underwent a complete change after World War II. In 1967, in the Yemeni conflict, the ICRC was confronted with the use of poison gas by one party, as in the Italo-Ethiopian war, and this was corroborated by ICRC staff in the field. They did not witness its use directly, but gathered substantial evidence. This time, the ICRC did not remain silent on a matter of methods of warfare. Twice it publicly condemned the use of such a means and it followed up with a memorandum to the signatories of the Geneva Conventions. Bugnion, *op. cit.* (note 20), p. 1103.

deflect some of the pressure it would face. A less rigid and more politically-minded approach would probably have been beneficial. In this respect the ICRC remained very much anchored in the 19th century tradition of an institution which grew out of a private philanthropic initiative, whose role was limited to dealing with the humanitarian consequences of political actions.

When evaluating the overall ICRC response to chemical warfare in Ethiopia, consideration should first be given to the key question: was the ICRC pro-Italian? The answer is negative if this means partiality in the political sense. There is no indication that political opinions exerted an improper influence on ICRC decisions, even though individual members had certain sympathies for Italy. A judge of Max Huber's calibre would not have allowed such considerations to enter into decisions.

Obviously, the evaluation cannot stop here. We have seen that the ICRC's response towards Fascist Italy was marked by excessive caution and timidity. The comment was made that the ICRC position during this period was "perfectly clear".[35] This is only true as regards the statement to the Italian Red Cross that gas warfare needed to be banned absolutely: the comment in question overlooks the significant fact that the ICRC only repeated the terms of the 1925 Protocol after the war was over. Although it should be recalled that not all the institution's members had advocated the same approach, the fact remains that the ICRC failed to adopt a stance of its own, contrary to expectations, and what action it did take amounted to too little too late.

The ICRC took insufficient account of the fact that, given its strict policy of confidentiality, only part of its deliberations and action became known to a wider public. In the case in question, it is clear that the ICRC's decisions played into Italy's hands in political terms. From the outside, especially after the refusal to share information with the League of Nations, it looked as if the ICRC had sided with Fascist Italy. Who could blame Italy, which exploited this situation adroitly in turn by making the institution an instrument of its policy? The ICRC's error was that it failed to see these grave implications. It should have kept a balance with focused representations to the governments concerned, the League of Nations and — at an early juncture — to its natural partners, the National Red Cross Societies. This brings us back to the point made earlier: namely, the ICRC's lack of vision with regard to things political.

[35] Bugnion, *op. cit.* (note 20), p. 172.

The matter goes deeper. It is clear that Mussolini and his general had a complete disregard for international law, in particular the 1925 Protocol prohibiting the use of gas. For them, force was stronger than law and, even worse, completely took its place. This new tenet of international relations destroyed the basis on which the post-1918 world order was built. Could such a belligerent be trusted and could a relationship of trust really be established under these circumstances? There was a limit beyond which an organization like the ICRC, possessing only its moral authority, could not go. A principle was at stake in which the ICRC itself had the highest interest: namely, respect for internationally agreed laws. The question here is whether the ICRC should not have realized what was going on at the time. The answer must be in the affirmative. The signs were clear: Mussolini's flagrant breach of the League's Covenant, the violation of the 1925 Protocol and, above all, the alarming and distressing Red Cross reports from the field. Max Huber and his colleagues should have wondered what kind of man and system they were dealing with. In retrospect, it appears that the ICRC heard the message, but failed to act on it. The institution was too impressed by Mussolini to weigh his words against his deeds.

In the final analysis, the ICRC did not understand what had really happened in Ethiopia. It lacked the political imagination to look behind the slick façade which Fascist Italy presented and, indeed, it fell into the trap which had been skilfully prepared by the Italian propaganda machine. Then again, it shared this fate with many other people and governments in Europe. It was not only the ICRC's failure, but that of a whole era.

The involvement of children in armed conflict

The International Committee of the Red Cross is deeply concerned about the increasing number of children recruited or volunteering to take part in hostilities throughout the world. Such children are exposed to the worst dangers and the most horrible suffering, both psychological and physical. What is more, they are easily manipulated and encouraged to commit grievous acts which they are often unable to comprehend.

Since the adoption in 1989 and the almost universal ratification of the United Nations Convention on the Rights of the Child,[1] much attention has been paid at the international level to the rights of the child in times of armed conflict. The subject has been the focus of several studies conducted both by the Movement[2] and by the United Nations.[3] Numerous non-governmental organizations have also joined in studying the question of the impact of armed conflict on children, whether in the case of child soldiers[4] or in relation with sexual exploitation.

For the third consecutive time, in January 1997 the ICRC was invited by the United Nations Commission on Human Rights to take part in a session of the Working Group entrusted with the task of drawing up a draft

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[1] Convention on the Rights of the Child, 20 November 1989. As at 15 December 1997, only the United States and Somalia had not yet ratified the Convention.

[2] Guy Goodwin-Gill and Ilene Cohn, *Child Soldiers, The Role of Children in Armed Conflicts*, A Study on Behalf of the Henry Dunant Institute, Clarendon Press, Oxford, 1994, 228 pages.

[3] UN Document A/51/306: *The Impact of Armed Conflict on Children — Report of the Expert of the Secretary-General, Ms Graça Machel.* Following this study, Mr Olara Otunnu was designated the Special Representative of the United Nations Secretary-General for children and armed conflict.

[4] Rachel Brett and Margaret McCallin, *Children: The invisible soldiers*, Rädda Barnen (Swedish Save the Children), Stockholm, 1996, 257 pages.

optional protocol to the Convention on the Rights of the Child. The draft's aim is to raise from 15 years — the current limit set out in Article 38 of the Convention — the minimum age for the recruitment of children and for their participation in hostilities. The ICRC has expressed its support for raising the minimum age to 18, in accordance with the Plan of Action for the International Red Cross and Red Crescent Movement on children affected by armed conflicts.[5]

In light of the way work is progressing on the draft optional protocol, and in anticipation of the questions often posed by representatives of the States, the ICRC has prepared a document detailing the legal basis of its position for the February 1998 session of the Working Group. Indeed, the ICRC's concern that the existing standards could be weakened has prompted it once again to highlight certain crucial legal points, with the aim of bringing the draft protocol in line with the principles and rules of international humanitarian law. The document is published below.[6]

As concerns the scope of the draft protocol, the ICRC's position may be summed up in the following four points:

(a) the optional protocol must apply in any situation of armed conflict;

(b) it must be binding on all parties to the conflict;

(c) it must prohibit any form of recruitment of children under the age of 18;

(d) it must prohibit their participation in hostilities.

While maintaining this stance, the ICRC emphasizes the need to address one of the most troubling aspects of modern warfare: the participation in hostilities of children under the age of 15. It reiterates that such participation is a flagrant violation of existing international norms contained in both humanitarian law treaties and the Convention on the Rights of the Child. Such acts must be sanctioned with all the severity they deserve. The ICRC thus proposes that recruitment in the armed forces of

[5] Resolution 2C, 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, *International Review of the Red Cross*, No. 310, January-February 1996, pp. 63-64; Resolution 5 of the Council of Delegates, Geneva, 1995, *ibid.*, pp. 146-147; Resolution 8.1 of the Council of Delegates, Seville, 1997, see p. 148 of this issue of the *Review*.

[6] Or see the ICRC web site (http://www.icrc.org), under "Issues and Topics", "Children in War". The text has also been published in UN document E/CN.4/1998/WG.13, paragraphs 53-105.

children under the age of 15 and their participation in hostilities should figure among the war crimes covered by the statutes of the future international criminal tribunal.

The adoption of a new legal standard is not in itself a sufficient response in a context where the existing rules are not applied in practice. For its part, the ICRC therefore strongly supports the view that effective measures should be taken, be they preventive or curative, to tackle the problem of child soldiers.

Stéphane Jeannet
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Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts

Position of the International Committee of the Red Cross

Geneva, 27 October 1997

1. The International Committee of the Red Cross (hereinafter "the ICRC") fully supports the adoption of an optional protocol to the United Nations Convention on the Rights of the Child aimed in particular at prohibiting the recruitment of children under 18 years of age into the armed forces and armed groups and their participation in hostilities.

2. As in previous years, the ICRC took an active part in the third session, held in January 1997, of the Working Group entrusted with the task of drawing up a draft optional protocol. On that occasion it stated its views, which had been developed over a number of years through studies conducted within the International Red Cross and Red Crescent Movement (hereinafter "the Movement"),[7] and particularly by the ICRC itself.

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[7] The Movement comprises all the National Red Cross and Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies.

3. The present document is an analytical summary of the main points to which the ICRC attaches special importance and which it has endeavoured to address in recent years, namely, minimum age of recruitment, minimum age of participation in hostilities, the notions of direct and indirect participation, the notions of armed conflict and hostilities, compulsory recruitment and voluntary enlistment, and armed groups.

I. Minimum age of recruitment

Position of the ICRC: *Children under 18 years of age must not be recruited by the armed forces or armed groups.*

A. Legal arguments

4. The arguments in favour of fixing the age of recruitment at 18 years derive both from international humanitarian law and from human rights law.

a. International humanitarian law

5. At the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Brazil put forward a proposal to prohibit the recruitment of persons under 18 years of age into the armed forces.[8] However, this amendment was not accepted and it was a compromise solution that emerged in Article 77, para. 2, of Protocol I of 8 June 1977 additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter "Protocol I"). Under this article, the parties to the conflict, "in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years (...) shall endeavour to give priority to those who are oldest". Though this provision might not appear particularly imperative, it was a sign that two decades ago States had already recognized the need to try to raise the age of recruitment to 18.

6. Moreover, still in the context of international armed conflicts, it is important to underline the fact that, by virtue of the Geneva Convention

[8] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts,* Geneva, 1974-1977, Federal Political Department, Bern, 1978 (hereinafter "*O. R.*"), III, p. 301.

of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (hereinafter "the Fourth Convention") and of Protocol I, persons aged between 15 and 18 who are recruited into the armed forces are no longer entitled to protection against the effects of hostilities as members of the civilian population. Instead, they are considered as combatants within the meaning of Article 43 of Protocol I and, in consequence, may be the object of attack.

7. In the context of non-international armed conflicts, neither Article 3 common to the Geneva Conventions nor Protocol II of 8 June 1977 additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter "Protocol II") contains a provision similar to that of Article 77, para. 2, of Protocol I. Nevertheless, in the course of the debates it appeared that certain delegations were already in favour of an age limit of 18 for recruitment. Thus, the fixing of the minimum age at 15 was a decision made under the pressure of consensus and in no way reflected massive opposition to raising the age limit for recruitment.[9] This point is worthy of special emphasis, as children recruited between the ages of 15 and 18 in the course of non-international armed conflicts are very often called upon to take part in hostilities and this places them in an even more critical position in terms of their protection.[10]

b. Human rights

8. Apart from international humanitarian law, Article 1 of the United Nations Convention on the Rights of the Child, whose wording is repeated in the preamble to the draft optional protocol, stipulates: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". The only restriction placed on this principle in the Convention comes in Article 38 on recruitment and participation in hostilities. This restriction seems paradoxical, since recruitment and participation in hostilities entail grave risks for children.

9. Furthermore, there is a tendency within the international community to fix the age of majority at 18, so the derogation provided for in

[9] See Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereinafter *"Commentary on the Additional Protocols"*), ICRC, Geneva, 1986, p. 1377.

[10] See below: II. A. a.

Article 1 of the Convention on the Rights of the Child will eventually become obsolete. By way of example, in interpreting Article 10 of the International Covenant on Civil and Political Rights, the Human Rights Committee mentioned that the age of majority should be 18 as far as criminal matters are concerned.[11] Similarly, the experts meeting in Vienna from 30 October to 4 November 1994 to discuss the question of children and adolescents held in detention urged States to ensure "that legislation concerning the age of criminal responsibility, civil majority and consent does not have the effect of depriving any child of the full enjoyment of the rights recognized by the Convention on the Rights of the Child".[12]

10. The two most recent texts on children to be issued at the regional level both state that the age of majority is 18 years. These are the European Convention on the Exercise of Children's Rights,[13] adopted by the Council of Europe on 26 January 1996, and the 1990 African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity.[14]

B. Arguments based on practice

11. For a number of years the ICRC has been voicing its concern to see the age of recruitment raised from 15 to 18 years, in particular within the framework of the Plan of Action for the International Red Cross and Red Crescent Movement on children affected by armed conflicts (hereinafter "the Plan of Action"). Thus, in its Resolution 2C, the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995) took note "of the efforts of the Movement to promote a principle of non-recruitment and non-participation in armed conflicts of children under the age of 18 years".[15] Similarly, the Council of Delegates (Geneva, 1995), in its Resolution 5, endorsed "the Plan of Action for the Red Cross and Red Crescent Movement (...) which aims to promote the principle of non-participation and non-recruitment of children below the age of 18 years in armed conflicts".[16]

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[11] Report of the Human Rights Committee of 9 October 1992, UN doc. A/47/40, para. 13.

[12] UN doc. E/CN.4/1995/100, para. 28(a) of the Recommendations.

[3] European Treaty Series, ETS No. 160. See Article 1, para. 1.

[14] OAU document CAB/LEG/24.9/49 (1990), Article 2.

[15] International Review of the Red Cross (IRRC), No. 310, January-February 1996, pp. 63-64.

[16] *Ibid.*, pp. 146-147. The Council of Delegates comprises representatives of the National Red Cross and Red Crescent Societies, the ICRC and the International Federation.

12. It is evident that a child who has been recruited by the armed forces or by an armed group before the age of 18 runs a greater risk of subsequently participating in hostilities should they break out before he has reached that age. He will have undergone military training and there will be the temptation to make use of his skills in the event of armed conflict. This is all the more likely if there is a shortage of troops. In such cases, mobilization is often broader-based and targets the young in particular.

13. Mention should also be made of the question of the recruitment of persons under the age of 18 in education or vocational training establishments operated by or under the control of the armed forces. This creates a potential problem at two levels. First of all, the students might be considered to be members of the armed forces because of their establishment's administrative dependence on the armed forces and may therefore come under attack. Secondly, there is the question of the type of education dispensed in such establishments. If it comprises an element of military training, there is every reason to fear that students who are not yet 18 will be required to take part in hostilities because they have received such training.

14. Finally, despite the fact that the age of recruitment is set at 15 years in the Additional Protocols (Article 77, para. 2, of Protocol I, Article 4, para. 3(c), of Protocol II), as well as in the United Nations Convention on the Rights of the Child (Article 38, para. 3), there is no lack of evidence that even younger children are recruited by the armed forces or armed groups. In cases where children do not possess birth certificates, it is easy for their superiors to pass them off as being older than they really are. However, if the age limit were fixed at 18 years, the recruitment of very young children could certainly be avoided, as their physical appearance would speak for itself.

15. An analysis of national legislation[17] shows that a large majority (about 70%) of the States included in the study have set the minimum age for compulsory recruitment at 18 years or older, a fact that must be taken into due account in the optional protocol.

II. Minimum Age for participation in hostilities

Position of the ICRC: *Children under 18 years of age must not take part in hostilities.*

[17] See tables in G. Goodwin-Gill, I. Cohn, *Child soldiers: The role of children in armed conflicts*, Clarendon Press, Oxford, 1994, pp. 186-208; R. Brett, M. McCallin, *Children: The invisible soldiers*, Rädda Barnen (Swedish Save the Children), Stockholm, 1996, pp. 53-64.

A. Legal arguments

16. Here again, international humanitarian law and human rights law show that it is contrary to the best interests of the child to allow persons under the age of 18 to take part in hostilities.

a. International humanitarian law

17. Under international humanitarian law, the parties to an international armed conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities (Protocol I, Article 77, para. 2). Furthermore, in the context of non-international conflicts, children who have not attained the age of 15 shall not be allowed to take part in the hostilities (Protocol II, Article 4, para. 3(c)).[18]

18. Raising the age for participation in hostilities from 15 to 18 years would bring a number of advantages for the children concerned. In international armed conflicts, as indicated in the discussion on recruitment, it would guarantee such children the protection to which the civilian population is entitled. In non-international armed conflicts, such a step would constitute important progress in law. Under Article 4, para. 3(d), of Protocol II, children under the age of 15 who have taken a direct part in hostilities despite the prohibition stipulated in Article 4, para. 3(c), of the same Protocol and are captured remain entitled to the special protection provided to children by Article 4, para. 3. On the other hand, this special protection is not expressly stipulated for children between 15 and 18 years of age. However, it should be noted that the wording of the article does not rule out the possibility of granting this special protection for children over the age of 15 who have been deprived of their freedom.[19] Moreover, the child enjoys the protection granted to all persons who are not or who are no longer taking part in the hostilities.[20] Children in this age-group are also entitled to protection if they are wounded, sick or shipwrecked.[21] Finally, they continue to benefit from the provision prohibiting the passing

[18] For further information on the protection of child soldiers in international humanitarian law, see M. T. Dutli, "Captured child combatants", *IRRC*, No. 278, September-October 1990, pp. 421-434.

[19] *Commentary on the Additional Protocols*, p. 1378.

