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A note from the Editor

Fifty years ago, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. Looking back today, we can see that this was a crucial event in the history of the twentieth century, and indeed a turning point for humanity as a whole. From that time onwards, no one would ever again be able to deny with a clear conscience such simple and fundamental rights as these:

“Everyone has the right to life, liberty and security of person.”¹

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²

“No one shall be subjected to arbitrary arrest, detention or exile.”³

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food [and] medical care (...).”⁴

Far from being mere exhortations, these rules set forth the obligations which States have undertaken to respect. The Preamble to the Declaration further states that:

“(...) Member States have pledged themselves to achieve (...) universal respect for and observance of human rights (...).”⁵

Although we are well aware that actual respect for the “inherent dignity (...) of all members of the human family”⁶ is still no more than

¹ Universal Declaration of Human Rights, Article 3.

² *Ibid.*, Art. 5.

³ *Ibid.*, Art. 9.

⁴ *Ibid.*, Art. 25, para. 1.

⁵ *Ibid.*, Preamble, para. 6.

⁶ *Ibid.*, Preamble, para. 1.

a dream for many people, the Universal Declaration of 1948 defined once and for all the goal to be achieved, and no one would now ever dare challenge the importance of that objective.

The Universal Declaration of Human Rights was drawn up and adopted by the United Nations in New York on 10 December 1948. At that very time, in Geneva the ICRC was putting the finishing touches to the drafts of what would become the four Geneva Conventions for the protection of the victims of war, following their adoption by a diplomatic conference on 12 August 1949. The parallel is striking. Was this a matter of political calculation or pure coincidence? An attempt to bring out the links between the two branches of law or a mere accident of history? In other words, is there some deep symbolism involved in this parallel development?

To commemorate the 50th anniversary of the adoption of the Universal Declaration of Human Rights, this issue of the *Review* will explore various aspects of the connections between the codification and practice of human rights law and international humanitarian law. As well as an original paper on the advent of the Universal Declaration and the Geneva Conventions, a number of contributions show the many clear links between human rights and humanitarian law in international practice — both in terms of the establishment of new international rules and as regards their implementation. We have only to look at the work done by the United Nations and European and American regional organizations for the defence of human rights to see that account is often taken of humanitarian law in the interpretation of obligations stemming from human rights instruments. Similarly, as human rights and humanitarian law both form part of the greater — albeit not always consistent — body of international law, a problem of a humanitarian nature can sometimes be solved by considering the issue from that broader perspective.

It was a deliberate decision to confine the contributions in the present issue to specific situations and to try and provide answers to practical questions relating to the links between international humanitarian law and human rights law. Although none of the articles here considers the broader implications of the coexistence of these two branches within the overarching structure of international law, the *Review* would be happy to pursue the debate on underlying questions of doctrine or matters of a theoretical or philosophical nature.⁷

⁷ A few years ago, the *Review* published an article which also discusses the ICRC's position on the matter: Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *JRRC*, No. 293, March-April 1993, pp. 94-119.

Finally, it should be recalled that the ICRC published the full text of the Universal Declaration of Human Rights in the April 1949 issue of the *Review*, along with two articles commenting on the adoption of the Declaration “as seen from Geneva”. At the time, the ICRC was seeking to fulfil the wish of the UN General Assembly that this crucial instrument should be given the widest possible circulation. Today, the *Review* takes that process one step further.

The Review

Foreword by Judge Abdul G. Koroma

The decision of the *International Review of the Red Cross* to commemorate the 50th anniversary of the Universal Declaration of Human Rights is both understandable and commendable, given the *Review's* mission to promote and strive for observance of international humanitarian law during armed conflicts and the increasing convergence of that law with human rights law — as evidenced by the gradual substitution of the term “international humanitarian law” for the term “the law of war”.

While it is generally recognized that international humanitarian law and human rights norms vary as to their origins and the situations in which they apply (the former during armed conflicts and the latter in peacetime), the two not only share a universal value, namely, that of humanity, but they also have the common objective of protecting and safeguarding individuals in all circumstances.

Since 1948, when the Universal Declaration proclaimed and recognized the inalienable rights of all individuals, as well as their inherent dignity and equality, the United Nations has adopted the following principal legal instruments in the field of human rights:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child.

In the sphere of international humanitarian law, apart from the various United Nations resolutions calling for the protection of human rights

during armed conflicts, the following principal legal instruments have been adopted:

- the Convention on the Prevention and Punishment of the Crime of Genocide;
- the four Geneva Conventions of 1949 for the protection of war victims;
- Protocol I additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts;
- Protocol II additional to the Geneva Conventions, and relating to the protection of victims of non-international armed conflicts.

Both sets of legal instruments could be seen as an expression of the international community's determination to strengthen and protect the rights of the individual both in peacetime and during armed conflicts.

But despite this impressive array of legal instruments, and their convergence, the international community has continued to witness, even most recently, many instances of the brutal and large-scale violation of human rights and humanitarian law in various parts of the world. It is because of such abuses that there have been renewed and urgent calls not only for the observance and enforcement of these instruments, but also for the establishment of institutions that would ensure their implementation. This has led to the setting up of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which have the power to prosecute those responsible for serious human rights abuses and violations of international humanitarian law, including genocide.

For its part the International Court of Justice, which is enjoined to apply international law when making its rulings, has, in appropriate cases, applied both human rights law and international humanitarian law. Already in 1949, in the *Corfu Channel* case, the Court had referred to "elementary considerations of humanity" (*ICJ Reports*, 1949, p. 22) which are to be observed by the parties to a conflict. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, the Court pointed out that "the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of fundamental principles of humanitarian law" (*ICJ Reports*, 1986, p. 113). Accordingly, the parties must respect those principles independently of their obligations under the Conventions.

Most recently, in considering the request for an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered the effects of the use of such weapons in the light of human rights law and international humanitarian law. In that case, the Court took the view that the most fundamental problem posed by nuclear weapons related to the protection of human life on the planet, in other words the right to life. It referred to Article 6 of the International Covenant on Civil and Political Rights, which provides that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The implication is that to the extent that the effects of nuclear weapons cannot discriminate between civilians and combatants, human life will be taken arbitrarily. This would seem to be a case in which human rights law and humanitarian law are in convergence.

If the objectives set out in the Universal Declaration some 50 years ago have not been achieved, and if its principles have not been upheld, it cannot be for want of specific legal instruments or institutions to implement and enforce them. The answer lies elsewhere, namely, in our unwillingness or inability to respect the obligations we have undertaken.

The articles contained in this issue of the *Review* will show how the rules and principles of international humanitarian law and human rights law have influenced and interacted with each other in such a way as to further their common goal — the protection of the individual. We are duly grateful to the *Review* and the authors for providing a forum for elucidating these points and showing why it is so important that each of the two bodies of law should retain its autonomy.