[20] Article 3 common to the Geneva Conventions.

[21] Part III of Protocol II.

of the death sentence on persons aged less than 18 years at the time the offence was committed.[22] Nevertheless, the whole set of provisions applicable in non-international armed conflicts do not guarantee very broad protection for children between the age of 15 and 18 years, and this is all the more worrying as the majority of present-day conflicts are non-international in nature.

b. Human rights

19. Under the United Nations Convention on the Rights of the Child, children are accorded special rights up to the age of 18 years, that is, the upper limit set by the Convention. However, the minimum age limit stipulated for the participation of children in hostilities is 15 years. It is clearly unsatisfactory that children should be entitled to a lower level of protection in situations of armed conflict which, by definition, place their rights in even greater danger.

20. The remarks relating to the tendency of the international community to fix the age of majority at 18 years are equally relevant to the issue of participation in hostilities.[23]

B. Arguments based on practice

21. It is an accepted fact that children who have taken part in hostilities suffer much more than adults, both psychologically and physically. Numerous reports show that persons under the age of 18 have not attained the physical and intellectual maturity which would enable them to cope with the harsh reality of armed conflict.

22. Because of the violence they have committed or witnessed, such children may well present serious psychological or emotional disorders, especially as adolescence is the period of life during which individuals absorb the norms and values of society. The physical suffering of children who have taken part in hostilities and are wounded is all the greater since they lack the care and assistance which a child has the right to expect. In many cases it has been observed that these children are drugged before going into battle so as to improve their military

[22] Article 6, para. 4, of Protocol II.

[23] See above: I. A. b.

performance.[24] In addition to all this, they have to endure indoctrination, coercion and threats.

23. Moreover, though this may be hard to comprehend, children are more ready to commit atrocities than adults. Lacking maturity, they are not always aware of the consequences of their acts and may unwittingly violate the rules of international humanitarian law.[25] This is all the more likely if they are under the influence of drugs. Hence they become a threat to the entire civilian population.

24. It should also be pointed out that the participation of children in hostilities places other children at great risk, since the parties to the conflict will have grounds for suspecting that these other children too are involved in the hostilities and may launch a pre-emptive attack against them.

25. The participation of children in hostilities can also have a deleterious effect on society in the long term. The rehabilitation of child soldiers and their reintegration into society are a long and difficult process and they often retain violent attitudes to which other people may fall victim. There are also indirect costs, as the financial and human resources required for the rehabilitation of these children have to be diverted away from other programmes needed after an armed conflict.

26. Finally, attention must be drawn once again to the resolutions of the Council of Delegates and of the 26th International Conference of the Red Cross and Red Crescent, whereby the ICRC, as part of the Movement, has declared itself in favour of setting the minimum age limit for participation in hostilities at 18 years.

III. Direct/indirect participation in hostilities

Position of the ICRC: *It is direct and indirect participation in hostilities that must be prohibited. Children must not be involved in hostilities in any capacity whatsoever.*

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[24] Examples of these physical and psychological traumas may be found in the following works: Goodwin-Gill/Cohn, *op. cit.* (note 11), pp. 105-112; K. Hedlund Thulin (ed.), *Children in armed conflict: Background document to the Plan of Action concerning children in armed conflict,* Henry Dunant Institute, Geneva, 1995, pp. 35-41; UN doc. A/51/306: *The impact of armed conflict on children: Report of the Expert of the Secretary-General, Ms Graça Machel* (hereinafter "Machel report"), paras 162-165; Brett/McCallin, *op. cit.* (note 11), pp. 171-181; Human Rights Watch/Africa, Human Rights Watch Children's Rights Project, *Easy prey: Child soldiers in Liberia,* Human Rights Watch, New York/Washington/Los Angeles/London/Brussels, 1994, pp. 35-38.

[25] See, for example, *Easy prey: Child soldiers in Liberia, op. cit.* (note 18), pp. 31-33.

A. Legal arguments

27. In international humanitarian law, a distinction must be drawn once again between international and non-international armed conflicts. In the former, it is direct participation in hostilities by children under the age of 15 which is covered, whereas the provisions relating to the latter speak of participation in hostilities by children without further specification.[26] The ICRC suggested that the word "direct" should be removed from Protocol I during the Diplomatic Conference of 1974-1977. Unfortunately, that proposal was not accepted.[27]

28. In the same way, Article 38, para. 2, of the Convention on the Rights of the Child gave rise to much discussion, especially with regard to the prohibition of the participation in hostilities of children under the age of 15. Although the ICRC and many delegations were in favour of applying this prohibition to any and all participation in hostilities, in the end the article specified only direct participation.[28] Moreover, the adoption of Article 38 took place amidst great confusion.[29] The ICRC had repeated over and over again that the article represented a step backward in the protection of children under the age of 15 in relation to existing international humanitarian law.[30]

29. The fact is that the reference to "direct participation" considerably weakens the protection conferred on children, because it is not participation in hostilities in general which is covered but just a certain type of participation. This means that the notion of "direct participation" has to be defined. The same term is used in various places in international humanitarian law.[31] According to the Commentary on the Additional Protocols, "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy

[26] Article 77, para. 2, of Protocol I and Article 4, para. 3(c), of Protocol II.

[27] *O. R.* XV, pp. 63-75, CDDH/III/SR.45.

[28] UN doc. E/CN.4/1988/28, paras 72-74.

[29] UN doc. E/CN.4/1989/48, paras 611-616.

[30] F. Krill, "United Nations Convention on the rights of the child: A controversial article on children in armed conflicts", *Dissemination,* No. 12, August 1989, pp. 11-12; M.-T. Dutli, *op. cit.* (note 12), p. 426; F. Krill, "The protection of children in armed conflicts", in M. Freeman, P. Veerman (eds.), *The ideologies of children's rights,* Martinus Nijhoff Publishers, Dordrecht, 1992, p. 353.

[31] Articles 43, para. 2, and 51, para. 3, of Protocol I.

at the time and the place where the activity takes place." In other words, it means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[32] Similarly, "[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees".[33] It has to be emphasized that direct participation does not include acts such as gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc.[34] However, it is these very tasks which are often entrusted to children, who are less conspicuous because of their size and so more effective than adults. It is therefore important that such activities, which are forms of participation in hostilities, also be prohibited if this provision is to play its full role, especially as the activities in question are often just as dangerous as combat itself.

B. Arguments based on practice

30. In practice, it very quickly becomes evident that the subtle distinction between direct and indirect participation poses serious problems. During the discussions of the Conference of government experts on the drafting of the Additional Protocols, this distinction already gave rise to divergences of interpretation. One expert, speaking in the context of another article, declared that it would be a good idea to cite specific examples after the reference to "direct participation", and suggested spying, recruitment, propaganda and the transport of arms and of military personnel.[35] This stance clearly illustrates the difficulties that arise in trying to delimit the various types of participation. Accordingly, it is easy to conceive that armed forces or armed groups might be tempted to adopt different definitions of direct participation, and this would divest the article of all meaning.

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[32] *Commentary on the Additional Protocols,* pp. 516 and 619.

[33] *Commentary on the Additional Protocols,* p. 619. The war effort has been defined as "all national activities which by their nature or purpose would contribute to the military defeat of the adversary" (*O. R.* XIV, p. 14, CDDH/III/SR.2, para. 8).

[34] *Commentary on the Additional Protocols,* p. 901.

[35] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the work of the Conference,* Vol. I, ICRC, Geneva, 1972, p. 143.

31. Furthermore, we know from experience that children who participate in hostilities are very often exploited by military personnel. In particular, they may be subjected to sexual exploitation or forced labour.

32. It has also been noted that in practice a child who is a member of the armed forces or of an armed group and who takes an indirect part in hostilities is very difficult to distinguish from the other members of the forces or group. The child is thus not protected from an enemy attack and runs the same risks as any other child (or adult) participating directly in the hostilities. Finally, children who have been assigned only subordinate tasks very soon find themselves fully involved in the hostilities proper.

IV. Armed conflicts/hostilities

Position of the ICRC: *The participation of children in "hostilities" must be prohibited.*

33. Taking the existing texts into account, and to avoid any risk of confusion as to the interpretation of the provisions of the optional protocol, it is participation in "hostilities" and not in "armed conflicts" that must be specified.

34. In international humanitarian law, there are numerous references to the concept of "participation in hostilities" or to "direct participation in hostilities" but not to that of "participation in armed conflicts".[36] To explain the difference between the terms and understand why it is participation in hostilities that must be prohibited, we must first of all define what an armed conflict is.

35. International humanitarian law applies to situations of armed conflict, but neither the Geneva Conventions nor their Additional Protocols define this concept.[37] It is worth noting that many studies have sought to define the international or internal nature of a conflict but hardly ever address the armed aspect of the conflict. As the ICRC sees it, "armed conflict" is not a legal term but rather a *de facto* situation.[38]

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[36] For example, see Article 3 common to the 1949 Geneva Conventions, Articles 43, para. 2, 45, 47, para. 2, 51, para. 3, 67, para. 1, and 77, paras 2 and 3, of Protocol I and Articles 4, para. 3, and 13, para. 3, of Protocol II.

[37] H. Haug, *Humanity for all: The International Red Cross and Red Crescent Movement,* Henry Dunant Institute, Geneva/Paul Haupt, Bern, 1993, pp. 510-511.

[38] J.S. Pictet (general editor), *Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War* (hereinafter *"Commentary on the Fourth Geneva Convention"*), ICRC, Geneva, 1956, pp. 20-21.

36. It would appear that the notion of armed conflict is not the same when it is applied to an international armed conflict as when it is applied to a non-international armed conflict. In the former case, according to Article 2 common to the Geneva Conventions, a conflict is any dispute which arises between two or more States and involves action by the armed forces. It makes no difference how long the conflict lasts or how deadly it is.[39] Even a minor border incident qualifies as an armed conflict.[40]

37. In the case of non-international armed conflict, the notion is different and more complex. Article 3 common to the Geneva Conventions has a field of application which is independent of Protocol II, which serves however to complement it. In common Article 3 the notion of conflict is not defined, even though certain criteria emerged while it was being drafted.[41] The ICRC is in favour of giving Article 3 as wide a scope as possible, as the rules it contains were "recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Geneva Conventions were signed".[42] The article may therefore be applied to low-intensity armed conflicts.

38. Under Article 1 of Protocol II, however, different conditions have to be fulfilled before a situation can be described as an armed conflict.[43] The following criteria have to be met:

— the existence of real confrontation between government armed forces and insurgents;

— the existence of a responsible command within the insurgent armed group or dissident armed forces;

— their control over a part of the territory;

— the sustained and concerted character of military operations;

— the ability of the insurgents to implement Protocol II.

39. It is expressly stated in Article 1, para. 2, of Protocol II that "situations of internal disturbances and tensions, such as riots, isolated and

[39] *Commentary on the Fourth Geneva Convention,* p. 20.

[40] D. Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols", *Recueil des cours de l'Académie de droit international,* 1979, Vol. 163, p. 131.

[41] *Commentary on the Fourth Geneva Convention,* pp. 35-36.

[42] *Ibid.,* p. 36.

[43] *Commentary on the Additional Protocols,* pp. 1351-1353.

sporadic acts of violence and other acts of a similar nature" are not armed conflicts.

40. The term "hostilities" was defined during the Diplomatic Conference of 1974-1977 as "acts of war that by their nature or purpose [strike] at the personnel and *matériel* of enemy armed forces".[44] Certain delegations considered that the term "hostilities" also covered preparations for combat and return from combat.[45] During discussions on persons having taken part in the hostilities[46] it was underlined that the word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.[47] Article 118 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War (hereinafter "the Third Convention") refers to "active hostilities". It appears that this term must be understood in the same sense as the word "hostilities" used in Article 133 of the Fourth Convention on the same subject.[48]

41. Finally, Article 38, para. 2, of the Convention on the Rights of the Child refers to direct participation in hostilities and not in armed conflicts.

42. From these definitions, it is evident that it is "participation in hostilities" which must be prohibited, without any intention to signify thereby in non-legal terms that children may participate in armed conflicts. Indeed, taking the example of international armed conflicts, such conflicts do not necessarily give rise to extensive hostilities, as was the case between France and Germany in 1939-1940. An armed conflict is usually a situation during which there are periods of hostilities interspersed with periods of truce. It is clear that it is the fact of taking part in acts of war that traumatizes a child. However, the arguments put forward above must not be interpreted in any way as signifying approval for the participation of children in armed conflicts in general.

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[44] *O. R.* XIV, p. 14, CDDH/III/SR.2, para. 8.

[45] *O. R.* XV, p. 330, CDDH/III/224.

[46] Article 45 of Protocol I.

[47] *Commentary on the Additional Protocols,* pp. 618-619.

[48] *Commentary on the Fourth Geneva Convention,* pp. 514-515.

V. Compulsory recruitment/voluntary enlistment

Position of the ICRC: *Both compulsory recruitment*[49] *and voluntary enlistment of children under the age of 18 must be prohibited.*

A. Legal arguments

43. Article 77, para. 2, of Protocol I prohibits the recruitment of children under the age of 15, without stating whether this applies to forced enrolment or voluntary enlistment. During the debates on this article, the reference to voluntary enlistment was dropped and, according to the Rapporteur, paragraph 2 is a compromise in which the absolute prohibition on recruiting children under the age of 15 is accompanied by a more flexible restriction in the case of voluntary service. It appeared that "sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under fifteen years of age would be unrealistic".[50] The ICRC has always been opposed to this possibility of seeing children under the age of 15 enlisting voluntarily, and indeed its draft article referred to a prohibition on voluntary enrolment for such children.[51] Accordingly, the ICRC has upheld the interpretation of Article 77, para. 2, of Protocol I whereby voluntary enlistment was included in the prohibition stipulated in this provision.[52]

44. During the discussions relating to Article 38 of the Convention on the Rights of the Child, this question of voluntary recruitment was again raised by the ICRC, which maintained that the word "recruit" included both compulsory recruitment and voluntary enlistment. This can be easily understood from the fact that, despite the voluntary nature of the enlistment, the formal act of recruitment and then incorporation by the armed forces or groups remains necessary and it is precisely this act which is prohibited by international humanitarian law.

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[49] "Recruitment" should be understood as encompassing not only formal recruitment but also any *de facto* recruitment involving no formalities. The relevant point is that the child is physically integrated into the armed forces or an armed group.

[50] *O. R.* XV, p. 465, CDDH/407/Rev. 1, para. 61.

[51] *O.R.* I, Part Three, p. 22.

[52] See M.-T. Dutli, *op. cit.* (note 12), pp. 423-424, and *Commentary on the Additional Protocols,* p. 901.

B. Arguments based on practice

45. Experience shows that voluntary enlistment is rarely based solely on the will of the child but tends to be conditioned by factors beyond his control.[53] Indeed, children enlist in the armed forces or armed groups for various reasons:

— *Economic reasons:* the child may choose to enlist in order to enjoy better living conditions. He is often encouraged to do so by his parents, who may not have sufficient resources to support the whole family. In addition, the child is encouraged to enlist by being told about the financial advantages he may obtain. Enlistment may also be considered by the child as a career opportunity and a way of earning a living. Such a situation is all the easier to understand where the child has no other means of survival.

— *Reasons connected with physical safety:* many reports show that the desire for revenge is rarely given by a child as a reason to explain voluntary enlistment, whereas the idea of obtaining protection is much more prevalent. Children who have witnessed murders or massacres are more inclined to join up with the armed forces or armed groups, believing that they will enjoy a greater degree of security in face of the dangers surrounding them.

— *Reasons connected with culture and environment*: children may enlist because, in their country, the military life is considered to be a way of achieving a higher social standing and obtaining a measure of glory. In some societies, it is also a way of proving one's manhood. In addition, children may come under pressure from peers who have already been recruited.

— *Reasons connected with beliefs or convictions:* in this case, the enlistment of the child may be considered genuinely voluntary. The convictions in question may be of a political, religious or social nature. Nevertheless, it is necessary to draw a distinction between such cases and those in which the child has been influenced, manipulated or indoctrinated by adults.

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[53] See, for example, K. Hedlund Thulin, "Child soldiers: The role of the Red Cross and Red Crescent Movement", in *Humanitäres Völkerrecht,* No. 3, 1992, p. 143; Machel report, *op. cit.* (note 18), paras 38-43; Brett/McCallin, *op. cit.* (note 111), pp. 91-102.

VI. Armed groups

***Position of the ICRC**: Every party to a conflict is required to apply the provisions of Articles 1 and 2 of the optional protocol. The application of these provisions has no effect on the legal status of the parties to the conflict.*

A. Legal arguments

46. Above all, it is important to emphasize that the obligations which stem from the optional protocol must be the same for all the parties to the conflict. This means, for example, that the obligations imposed on armed groups must not be greater than those imposed on the armed forces. It is a rule of international humanitarian law that the parties to a conflict must be treated on an equal footing. This equality between the parties must be respected even in the absence of reciprocity in the application of international humanitarian law. Accordingly, one party to a conflict cannot refuse to apply international humanitarian law on the grounds that the adverse party has failed to comply with it.[54] One of the direct consequences of this principle is the fact that the application of international humanitarian law has no effect on the legal status of parties to a conflict.

a. Definition of an armed group

47. First of all, it is important to define what is meant by a "party to the conflict". To do so, a distinction must be drawn between international and non-international armed conflicts.

48. In the case of international armed conflicts, the parties to the conflict are principally the "High Contracting Parties" within the meaning of the Geneva Conventions and their Additional Protocols.[55] The armed forces of these parties are defined in various provisions of international humanitarian law which deal with the armed forces themselves, prisoners of war and combatants.[56] In addition, Protocol I extends the concept of

[54] J.S. Pictet (general editor), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 25; see also Article 60, para. 5, of the Vienna Convention on the Law of Treaties of 23 May 1969, *United Nations Treaty Series*, Vol. 1155, p. 331.

[55] The term "party" should be understood within the meaning of Article 2, para. 1(g) of the Vienna Convention on the Law of Treaties, namely as "a State which has consented to be bound by the treaty and for which the treaty is in force".

[56] Article 2 common to the Geneva Conventions, Article 4A, paras 1-3, of the Third Convention, Article 43, paras 1 and 3, of Protocol I.

"party to the conflict" to cover peoples fighting against colonial domination, foreign occupation or racist regimes in the exercise of their right of self-determination.[57] In general, the parties to an international armed conflict must be States and the combatants members of formations organically dependent on a State.[58]

49. In the context of non-international armed conflicts, not all the "parties to the conflict" are subjects of international law. Article 3 common to the Geneva Conventions refers to such parties, but without further explanation. This implies that the article is applicable even in cases where no government armed force is a party to the conflict, that is, in a situation involving several warring factions.[59] Protocol II, which applies in non-international conflicts, is more precise. Non-international armed conflicts take place between the armed forces of a High Contracting Party and dissident armed forces or organized armed groups.[60] In the definition of an armed conflict,[61] reference is made to the various conditions that have to be met for a situation to qualify as a non-international armed conflict; these conditions must be borne in mind and developed to arrive at a definition of "dissident armed forces" and "armed groups".

50. Dissident armed forces are armed forces which have risen up against those remaining loyal to the government. Armed groups — usually insurgents — must satisfy various objective criteria listed in Protocol II,[62] in the same way as dissident forces.

— *Responsible command:* This implies a certain degree of organization of the armed group or dissident forces. Without being similar to the hierarchy of the regular armed forces, this degree of organization has to be sufficient to enable the group or forces to conduct sustained and concerted military operations and to impose discipline.

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[57] Articles 1, para. 4, and 96, para. 3, of Protocol I.

[58] K. Ipsen, "Kombattanten und Kriegsgefangene", in H. Schöttler, B. Hoffmann (eds), *Die Genfer Zusatzprotokolle: Kommentare und Analysen,* Osang Verlag, Bonn, 1993, p. 156.

[59] *Commentary on the Additional Protocols,* pp. 1349-1350.

[60] Article 1, para. 1, of Protocol II. The term "armed forces of a High Contracting Party" should be deemed to mean "*all* the armed forces — including those which under some national systems might not be called regular forces — constituted in accordance with national legislation" *(O. R.* X, p. 94, CDDH/I/238/Rev. 1).

[61] See above: IV.

[62] Article 1, para. 1, of Protocol II.

— *Control over a part of the territory:* "Control" is understood to mean domination of a part of the territory, but what part of the territory should be controlled is not specified. However, this criterion must be linked with the preceding one, since such control must be sufficient to enable the armed group or dissident forces to conduct sustained and concerted military operations and to implement the Protocol.

— *The sustained and concerted character of military operations:* This is an objective criterion which takes no account of the duration or intensity of the operations. On the other hand, it should be understood that such operations must not be sporadic and that they are planned or prepared by organized armed groups capable of taking concerted action.

— *Ability to implement the Protocol:* This is a fundamental criterion which justifies the other elements of the definition. It sets a threshold for application which may seem high, but it is no more than should be expected of groups which meet the previous conditions.[63]

b. Legal status

51. International humanitarian law makes it clear that its application by the various parties to a conflict has no effect on their legal status. This provision, it is true, was laid down in the Geneva Conventions only with reference to non-international armed conflicts.[64] However, during the negotiations leading up to the Additional Protocols, the provision was expressly applied to international armed conflicts.[65] Thus the application of international humanitarian law in no way changes the legal status — whether or not contested by the adverse party — that a party had when the conflict broke out, and neither establishes nor consolidates an attribute which did not previously exist.

[63] For further details of these criteria, see *Commentary on the Additional Protocols*, pp. 1351-1353.

[64] Article 3, para. 2, common to the Geneva Conventions.

[65] Article 4 of Protocol I. This provision is not expressly restated in Protocol II, but it is implied, inasmuch as Article 1 specifies: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application...".

B. Arguments based on practice

52. It must be stressed that most of today's armed conflicts are of a non-international nature. Consequently, it is very important to include a provision which is binding on armed groups.

53. It was rightly pointed out by the United Nations Committee on the Rights of the Child that, in the 28 conflicts in progress in January 1997, "persons below the age of 18 were being used heavily by non-governmental groups in hostilities, both directly and indirectly. It was, therefore, most important that the optional protocol should address the issue, obliging States parties to take all possible steps to prevent the recruitment of children by such insurgent groups in their territory. It was also recommended that the terminology of the optional protocol should not go beyond that contained in the Protocol II Additional to the 1949 Geneva Conventions".[66]

54. The refusal to include armed groups is often based on the fact that it is impossible to apply provisions relating to groups which by definition cannot formally be contracting parties to treaties of international law. However, it has repeatedly been shown in practice that governments and international or non-governmental organizations can exert influence on such groups and persuade them to acknowledge that they have to respect certain obligations of a humanitarian nature so as to safeguard and protect the population under their control.[67] The ICRC has been actively endeavouring for many years to exert such influence with regard to the rules of international humanitarian law.

International Committee of the Red Cross

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[66] UN doc. E/CN.4/1997/96, para. 45.

[67] Examples may be found in the Machel report, *loc. cit.* (note 18), para. 61.

The ICRC looks to the future

If what people say is true and the future rarely turns out as we expect, all the more reason to prepare for it with a clear head. At a time when uncertainty is becoming increasingly widespread, it is essential for us to try and understand what is happening and, above all, to learn from today so that we can function better tomorrow.

Eighteen months ago, the ICRC launched its *Avenir* project, which aims to analyse contemporary humanitarian action and to gain a fresh perspective for its future. In so doing, the ICRC committed itself to a process of change rendered necessary by the many challenges which arose from the extraordinarily turbulent period of history that started in 1989. Operational difficulties related to these upheavals and the tragedies that befell the ICRC in Burundi and Chechnya in June and December 1996, respectively, made it all the more urgent to set that process in motion.

In order to define the organization's future over the coming five to ten years the ICRC embarked on an extensive exercise, mobilizing more than 200 staff members at headquarters and in the field, the Group of International Advisers, various independent experts, and representatives of the International Red Cross and Red Crescent Movement. By mandate of the Assembly, which is the ICRC's supreme decision-making body, a steering committee was set up to oversee the first part of the exercise which, to ensure progressive consolidation, was carried out in three separate stages. The first step was to create a number of working groups, each covering a specific subject, at headquarters and in the field. These groups produced more than 1,200 pages of text containing some 300 different proposals. As a next step, all their suggestions were examined and developed more in depth. The final stage involved selecting proposals and preparing a general summary, the principal elements of which were discussed, weighed up and elaborated at length by the management before being submitted to the ICRC Assembly. After two marathon debates the Assembly approved the *Avenir* project on 12 December 1997. The report adopted by the Assembly sets out a series of key trends and strategic

decisions. It constitutes the reference framework for the project, which recently entered its implementation phase. An implementation plan is currently being drawn up and will be adopted in the next three months, after which it will gradually be put into effect.

The document below consists of three main parts: an outline of the challenges facing humanitarian agencies today, in particular the ICRC, the fundamental mission of the ICRC, which forms the basis for all its activities, and, lastly, the strategic options for the years ahead.

International Committee of the Red Cross

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International Committee of the Red Cross

"Avenir" Study: Strategic content

Geneva, 12 December 1997

1. The new challenges

Ever since the upheavals of 1989, the environment in which humanitarian action takes place has been undergoing constant change; however, the shape that will be assumed by the international system of the future is not yet clear. New types of problems are appearing which call for an appropriate response.

1.1 An uncertain future

In the post-Cold War era, the world's communities have in many senses lost their bearings and much of their capacity to give meaning to the future. The vision of continuous progress has been shattered, and there is a widespread feeling of uncertainty as to what the future holds in store. This feeling is gaining ground as a result of two simultaneous but contradictory forces, namely globalization and the assertion of individual identity.

1.2 The tension between globalization and insularity

Globalization is a cultural as well as an economic phenomenon: it is increasingly affecting the very core of national sovereignty and identity. There is a strong tendency to look back to an often idealized past, and sectarian interests and the assertion of various types of identity are invading territorial, cultural and religious entities. In the absence of any realistic prospects of progress, the tension between the two processes persists and fuels many conflicts, most of which are internal. Inequalities between regions and social groupings also contribute to sustaining tension. Although it is perhaps unwise to make predictions in this sphere, everything suggests that armed violence and conflicts arising from the trend towards the fragmentation of societies will continue in the years to come, with an increasing impact on the civilian population. This at least is the conclusion that may be drawn from an analysis of the potential for conflict on the regional level.

1.3 The emergence of new players and the weakening of the State

New protagonists and new elements in the equation of power are emerging and asserting themselves on the local and international scene. Specifically, these are associations and NGOs belonging to civil society, economic players, and new perpetrators of violence who are increasingly beyond State control.

Weakened States, for their part, are attempting to transform themselves by ceding some of their prerogatives to civil society and economic forces. Nevertheless, States remain the key players in the international system and the most influential among them wish to play a role in resolving crises. Against this background, and for want of sufficient political will or influence, some States are more inclined to turn to emergency humanitarian action, which they perceive as a valuable means of gaining legitimacy.

1.4 The growing complexity of the humanitarian environment

Among many professionals working in the humanitarian sector, uncertainty is giving way to confusion, caused by a combination of factors that affect the credibility and overall functioning of the humanitarian sphere.

First, victims' needs are changing with the changing nature of crises. These needs have become more difficult to define, particularly in view of the intermittent character of many conflicts and the economic

implications of humanitarian bounty. Ranging as they do from the occasional to the chronic, and whether they arise in an emergency situation or a development phase, needs have to be defined using a new and relevant approach.

Another factor is the growth and proliferation of humanitarian agencies providing resources on both a small and a large scale. Though a welcome development in itself, this phenomenon and the competition and confusion to which it obviously gives rise cause problems in both ethical and operational terms. Within the Movement, the difficulties relating to the distribution of tasks between the various components illustrate this kind of problem.

Humanitarian action itself is also changing, in terms of both its working methods and the way it is perceived. In this perspective the growing involvement of political players in the "humanitarian market" — and especially the action taken by forces mobilized by the United Nations and by various regional organizations in quest of new roles — may be seen as a strong trend for the years to come.

Then there is the erosion of moral and humanitarian values, which has an adverse effect on respect for human dignity. In many contexts, this means greater difficulty in persuading parties to conflict to accept humanitarian action and to allow access to the victims, and greater danger for humanitarian workers.

1.5 The internal challenge for the ICRC

Last but not least, the spotlight must be focused on the internal workings of the ICRC, its strengths and its weaknesses. This means taking the full measure of areas where there are shortcomings and those that show potential before embarking on the changes that have to be made on the operational level and in terms of structural organization, always bearing in mind that the motivation and commitment of all its staff members is the ICRC's most precious asset.

In this unstable context, the ICRC must strive to enhance the overall coherence of humanitarian thinking and action and must adapt to the circumstances without losing its identity.

The response to these new challenges will require strategic choices guided by the mission which the ICRC has defined for itself and which is broadly recognized.

2. The ICRC's mission

The ICRC acts on a purely humanitarian basis. Its protection and assistance work is designed to promote implementation of humanitarian law and the universal humanitarian principles, taking into account the legal standards and the specific cultural, ethical and religious features of the environment in which it operates. The ICRC maintains relations with all States and with all parties actually or potentially involved in violence, in order to make them aware of their responsibilities in the humanitarian sphere. As a member of the International Red Cross and Red Crescent Movement — of which it is the founder — the ICRC works to ensure respect for the Fundamental Principles and cooperates primarily with the National Red Cross and Red Crescent Societies and their Federation. It also acts in consultation with all the other humanitarian agencies.

The exclusively humanitarian mission of the ICRC is to protect the lives and dignity of victims of war and internal violence and to forestall the suffering engendered by such situations

— by taking direct action at the level of the victims

— by assuming its role as a neutral and independent institution and intermediary

— by influencing the conduct of all actual and potential perpetrators of such violence through dialogue, the establishment of standards of conduct and the dissemination of humanitarian law and of the principles of the Movement.

3. Strategy

In order to meet the new challenges and fulfil this mission in the environment of the future, a major change of strategy is required. This will have to be achieved on the basis of four main priorities, while maintaining the complementary relationship between humanitarian reflection and humanitarian action:

- restoring independent humanitarian action and knowledge of and respect for humanitarian law and principles to their proper status;
- bringing humanitarian action close to the victims, looking to the long term and establishing priorities;
- strengthening dialogue with all players;
- increasing the ICRC's efficiency.

3.1 Restoring independent humanitarian action and knowledge of and respect for humanitarian law and principles to their proper status

The ICRC intends to remain the promoter of humanitarian action based on the demands of humanity, maintaining an impartial, neutral and independent approach. The challenge it faces is to reach and influence, by means of dialogue, all actual or potential perpetrators of violence, placing emphasis on the moral dimension and putting persuasion before condemnation.

The ICRC is the only organization which is expressly entrusted with a specific mandate by international humanitarian law. In this capacity, it reaffirms its resolve to assume the role of guardian of humanitarian law. Faced with the serious and large-scale violations which attack the very foundations of this law, the ICRC must redouble efforts to achieve, in peacetime, better knowledge, understanding and respect for its principles and scope. The ICRC must also maintain its commitment to the development of humanitarian law, but without launching into a full-scale revision of the law of Geneva, which might prove to be a risky undertaking. This means opting for a selective approach aimed at clarifying and developing humanitarian law in areas where the lack of legal prescriptions penalizes the victims, and promoting use of the available implementation mechanisms. The relationship between humanitarian law and human rights law must be strengthened, as this would be conducive to the production of instruments geared to realities in the field.

The values underlying humanitarian law provide an essential reference point in the current diversity of cultures and operational contexts. These values, of which the ICRC is a guardian, must be incorporated in a message that is systematically propagated and constantly adapted to the cultural environment for which it is intended.

In an increasingly comprehensive approach to crises in which political responsibility, military operations and humanitarian action are interdependent, the ICRC must preserve a space for humanitarian action, which may be defined both as the complementary relationships among all the players working simultaneously in a conflict situation and as the autonomy required for independent, neutral, impartial and non-coercive humanitarian action.

The development of a code of professional ethics for humanitarian players must be encouraged. In particular, this means ensuring knowledge of and respect for the Fundamental Principles within the Movement and, in conjunction with the Federation, setting up mechanisms to strengthen the integrity of the National Societies and to enhance the unity and overall coherence of the Movement. The drafting and promotion of codes of conduct with other humanitarian agencies will also be pursued.

3.2 Bringing humanitarian action close to the victims, looking to the long term and establishing priorities

Working in closer proximity to the victims is the objective for the future. This idea of proximity, which was very much in the forefront of everyone's mind during the meeting of heads of delegation in Glion in January 1997 following the tragic events of Novye Atagi, is one of the key concepts of the *Avenir* project. It is based on the premise that staying close to the victims is the best way of ensuring their protection.

The ICRC must give more weight to its delegations and allow them greater autonomy. It considers it vitally important to deploy greater efforts in the field to enhance its acceptability by all those involved in violence. To this end, it must take even more care to include the local dimension in every operation. In this connection, the ICRC intends to rely more on its national staff members and on the expertise and material resources available locally. Similarly, relations with the operating National Societies will be consolidated. Improved consistency in operations is bound to lead ultimately to improved security.

The ICRC also intends to pay more attention to the overall context in which it operates and to examine carefully the pattern of local socio-economic interests of which the needs of the victims form a part. The aim here is to avoid isolating specific categories of victims and to give more prominence in projects to qualitative aspects relating to the dignity of the protected persons.

The proximity referred to above also encompasses familiarity with the local culture, which makes it possible to gain a better understanding and to anticipate the thinking of the different players, and also helps them to understand the objectives of the ICRC. Indeed, comprehension of the ICRC's humanitarian message often depends on the existence of corresponding tenets in local custom. A more receptive approach must therefore be encouraged by strengthening direct cooperation with the operating National Societies, while involving them as far as possible in project delegations and bilateral projects.