**Abdul G. Koroma, Judge
International Court of Justice
The Hague**

Foreword by Daniel Thürer

Fifty years ago ... on 10 December 1948, the General Assembly of the United Nations solemnly adopted the Universal Declaration of Human Rights. This event was a turning point in the development of international law. The individual human being, whose rights had been established over the long evolution of constitutional history, was now recognized as a central point of reference within the international legal system.

Thirty years ago ... at the International Conference on Human Rights held in Teheran in 1968 to commemorate the Universal Declaration, a resolution was adopted on “Human rights in armed conflict”. By shedding light on the rules and principles of international humanitarian law, the United Nations clearly revealed a line of thought much older than its own human rights law. As a matter of fact, Jean Pictet rightly observed that as long ago as 1864, with the adoption of the first Geneva or “Red Cross” Convention, an era which gave primacy to the individual and to the principles of humanity had already begun.

Today... we are witnessing an increasing tendency for the two traditions – human rights law and the law of armed conflict – to converge:

- in most modern armed conflicts both sets of rules are applicable, sometimes in a complementary way, but more usually in parallel;
- there is a growing understanding that international humanitarian law is to be interpreted in the light of human rights law, and vice versa;
- a general awareness is emerging among international lawyers that the two systems of rules are mutually supportive;
- although international law has established different mechanisms for the implementation of international humanitarian law and for that of human rights law, more and more often the two sets of rules are applied or referred to interchangeably.

Thus we are on the threshold of fascinating new developments: international human rights law and humanitarian law, while remaining distinct, are in the process of drawing closer together. Undoubtedly, therefore, the theme of this issue of the *International Review of the Red Cross* is as apt as it is timely.

Daniel Thürer
Professor, University of Zurich
Member of the ICRC

The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions

by Robert Kolb

Today there can no longer be any doubt: international humanitarian law and international human rights law are near relations. This oft-repeated observation must now be accepted by all. Many believe that the close relationship between these two areas existed and was perceived “from the outset”. That is not at all the case. Formerly assigned to separate legal categories, it was only under the persistent scrutiny of modern analysts that they revealed the common attributes which would seem to promise many fruitful exchanges in the future.¹ Let us try to clarify the situation.

There are two kinds of reasons for the almost total independence of international humanitarian law from human rights law immediately after the Second World War.² The first relate to the genesis and development

Robert Kolb holds a doctorate in international relations (international law) from the Graduate Institute of International Studies, Geneva.

Original: French

¹ On this point, see “The relationship between international humanitarian law and human rights law: Bibliography”, p. 572.

² For an overall view of the development of the relationship between the two branches of international law, see A.H. Robertson, “Humanitarian law and human rights”, in C. Swinarski (éd.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge/Studies and essays on international humanitarian law and Red Cross principles, en l'honneur de/in honour of Jean Pictet*, CICR/Martinus Nijhoff, Genève/La Haye, 1984, p. 793; D. Schindler, “The International Committee of the Red Cross and human rights”, *IRRC*, No. 208, January-February 1979, p. 3.

of the branches concerned.³ The law of war has its roots in Antiquity. It evolved mainly during wars between European States, and became progressively consolidated from the Middle Ages. This is one of the oldest areas of public international law; it occupies a distinguished place in the writings of the classical authors of this branch. Its international aspect is, also emphasized by the contributions of Christianity and the rules of chivalry and of *jus armorum*.

Human rights are concerned with the organization of State power vis-à-vis the individual. They are the product of the theories of the Age of Enlightenment and found their natural expression in domestic constitutional law. In regard to England, mention may be made of the 1628 *Petition of Rights*, the 1679 *Habeas Corpus Act* and the 1689 *Bill of Rights*; for the United States of America, the 1776 *Virginia Bill of Rights*; for France, the 1789 *Declaration of the Rights of Man and of the Citizen*. It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of public international law. The end of the 1940s was when human rights law was first placed beside what was still called the law of war. The question of their mutual relationship within the body of international law can be considered only from that moment. But human rights law was still too young and undeveloped to be the subject of analyses, which require a better-established sphere of application and a more advanced stage of technical development.

The other reasons are institutional in nature. The most important one relates to the fact that United Nations bodies decided to exclude all discussion of the law of war from their work, because they believed that by considering that branch of law they might undermine the force of *jus contra bellum*, as proclaimed in the Charter, and would shake confidence in the ability of the world body to maintain peace.⁴ In 1949, for example, the United Nations International Law Commission decided not to include the law of war among the subjects it would consider for codification.⁵ This

³ See for example D. Schindler, *ibid.*, pp. 4-7.

⁴ A. H. Robertson, *op. cit.* (note 2), p. 794; D. Schindler, *op. cit.* (note 2), p. 7; A. Migliazza, "L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", *RCADI*, Vol. 137, 1972-III, pp. 164-165.

⁵ *Yearbook of the International Law Commission*, 1949, p. 281, par. 18: "It was considered that if the Commission, at the very beginning of its work, were to undertake this study [on the laws of war], public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for

attitude can be understood only in a post-war context; it had already existed in the 1930s.⁶ In addition to this there was a certain dichotomy between the ICRC and the United Nations, which was only partly due to the latter's elimination of the law of war from its discussions. A more profound reason was the ICRC's determination to preserve its independence, a determination which was strengthened by the political nature of the United Nations.⁷ Human rights, which were seen as being within the purview of the United Nations and bodies specifically set up to promote and develop those rights, were thus distanced from the concerns of the ICRC, which continued to work solely in the area of the law of war. These institutional factors affected the development of the rules: the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression. The result was a clear separation of the two branches.

A perusal of the preparatory work for the major instruments in these areas, which were adopted almost simultaneously at the end of the 1940s, illustrates the above. The Universal Declaration of Human Rights of 1948 completely bypasses the question of respect for human rights in armed

maintaining peace". On this point, see the more apt comments of members of the International Law Institute, in 1957, on the reconsideration of the principles of the law of war, *Annuaire de l'Institut de droit international*, Vol. 47-I, 1957, p. 323 ff., and the opinion of the rapporteur J.-P. A. François (*ibid.*, p. 367 ff.). See also J. Kunz, "The chaotic status of the laws of war and the urgent necessity for their revision", *American Journal of International Law*, Vol. 45, 1951, p. 37 ff.; J. Kunz, "The laws of war", *ibid.*, Vol. 50, 1956, p. 313 ff.; H. Lauterpacht, "The revision of the laws of war", *British Yearbook of International Law*, Vol. 29, 1952, p. 360 ff.

⁶ See for example the remarks made by Sokal (Poland) and Politis (Greece) in the Disarmament Commission: League of Nations, *Preparatory Committee for the Disarmament Conference*, 8th Series, 1929, pp. 87 and 91; *contra*: Rutgers (Netherlands), *ibid.*, p. 90. See also the characteristic comment of K. Strupp, *Eléments du droit international public universel, européen et américain*, Vol. II, Paris, 1930, p. 503, note 1, whereby *ius in bello* is subordinated to the preventive law of war. A.P. Sereni, *Diritto internazionale*, Vol. IV, Milan, 1965, p. 1823 ff., believes this to be an "illusion". In general, see J. Kunz, "Plus de lois de la guerre?", *Revue générale de droit international public*, Vol. 41, 1934, p. 22 ff. and p. 40 ff.