Looking to the long term, conflicts develop in a chaotic and above all an intermittent manner. Their heterogeneity in time and space causes the ICRC to overstep the strict limits of emergency action in favour of continuity. The ICRC's role and responsibilities within the time-frame of situations of internal disturbances or tension, conflict and "stalled" conflict must therefore be adapted and specified at every stage, particularly with regard to the other players involved. Within the Movement, the ICRC's

general leadership in situations of internal disturbances, conflict and "stalled" conflict must be fully effective, in accordance with the letter and spirit of the Agreement on the organization of the international activities of the components of the Movement, and must rely on closer cooperation with the National Societies and their Federation.

Turning now to interaction with other humanitarian players in conflict situations, the ICRC would like to enhance the overall coherence of humanitarian activities by being available to ensure the coordination of emergency assistance operations, under conditions that guarantee the independence of its action.

In the sphere of preventive action, the ICRC invites States to take the necessary national measures in peacetime, in particular with regard to the dissemination of international humanitarian law and the adoption of penal sanctions for violations. It also promotes the teaching of international humanitarian law and reflection on its underlying principles, among interested circles. In addition it endeavours, but on a more targeted basis, to contribute to the easing of tension through its operations and to draw emergency situations to the attention of the international community in the framework of humanitarian diplomacy.

Proceeding gradually, the ICRC first of all tries to persuade the State authorities to take direct action. If they are unable to do so, it initiates its own operations, taking care to give priority to supportive activities designed to help local services become self-sufficient rather than substituting for them.

This increased emphasis on proximity and on the long term means that the ICRC must set clear priorities for its action, taking into account the responsibilities incumbent on it by virtue of international humanitarian law and the Statutes of the Movement. It does so on the basis of the following parameters:

- the urgency of the victims' needs and of preventive activities to avoid any recurrence of their suffering;
- the extent to which the local authorities are able and willing to cooperate, and their reliability;
- the ICRC's capacity for supervision;
- the activities of other humanitarian players.

3.3 Strengthening dialogue with all concerned

The multiplicity of entities involved and the diversity of their roles and interests adds to the complexity of the humanitarian environment, and must be taken into account in a coordinated manner at the institutional level.

To this end, the ICRC intends to adapt and strengthen its humanitarian diplomacy, which may be defined as its overall policy of external relations aimed at spreading knowledge of international humanitarian law, applying and ensuring the application of its provisions, facilitating the accomplishment of the institution's mission and promoting independent humanitarian action.

This means that the ICRC must direct its energy to a systematic effort to maintain contact with all the entities concerned, in particular States, the various centres of power in civil society — including economic circles and special interest and pressure groups — and new non-State players such as guerrilla forces, paramilitary groups, private armies, and even groups that might be connected with organized crime. In this context, it intends to establish a humanitarian platform, that is, a mechanism for identifying and updating the institution's agenda of priority issues and of the problems and challenges to be anticipated and solved by mobilizing the international community in a targeted manner.

As far as humanitarian players are concerned, the first strategic priority must be the Movement, which originated with the ICRC. Relations with the Movement's various components must be intensified and enhanced, so that it can become the essential independent force for humanitarian action throughout the world. The links forged with the National Societies must be strengthened by engaging in dialogue at several levels.

The ICRC intends to develop its relations with other humanitarian players. In particular, it wants to establish alliances with NGOs and intergovernmental agencies that share its ethical standards and humanitarian principles.

In all its relations, the ICRC will move towards greater openness and complementarity.

3.4 Enhancing the ICRC's efficiency

For the ICRC, operating more efficiently in a complex and uncertain environment while preserving its identity is a challenge calling for improvements in the way the institution functions. This touches on various priority areas such as training and properly planned internationalization

of staff, reflection on operational and policy matters, evaluation and monitoring, communication, funding, interaction between headquarters and the field, and decision-making structures.

The ICRC must strengthen its capacity for deliberation and analysis, so as to guarantee the overall coherence of its activities while devising different responses tailored to various contexts. Thinking on operational and policy matters must be better coordinated and encompass all the realities of conflict situations, in particular through a multidisciplinary approach that takes due account of the economic dimension of conflicts. This intensified reflection on operational and policy matters must continue to demonstrate the ICRC's willingness to learn lessons from its activities. Externally, the institution's ideas and expertise are factors of persuasion and credibility which should be used to greater advantage in the context of humanitarian diplomacy and in the public debate on humanitarian action.

The ICRC's capacity for devising strategies must also be strengthened by developing new methods and tools for analysis, so as to ensure that constantly reassessed planning is effective and that impact evaluation and monitoring are an integral part of project implementation.

The balance between the respective roles of headquarters and the field needs to be readjusted, for two purposes: on the one hand to remedy the unduly cumbersome and compartmentalized headquarters structure by concentrating its activities on the strategic level in order to develop guidelines for action, to provide the required expertise and to plan, monitor and supply the necessary support for the field; and on the other hand to allow the field greater autonomy by strengthening its capacity for adapting action to the environment. This decentralization must be achieved in a gradual and functional manner, using organizational and management tools that remain to be defined. In any event, it is important to bear in mind the primary aim of the exercise, namely maintaining proximity to the victims as a means of protecting them.

As regards the ICRC's structure, there is a need for a move towards greater clarity in terms of competence and responsibilities. This process must begin at the top, in order to achieve a more precise distinction between the Assembly and the executive level. Such an approach entails some essential changes: restoration of the Assembly to its original *raison d'être,* abolition of the Executive Board, and the establishment of a governing body. At the functional level, the effort to clarify competence and responsibilities must be pursued and must create the synergy that is indispensable for improved institutional functioning.

The maintenance of single-nationality membership of the Assembly, which is necessary to preserve the ICRC's independence, must be accompanied by a more receptive attitude to cultural diversity, taking the concrete form of closer consultations with the Group of International Advisers and the leaders of the National Societies.

Functioning more effectively in a complex and uncertain environment will ultimately enhance the security, mobility and motivation of ICRC staff members.

Council of Delegates

Seville, 25-27 November 1997

The Council of Delegates which met in Seville, Spain, from 25 to 27 November 1997 undoubtedly marked a turning point in the history of the entire International Red Cross and Red Crescent Movement. This issue of the *Review* contains the resolutions adopted by the Council,[1] along with the text of the *Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement*.[2] This brief introduction focuses on the Agreement itself, since by virtue of its scope it constitutes one of the major decisions taken in Seville.

The adoption by consensus of the Agreement forms part of the reappraisal and renewal process begun at the 1991 Council of Delegates in Budapest where, on the initiative of a group of National Societies, it was decided to undertake an in-depth analysis of how best to remedy the problems encountered in the functioning of the various statutory bodies (International Conference, Council of Delegates, Standing Commission), strengthen the unity of the Movement and promote more active cooperation[4] among all its components. The implementation over the following six years of a series of practical measures requiring no statutory changes did make the Movement's governing bodies more dynamic, but the renewal effort had yet to address the Movement's *raison d'être*, namely the operations conducted by its components in behalf of victims of conflict, natural disasters and other emergency situations. By adopting in Seville

[1] See pp. 140-158.

[2] See pp. 159-176.

[3] Resolution 1 of the Council of Delegates (Budapest, 28-30 November 1991), *IRRC*, No. 286, Jan.-Feb. 1992, p. 43.

the Agreement on the organization of the international activities of the Movement's components, drawn up by an ad hoc advisory commission, the representatives of National Societies, the ICRC and the Federation achieved two significant results: they not only demonstrated that the Council of Delegates could be a productive forum for discussion when it came to common efforts to deal with the humanitarian challenges of our time, but they also devised a new tool which will enable them to carry out their activities more effectively and in a spirit of greater solidarity.

This new Agreement provides for cooperation and partnership between components which under the Statutes have distinct, yet highly complementary spheres of competence. It is fundamentally different from the 1989 Agreement[4] which was hitherto in force and which it has now replaced. Indeed, it covers the activities of all of the Movement's components and, unlike the previous agreement, is not limited to defining the organization and distribution of tasks within the Movement between the ICRC and the Federation Secretariat. It takes into account the part played by National Societies, in particular as indispensable partners in international relief operations. National Societies are therefore parties to the Agreement in their own right.

The new Agreement organizes the Movement's international activities around two new concepts: that of "lead role", which recognizes the specific tasks entrusted to each component, and the concept of "lead agency" which, in a given situation, confers on one of the components the responsibility of directing and coordinating all international relief operations. Moreover, the Agreement aims to ensure the necessary continuity between international operations carried out in a crisis situation and those developed in its aftermath, i.e., during the normalization or reconstruction phase. The Agreement also broaches the vital question of the development of National Societies and lays the foundations for greater functional cooperation among the various components in the accomplishment of their permanent activities. Lastly, since the effectiveness of an agreement depends on the willingness of the parties thereto to observe it, the final provisions of the Agreement establish mechanisms to monitor its implementation and, in case of dispute, to resolve any problems through a conciliation procedure or, as a last resort, by arbitration. Finally, as the

[4] Agreement between the International Committee of the Red Cross and the League of Red Cross and Red Crescent Societies, dated 20 October 1989, *Handbook of the International Red Cross and Red Crescent Movement*, 13th ed., Geneva, 1994, pp. 517-527.

Agreement is intended to have a dynamic role, it provides that each Council of Delegates shall include an agenda item relative to its implementation, thus ensuring a process of regular review.

In concluding his presentation of what was still only a proposal, the Advisory Commission Chairman called on the Council of Delegates to adopt the new Agreement by consensus, saying: "We go forward or, at great cost and at great risk, we go backwards". On 26 November 1997, in Seville, the Movement gave a clear, unambiguous and forward-looking response by adopting the new Agreement, which has now come into force.

The Review

Resolutions of the Council of Delegates

Sevilla, 25-27 November 1997

Resolution 1

THE STANDING COMMISSION OF THE RED CROSS AND RED CRESCENT

The Council of Delegates,

having taken note of the report submitted by the Standing Commission on its work since December 1995,

noting that the establishment, under Article 18, para. 7, of the Statutes of the International Red Cross and Red Crescent Movement, of ad hoc bodies can enable the Standing Commission to fulfil its statutory mandate more effectively,

taking into account the recommendations made by the Advisory Commission on the functioning of the Movement's statutory bodies,

1. *urges* the Standing Commission to continue to take steps to promote harmony in the work of the Movement;

2. *endorses* the Standing Commission's draft model rules of procedure for an arbitration board, drawn up pursuant to Resolution 3, para. 4(c), of the 1995 Council of Delegates;

3. *encourages* the Standing Commission to persevere in its implementation of those parts of Resolution 3 of the 1995 Council of Delegates that are relevant to it;

4. *recommends* that the Standing Commission associate, as and when it deems necessary, personalities of National Societies, participating in a consultative capacity, in the preparation and organization of the Council of Delegates and the International Conference;

5. *further recommends* that the Standing Commission organize structured consultations with National Societies on all Standing Commission issues, taking advantage of regional or other meetings organized within the Movement;

6. *decides* that the financial implications of paragraphs 4 and 5 shall be the joint responsibility of the International Federation, the ICRC and the National Societies, on the basis of 25% from the ICRC, 25% from the International Federation and 50% through voluntary contributions of National Societies.

Resolution 2

THE EMBLEM

The Council of Delegates,

bearing in mind Articles 38 and 44 of the First Geneva Convention of 1949 on the protective and indicative uses of the emblems,

emphasizing the long-standing and incontestable value of the red cross and the red crescent as protective and indicative emblems for the Movement and that both emblems are widely known around the world and deeply meaningful to many millions of people,

noting that the emblems are above all treaty-based distinctive signs designed to protect the victims and that it is primarily the responsibility of the States party to the Geneva Conventions to take the necessary measures to strengthen their protective force,

recognizing the need to improve the protection of the victims and of those who come to their aid in situations where the emblems are not respected or where there is a danger that they will not be respected,

1. *takes note* of the interim report submitted by the Standing Commission and of the working paper attached to it;

2. *recalls* operative paragraph 8 of Resolution 3 on the Future of the Movement (Geneva, 1995), and *encourages* the ICRC, the International Federation, National Societies and States to take steps at the legislative, preventive and repressive levels to ensure greater respect for the emblems and to inform the Council of the measures adopted;

3. *requests* that the "Criteria for evaluating possible solutions"[1], as defined on page 13 of the working paper attached to Report CD 97/4.1/1, serve as a basis for the discussions aimed at finding an overall solution, mindful of the emblems, to the specific problems that arise;

recommends that the Standing Commission continue its consultations with the National Societies and government experts from States party to the Geneva Conventions and report to the next Council of Delegates, in the hope that all the components of the Movement can adopt a common position that will lead to a dialogue with States.

Resolution 3

THE 27th INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT

(Geneva, 1-6 November 1999)

The Council of Delegates,

having taken note of the Standing Commission's report on the 27th International Conference and its attachment, entitled "Voting Procedures for Elected Members of the Standing Commission",

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[1] **"Criteria for evaluating possible solutions**

On the basis of past and more recent discussions within the Movement on the plurality of the emblems, the following six criteria have been defined for judging any proposed solution:

1. Any solution must be assessed primarily in the light of the protection afforded to victims and must actually lead to an improvement in such protection.

2. Any solution must be based on the existence of the two emblems currently in use, that is, the cross and the crescent, which are *de facto* placed on an equal footing — even though such equality has not yet been enshrined in the Conventions — and which are known worldwide.

3. Any solution must avoid creating new obstacles for the Movement's ideal of unity and must, on the contrary, be compatible with that ideal.

4. Even though this ideal of unity naturally extends to the emblem, the objective of having a single emblem for both protective and indicative purposes is not on the agenda at present; the aim is to solve the problems mentioned on pages 9-12.

5. Any solution must be capable of settling these problems without creating new ones for National Societies which have no difficulties in this respect, and which must be able to carry on with their present emblems (status quo).

6. The issue of the emblem must not cause division within the Movement; any solution must be very widely acceptable and any resolution on this crucial matter must be adopted by consensus."

1. *considers* that the 27th International Conference is of particular importance as it will take place just prior to the next millennium and in the year of the 50th anniversary of the signing of the Geneva Conventions and will give the Movement the opportunity to reassert its key role in humanitarian work throughout the world;
2. *approves* the Commission's concept for the Conference as set out in the report and *endorses* the proposals summarized in paragraphs 1 to 13 of Section 7;
3. *encourages* all components of the Movement to be active in promoting the Conference and to commit adequate resources, human and financial, to this task, and to urge States to do likewise;
4. *accepts* the Commission's preliminary selection of topics for the Conference, noting that these topics may be subject to change in the light of events and developments between now and the Conference;
5. *requests* the organizers of the Conference to implement the streamlined Voting Procedures for Elected Members of the Standing Commission at the 27th International Conference.

Resolution 4

NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

The Council of Delegates,

recalling Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (1995), entitled "International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims",

stressing the importance of implementation of international humanitarian law at the national level,

noting that all States must take national measures to implement international humanitarian law, including dissemination to the armed forces and to the general public, the adoption of legislation to punish war crimes and protect the use of the red cross/red crescent emblems, and other relevant measures,

1. *welcomes* the valuable contribution of the ICRC's Advisory Service in assisting States with the adoption of national measures to implement

international humanitarian law, in promoting the exchange of information on such measures, and in encouraging the ratification of international humanitarian law treaties;

2. *reaffirms* the special role of National Societies in cooperating with their governments in the implementation and dissemination of international humanitarian law;

3. *welcomes* the work of many National Societies in drawing the attention of their respective governments to the need for legislation and other measures to be adopted nationally in order to implement international humanitarian law, in assisting their governments in adopting such measures, and in promoting the ratification of international humanitarian law treaties;

4. *encourages* all National Societies to promote the adoption of implementation measures at the national level and to cooperate regionally and internationally with other National Societies, with the International Federation of Red Cross and Red Crescent Societies and with the ICRC in this field;

5. *notes* the valuable role played by existing national committees for the implementation of international humanitarian law in advising and assisting their governments on implementation and dissemination of international humanitarian law;

6. *encourages* all National Societies to make every effort to promote the establishment of national committees and, where such committees already exist, to play an appropriate role in their work;

7. *takes note of* the proposal to establish a voluntary review procedure on national implementation of international humanitarian law;

8. *invites* National Societies to examine the proposal with their respective governments.

Resolution 5

INTERNATIONAL CRIMINAL COURT

The Council of Delegates,

deeply alarmed by the large-scale and continuing violations of international humanitarian law, both in international and in non-international armed conflicts,

recalling the obligation of States to repress violations of international humanitarian law and of the Convention on the Prevention and Punishment of the Crime of Genocide,

recalling also resolution 2 of the 26th International Conference of the Red Cross and Red Crescent, which urges States to increase international efforts to permanently establish an international criminal court,

considering the efforts already undertaken to that end, and, in particular, the planning of an international diplomatic conference in Rome in 1998, to set up such an international criminal court,

considering also the efforts of the ICRC to further the establishment of an effective and impartial international criminal court,

1. *invites* National Societies to support all these efforts and to promote the creation of such a court, while at the same time encouraging States to comply with their existing obligation under international humanitarian law to repress violations of this law and of the Convention relating to the crime of genocide;
2. *requests* the ICRC, in consultation with the International Federation, to follow developments closely, to actively keep National Societies informed, and to report to the 1999 meeting of the Council of Delegates on progress made in establishing an international criminal court.

Resolution 6

FUTURE OF THE MOVEMENT

The Council of Delegates,

recalling that its Resolution 3 of 1995 mandated the Advisory Commission to "review (...) the statutory provisions (including the Rules of Procedure) concerning the role, competencies and functioning of statutory bodies of the Movement", and to "work on a clear definition of the organization of the international activities of the Movement's components (...) and (...) draft an agreement between all components of the Movement, replacing the 1989 Agreement between the ICRC and the International Federation, for endorsement by the next Council of Delegates, which would bind all components of the Movement",

welcoming the report of the Advisory Commission (CD 97/5.1/1),

expressing satisfaction that the Advisory Commission reached the conclusions contained in its report by consensus,

recognizing that this report envisages a new era of cooperative action between all components of the Movement in the interests of victims and vulnerable people,

being aware that the components of the Movement have both a collective and an individual responsibility to give effect to this new spirit of cooperation,

1. *takes note* of the proposal not to revise at the present stage the provisions in the Statutes concerning the statutory bodies of the Movement;
2. *further takes note* of the summary of recommendations concerning those statutory provisions;
3. *decides* to adopt by consensus the "Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement";
4. *recommends* that the process initiated by the Study Group on the Future of the Movement and continued by two Advisory Commissions be regarded as at an end; that the process of renewal be continued by the statutory bodies of the Movement; and to this effect that the Standing Commission call annually for a report on the implementation of the Agreement from the ICRC and the Federation, to be transmitted to all National Societies as part of a consultative process;
5. *further recommends* that the Standing Commission include an item on the Agreement in the agenda of each Council of Delegates, thus establishing a process of regular review of the Agreement.

Resolution 7

FUNCTIONAL COOPERATION

The Council of Delegates,

recognizing the importance of the relationship that has been built up between the senior managements of the International Federation Secretariat and the ICRC to ensure the effectiveness of the operations of the Movement's components,

recognizing also the importance of the establishment of the "Yverdon" meetings, the Study Group on the Future of the Movement, the Policy and Planning Advisory Commission and the Advisory Commission in order to enable the Movement to find a way to strengthen cohesion and cooperation within the Movement,

recalling the importance for the Movement not only to be united, coherent and cost-effective, but also to present such an image of itself as to be able to work in the interest of the victims and the most vulnerable,

taking note of the joint report on functional cooperation submitted by the ICRC and the International Federation,

having endorsed the Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement,

urging all components of the Movement to make the effective implementation of the Agreement a high priority,

1. *recommends* that
   (a) the managements of the ICRC and the Federation together establish a task force in order to actively develop new initiatives to promote functional cooperation based on the guiding and management principles set out in the new Agreement, and further elaborated in terms of reference to be agreed,
   (b) the ICRC and the Federation, in countries where both are already operating, explore and advance, in cooperation with the operating National Societies and involved participating National Societies, new systems for implementing effective functional cooperation;
2. *requests* that the ICRC/Federation task force involve concerned National Societies at least twice a year to establish plans, monitor implementation of the project and evaluate functional cooperation against agreed performance indicators, in order to:
   (a) report back regularly to their respective governing bodies,
   (b) report to the Council of Delegates in 1999 and the Standing Commission as part of the reporting arrangements outlined in the new Agreement.

Resolution 8

PEACE, INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS

The Council of Delegates,

having taken cognizance of the various interim and progress reports on work accomplished in areas pertaining to children in armed conflicts,

street children, and the role and attitude of the Movement in regard to arms transfers, anti-personnel landmines and the security of field personnel,

recalling all the efforts made to foster peace and develop the Movement's contribution to respect for human rights and for international humanitarian law, and the importance of ensuring the promotion and implementation thereof,

stressing the need to encourage any initiative aimed at promoting indigenous local capacities for conflict resolution and peace building, tolerance, solidarity, dialogue and mutual understanding, at combating all forms of discrimination and at raising awareness of those values,

reaffirming the necessity for the Movement, which upholds such values, to continue its efforts to spread knowledge of the rules of international humanitarian law and the principles and ideals of the Movement and to achieve greater respect for the fundamental rights of the individual,

1. With regard to children affected by armed conflict:

recalling Resolution 2C of the 26th International Conference of the Red Cross and Red Crescent (1995), recommending that "parties to conflict refrain from arming children under the age of 18 years and take every feasible step to ensure that children under the age of 18 years do not take part in hostilities", and Resolution 5 of the Council of Delegates (1995) endorsing a Plan of Action for the Red Cross and Red Crescent Movement concerning children in armed conflicts,

welcoming the resolution adopted by the Organization of African Unity (Sixty-sixth Ordinary Session of the Council of Ministers, 26-30 May 1997, Harare, Zimbabwe) condemning recruitment and conscription of children under the age of 18 years,

mindful that the Geneva Conventions of 1949 and their 1977 Additional Protocols establish protection for children affected by armed conflict and provide a basis for the Movement's services on behalf of these children,

commending the progress made by the ICRC, the National Societies and the International Federation in implementing the Movement's Programme on Children Affected by Armed Conflict (CABAC),

welcoming the work of the international coordinating group set up to monitor implementation of the Plan of Action, and the cooperation established between the Movement and other organizations,

concerned by the number of contexts in which armed conflict is still having a serious effect on children, and by the resulting need to increase support for activities on their behalf,

regretting the fact that no international agreement has yet been reached to set at 18 years the minimum age limit for recruitment into armed forces or armed groups and for participation in hostilities,

1. *urges* all National Societies, the International Federation and the ICRC to implement the Plan of Action for the Red Cross and Red Crescent Movement concerning children in armed conflicts;

2. *further urges* all National Societies, the International Federation and the ICRC to support the work of the international coordinating group set up to facilitate and monitor implementation of the Plan of Action;

3. *takes note* with interest of the report on progress achieved in implementing the Plan of Action and *requests* the international coordinating group to submit a report to the Council of Delegates in 1999;

4. *calls on* all the components of the Movement to undertake specific action aimed at providing all necessary psychological and social assistance to children affected by armed conflict, and to take every feasible measure to help reintegrate the children into their families, their communities and their normal environment after the conflict;

5. *appeals* to all National Societies to promote the Movement's position on the 18-year age limit for recruitment and participation in hostilities, with a view to encouraging their respective governments to adopt national legislation and recruitment procedures in line with this position;

6. *asks* National Societies of countries that have already adopted the 18-year age limit for recruitment and participation to urge their respective governments to make their positions known to other governments, and to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts;

7. *acknowledges* the efforts made by the ICRC and the International Federation to support and facilitate action by National Societies with regard to this 18-year age limit and to promote the minimum age limit in the relevant international fora, and *requests* them to continue those efforts within the framework of the Plan of Action for the International Red Cross and Red Crescent Movement concerning children affected by armed conflict.

2. With regard to street children:

deeply concerned about the growing number of street children in the vast majority of countries and the conditions in which they are forced to live, which deprive them of their basic rights,

expressing grave concern at all forms of abuse, exploitation and neglect to which street children are particularly vulnerable,

aware of the capacities and potential of National Societies to advocate the plight of street children and to contribute to improving their situation and meeting their particular needs,

recalling Resolution 2, operative para. 5, adopted by the 1995 Council of Delegates and resolution 51/77, Chapter VI, of the General Assembly of the United Nations of 12 December 1996, on the plight of street children,

recalling the UN Convention on the Rights of the Child as the major international legal instrument for the protection of the rights of all children, including street children,

1. *takes note* of and congratulates the Henry Dunant Institute for its study on street children carried out in collaboration with the ICRC and the International Federation and *thanks* National Societies which have actively contributed to it;

2. *urges* National Societies to include street children in their health, social, or youth programmes, since they are an especially vulnerable group;

3. *recommends* that National Societies draw inspiration from experiences developed within the Movement with street children, and *strongly encourages* them to cooperate effectively within the Movement and with intergovernmental and non-governmental organizations which have expertise in this domain;

4. *calls upon* National Societies to actively take part in advocating the plight of street children, since this problem is still denied in some countries;

5. *invites* National Societies to create preventive programmes, to provide assistance to street children in order to guarantee their rights as set down notably in the UN Convention on the Rights of the Child, and to ensure their reintegration into society, with the participation of the children themselves;

6. *requests* the International Federation to establish a task force on street children to reinforce awareness of this issue, to draw up and implement a Plan of Action on the basis of the study of the Henry Dunant Institute, with the aim of encouraging action by National Societies, and to report back to the next Council of Delegates.

3. With regard to anti-personnel landmines:

deeply alarmed by the appalling level of suffering caused by the presence of millions of anti-personnel landmines worldwide,

endorsing the campaign of the International Red Cross and Red Crescent Movement against the scourge of anti-personnel mines,

noting with appreciation the proposals made by the ICRC to the international community to greatly improve assistance to landmine victims,

welcoming the increasing number of unilateral decisions to ban anti-personnel mines and of regional initiatives for the establishment of zones free of these weapons,

welcoming also the rapid progress being made towards the global prohibition of the production, transfer, stockpiling and use of anti-personnel mines,

welcoming in particular the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted in Oslo on 18 September 1997,

taking into account Resolution 10 of the 1995 Council of Delegates,

1. *urgently calls upon* National Societies to promote the signing by their governments, in Ottawa in December 1997, of the aforementioned comprehensive international humanitarian law Convention prohibiting anti-personnel mines, to work for the earliest possible national ratification of this treaty, to ensure its rapid entry into force, and to encourage their governments to take all appropriate additional means to achieve the total elimination of all anti-personnel mines;
2. *calls upon* National Societies, where required, to encourage their governments to adopt national legislation outlawing anti-personnel landmines;
3. *urges* all components of the Movement to intensify their efforts in support of the total prohibition and elimination of all anti-personnel

mines, the care, treatment and rehabilitation of landmine victims, including their social and economic reintegration, and mine awareness programmes as foreseen, inter alia, in Article 6 of the aforementioned Convention;

4. *encourages* all components of the Movement, when considering support for mine clearance activities, to follow the guidelines for the Movement on this subject;

5. *requests* the ICRC and the International Federation, in consultation with National Societies, to elaborate a long-term strategy to address the anti-personnel mines problem, in particular the suffering of victims, and further develop mine awareness programmes, thus showing the continuing commitment of the Movement to the mines issue;

6. *requests* the ICRC and the International Federation to report to the 1999 meeting of the Council of Delegates on progress made towards the total prohibition and elimination of all anti-personnel landmines, in alleviating the suffering of victims, and in elaborating and carrying out the aforementioned long-term strategy of the Movement.

4. With regard to arms transfers:

noting with concern the easy access of combatants and civilians 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,

recalling Council of Delegates Resolution 2, para. 8, of 1995, which called for study and clarification of the Movement's role and attitude on the problem of arms transfers,

recalling further the concern about the proliferation of weapons expressed by the Movement to the 26th International Conference of the Red Cross and Red Crescent and the Conference's mandate to the ICRC to study the relationship between arms availability and violations of international humanitarian law,

welcoming the ICRC's discussions with legal advisers of National Societies, in October 1996, on the subject of arms transfers and international humanitarian law,

taking note of the report to the present Council of Delegates on changing patterns of arms transfers since the end of the Cold War,

1. *expresses* its concern about the easy availability of arms which may facilitate violations of international humanitarian law;
2. *supports* the ICRC's efforts to document the manner in which unrestrained arms transfers may facilitate violations of international humanitarian law and increase the suffering of civilians in situations of armed conflict;
3. *requests* that the role and attitude of the Movement on this issue be further clarified, before the next meeting of the Council of Delegates.

5. With regard to the security and safety of the staff of humanitarian organizations:

alarmed by the ever-more frequent threats to the safety and security of Red Cross and Red Crescent personnel and of the staff of other humanitarian organizations, in particular through intentional and often fatal violent attacks, as well as by hostage-taking,

worried that the targeting of acts of violence against neutral and impartial humanitarian activities is likely to put threatened populations in jeopardy through lack of protection and assistance,

concerned by the failure to respect the red cross and red crescent emblems in these situations and *aware* of the increased risk of confusion in the field between the humanitarian players and between their different modes of action, and of the consequent deterioration of security,

reaffirming that humanitarian law also extends protection to the relief work of impartial and humanitarian organizations which is carried out, without any adverse distinction, in favour of the civilian population,

aware of the forthcoming Periodical Meeting of States, where the security and safety of humanitarian personnel will be discussed,

recalling Resolution 9 of the 1995 Council of Delegates,

1. *appeals* to all components of the Movement to urge States to take all necessary steps, both nationally and internationally, without prejudice to the Fundamental Principles, to ensure unimpeded access to vulnerable people;
2. *appeals* to all components of the Movement to urge States to take all necessary steps, both nationally and internationally, without prejudice to the Fundamental Principles, to maximize the security and the safety of humanitarian workers;

3. *reaffirms* the obligation, under international humanitarian law, of parties to armed conflicts to respect and protect relief work and in particular personnel engaged in relief operations;
4. *reaffirms* the obligation of the States party to the Geneva Conventions of August 12, 1949 to adopt national legislation protecting the red cross and red crescent emblems and the need to broaden awareness of the protective significance of these emblems by the States and by the components of the Movement;
5. *reminds* all components of the Movement of the necessity to adhere strictly to the Fundamental Principles in all their actions, of their obligations under Resolution 9 of the 1995 Council of Delegates and of the need to promote clear and consistent humanitarian principles and standards among all humanitarian agencies providing assistance and protection;
6. *strongly recommends* that all components of the Movement further develop recruitment and training policies and activities, as well as improve their communication and information networks on these issues;
7. *recommends* that all components of the Movement working in the field seek and rely more on informed local knowledge of the safety and security situation;
8. *expresses* its deepest sympathy to the families of the murdered Red Cross and Red Crescent staff and volunteers.

6. Follow-up:

decides to continue placing a regular item on its agenda devoted to the promotion of activities aimed at fostering peace and achieving greater respect for the rules of international humanitarian law and the fundamental rights of the individual.

Resolution 9

COMMUNICATION POLICY OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

The Council of Delegates,

recalling Resolution 6 adopted by the Council in 1995,

1. *welcomes* the report of the Communication Forum of the Movement set up as a result of that resolution;

2. *congratulates* the Federation Secretariat, the ICRC and the National Societies involved on their work;

3. *adopts* and *calls* for the implementation of the report of the Forum as the current communication policy for the Movement and in particular:

   (a) *encourages* all National Societies to introduce the Red Cross/Red Crescent pin project for 8 May each year, using a common cross and crescent modelled on the British Red Cross campaign, in order to raise the profile of the Red Cross/Red Crescent worldwide and provide a practical vehicle for future global campaigns, including the Movement's activities for the millennium,

   (b) *supports* the production of a directory of information staff within the Movement and the introduction of an alert system to promote communication between information departments of the Movement, and to improve their handling of media issues,

   (c) *endorses* the Movement web site project managed from the Federation Secretariat and *urges* National Societies and the ICRC to support the project with both material for the site and financial support for the necessary resources, and to link it with their own sites,

   (d) *commends* the pilot media training project funded by the British Red Cross and run by the ICRC on behalf of the Forum and *calls* for its introduction as part of the capacity-building programme of the Federation. It further *urges* the ICRC, the International Federation and the National Societies to fund the media training project in the future,

   (e) *welcomes* the production of the promotional television spot produced by the ICRC for National Societies on behalf of the Forum and *urges* all parts of the Movement to promote its screening,

   (f) *supports* contacts with leading international television companies aimed at producing coverage of Red Cross/Red Crescent values and actions on behalf of the victims of conflict and disaster, and the most vulnerable, and *commends* the support of the American Red Cross in furthering the project,

   (g) *endorses* the Forum's list of key messages and requests the information and communication departments within the Movement to promote their use;

4. *expresses its thanks* for the financial contributions, in the form of membership of the Communication Forum of the Movement, of the National Societies of Australia, Belgium, China (the former Hong Kong branch of the British Red Cross Society), Colombia, Lebanon, Malaysia, South Africa, Uganda, the United Kingdom and the United States;

5. *expresses particular gratitude* for the financial contribution to the Forum's running costs by the National Societies of Italy and Norway;

6. *also recognizes* the financial and administrative support of the ICRC, the Federation Secretariat, the American Red Cross, the Belgian Red Cross, the British Red Cross and the South African Red Cross Society;

7. *agrees* that the Communication Forum of the Movement should continue its work to implement the projects already identified, consider further Movement communication projects, and report on progress to the 1999 Council of Delegates;

8. *calls on* National Societies to support the work of the Forum through financial contributions to its running costs in 1998 and 1999.