⁷ See the amendment proposed by Woolton (United Kingdom) and adopted by the 17th International Conference of the Red Cross (Stockholm, 1948). It urged the ICRC, "in view of the non-political character of the constituent bodies of the International Red Cross, to exercise the greatest care in regulating [its] relationship with intergovernmental, governmental or non-governmental organizations". *Seventeenth International Red Cross Conference, Report*, Stockholm, 1948, p. 48.

conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.⁸

The 1948 Universal Declaration of Human Rights

During the drafting of the Universal Declaration of 1948,⁹ the question of the impact of war on human rights was touched on only in exceptional cases. Paragraph 2 of the Preamble describes respect for human rights as a condition for the maintenance of peace.¹⁰ This is *jus contra bellum*. There was a shift towards *jus in bello* when a few delegates indicated in passing, in a very secondary way, that the rights envisaged by the Declaration presuppose a state of peace. In the long debates in the Third Committee of the United Nations, for example, Jiménez de Aréchaga expressed the view that human rights have to “govern, in times of peace, an international community based on the principles of the United Nations”.¹¹ A similar comment was made by Campos Ortiz, the Mexican delegate, in the plenary meetings of the Third Session of the United Nations General Assembly, when he used the expression “in a peaceful world”.¹² Only the delegate of Lebanon, Mr Azkoul, explicitly went further. Speaking on Article 26 of the draft,¹³ he said that fundamental human rights, as set out in the Declaration, should also be guaranteed in time of war.¹⁴ The absence of any discussion of the problem of war can be explained by the general philosophy which prevailed within the United Nations at the time. There

⁸ D. Schindler, *op. cit.* (note 2), p. 7. See also J. G. Lossier, “The Red Cross and the International (sic) Declaration of Human Rights”, *IRRC*, No. 5, May 1949, p. 184-189.

⁹ For a synoptic table of the stages in the preparatory work, see A. Eide *et al.* (eds), *The Universal Declaration of Human Rights: A commentary*, Oslo, 1992, p. 3. On the debates in the Third Committee, see doc. A/C.43/SR.88-116, 119-170, 174-178. On the older literature: Economic and Social Council, *Bibliography on the Protection of Human Rights*, E/CN.4/540 (1951), pp. 36-40.

¹⁰ See the *Report of the Drafting Committee to the Commission on Human Rights, suggestions submitted by the representative of France* (R. Cassin), doc. E/CN.4/21, pp. 48 and 68; see also the comment of Mexico, doc. E/CN.4/85, p. 8.

¹¹ Doc. A/C.3/SR.116, p. 268.

¹² “...in a peaceful world, it was essential to ensure respect for human rights.” *UN General Assembly, Plenary sessions, Third session, 181st meeting*, p. 886.

¹³ Draft Article 26 read as follows: “Everyone is entitled to a good social and international order in which the rights and freedoms set out in this Declaration can be fully realized”. See *Economic and Social Council, Third Year, Seventh Session, Supplement No. 2*, p. 11.

¹⁴ Doc. A/C.3/SR.152, p. 639.

seemed to be a tacit but nevertheless general consensus that the Declaration was intended for times of peace, of which the United Nations was the guarantor.

In addition, there was a more technical reason: the draft codification of human rights law covered two branches. On the one hand, the aim was to proclaim a solemn and succinct declaration modelled on the great declarations of national rights. As a proclamation of the United Nations General Assembly, the text would have been devoid of binding legal force. On the other hand, what was needed was a binding instrument, a much more detailed text taking up all the rights proclaimed previously, giving them full weight and expressing them in the form of a positive rule of law. That was a draft international covenant on human rights.¹⁵ It was often emphasized during the preparatory work that the Declaration was not a legislative text, that it was not the Covenant, and that consequently, if it was to preserve its force and its own specific role, it had to be brief and concise and contain no ponderous and unnecessary elaboration.¹⁶

The question of the scope of application of a codification of human rights was subsequently raised only in the context of the Covenant, which was intended to be a truly legal (in the strict sense) regulation of the issue. Article 4, paragraph 1, of the draft covenant related to this problem, stating that “in time of war or other national emergency, a state may take measures derogating from its obligations under Article 2 above”; paragraph 2 stipulated a State’s duty to inform the Secretary-General of the United Nations accordingly.¹⁷ The drafting of this provision was not taken further. Shortly thereafter, work on the draft Covenant was interrupted.

The 1949 Geneva Conventions

Similarly, in the preparatory work for the 1949 Geneva Conventions, references to human rights were few and far between. It was principally outside the operational provisions that they were mentioned, mostly in passing and in vague terms, or as a never superfluous profession of faith.

¹⁵ R. Cassin, “La déclaration universelle et la mise en œuvre des droits de l’homme”, *RCADI*, Vol. 79, 1951-II, p. 297 ff. The Covenant on human rights was finally adopted in 1966.

¹⁶ See, for example, the observations of Australia (doc. E/CN.4/85, p. 5) and the United States (*ibid.*, p. 6).

¹⁷ Report of the Drafting Committee, doc. E/CN.4/21, p. 31; also doc. E/CN.4/95, p. 17, E/CN.4/85, p. 59 ff., E/600, Annex B, p. 32 ff. and E/800, p. 17.

Although the delegates attending the two conferences were generally not the same,¹⁸ some delegates—for example the Australian ambassador Hodgson and the Mexican plenipotentiary de Alba—did take part in both. It is therefore not surprising to find in their statements references to the work being carried out under the auspices of the United Nations. The highly contentious issue of the preamble to the Conventions gave rise to many references to human rights. The representative of the Holy See, Msgr Compte, wanted the preamble to contain an appeal to the “divine principle” on which the rights and duties of man were based,¹⁹ or a call for “respect for the human person and for human dignity”.²⁰ We are not far here from the more general formulations used in the same context, such as “respect for suffering humanity”.²¹ In the end it was proposed that a reference to “universal human law”²² be included in the preamble. The borrowing from the 1948 Declaration is particularly evident here. Several delegates also emphasized that the Fourth Geneva Convention, on the protection of civilians, should be taken together with the Universal Declaration, and that the establishment of such a link in the preamble would be welcome.²³ The Australian delegate, Hodgson, said it would be sufficient to refer to the preamble of the Declaration, without drafting a new one for the Convention on prisoners of war.²⁴ He made similar comments regarding the preamble for the Convention on civilians, adding dryly that the Conference “was not called upon to re-write” the 1948 Declaration.²⁵

Quite naturally, Article 3 common to the four Conventions also gave rise to references to human rights. The Special Committee nominated by Committee II of the Conference had proposed, for the Convention on

¹⁸ R. Quentin-Baxter, “Human rights and humanitarian law—confluence or conflict?”, *Australian Yearbook of International Law*, Vol. 9, 1985, p. 101.