Resolution 10

INTERNATIONAL RED CROSS AND RED CRESCENT MILLENNIUM YEAR

The Council of Delegates,

taking into account the changing humanitarian and development needs of the world's most vulnerable people,

aware of how important it is for the International Red Cross and Red Crescent Movement to continue to develop its services and to promote humanitarian values, ideals and actions,

recalling Resolution 6 of the 1995 Council of Delegates on the Information Policy of the Movement, in which the ICRC and the International Federation were invited to work skilfully with all National Societies to deliver clear and concise messages to the world,

re-emphasizing the importance of communication at all levels in promoting the humanitarian values of the Movement and real concern and action for the world's most vulnerable groups and victims of armed conflict,

recognizing that the opportunity of a new millennium can be used by the International Red Cross and Red Crescent to promote its humanitarian values and action worldwide,

1. *welcomes* the proposal of the International Federation for an overall concept and global strategy for a Movement "millennium year" (8 May 1999 to 8 May 2000), which will include an ICRC project to mark the 50th anniversary of the Geneva Conventions and involve all components of the International Red Cross and Red Crescent Movement;
2. *notes* that the proposal for the International Red Cross and Red Crescent Movement millennium year encompasses such key dates as the 50th anniversary of the Geneva Conventions, the 100th anniversary of the Hague Peace Conference and the 27th International Conference;
3. *bears in mind* that, in order to be effective, the action and communication efforts of the Movement will require that adequate resources be identified, raised and allocated for specific events and programmes;
4. *appeals* to all National Societies, the International Federation and the ICRC to implement, coordinate and support programmes and activities during the millennium year.

Resolution 11

COMMISSION FOR THE FINANCING OF THE ICRC

The Council of Delegates,

having taken note of the interim report and of the supplementary report submitted by the Commission for the Financing of the ICRC,

recalling the numerous resolutions in which National Societies have, since 1921, shown their concern to see the Geneva institutions receive the necessary resources, and have expressed their willingness to provide support to that effect,

recognizing that the ICRC requires support and financial independence in order to carry out its activities for victims of war and internal violence,

further recalling Resolution 7 of the 1995 Council of Delegates, which asked the Commission for the Financing of the ICRC to review its role and working methods,

1. *renews* the mandate of the Commission for the Financing of the ICRC in its present composition for two years;

2. *asks* the Commission to favour, within its original mandate, mutual consultation between the ICRC and National Societies on questions relating to financing (whether in kind, cash or services) and to resource management, it being understood that emphasis should be put on seeking ways and means to adapt to the constantly changing humanitarian aid environment;

3. *recommends* that the Commission adopt a flexible way of working whereby informal ad hoc meetings can be held throughout the year whenever some of its members are gathered, the outcome of such discussions then being presented to the annual plenary meeting;

4. *thanks* the National Societies which have already contributed to the financing of the ICRC and encourages all National Societies to join in this common effort;

5. *asks* the Commission to periodically review, in close consultation with the ICRC, the rate of National Societies' contributions to the ICRC's headquarters budget, it being recommended that each National Society's contribution should be equal to the percentage assigned to it in the Federation's established annual scale of contributions;

6. *requests* the Commission to establish a system providing for balanced geographical representation in its membership; the term of office shall be four years, and it is recommended that no member should serve more than two terms; National Societies arriving at the end of their terms should, subsequent to consultation with the ICRC, recommend a replacement National Society from the same geographical region;

7. *further requests* the Commission to report to it during the next meeting of the Council of Delegates in 1999.

Council of Delegates

Sevilla, 25-27 November 1997

Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement

26 November 1997

PREAMBLE

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PREAMBLE

The mission of the International Red Cross and Red Crescent Movement is *"to prevent and alleviate human suffering wherever it may be found, to protect life and health, and ensure respect for the human being, in particular in times of armed conflict and other emergencies, to work for the prevention of disease and for the promotion of health and social welfare, to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance".*

The accomplishment of this common mission calls for the combined efforts and participation of all the components of the Movement. To respond with speed, flexibility and creativity to the needs of all those calling for impartial humanitarian protection and assistance, the components must join their forces and capitalize on their diversity. To achieve that goal through effective collaboration in a spirit of mutual trust, to ensure an efficient mobilization of resources, the components must therefore, based on a clear sense of purpose and their common mission, organize their international activities on a sound and predictable basis. This implies observance of the Fundamental Principles and of the Statutes of the Movement, and a synergetic cooperation, coupled with a clear division of labour, among components having distinct but closely related and complementary roles and competencies.

This Agreement is more than an instrument of operational management or a statement of understanding. It sets into motion a profound change in attitude between members of the same Movement: the adoption of a collaborative spirit, in which every member of the Movement values the contributions of other members as partners in a global humanitarian enterprise. It is an agreement on cooperation and not merely on a division of labour, and it applies to all those international activities which, under the Movement's Statutes, the components are called upon to carry out in close collaboration. It establishes clear guidelines for the performance of tasks by Movement members, using the specific areas of competence and the complementary capacities of each to best effect. It provides for continuity of activities as situations change, and aims at fostering among the components a stronger sense of identity, of solidarity, of mutual trust and of shared responsibility.

With those objectives set out, this Agreement on the organization of the international activities of the Movement's components constitutes an

essential element of a new common strategy of action that will allow the components to achieve three important goals:

— to provide more effective response to humanitarian needs using to best effect the Movement's many resources;

— to promote better respect for humanitarian principles, and for international humanitarian law;

— to create a stronger International Red Cross and Red Crescent Movement in which all components cooperate to the optimum extent.

PART I

GENERAL

Article 1: Scope of the Agreement

1.1 The Agreement applies to those international activities which the components are called upon to carry out in cooperation, on a bilateral or multilateral basis, to the exclusion of the activities which the Statutes of the Movement and the Geneva Conventions entrust to the components individually.

1.2 The "international activities" of the components are the activities of the National Societies defined in Article 3, paragraphs 3 and 5 of the Statutes of the Movement; the activities of the International Committee of the Red Cross defined in Article 5, paragraphs 2, 3 and 4 of the Statutes of the Movement; and the activities of the International Federation of Red Cross and Red Crescent Societies defined in Article 6, paragraphs 3, 4 and 5 of the Statutes of the Movement.

1.3 Pursuant to Article 7, paragraph 1 of the Statutes of the Movement, the Agreement defines the organization of international activities carried out in bilateral or multilateral cooperation between:
— the National Societies and their Federation;
— the National Societies and the ICRC;
— the National Societies between themselves;
— the ICRC and the Federation;
— the ICRC, the Federation and the National Societies.

1.4 Nothing in this Agreement shall be interpreted as restricting or impairing the specific role and competencies of each component according

to the Geneva Conventions and their additional Protocols, and under the Statutes of the Movement.

Article 2: Object and Purpose of the Agreement

The object and purpose of the Agreement is:

a) to promote the efficient use of the human, material and financial resources of the Movement and to mobilize them as rapidly as possible in relief operations and development activities in the interest of the victims of armed conflicts or of internal strife and their direct results, as well as of natural or technological disasters, and of vulnerable persons in other emergency and disaster situations in peacetime;

b) to promote closer cooperation among the components in situations referred to in Article 2 a) above;

c) to strengthen the development of National Societies and to improve cooperation among them, thus enabling National Societies to participate more effectively in the international activities of the Movement;

d) to obviate differences between the components as to the definition and the organization of their respective international activities and responsibilities within the Movement;

e) to strengthen functional cooperation among the ICRC, the Federation and National Societies.

Article 3: Guiding Principles

The organization of the international activities of the components is at all times governed by the values and principles which guide the Movement, as enshrined in:

— the Fundamental Principles of the Red Cross and Red Crescent;

— the Statutes of the Movement;

— the Geneva Conventions and their Additional Protocols.

Article 4: Management Principles

Implicit in the Statutes of the Movement are two organizational concepts which this Agreement defines as "the lead role" and "the lead agency".

A) *Lead Role*

4.1 The Geneva Conventions and the Statutes of the Movement entrust specific competencies to each component which therefore plays a lead role in these matters.

4.2 The concept of lead role implies the existence of other partners with rights and responsibilities in these matters.

B) *Lead Agency*

4.3 The lead agency concept is an organizational tool for managing international operational activities. In a given situation, one organization is entrusted with the function of lead agency. That organization carries out the general direction and coordination of the international operational activities.

4.4 The lead agency concept applies primarily in emergency situations as referred to in Article 2 a) above, where rapid, coherent and effective relief is required in response to the large-scale needs of the victims, on the basis of an evaluation of these needs and of the capacity of the National Society concerned to meet them.

4.5 Effective coordination between the components under the responsibility and general direction of the lead agency requires the establishment of appropriate mechanisms for consultation and a commitment by all those taking part to abide by coordination rules and procedures.

4.6 The effectiveness of an operation depends on adequate prior training and preparation of those carrying out the operation (emergency preparedness).

PART II

INTERNATIONAL RELIEF ACTIVITIES

Article 5: Organization of International Relief Operations

5.1 *Situations Requiring a Lead Agency*

A) International and non-international armed conflicts, internal strife and their direct results, within the meaning of the Geneva Conventions and their Additional Protocols and the Statutes of the Movement:

a) within the meaning of the Geneva Conventions and of this Agreement, the term "situation of armed conflict" covers the entire territory of the parties to a conflict as far as the protection and assistance of the victims of that conflict are concerned;

b) the term "direct results of a conflict" within the meaning of the Geneva Conventions applies beyond the cessation of hostilities and extends to situations where victims of a conflict remain in need of relief until a general restoration of peace has been achieved;

c) the term "direct results of a conflict" shall also apply to situations in which general restoration of peace has been achieved, hence the intervention of the ICRC as a specifically neutral and independent institution and intermediary is no longer required but victims remain in need of relief during the post-conflict period, especially within the context of reconstruction and rehabilitation programmes;

d) the term "direct results of a conflict" shall also apply to situations in which victims of a conflict are to be found on the territory of a State which is neither party to a conflict nor affected by internal strife, especially following a large scale movement of refugees.

B) Natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society and thus call upon the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* to apply;

C) Armed conflict concomitant with natural or technological disasters.

5.2 *Armed Conflict and Internal Strife: Elements of Identification*

For the purposes of the application of the present Agreement and the organization of the international activities of the components,

a) an armed conflict exists when the armed action is taking place between two or more parties and reflects a minimum of organization;

b) internal strife does not necessarily imply armed action but serious acts of violence over a prolonged period or a latent situation of violence, whether of political, religious, racial, social, economic or other origin, accompanied by one or more features such as: mass arrests, forced disappearances, detention for security reasons, suspension of judicial guarantees, declaration of state of emergency, declaration of martial law.

5.3 *Lead Agency Role of each Component*

5.3.1 The ICRC will act as lead agency, as provided for in Article 4 of the present Agreement, in situations of international and non-international armed conflicts, internal strife and their direct results as referred to in Article 5.1, Section A and in paragraphs a) and b), and in Section C (armed conflict concomitant with natural or technological disasters).

5.3.2 The Federation will act as lead agency in situations referred to in Article 5.1, paragraphs c) and d) of Section A, and in Section B (natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society).

5.3.3 A National Society may undertake the functions of lead agency necessary for the coordination of international relief assistance within its own territory subject to the concurrence of the ICRC or the Federation, as the case may be, as provided for in Article 3, paragraph 3 of the Statutes of the Movement.

5.3.4 If a natural or technological disaster occurs in a situation of conflict where the ICRC is already engaged, the ICRC will call upon the Federation to provide additional appropriate expertise to facilitate relief.

5.3.5 If an armed conflict or internal strife breaks out in a situation where there is ongoing Federation relief assistance activity, the transition provisions apply, as provided for in Article 5.5 of the present Agreement.

5.4 *Unforeseen Situations*

In handling unforeseen situations which do not fall within the situations referred to in Part II, Articles 5.1 and 5.3, the components of the Movement directly concerned undertake, in good faith and with common sense, to be guided by the Fundamental Principles and the Statutes of the Movement, to ensure, in the interest of the victims, maximum efficiency of the operation and harmonious cooperation within the Movement as a whole.

5.5 *Transition*

5.5.1 Where, as a result of a change of situation, responsibility for directing and coordinating an international relief operation is transferred from the ICRC or from the Federation in accordance with the relevant Articles of the present Agreement, the incumbent lead agency shall, in agreement

with the operating National Society and in consultation with the participating National Societies, take all the steps appropriate to ensure an efficient and harmonious handover of the management and conduct of the new international relief operation by the component taking over the lead agency function.

5.5.2 Subject to the agreement of the donors who have contributed to financing the international relief operation which is being phased out, the funds and relief supplies available, together with the logistic and material resources deployed in the field, shall, if they are suited to the objectives of the new operation, be placed at the disposal of the lead agency henceforth responsible for its general direction and coordination.

5.6 *Other International Relief Actions by National Societies*

5.6.1 In situations where the needs of the victims do not call for the organization of an international relief operation under a lead agency, a National Society which provides direct assistance to the Society of the country affected by a conflict or a disaster shall immediately inform the ICRC or the Federation, as the case may be.

5.6.2 Mutual emergency relief assistance agreements in case of natural or technological disasters between neighbouring National Societies, and bilateral or multilateral development agreements between National Societies shall be notified in advance to the Federation.

5.6.3 The fact that one or several National Societies submit a request for aid to the ICRC or to the Federation, or hand over relief supplies to one of them, shall in no way be deemed to modify the organization of functions and responsibilities between the two institutions as defined in the present Agreement. In such an event, the institution which is not competent will so inform the National Society or Societies concerned and will refer the matter without delay to the competent institution.

5.7 *Operational Difficulties*

5.7.1 Should an international relief operation directed and coordinated either by the ICRC or by the Federation be obstructed for a prolonged period, the lead agency shall consult the components involved with a view to bringing their combined influence to bear so that the obstacles to the operation may be overcome as soon as possible in the sole interest of the victims.

5.7.2 Where appropriate they may, by mutual agreement, decide to implement provisional measures which shall in no way be regarded as

precedents affecting the respective mandates of the components of the Movement or the organization of tasks provided for in the present Agreement.

5.8 *United Nations Specialized Agencies*

5.8.1 In order to maintain among the components a coherent approach that will preserve the Movement's unity and independence, a National Society wishing to conclude a cooperation agreement with a specialized agency of the United Nations, shall keep the Federation and/or the ICRC informed.

5.8.2 In particular, it shall keep the Federation and/or the ICRC informed of any negotiations likely to lead to a formal agreement with the UNHCR which should be undertaken in association with the Federation and/or the ICRC.

Article 6: Responsibilities for General Direction and Coordination of International Relief Operations

6.1 In situations defined in the present Agreement, where the general direction and coordination of an international relief operation is exercised by the ICRC or the Federation acting as lead agency, this function carries the following responsibilities:

6.1.1 *General Responsibilities*

a) to define the general objectives of the international relief operation based on access to the victims and on an impartial assessment of their needs;

b) to direct the implementation of these objectives;

c) to ensure that all actions within the relief operation are effectively coordinated;

d) to establish appropriate mechanisms of consultation with Red Cross and Red Crescent partners;

e) to coordinate international Red Cross and Red Crescent relief operations with the humanitarian activities of other organizations (governmental or non-governmental) where this is in the interest of the victims and is in accordance with the Fundamental Principles;

f) to act as a spokesman for the international relief action and to formulate the Red Cross and Red Crescent partners' response to public interest;

g) to mobilize financial resources for the relief operation and to launch appeals integrating when necessary other directly or indirectly related Red Cross and Red Crescent activities.

h) to ensure that the resources mobilized for an international relief operation are managed in a sound and efficient manner by the operating and the participating National Societies;

i) to promote, by means of project delegations, bilateral or multilateral cooperation agreements between participating and operating National Societies;

6.1.2 *Specific Responsibilities*

A) In situations where the ICRC is acting as lead agency:

a) to establish and maintain relations and contacts with all the parties to the conflict and take any steps necessary for the conduct of international relief operations for victims, in accordance with the relevant provisions of international humanitarian law and in compliance with the Fundamental Principles of independence, neutrality and impartiality;

b) to assume ultimate responsibility for international relief operations vis-à-vis the parties to the conflict and the community of States party to the Geneva Conventions;

c) to define and ensure the application of any measure which may prove necessary to guarantee, to the greatest extent possible, the physical safety of personnel engaged in relief operations in the field;

d) to ensure respect for the rules in force relating to the use of the red cross and red crescent emblems for protective purposes;

e) to draw up, in consultation with the National Societies concerned, public statements relating to the progress of the relief operation.

B) In situations where the Federation is acting as lead agency:

a) to ensure that the participating and the operating National Societies comply with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* (1995) and the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1995);

b) to offer the National Societies rapid information on disasters in order to permit mobilization and coordination of all possible forms of relief;

c) to promote, beyond the emergency phase, the establishment and the development of rehabilitation and reconstruction programmes, and to mobilize for this purpose the support of National Societies of other countries;

d) to decide, in agreement with the National Society of the country concerned, and after consultation of the donor Societies, on the use of any goods or funds that remain available at the end of an international relief operation.