¹⁹ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, p. 165.

²⁰ *Ibid.*, p. 323.

²¹ Jean Pictet (ICRC), *ibid.*, p. 166.

²² *Ibid.*, pp. 813 and 691 ff.

²³ De Alba (Mexico), *ibid.*, p. 692; de Geouffre de la Pradelle (Monaco), *ibid.*, p. 693; Cohen-Salvador (France), *ibid.*, p. 696; Nassif (Lebanon), *ibid.*, p. 695. See also the comments of the rapporteur, *ibid.*, p. 777 ff.

²⁴ *Ibid.*, p. 393.

²⁵ *Ibid.*, p. 780.

prisoners of war, a third paragraph containing a kind of Martens clause.²⁶ It had been said in the Special Committee that even when a person did not benefit under the provision of the Convention, that person would nevertheless remain “safeguarded by the principles of the rights of man as derived from the rules established among civilized nations ...”.²⁷ In the view of the Danish delegate, Cohn, Article 3 should not be interpreted in such a way as to deprive individuals of any rights they may have acquired from other sources, in particular human rights.²⁸

Another context in which human rights were mentioned was the protection of the civilian population in territory occupied by the enemy. Mr de Alba said that wording should be adopted to the effect that the Occupying Power could modify the legislation of an occupied territory only if that legislation violated the principles of the Universal Declaration.²⁹ That would constitute a narrow exception to a guaranteed legislative status quo in such territories. Elsewhere, the Mexican delegate made mention in passing of the “fundamental rights of man”.³⁰

Incontestably the most solemn reference to human rights came from the President of the Conference, Max Petitpierre, during the signing ceremony, when he spoke of the parallelism between and the common ideal of the Geneva Conventions and the Universal Declaration. He noted that the text of the Conventions incorporated and expressed in concrete terms some of the rights proclaimed by the Declaration. “The day after tomorrow, we shall celebrate the anniversary of the Universal Declaration of the Rights of Man which was adopted by the General Assembly of the United Nations on December the 10th, 1948. It is, we think, interesting

²⁶ See the preamble to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907.

²⁷ *Final Record* (*supra*, note 19), p. 466. The special nature of the Martens clause stems from the fact that it mentions the rights of man rather than the principles of international law. Elsewhere this reference to human rights was replaced by the term “humanitarian principles” (Devijver, *ibid.*, p. 480; see also the Report of Committee II, *ibid.*, p. 562).

²⁸ “Nothing in the present Article shall be interpreted in such a way as to deprive persons not covered by the categories named in the said Article of their human rights and in particular of their right to self-defence against illegal acts as it is contained in their national legislation in force before the outbreak of hostilities or occupation”, *ibid.*, p. 480 (Danish amendment). On this subject see the critical comments of Gardner (United Kingdom), *ibid.*, p. 408, and Cohn’s reply, *Final Record* (*supra*, note 19), Vol. II, Section B, p. 267 ff.

²⁹ *Ibid.*, Vol. II, Section A, p. 671.

³⁰ *Ibid.*, Vol. II, Section B, p. 333.

to compare that Declaration with the Geneva Conventions. Our texts are based on certain of the fundamental rights proclaimed in it—respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights find their legal expression in the contractual engagements which your Governments have today agreed to undertake. The Universal Declaration of the Rights of Man and the Geneva Conventions are both derived from one and the same ideal ...”³¹

The implications of those statements should not be overestimated; they were very sporadic and rarely placed in an operational context. The scope of the Conventions remains dependent on the objective concept of the protected person, defined according to his status in relation to the events of war (sick, wounded, prisoner of war, civilian), with very little room for the idea of attributing supreme subjective rights, without any distinction, deriving solely from the quality of being human.³² On the other hand, even in very likely contexts, such as the protection to be afforded to those who have violated the law of war and the presumption of innocence, human rights are not mentioned at all.³³

It may be concluded from the above that, although it would be wrong to say that total mutual ignorance prevailed during the drafting of these texts, nor would it be right to assert that any real reciprocal influence affected the choices made or the wording selected by the negotiators. What we see is that after saluting the flag of principles, each camp tackled its subject-matter on the basis of its own rules and methods. A technical and cultural gap separated these branches of the law which the vicissitudes of two very different paths had happened to bring relatively close to each other within the body of international law.

Legal literature

At the time of the adoption of the Geneva Conventions and the Universal Declaration of Human Rights, literature relating to the law of war sometimes made reference to human rights. However, it never failed to stress the continuing cleavage between the two branches, although the

³¹ *Ibid.*, p. 536.

³² *Ibid.*, Vol. II, Section A, p. 813 ff.

³³ *Ibid.*, p. 321.

similarity of their aims gives the impression of being closely related. Such is the case for the rules contained in the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. Commentaries, including the most recent, place these rules close to human rights because they concern the protection of individuals who do not have any military status.³⁴ This also applies to Article 3 common to the four Conventions, which lays down certain standards of treatment in non-international armed conflicts; these rules resemble human rights guarantees.³⁵

In 1949 a British author considered that common Article 3 should be understood as imposing “such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights”.³⁶ He concluded by stating that the whole of the Fourth Convention is in harmony with the fundamental human rights proclaimed by the Universal Declaration of 1948.³⁷

Various discreet references to human rights appear in the commentaries on the four Geneva Conventions published under the editorship of Jean Pictet between 1952 and 1960.³⁸ They relate mostly to areas in which the protection afforded by the Conventions is similar to safeguards that

³⁴ See G.I.A.D. Draper, “The relationship between the human rights regime and the law of armed conflict”, *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 205.

³⁵ See, for example, R. Quentin Baxter, *op. cit.* (note 18), p. 101; S. Junod, “Human Rights and Protocol II”, *IRRC*, No. 236, September-October 1983, p. 246; D. Schindler, *op. cit.* (note 2), p. 8; L. Doswald-Beck/S. Vité, “International humanitarian law and human rights law”, *IRRC*, No. 293, March-April 1993, p. 119 ff.; W. A. Solf, “Human rights in armed conflict: Some observations on the relationship of human rights law to the law of armed conflict”, in H. H. Han (ed), *World in Transition: Challenges to Human Rights, Development and World Order*, Washington, 1979, p. 43.—Even authors hostile to any convergence of the traditional law of war and human rights law admit that Article 3 common to the four Geneva Conventions constitutes “the sole meeting point” between the two branches of law: H. Meyrowitz, “Le droit de la guerre et les droits de l’homme”, *Revue du droit public et de la science politique en France et à l’étranger*, Vol. 88, 1972, p. 1104.

³⁶ J. A. C. Gutteridge, “The Geneva Conventions of 1949”, *British Yearbook of International Law*, Vol. 26, 1949, p. 300.