6.2 *Coordination of an International Relief Operation by a National Society within its own Territory*

6.2.1 Taking into account:

— the nature of the situation and the resulting constraints imposed upon the implementation of the operation;

— the scope of the needs to be met;

— the logistic means to be deployed;

— the preparedness and capacity of the National Society to undertake efficiently the action required in conformity with the Fundamental Principles,

a National Society may act as a lead agency in the sense of undertaking the coordination of an international relief operation within its own territory, subject to the concurrence of, and on the basis of general objectives defined by the ICRC or the Federation, as the case may be.

6.2.2 In this context, this function of coordination by a National Society within its own territory implies primarily the following responsibilities:

a) to direct the implementation of the general objectives defined for the international relief operation;

b) to direct the work of personnel made available by participating National Societies placed under the authority of the operating National Society for the purpose of the operation;

c) to coordinate the relief operation with the humanitarian activities of other organizations (governmental or nongovernmental) having a representation and being active locally when this is in the interest of the victims and in accordance with the Fundamental Principles;

d) to act as a spokesman for the international relief operation to respond to public interest;

e) to ensure respect for the rules in force relating to the use of red cross and red crescent emblems;

f) to ensure that the action is carried out and conducted in accordance with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief (1995)* and the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief (1995)*;

g) to ensure that the financial and material ressources made available for the purpose of the relief operation through the ICRC and/or the Federation, as the case may be, are managed in a sound and efficient manner;

h) to provide required and appropriate information to the Federation or the ICRC, as the case may be, on the progress of the relief operation in order to enable them to report to donors having responded to international appeals launched to mobilize the necessary financial resources to meet the general objectives set out.

PART III

STRENGTHENING OF THE MOVEMENT: DEVELOPMENT AND FUNCTIONAL COOPERATION

All components shall strive to assist each other to realize their full potential and adopt a policy of constructive complementarity in elaborating a comprehensive development approach.

Article 7: Development of National Societies

7.1 A National Society is primarily responsible for its own development.

7.1.1 National Societies shall contribute as far as their means permit to the development of other National Societies requiring such assistance, by means of bilateral or multilateral development agreements.

7.1.2 Such agreements shall take account of the relevant policies and strategies adopted by the Federation's General Assembly.

7.2 The Federation has the lead role with regard to development activities and to the coordination of international development support to National Societies. The ICRC provides support in matters falling within its statutory core competencies.

7.2.1 The specific tasks of the Federation in development activities include:

a) formulating and reviewing development policies on behalf of the Movement in consultation with the other components;

b) assisting National Societies to draw up development plans and project proposals;

c) providing standards and guidelines for programme design and planning;

d) setting criteria for mobilization and allocation of resources for development.

7.2.2 The ICRC shall contribute to the development of the National Societies in the following matters, in coordination with the Federation:

a) technical and legal assistance in establishing and reconstituting National Societies;

b) support of the National Societies' programmes for disseminating knowledge of international humanitarian law and the Fundamental Principles;

c) involvement of the National Societies in measures taken to promote international humanitarian law and ensure its implementation;

d) preparation of the National Societies for their activities in the event of conflict;

e) contribution to the training of National Society personnel in fields related to its mandate.

7.2.3 In armed conflict situations, internal strife and their direct results, the Federation may continue to assist the National Society of the country concerned in its further development, taking into account that in such situations, where the ICRC is acting as lead agency as provided for in Article 5.3, the ICRC has the responsibility to coordinate and direct the relief operations in favour of the victims.

7.2.4 In armed conflict situations, internal strife and their direct results, the ICRC may expand its cooperation with the operating

National Society concerned in order to strengthen its operational capacity. In such cases, the ICRC shall coordinate with the plans of the National Society concerned and the Federation in this regard.

7.2.5 Whenever it appears to either institution that a National Society has become unable to protect its integrity and to act in accordance with the Fundamental Principles, the ICRC and the Federation shall consult each other on the advisability of taking action, either jointly or separately. In the latter case, the two institutions shall keep each other informed of any action taken and of subsequent results.

Article 8: Functional Cooperation between the Components of the Movement

8.1 The coherence of the action of the components of the Movement depends on cooperation and coordination among them in undertaking emergency actions in general or specific cases, as well as in all other areas of activity.

8.2 Functional cooperation between the ICRC, the National Societies and the Federation applies in particular to the following areas of international activities:

a) establishment and recognition of National Societies and protection of their integrity;

b) use and respect of the red cross and red crescent emblems;

c) human resources development, training and preparation of personnel for international relief operations;

d) cooperation at delegation level;

e) relations with international institutions, non-governmental organizations and other actors on the international scene;

f) coordination of international fundraising.

8.3 The principles outlined in Articles 3 and 4 of this Agreement may serve as a frame of reference for more detailed bilateral agreements on an *ad hoc* basis, that the ICRC and the Federation may wish to conclude for organizing their cooperation in specific areas at the institutional or regional levels.

8.4 The process of development of functional cooperation among the components, and the opportunities for its evolution in response to changes

in the external environment can only be enhanced by continuous dialogue and regular consultation between those responsible for international activities within the ICRC and the Federation and with National Societies with a view to analyzing and anticipating needs. The initiative in respect of each specific area might best be taken by the organization having the lead role in that area.

Article 9: Communication, Fundamental Principles and International Humanitarian Law

9.1 *Public Relations and Information*

9.1.1 In their public relations, the ICRC, the Federation and National Societies, while performing their respective functions and thereby informing the public of their respective roles within the Movement, shall harmonize their activities so as to present a common image of the Movement and contribute to a greater understanding of the Movement by the public.

9.1.2 In order to ensure maximum efficiency in advocating humanitarian principles, according to the policies promulgated to that effect by the Council of Delegates, the components of the Movement shall cooperate in coordinating campaigns and developing communication tools. Whenever necessary, they may set up mechanisms to that effect, taking into account the lead roles of the different components.

9.2 *Fundamental Principles*

9.2.1 All components of the Movement shall ensure that the Fundamental Principles are respected by the Movement's components and statutory bodies.

9.2.2 The ICRC has the lead role in the maintenance and dissemination of the Fundamental Principles. The Federation and the ICRC shall collaborate in the dissemination of those Principles among the National Societies. National Societies have a key role to play in upholding and disseminating the Fundamental Principles within their own country.

9.3 *International Humanitarian Law*

9.3.1 The ICRC has the lead role for promoting, developing and disseminating international humanitarian law (IHL). The Federation shall assist the ICRC in the promotion and development of IHL and collaborate with it in the dissemination of IHL among the National Societies.

9.3.2 National Societies shall disseminate, and assist their governments in disseminating IHL. They shall also cooperate with their governments to ensure respect for IHL and to protect the red cross and red crescent emblems.

PART IV

IMPLEMENTATION AND FINAL PROVISIONS

Article 10: Implementation

10.1 All components of the Movement undertake to respect and implement the present Agreement on the organization of their international activities, in accordance with Article 7 of the Statutes of the Movement.

10.2 Each component — the Federation, the ICRC, and National Societies — is individually responsible for the implementation of the provisions of this Agreement, and shall instruct its volunteers and staff accordingly.

10.3 Beyond their individual responsibility to implement the provisions of this Agreement, the ICRC and the Federation, because of their directing and coordinating roles, have a special responsibility to ensure that the Agreement be fully respected and implemented by the Movement as a whole.

10.4 As the institutions most often called on to act as lead agency in international activities, the ICRC and the Federation have a need to:

— share information on global operational activities of common interest;

— discuss possible difficulties which may hamper smooth cooperation between the components.

It is for these institutions to agree between themselves what arrangements are best suited to meet this need.

10.5 The Standing Commission, by virtue of the role conferred upon it by Article 18 of the Statutes of the Movement, shall call annually for a report on the implementation of the Agreement from the ICRC and the Federation, which will be transmitted to all National Societies as part of a consultative process.

10.6 The Standing Commission shall include an item on the Agreement on the agenda of each Council of Delegates, thus establishing a process of regular review of the Agreement.

10.7 If differences arise between the components concerning the implementation of the Agreement and if these cannot be otherwise resolved, the Standing Commission may establish an *ad hoc* independent body, as and when required, to arbitrate, with the agreement of the Parties, differences between the components of the Movement where conciliation and mediation have failed.

Article 11: Final Provisions

The present Agreement replaces the 1989 Agreement between the ICRC and the League of Red Cross and Red Crescent Societies (International Federation). It was adopted by consensus, in Resolution 6 of the Council of Delegates in Seville, Spain, on 26 November 1997.

Eleventh General Assembly of the International Federation of Red Cross and Red Crescent Societies

Seville, Spain
20-25 November 1997

At its 11th Session, the General Assembly of the International Federation of Red Cross and Red Crescent Societies elected Dr Astrid Nøklebye Heiberg (Norway) as its new President. Dr Heiberg was elected in the first round by 110 of the 175 National Society votes cast.

The following were elected as Vice-Presidents: Ms Janet Davidson (Canada), Ms Mariapia Garavaglia (Italy), Ms Lyudmila G. Potravnova (Russian Federation), Mr Ali Bandiare (Niger), Mr Mamdouh Gabr (Egypt), Mr Mario R. Nery (Philippines), Mr Manoj Mathur (India) and Mr Miguel Carmona Jiménez (Costa Rica). Sixteen National Societies were elected to membership of the Executive Council: Chile, Denmark, Ethiopia, France, Germany, Ghana, Jamaica, Morocco, Nepal, New Zealand, Pakistan, Panama, Senegal, Tunisia, Ukraine and the United Arab Emirates.

Geneva Conventions for the protection of war victims of 12 August 1949 and Additional Protocols of 8 June 1977

ratifications, accessions and successions as at 31 December 1997

1. Abbreviations

Ratification (R): a treaty is generally open for signature for a certain time following the conference which has adopted it. However, a signature is not binding on a State unless it has been endorsed by ratification. The time limits having elapsed, the Conventions and the Protocols are no longer open for signature. The States which have not signed them may at any time accede or, in the appropriate circumstances, succeed to them.

Accession (A): instead of signing and then ratifying a treaty, a State may become party to it by the single act called accession.

Succession (S): a newly independent State may declare that it will abide by a treaty which was applicable to it prior to its independence. A State may also declare that it will provisionally abide by such treaties during the time it deems necessary to examine their texts carefully and to decide on accession or succession to some or all of the said treaties (declaration of provisional application of the treaties). At present no State is bound by such a declaration.

Reservation/Declaration (R/D): unilateral statement, however phrased or named, made by a State when ratifying, acceding or succeeding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (provided that such reservations are not incompatible with the object and purpose of the treaty).

Declaration provided for under article 90 of Protocol I (D90): prior acceptance of the competence of the International Fact-Finding Commission.

2. Dates

The dates indicated are those on which the Swiss Federal Department of Foreign Affairs received the official instrument from the State that was ratifying, acceding to or succeeding to the Conventions or Protocols or accepting the competence of the Commission provided for under Article 90 of Protocol I. They thus represent neither the date on which ratification, accession, succession or acceptance of the Commission was decided upon by the State concerned nor that on which the corresponding instrument was sent.

N.B.: The dates given for succession to the Geneva Conventions by Congo, Jamaica, Madagascar, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone and Zaire used to be those on which the corresponding instruments had been officially adopted. They have now been replaced by the dates on which the depositary received those instruments.

3. Entry into force

Except as mentioned in footnotes at the end of the tables, for all States the entry into force of the Conventions and of the Protocols occurs six months after the date given in the present document; for States which have made a declaration of succession, entry into force takes place retroactively, on the day of their accession to independence.

The **1949 Geneva Conventions** entered into force on 21 October 1950.

The **1977 Additional Protocols** entered into force on 7 December 1978.

4. Names of countries

The name given in the following list may differ from the official name of the concerned State.

5. Update since 31 December 1996

Ratifications, accessions or successions to Additional Protocol I:

Chad	17.01.1997
Lebanon	23.07.1997

Ratifications, accessions or successions to Additional Protocol II:

Chad	17.01.1997
Lebanon	23.07.1997

Declaration provided for under article 90 of Protocol I:

Tajikistan	10.09.1997

6. Notes

Djibouti. Djibouti's declaration of succession in respect of the First Convention was dated 26.01.1978.

France. On accession to Protocol II, France made a communication concerning Protocol I.

Ghana. Entry into force of Protocols I and II on 07.12.1978.

Namibia. An instrument of accession to the Geneva Conventions and their additional Protocols was deposited by the United Nations Council for Namibia on 18.10.1983. In an instrument deposited on 22.08.1991, Namibia declared its succession to the Geneva Conventions, which were previously applicable pursuant to South Africa's accession on 31.03.1952.

Palestine. On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto".

On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

Philippines. The First Geneva Convention was ratified on 7.03.1951.

Republic of Korea. The Geneva Conventions entered into force on 23.09.66, the Republic of Korea having invoked Art. 62/61/141/157 common respectively to the First, Second, Third and Fourth Conventions (immediate effect).

Sri Lanka. Accession to the Fourth Geneva Convention on 23.02.1959 (Ceylon had signed only the First, Second, and Third Conventions).

Switzerland. Entry into force of the Geneva Conventions on 21.10.1950.

Trinidad and Tobago. Accession to the First Geneva Convention on 17.03.1963.

7. Total

Number of States party to the 1949 Geneva Conventions	**188**
Number of States party to the 1977 Additional Protocol I	**148**
Number of States having made the declaration under Article 90	**50**
Number of States party to the 1977 Additional Protocol II	**140**
Number of States members of the United Nations	**185**

States members of U.N. or parties to the Statute of the International Court of Justice, not being party to the 1949 Geneva Conventions: Eritrea, Marshall, Nauru.

	GENEVA CONVENTIONS			PROTOCOL I				PROTOCOL II		
COUNTRY	R/A/S	R/D		R/A/S	R/D		D90	R/A/S	R/D	
Afghanistan	26.09.1956	R								
Albania	27.05.1957	R	X	16.07.1993	A			16.07.1993	A	
Algeria	20.06.1960; 03.07.1962	A		16.08.1989	A	X	16.08.1989	16.08.1989	A	
Andorra	17.09.1993	A								
Angola	20.09.1984	A	X	20.09.1984	A	X				
Antigua and Barbuda	06.10.1986	S		06.10.1986	A			06.10.1986	A	
Argentina	18.09.1956	R		26.11.1986	A	X	11.10.1996	26.11.1986	A	X
Armenia	07.06.1993	A		07.06.1993	A			07.06.1993	A	
Australia	14.10.1958	R	X	21.06.1991	R	X	23.09.1992	21.06.1991	R	
Austria	27.08.1953	R		13.08.1982	R	X	13.08.1982	13.08.1982	R	X
Azerbaijan	01.06.1993	A								
Bahamas	11.07.1975	S		10.04.1980	A			10.04.1980	A	
Bahrain	30.11.1971	A		30.10.1986	A			30.10.1986	A	
Bangladesh	04.04.1972	S		08.09.1980	A			08.09.1980	A	

Barbados	10.09.1968	S	X	19.02.1990	A			19.02.1990	A	
Belarus	03.08.1954	R	X	23.10.1989	R		23.10.1989	23.10.1989	R	
Belgium	03.09.1952	R		20.05.1986	R	X	27.03.1987	20.05.1986	R	
Belize	29.06.1984	A		29.06.1984	A			29.06.1984	A	
Benin	14.12.1961	S		28.05.1986	A			28.05.1986	A	
Bhutan	10.01.1991	A								
Bolivia	10.12.1976	R		08.12.1983	A		10.08.1992	08.12.1983	A	
Bosnia-Herzegovina	31.12.1992	S		31.12.1992	S		31.12.1992	31.12.1992	S	
Botswana	29.03.1968	A		23.05.1979	A			23.05.1979	A	
Brazil	29.06.1957	R		05.05.1992	A		23.11.1993	05.05.1992	A	
Brunei Darussalam	14.10.1991	A		14.10.1991	A			14.10.1991	A	
Bulgaria	22.07.1954	R		26.09.1989	R		09.05.1994	26.09.1989	R	
Burkina Faso	07.11.1961	S		20.10.1987	R			20.10.1987	R	
Burundi	27.12.1971	S		10.06.1993	A			10.06.1993	A	
Cambodia	08.12.1958	A								
Cameroon	16.09.1963	S		16.03.1984	A			16.03.1984	A	
Canada	14.05.1965	R		20.11.1990	R	X	20.11.1990	20.11.1990	R	X
Cape Verde	11.05.1984	A		16.03.1995	A		16.03.1995	16.03.1995	A	
Central African Republic	01.08.1966	S		17.07.1984	A			17.07.1984	A	
Chad	05.08.1970	A		17.01.1997	A			17.01.1997	A	
Chile	12.10.1950	R		24.04.1991	R		24.04.1991	24.04.1991	R	
China	28.12.1956	R	X	14.09.1983	A	X		14.09.1983	A	
Colombia	08.11.1961	R		01.09.1993	A		17.04.1996	14.08.1995	A	
Comoros	21.11.1985	A		21.11.1985	A			21.11.1985	A	
Congo	04.02.1967	S		10.11.1983	A			10.11.1983	A	
Congo (Dem. Rep.)	24.02.1961	S		03.06.1982	A					
Costa Rica	15.10.1969	A		15.12.1983	A			15.12.1983	A	
Côte d'Ivoire	28.12.1961	S		20.09.1989	R			20.09.1989	R	
Croatia	11.05.1992	S		11.05.1992	S		11.05.1992	11.05.1992	S	
Cuba	15.04.1954	R		25.11.1982	A					
Cyprus	23.05.1962	A		01.06.1979	R			18.03.1996	A	
Czech Republic	05.02.1993	S	X	05.02.1993	S		02.05.1995	05.02.1993	S	
Denmark	27.06.1951	R		17.06.1982	R	X	17.06.1982	17.06.1982	R	
Djibouti	06.03.1978	S		08.04.1991	A			08.04.1991	A	
Dominica	28.09.1981	S		25.04.1996	A			25.04.1996	A	
Dominican Republic	22.01.1958	A		26.05.1994	A			26.05.1994	A	
Ecuador	11.08.1954	R		10.04.1979	R			10.04.1979	R	
Egypt	10.11.1952	R		09.10.1992	R	X		09.10.1992	R	X
El Salvador	17.06.1953	R		23.11.1978	R			23.11.1978	R	
Equatorial Guinea	24.07.1986	A		24.07.1986	A			24.07.1986	A	
Estonia	18.01.1993	A		18.01.1993	A			18.01.1993	A	
Ethiopia	02.10.1969	R		08.04.1994	A			08.04.1994	A	
Fiji	09.08.1971	S								
Finland	22.02.1955	R		07.08.1980	R	X	07.08.1980	07.08.1980	R	
France	28.06.1951	R						24.02.1984	A	X
Gabon	26.02.1965	S		08.04.1980	A			08.04.1980	A	

Gambia	20.10.1966	S		12.01.1989	A			12.01.1989	A	
Georgia	14.09.1993	A		14.09.1993	A			14.09.1993	A	
Germany	03.09.1954	A	X	14.02.1991	R	X	14.02.1991	14.02.1991	R	X
Ghana	02.08.1958	A		28.02.1978	R			28.02.1978	R	
Greece	05.06.1956	R		31.03.1989	R			15.02.1993	A	
Grenada	13.04.1981	S								
Guatemala	14.05.1952	R		19.10.1987	R			19.10.1987	R	
Guinea	11.07.1984	A		11.07.1984	A		20.12.1993	11.07.1984	A	
Guinea-Bissau	21.02.1974	A	X	21.10.1986	A			21.10.1986	A	
Guyana	22.07.1968	S		18.01.1988	A			18.01.1988	A	
Haiti	11.04.1957	A								
Holy See	22.02.1951	R		21.11.1985	R	X		21.11.1985	R	X
Honduras	31.12.1965	A		16.02.1995	R			16.02.1995	R	
Hungary	03.08.1954	R	X	12.04.1989	R		23.09.1991	12.04.1989	R	
Iceland	10.08.1965	A		10.04.1987	R	X	10.04.1987	10.04.1987	R	
India	09.11.1950	R								
Indonesia	30.09.1958	A								
Iran (Islamic Rep.of)	20.02.1957	R	X							
Iraq	14.02.1956	A								
Ireland	27.09.1962	R								
Israel	06.07.1951	R	X							
Italy	17.12.1951	R		27.02.1986	R	X	27.02.1986	27.02.1986	R	
Jamaica	20.07.1964	S		29.07.1986	A			29.07.1986	A	
Japan	21.04.1953	A								
Jordan	29.05.1951	A		01.05.1979	R			01.05.1979	R	
Kazakhstan	05.05.1992	S		05.05.1992	S			05.05.1992	S	
Kenya	20.09.1966	A								
Kiribati	05.01.1989	S								
Korea (Dem. People's Rep.)	27.08.1957	A	X	09.03.1988	A					
Korea (Republic of)	16.08.1966	A	X	15.01.1982	R	X		15.01.1982	R	
Kuwait	02.09.1967	A	X	17.01.1985	A			17.01.1985	A	
Kyrgyzstan	18.09.1992	S		18.09.1992	S			18.09.1992	S	
Lao People's Dem.Rep.	29.10.1956	A		18.11.1980	R			18.11.1980	R	
Latvia	24.12.1991	A		24.12.1991	A			24.12.1991	A	
Lebanon	10.04.1951	R		23.07.1997	A			23.07.1997	A	
Lesotho	20.05.1968	S		20.05.1994	A			20.05.1994	A	
Liberia	29.03.1954	A		30.06.1988	A			30.06.1988·	A	
Libyan Arab Jamahiriya	22.05.1956	A		07.06.1978	A			07.06.1978	A	
Liechtenstein	21.09.1950	R		10.08.1989	R	X	10.08.1989	10.08.1989	R	X
Lithuania	03.10.1996	A								
Luxembourg	01.07.1953	R		29.08.1989	R		12.05.1993	29.08.1989	R	
Macedonia	01.09.1993	S	X	01.09.1993	S	X	01.09.1993	01.09.1993	S	
Madagascar	18.07.1963	S		08.05.1992	R		27.07.1993	08.05.1992	R	
Malawi	05.01.1968	A		07.10.1991	A			07.10.1991	A	
Malaysia	24.08.1962	A								
Maldives	18.06.1991	A		03.09.1991	A			03.09.1991	A	

Mali	24.05.1965	A		08.02.1989	A			08.02.1989	A	
Malta	22.08.1968	S		17.04.1989	A	X	17.04.1989	17.04.1989	A	X
Mauritania	30.10.1962	S		14.03.1980	A			14.03.1980	A	
Mauritius	18.08.1970	S		22.03.1982	A			22.03.1982	A	
Mexico	29.10.1952	R		10.03.1983	A					
Micronesia	19.09.1995	A		19.09.1995	A			19.09.1995	A	
Moldova (Republic of)	24.05.1993	A		24.05.1993	A			24.05.1993	A	
Monaco	05.07.1950	R								
Mongolia	20.12.1958	A		06.12.1995	R	X	06.12.1995	06.12.1995	R	
Morocco	26.07.1956	A								
Mozambique	14.03.1983	A		14.03.1983	A					
Myanmar	25.08.1992	A								
Namibia	22.08.1991	S		17.06.1994	A		21.07.1994	17.06.1994	A	
Nepal	07.02.1964	A								
Netherlands	03.08.1954	R		26.06.1987	R	X	26.06.1987	26.06.1987	R	
New Zealand	02.05.1959	R	X	08.02.1988	R	X	08.02.1988	08.02.1988	R	
Nicaragua	17.12.1953	R								
Niger	21.04.1964	S		08.06.1979	R			08.06.1979	R	
Nigeria	20.06.1961	S		10.10.1988	A			10.10.1988	A	
Norway	03.08.1951	R		14.12.1981	R		14.12.1981	14.12.1981	R	
Oman	31.01.1974	A		29.03.1984	A	X		29.03.1984	A	X
Pakistan	12.06.1951	R	X							
Palau	25.06.1996	A		25.06.1996	A			25.06.1996	A	
Panama	10.02.1956	A		18.09.1995	R			18.09.1995	R	
Papua New Guinea	26.05.1976	S								
Paraguay	23.10.1961	R		30.11.1990	A			30.11.1990	A	
Peru	15.02.1956	R		14.07.1989	R			14.07.1989	R	
Philippines	06.10.1952	R						11.12.1986	A	
Poland	26.11.1954	R	X	23.10.1991	R		02.10.1992	23.10.1991	R	
Portugal	14.03.1961	R	X	27.05.1992	R		01.07.1994	27.05.1992	R	
Qatar	15.10.1975	A		05.04.1988	A	X	24.09.1991			
Romania	01.06.1954	R	X	21.06.1990	R		31.05.1995	21.06.1990	R	
Russian Federation	10.05.1954	R	X	29.09.1989	R	X	29.09.1989	29.09.1989	R	X
Rwanda	05.05.1964	S		19.11.1984	A		08.07.1993	19.11.1984	A	
Saint Kitts and Nevis	14.02.1986	S		14.02.1986	A			14.02.1986	A	
Saint Lucia	18.09.1981	S		07.10.1982	A			07.10.1982	A	
Saint Vincent Grenadines	01.04.1981	A		08.04.1983	A			08.04.1983	A	
Samoa	23.08.1984	S		23.08.1984	A			23.08.1984	A	
San Marino	29.08.1953	A		05.04.1994	R			05.04.1994	R	
Sao Tome and Principe	21.05.1976	A		05.07.1996	A			05.07.1996	A	
Saudi Arabia	18.05.1963	A		21.08.1987	A	X				
Senegal	18.05.1963	S		07.05.1985	R			07.05.1985	R	
Seychelles	08.11.1984	A		08.11.1984	A		22.05.1992	08.11.1984	A	
Sierra Leone	10.06.1965	S		21.10.1986	A			21.10.1986	A	
Singapore	27.04.1973	A								

Slovakia	02.04.1993	S	X	02.04.1993	S		13.03.1995	02.04.1993	S	
Slovenia	26.03.1992	S		26.03.1992	S		26.03.1992	26.03.1992	S	
Solomon Islands	06.07.1981	S		19.09.1988	A			19.09.1988	A	
Somalia	12.07.1962	A								
South Africa	31.03.1952	A		21.11.1995	A			21.11.1995	A	
Spain	04.08.1952	R		21.04.1989	R	X	21.04.1989	21.04.1989	R	
Sri Lanka	28.02.1959	R								
Sudan	23.09.1957	A								
Suriname	13.10.1976	S	X	16.12.1985	A			16.12.1985	A	
Swaziland	28.06.1973	A		02.11.1995	A			02.11.1995	A	
Sweden	28.12.1953	R		31.08.1979	R	X	31.08.1979	31.08.1979	R	
Switzerland	31.03.1950	R		17.02.1982	R	X	17.02.1982	17.02.1982	R	
Syrian Arab Republic	02.11.1953	R		14.11.1983	A	X				
Tajikistan	13.01.1993	S		13.01.1993	S		10.09.1997	13.01.1993	S	
Tanzania (United Rep.of)	12.12.1962	S		15.02.1983	A			15.02.1983	A	
Thailand	29.12.1954	A								
Togo	06.01.1962	S		21.06.1984	R		21.11.1991	21.06.1984	R	
Tonga	13.04.1978	S								
Trinidad and Tobago	24.09.1963	A								
Tunisia	04.05.1957	A		09.08.1979	R			09.08.1979	R	
Turkey	10.02.1954	R								
Turkmenistan	10.04.1992	S		10.04.1992	S			10.04.1992	S	
Tuvalu	19.02.1981	S								
Uganda	18.05.1964	A		13.03.1991	A			13.03.1991	A	
Ukraine	03.08.1954	R	X	25.01.1990	R		25.01.1990	25.01.1990	R	
United Arab Emirates	10.05.1972	A		09.03.1983	A	X	06.03.1992	09.03.1983	A	X
United Kingdom	23.09.1957	R	X							
United States of America	02.08.1955	R	X							
Uruguay	05.03.1969	R	X	13.12.1985	A		17.07.1990	13.12.1985	A	
Uzbekistan	08.10.1993	A		08.10.1993	A			08.10.1993	A	
Vanuatu	27.10.1982	A		28.02.1985	A			28.02.1985	A	
Venezuela	13.02.1956	R								
Viet Nam	28.06.1957	A	X	19.10.1981	R					
Yemen	16.07.1970	A	X	17.04.1990	R			17.04.1990	R	
Yugoslavia	21.04.1950	R	X	11.06.1979	R	X		11.06.1979	R	
Zambia	19.10.1966	A		04.05.1995	A			04.05.1995	A	
Zimbabwe	07.03.1983	A		19.10.1992	A			19.10.1992	A	

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Accession to the Additional Protocols by the Kingdom of Cambodia

The Kingdom of Cambodia acceded on 14 January 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 the Kingdom of Cambodia on 14 July 1998.

This accession brings to 149 the number of States party to Protocol I and to 141 those party to Protocol II.

Ratification of the Additional Protocols by the United Kingdom of Great Britain and Northern Ireland

On 28 January 1998, the United Kingdom of Great Britain and Northern Ireland ratified 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 the United Kingdom on 28 July 1998.

This accession brings to 150 the number of States party to Protocol I and to 142 those party to Protocol II.

The instrument of ratification is accompanied by various declarations, the text of which is given below:

I also have the honour to lodge with the Government of the Swiss Federation, as the depositary of Additional Protocol I the following statements in respect of the ratification by the United Kingdom of that Protocol:

(a) It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.

(b) The United Kingdom understands the term "feasible" as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.

(c) Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

(d) *Re: Article 1, paragraph 4 and Article 96, paragraph 3*

It is the understanding of the United Kingdom that the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.

The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an

authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.

(e) *Re: Article 28, paragraph 2*

Given the practical need to make use of non-dedicated aircraft for medical evacuation purposes, the United Kingdom does not interpret this paragraph as precluding the presence on board of communications equipment and encryption materials or the use thereof solely to facilitate navigation, identification or communication in support of medical transportation as defined in Article 8(f).

(f) *Re: Article 35, paragraph 3 and Article 55*

The United Kingdom understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time.

(g) *Re: Article 44, paragraph 3*

It is the understanding of the United Kingdom that:

— the situation in the second sentence of paragraph 3 can only exist in occupied territory or in armed conflicts covered by paragraph 4 of Article 1;

— "deployment" in paragraph 3(b) means any movement towards a place from which an attack is to be launched.

(h) *Re: Article 50*

In the view of the United Kingdom the rule in the second sentence of paragraph 1 applies only in cases of substantial doubt still remaining after the assessment referred to at paragraph (c) above has been made, and not as overriding a commander's duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of the Protocol.

(i) *Re: Article 51 and Article 57*

In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated

from the attack considered as a whole and not only from isolated or particular parts of the attack.

(j) *Re: Article 52*

It is the understanding of the United Kingdom that:

— a specific area of land may be a military objective if, because of its location or other reasons specified in this Article, its total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers definite military advantage;

— the first sentence of paragraph 2 prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives.

(k) *Re: Article 53*

The United Kingdom declares that if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military uses.

(l) *Re: Article 54, paragraph 2*

The United Kingdom understands that paragraph 2 has no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party.

(m) *Re: Article 51-55*

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom

will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.

(n) *Re: Article 56 and 85, paragraph 3c*

The United Kingdom cannot undertake to grant absolute protection to installations which may contribute to the opposing Party's war effort, or to the defenders of such installations, but will take all due precautions in military operations at or near the installations referred to in paragraph 1 of Article 56 in the light of the known facts, including any special marking which the installation may carry, to avoid severe collateral losses among the civilian populations; direct attacks on such installations will be launched only on authorisation at a high level of command.

(o) *Re: Article 57, paragraph 2*

The United Kingdom understands that the obligation to comply with paragraph 2(b) only extends to those who have the authority and practical possibility to cancel or suspend the attack.

(p) *Re: Article 70*

It is the understanding of the United Kingdom that this Article does not affect the existing rules of naval warfare regarding naval blockade, submarine warfare or mine warfare.

Republic of Paraguay: Declaration in accordance with Article 90 of Protocol I

On 30 January 1998 the Republic of Paraguay made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90, paragraph 2 (a), of Protocol Additional to

the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

The Republic of Paraguay is the 51st State to recognize the competence of the Fact-Finding Commission.

Lao People's Democratic Republic Declaration in accordance with Article 90 of Protocol I

On 30 January 1998 the Lao People's Democratic Republic made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90, paragraph 2 (a), of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

The Lao People's Democratic Republic is the 52nd State to recognize the competence of the Fact-Finding Commission.

Greece: Declaration in accordance with Article 90 of Protocol I

On 4 February 1998 Greece made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90, paragraph 2 (a), of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

Greece is the 53rd State to recognize the competence of the Fact-Finding Commission.

Articles submitted for publication in the International Review of the Red Cross

The *International Review of the Red Cross* invites readers to submit articles relating to the various activities of the International Red Cross and Red Crescent Movement or to international humanitarian law. These will be considered for publication on the basis of merit and relevance to the topics covered by the *Review*.

Manuscripts may be submitted in *English, French, Spanish, Arabic* or *Russian.*

Texts should be typed, double-spaced, and no longer than 20 pages (or 5,000 words). The word processing software used by the ICRC is AmiPro 3.1. If possible, therefore, documents should be submitted on diskette with the texts in either AmiPro or ASCII.

Footnotes should be numbered superscript in the main text. They should be typed, double-spaced, and grouped at the end of the article.

Bibliographical references should be given in the original language of publication and should include the following details:

(a) for *books*, the author's initials and surname (in that order), book title (in italics), place of publication, publisher and year of publication (in that order), and page number(s) referred to (p. or pp.);

(b) for *articles*, the author's initials and surname, article title (in inverted commas), title of periodical (in italics), volume number, place of publication, date of publication, and page number(s) referred to (p. or pp.).

The *Review* reserves the right to edit all articles before publication.

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The ***International Review of the Red Cross*** is a forum for reflection and comment and serves as a reference work on the mission and guiding principles of the International Red Cross and Red Crescent Movement. It is also a specialized journal in the field of international humanitarian law and other aspects of humanitarian endeavour.

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