³⁷ *Ibid.*, p. 325.

³⁸ Commentary published under the general editorship of Jean S. Pictet: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, ICRC, Geneva, 1952; *Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)*, ICRC, Geneva, 1960; *Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, ICRC, Geneva, 1960.

the law places in the category of human rights or public freedoms. Examples are the inalienability of rights,³⁹ the treatment of protected persons in general,⁴⁰ the prohibition of torture and corporal punishment,⁴¹ penal procedure,⁴² civil capacity⁴³ and complaints and petitions from internees.⁴⁴

Obviously, the most frequent references to human rights are to be found in the Fourth Geneva Convention relating to civilians. In the commentary on Article 79,⁴⁵ however, the emphasis is placed very firmly on the essential difference between the two branches of law: it is stated that the Convention, true to the traditional conception of international law, does not apply to the relations of a State with its own nationals.⁴⁶ Its sole objectives are to govern relations between a belligerent and enemy civilians who, as a result of the occupation of the territory of the State of which they are nationals, are under the control of the adverse power. The international aspect, which is inherent in the traditional notion of war, therefore continued to predominate. Protection was to be accorded only in a situation of belligerence. The commentator concludes that a doctrine which “is today only beginning to take shape”—human rights—could one day broaden the scope of international humanitarian law and afford protection for all, irrespective of nationality.⁴⁷

Final remark

This was an astute reading of the course of future developments, in view of the fervent efforts made to bring the two branches closer to each

³⁹ Article 7 and *Commentary on the First Geneva Convention*, p. 82; Article 7 and *Commentary on the Third Geneva Convention*, p. 91; Article 8 and *Commentary on the Fourth Geneva Convention*, p. 78.

⁴⁰ Article 27 and *Commentary on the Fourth Geneva Convention*, p. 200.

⁴¹ Article 32 and *Commentary on the Fourth Geneva Convention*, p. 223.

⁴² Article 99 and *Commentary on the Third Convention*, p. 470; *Article 71 and Commentary on the Fourth Convention*, p. 353 with, in note 1, a reference to the Universal Declaration.

⁴³ Article 80 and *Commentary on the Fourth Geneva Convention*, p. 374.

⁴⁴ Article 101 and *Commentary on the Fourth Geneva Convention*, p. 436.

⁴⁵ Articles 79 ff. of the Fourth Geneva Convention deal with the internment of civilians.

⁴⁶ *Commentary on the Fourth Geneva Convention*, p. 372 ff.

⁴⁷ *Ibid.*, p. 373.

other from the end of the 1960s. From an historical standpoint, it must be emphasized that this common front hardly existed before the adoption of Resolution XXIII by the International Conference on Human Rights (Teheran, 1968), entitled *Respect for human rights in armed conflict*. It certainly does not date back to the period reviewed in this article.

Women, human rights and international humanitarian law

by **Judith Gardam**

The development in the last 50 years of the principles that comprise human rights law has had a major impact on international humanitarian law and indeed on international law generally.¹ In more recent years, the movement for recognition of the equal rights of women has been exerting its own influence on human rights law and to some effect.² In 1979, for example, the international community adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which 155 States are now party. Consideration is currently being given to the adoption of an Optional Protocol that will allow for individual and group complaints to be brought before the CEDAW Committee. Governmental and non-governmental organizations have increasingly focused on women's human rights. As a result, a wide range of studies, reports and recommendations on various aspects of the issue is available. The topic of women is thus firmly established on the international human rights agenda.

So much human suffering in today's world occurs, however, in situations of armed conflict, where to a large extent human rights are in

Dr Judith G. Gardam teaches international law, including international humanitarian law, at the Law School, University of Adelaide, Australia.

¹ See, for example, A. H. Robertson, "Humanitarian law and human rights", in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, p. 793.

² For an overview of the achievements of the last decade, see C. Chinkin, "Feminist interventions in international law: Reflections on the past and strategies for the future", *Adelaide Law Review*, Vol. 19, 1997, pp. 15-18.

abeyance, leaving individuals to rely solely on the protection offered by international humanitarian law.³ And women are major victims in these situations.⁴ There is now evidence, moreover, that women experience conflict in a different way to men,⁵ a phenomenon that is confirmed by those working in the field. This distinctive experience, although its effects differ widely across cultures depending upon the role of women in each society, is related to the particular vulnerability of this group when armed conflict breaks out. War exacerbates the inequalities that exist in different forms and to varying degrees in all societies, and women make up 70 per cent of the world's population living in poverty.⁶ They are, moreover, generally disadvantaged in terms of education and are considerably less mobile because of their traditional role in caring for others.⁷ Perhaps most significantly, women are generally excluded from access to power structures and participation in decision-making with regard to armed conflict. They are therefore unable to draw attention to the particular difficulties they experience in conflict situations and, moreover, are powerless to recommend any preventive action.

Against that background, the present article considers the extent to which the focus on women's human rights and the advances made in the protection of women under human rights law has had an impact on international humanitarian law. As will become apparent, this impact can be seen primarily in developments regarding the criminalization and punishment of sexual violence against women in armed conflicts. Broader consideration has yet to be given to the question of women, armed conflict and humanitarian law.

³ For a discussion of the situation in relation to human rights in times of armed conflict, see Y. Dinstein, "Human rights in armed conflict: International humanitarian law", in T. Meron (ed.), *Human rights in international law: Legal and policy issues*, Clarendon Press, Oxford, p. 345.

⁴ See the statement by Renée Guisan, head of the ICRC delegation to the Fourth World Conference on Women, Beijing, and Article 136 of the Beijing Platform for Action in *Fourth World Conference on Women, Action for Equality, Development and Peace, Beijing Declaration and Platform for Action*, UN Doc. A/Conf. 177/20 (1995) (hereafter Beijing Platform for Action).

⁵ *Ibid.* and see Harvard Study Team, *Health and welfare in Iraq after the Gulf Crisis*, Chapter 9, 1991.

⁶ The feminization of poverty was a key area of concern at the Beijing Conference, see Beijing Platform for Action, paras. 47 and 48, *supra* (note 4).

⁷ See ICRC (ed.), *Women and war*, 1995.

The provisions of the law of armed conflict relating to women at the time of the adoption of the Universal Declaration of Human Rights

There were occasional references to the protection of women in some of the earliest documents of the law of armed conflict. For example, Article XLVII of the Lieber Code punished those responsible for the rape of inhabitants of a hostile country.⁸ Until recently, however, sexual violence against women was never taken seriously. Rape was not listed as a war crime at Nuremberg, despite the high incidence of sexual violence during the Second World War. Indictments before the Tokyo Tribunal did contain charges of rape and some individuals were convicted for their failure to ensure that subordinates complied with the law. Moreover, the occupying powers included rape as a war crime in the charters of their national courts set up to try offences committed in Germany, although no prosecutions were ever undertaken on this basis.⁹ Generally, however, rape and sexual violence against women were regarded as an inevitable aspect of armed conflict and seldom if ever prosecuted.¹⁰

The four 1949 Geneva Conventions,¹¹ which at the time of their adoption were the major instruments protecting the victims of armed conflict (and with their two 1977 Protocols¹² remain so today), contain some 19 provisions that are specifically relevant to women. The scope of

⁸ See, for example, Article XLIV of the Lieber Code: *Instructions for the government of armies of the United States in the field, General Orders No. 100, April 24, 1863*, reprinted in L. Friedman, *The laws of war: A documentary history*, 1972, p. 158.

⁹ See Control Council Law No. 10 of 1945, *Control Council for Germany, Official Gazette*, 31 January 1946, reprinted in Friedman, *ibid.* p. 908.

¹⁰ See generally C. Chinkin, "Rape and sexual abuse of women in international law", *European Journal of International Law*, 1994, p. 326.

¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter referred to as the Fourth Geneva Convention), of 12 August 1949. For a description of the system of international humanitarian law in relation to women generally, see M. Tabory, "The status of women in humanitarian law", in Yoram Dinstein (ed.), *International law at a time of perplexity*, 1989, p. 941; and F. Krill, "The protection of women in international humanitarian law", *IRRC*, No. 249, November-December 1985, p. 337.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

these rules is somewhat limited and many of them are in fact designed to protect children.¹³ Overall, the aim of the Conventions is to provide special protection for pregnant women, nursing mothers and mothers in general and to address the vulnerability of women to sexual violence in times of armed conflict.

Significantly, Article 27(2) of the Fourth Geneva Convention contains the first provision specifically dealing with rape and requires that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”. Although this article constitutes a long overdue recognition that rape is unacceptable in times of armed conflict, the extent and gravity of the practice are not acknowledged since the provision falls outside the system of grave breaches of international humanitarian law (under this system States are obliged to seek out and punish persons responsible for failing to observe certain designated provisions of the Conventions). Article 27(2) has also been criticized on the grounds that, like many of the provisions relating to women, it categorizes rape as an attack on the victim’s honour and thus does not reflect the seriousness of the offence of sexual violence.¹⁴ Apart from the protection afforded under such articles, which is clearly valuable as far as it goes, any indication that the difficulties women experience in armed conflicts might be distinctive and encompass wider issues than their roles as mothers and victims of sexual violence is not discernible in the provisions of the Geneva Conventions.

To what extent were the provisions of the 1977 Protocols relating to women influenced by the human rights movement?

The movement to bring about further improvements in international humanitarian law that culminated in the adoption by States of the 1977 Protocols owed a great deal to developments in the area of human rights. Gerald Draper wrote that progress in the law of armed conflict “had come perilously close to stagnation before the impact of the movement for a regime of human rights was brought to bear”.¹⁵ As early as 1956, the ICRC had completed a set of Draft Rules for the limitation of dangers incurred

¹³ See Articles 50 and 132 of the Fourth Geneva Convention.

¹⁴ See J. Gardam, “Women and the law of armed conflict”, *International and Comparative Law Quarterly*, Vol. 46, 1997, p. 74.

¹⁵ G. I. A. D. Draper, “Human rights and the law of war”, *Virginia Journal of International Law*, Vol. 12, 1972, p. 336.

by the civilian population in time of war. No action was taken on these rules. The question of further revision of the law of armed conflict was shelved by the international community until the work on human rights in peacetime undertaken by the United Nations Commission on Human Rights and the UN General Assembly began to expand logically into concern for human rights in armed conflict. The International Conference on Human Rights held in Tehran in 1968 can be seen as a watershed in this relationship.¹⁶ The final outcome of these initiatives was the adoption of the two 1977 Protocols, which have a distinct human rights flavour. The Protocols merge the respective principles of the so-called law of The Hague and law of Geneva and focus on the protection of civilians.¹⁷

What is the approach of the Protocols to women victims of armed conflict? Does the emphasis on protection that underpinned the negotiations leading up to the adoption of these instruments and is reflected in their final text extend to a recognition of the distinctive difficulties women experience in times of armed conflict?

Overall, the approach to women remains unchanged in the provisions of the Protocols. The focus continues to be on protection for pregnant women and mothers. In the context of sexual violence, Article 76 of Protocol I contains the important comprehensive provision specifically protecting women against rape, although this practice is still not designated as a grave breach. There is no recognition, either in the *travaux préparatoires* or in the provisions themselves, of the other distinctive problems women face in armed conflicts.

Women and human rights

It would be misleading to represent the existing body of human rights law as a satisfactory regime from the perspective of women. Commentators have convincingly demonstrated the limitations of this law, which does not adequately take into account the reality of women's experience of the world.¹⁸ However, it is in the context of human rights law rather

¹⁶ See Resolution XXIII, "Human rights in armed conflict", adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

¹⁷ See generally, J. G. Gardam, *Non-combatant immunity as a norm of international humanitarian law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993.

¹⁸ See, for example, C. Bunch, "Women's rights as human rights: Towards a revision of human rights", *Human Rights Quarterly*, Vol. 12, 1990, p. 486; and H. Charlesworth, "What are women's human rights?", in R. Cook (eds), *Human rights of women: National and international perspectives*, 1994, p. 58.

than humanitarian law that more progress has been made in recognizing and attempting to meet the as yet unaddressed needs of women.¹⁹

This attention to women's human rights has had substantial implications for international humanitarian law. Indeed, the fact that violence against women and strategies to contain it have been the focus of much of the work of human rights agencies concerned with this group has led to a consideration of the issue in connection with armed conflicts, where so much of the violence against women occurs. What have been some of the results of this work?

The 1993 Vienna Declaration and Programme of Action, adopted by the United Nations World Conference on Human Rights, confirmed that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law" and that they require a "particularly effective response".²⁰ The Programme of Action also stressed that "the equal status of women and the human rights of women" should be "integrated into the mainstream of United Nations system-wide activity" and "form an integral part of United Nations human rights activities."²¹

This growing movement to address the problem saw the adoption by the General Assembly in December 1993 of the Declaration on the Elimination of Violence Against Women. The Declaration expressly recognizes that women in situations of armed conflict are especially vulnerable to violence.²²

Another important development in the context of women and human rights during armed conflicts has been the appointment of Special Rapporteurs with mandates covering certain aspects of women's experience of armed conflict. In 1994 the United Nations Commission on Human Rights appointed Radhika Coomaraswamy as the Special Rapporteur on

¹⁹ See Chinkin, *supra* (note 2).

²⁰ See Article 38 of the *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (Part 1), 13 October 1993.

²¹ For a description of what amounts to "mainstreaming", see UNHCR, *Policy on refugee women*, and UNHCR, *Guidelines on the protection of refugee women*, 1991, pp. 5-7. For an account of the initiatives taken to achieve this end, see generally A. Gallagher, "Ending the marginalization: Strategies for incorporating women into the United Nations human rights system", *Human Rights Quarterly*, Vol. 19, 1997, p. 283.

²² *Declaration on the Elimination of Violence against Women*, UN GA/Res/48/104, 20 December 1993, preamble, para. 7 and Art. 2.

violence against women, with a mandate covering situations of armed conflict. In January 1998 the Special Rapporteur submitted her report on the subject, in which she recommended, in the context of international wars, that the Geneva Conventions be re-examined and re-evaluated so as to “incorporate developing norms against women during armed conflict”.²³ Additionally, in 1995 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Linda Chavez as Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict.²⁴

The Fourth UN World Conference on Women, held in Beijing in 1995, recognized the seriousness of armed conflict and its impact on the lives of women. The Beijing Declaration referred to the determination of the participating States to “ensure respect for international law, including humanitarian law, in order to protect women and girls in particular”. The Conference’s Platform for Action identified women and armed conflict as one of the twelve critical areas of concern to be addressed by Member States, the international community and civil society. A remedial strategy identified in the Platform was to “increase the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign domination”.

The process of identifying women’s particular difficulties and demonstrating the failure of the law to acknowledge them is thus considerably more advanced within human rights bodies than within organizations focusing solely on armed conflict. Of course action plans, recommendations and proposals need to be implemented if they are to be of lasting value. Progress is slow and at times disheartening.²⁵ There are, however, positive signs. Of particular significance in this context is the very effective work at the grass roots level of the UN High Commissioner for Refugees in relation to refugee women.²⁶

²³ See R. Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/1998/54.

²⁴ See *Preliminary Report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict*, UN Doc. E/CN.4/Sub.2/1996/26, 16 July 1996.

²⁵ See Chinkin, *supra* (note 2).

²⁶ See UNHCR, *Policy on refugee women, supra* (note 21) and UNHCR, *Sexual violence against refugees: Guidelines on prevention and response*, 1995.

All these efforts, whilst groundbreaking in nature, have focused almost exclusively on sexual violence.²⁷ The broader context of the problem has been largely ignored. However, an exception to this limited view is evident, for example, in the work of the Economic and Social Council, particularly in relation to Palestinian women and children in occupied territories.²⁸

The impact on international humanitarian law of developments in women's human rights

There is no doubt that the work of human rights organizations has had a considerable impact on the approach taken to the protection of women in times of armed conflict. A change of emphasis over recent years can be discerned in the work of the ICRC in this context. The protection of women victims of conflict has always been part of the ICRC's mandate. Traditionally, however, women have been subsumed under the general category of civilians or under the separate category of "women and children". This has occurred despite the fact that the needs of these various categories of victims are not identical.

Over the years, the ICRC has been active in attempts to mitigate the horrors of conflict for women. For example, efforts were made during the Second World War to ensure the lawful treatment of women prisoners of war.²⁹ In the post-war period as well, from time to time the ICRC made efforts to ensure that women were treated humanely in various conflict situations.³⁰ However, in the context of sexual violence — the most obvious way in which women experience conflict — the silence was deafening, despite the appalling reality of this practice in all armed struggles.

²⁷ See, for example, Human Rights Watch (Helsinki Watch), *War crimes in Bosnia-Herzegovina*, 1993, pp. 18, 163-186; *Final report of the Commission of experts established pursuant to Security Council Resolution 780*, UN Doc. S/1994/674 (considering the issue of rape and sexual assault at paras. 58-60 and 232-253); Human Rights Watch, *Global report on women's human rights*, 1995 (at paras. 100-138 in relation to sexual assault of refugees and displaced women); Human Rights Watch, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, 1996.

²⁸ See, for example, E/RES/1991/19 of 30 May 1991; E/RES/1992/16 of 30 July 1992; E/RES/1993/15 of 27 July 1993; and E/RES/1995/30 of 25 July 1995. See also ECOSOC resolutions dealing with women and children in Namibia, and women and children living under apartheid.

²⁹ See Krill, *supra* (note 11), p. 356.

³⁰ *Ibid.*, p. 357.

The invisibility of women and sexual violence rapidly came to an end with the events that took place during the armed conflict in the former Yugoslavia. Although sexual violence against women had been on the agenda of human rights bodies for some years, it was this conflict that galvanized the international community into action and led to the most significant development of humanitarian law attributable to the growing emphasis on women's human rights: the inclusion of rape within the system of grave breaches.

In 1993, as a response to the findings of widespread violations of international humanitarian law in the former Yugoslavia, including rape and many other forms of sexual violence against women, the Security Council set up the International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute persons responsible for such acts. One of the issues to be resolved was the place of rape within the Statute of the ICTY. In 1992, in the context of what constituted a grave breach of international humanitarian law, the ICRC had declared that the phrase common to the Geneva Conventions and their Protocols, "wilfully causing great suffering or serious injury to body or health", obviously covered not only rape but also any other attack on a woman's dignity.³¹ This added weight to the argument that prevailed with the Commission of Experts set up by the Security Council to consider the question of the establishment of the ICTY, namely that rape and other sexual assaults, although not specifically designated as grave breaches in the Conventions and Protocols, constituted "torture or inhumane treatment" and acts that "wilfully caus[ed] great suffering or serious injury to body or health" and were thus punishable as grave breaches under the Conventions.³²

In the Statute of the ICTY, however, rape is only specifically punishable as a crime against humanity and, to constitute such a crime, it must be directed against the civilian population as a whole: for it to occur on an individual basis is not sufficient. The practice of the Office of the Prosecutor has nevertheless been to charge defendants with sexual violence as a war crime and a grave breach.³³

³¹ ICRC, Update on Aide-Memoire of 3 December 1992. This was a view shared by a number of States, see T. Meron, "Rape as a crime under international humanitarian law", *American Journal of International Law*, Vol. 87, 1993, p. 427.

³² See *Final Report of the Commission of experts established pursuant to Security Council Resolution 780*, *supra*, (note 27).

³³ See R. Coomaraswamy, *supra* (note 23).

Although the precedential value of the ICTY is limited both by its origin as a Security Council measure and by its geographical scope, the normative effect of these initiatives is much more widespread. Consequently, it will now be difficult to maintain that rape and various forms of sexual violence against women committed in international armed conflicts are not grave breaches of treaty rules. This is a major development of humanitarian law and it can be attributed to the growing recognition that women's human rights call for the prosecution of crimes of sexual violence committed in armed conflicts.

Doubts have nevertheless been expressed, in the context of the Rwandan conflict, as to whether the Yugoslav experience indicates a lasting reversal of the long tradition of silence and inaction in relation to sexual violence against women in armed conflicts. The Special Rapporteur on Violence Against Women, after hearing of the levels of sexual violence in the Rwandan conflict was, in her words, "absolutely appalled that the first indictment on the grounds of sexual violence at the International Tribunal for Rwanda (ICTR) was issued only in August 1997, and then only after heavy international pressure from women's groups".³⁴

Despite these reservations, the criminalization of sexual violence against women in internal armed conflicts by the Statute of the ICTR is an important development, and owes much to the work of human rights activists and commentators. International humanitarian law has traditionally distinguished between international and internal armed conflicts, concentrating on the former. However, the redrawing of the boundaries of human rights law has been integral to the implementation of women's human rights and the influence of this approach is now being felt in humanitarian law. Any consideration of violence against women naturally encompasses international and internal armed conflicts without distinction (an increasingly unreal division in any context). The Statute of the ICTR reflects this view by providing both that rape is punishable as a crime against humanity and that the practice falls within the Tribunal's jurisdiction since, in common with enforced prostitution and indecent assault, it is specifically designated as a crime under Article 3 common to the Geneva Conventions. Breaches of Article 3, the so-called "mini code" for internal armed conflicts, have traditionally not been regarded as constituting war crimes.

³⁴ *Ibid.*

Further developments in humanitarian law relating to the enforcement of the provisions protecting women against sexual violence have their genesis in the Yugoslav conflict and the practice of the ICTY. It has long been recognized in the context of women's human rights that, to be effective, any enforcement regime for prohibitions on sexual violence in armed conflicts must incorporate procedural reforms. This view is slowly gaining broader acceptance within the international community and some progress has been made in taking into account the particular concerns of women in the prosecution of sexual offences. Such matters as the anonymity of witnesses and victims in trials for sexual assault and provision for their support and counselling have been addressed by the ICTY.³⁵ However, these changes have not been readily accepted. For example, there is a perceived conflict between the demands of a fair trial and the protection of women as victims and witnesses.³⁶ The two are not necessarily inconsistent: what is required is an appropriate balance between them.³⁷ Recognition has also been given to the importance of equal gender distribution in the composition of enforcement tribunals and their support staff.

The scrutiny by human rights groups of sexual violence against women in armed conflicts has translated into a new perception that such acts must be addressed by mainstream bodies dealing with the enforcement of international humanitarian law. The inclusion, within the definition of war crimes and as serious violations of Article 3 common to the Geneva Conventions, of several forms of sexual violence against women was considered during the negotiations of the Statute for the International Criminal Court. Other issues of concern to women in relation to the enforcement process in general were also discussed in this context, such as the gender balance of the Court, protection for witnesses and victims, and the investigation of crimes of sexual violence. The Commission on the Status of Women, at its March 1988 meeting, called on States to support these initiatives in relation to the future International Criminal Court.

³⁵ See *Prosecutor v. Tadic, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses*, UN Doc. IT-94-1-T (10 August 1995). See also C. Chinkin, "Due process and witness anonymity", *American Journal of International Law*, Vol. 91, 1997, p. 75.

³⁶ See Monroe Leigh, "The Yugoslav Tribunal: Use of unnamed witnesses against accused", *American Journal of International Law*, Vol. 90, 1996, p. 235.

³⁷ Chinkin, *supra* (note 35), pp. 78-79.

The ICRC has given increasing recognition to the fact that the situation of women in armed conflicts poses distinctive challenges for humanitarian law. In 1993 the Final Declaration of the International Conference for the Protection of War Victims expressed alarm at “the marked increase in acts of sexual violence directed notably against women and children” and reiterated that “such acts constitute[d] grave breaches of international humanitarian law”.³⁸ In 1995 the 26th International Conference of the Red Cross and Red Crescent adopted by consensus a resolution dealing separately with sexual violence against women,³⁹ which condemned this practice, reaffirmed that rape in the conduct of hostilities was a war crime and highlighted the importance of enforcing the relevant provisions and the need to train those involved in such processes. Moreover, there is growing acknowledgement of the broader nature of the problem, which has not previously been apparent in the work of human rights bodies. For example, recent ICRC publications emphasize that armed conflict exacerbates inequalities which already exist in different forms and to varying degrees in all societies.⁴⁰

Conclusion

After years on the fringe of human rights law, the topic of women and human rights is nowadays gaining increasing respect as a separate area of concern within the mainstream of international law. Moreover, although women’s human rights are very much in the developmental stage as regards both framework and substance, each passing year sees the further elaboration of their guiding principles. Yet the new concern being paid to women’s human rights and the impact, albeit small, that the issue has so far made on humanitarian law have not led to the general acknowledgement that women’s human rights warrant a special place within the field of international humanitarian law. This is, however, only a matter of time. Let us hope that such acknowledgement, when it comes, will be accompanied by a reassessment of humanitarian law that takes into account the actual ways in which women experience armed conflict.

³⁸ Final Declaration of the International Conference for the Protection of War Victims, para. I.3, reprinted in *IRRC*, No. 296, September-October 1993, p. 377.

³⁹ Resolution 2(B), reprinted in *IRRC*, No. 310, January-February 1996, p. 63.

⁴⁰ See ICRC, *Women and war*, 1995.

The struggle against torture

by **Walter Kälin**

Over the past fifty years, the struggle against torture has become a central concern of human rights law. The first international legal text specifically outlawing “torture” was the 1948 Universal Declaration of Human Rights (Article 5). The first treaty prohibiting torture — the European Convention on human rights (Article 3) — was adopted soon afterwards, in 1950. In 1984, the United Nations Convention against torture became the first binding international instrument exclusively dedicated to the struggle against one of the most serious and pervasive human rights violations of our time.

Today, most general human rights conventions, at both regional and global levels, address the issue of torture and ill-treatment of persons.¹ They declare that torture is prohibited absolutely — even during emergencies or armed conflicts, these conventions insist, torture is impermissible.² The dedication of international human rights law to outlawing such acts is also evidenced by the existence of instruments dedicated to the *prevention* of torture.³

Walter Kälin is Professor of International law at the University of Bern (Switzerland). A former Special Rapporteur of the UN Commission on Human Rights, he is the author of the report “Situation of human rights in occupied Kuwait”.

¹ Article 7 of the Covenant on civil and political rights (CCPR), 19 December 1966; Article 37(a) of the Convention on the rights of the child (CRC), 20 November 1989; Article 5(2) of the American Convention on human rights (ACHR), 22 November 1969; Article 3 of the (European) Convention for the protection of human rights and fundamental freedoms (ECHR), 4 November 1950; Article 5 of the African Charter on human and peoples’ rights, 26 June 1981.

² Article 4(2) CCPR, Article 15(2) ECHR, Article 27(2) ACHR.

³ European Convention for the prevention of torture and inhuman or degrading treatment or punishment, 26 November 1987; Inter-American Convention to prevent and punish torture, 9 December 1985.

The strong presence of prohibitions on torture in human rights law should not overshadow the important contributions to banning torture made by international humanitarian law over the last century. Without referring explicitly to “torture”, Article 4 of the Hague Conventions on the laws and customs of war on land of 1899 and 1907 states that prisoners of war must be humanely treated, clearly excluding torture from acceptable treatment.⁴ Article 3, common to the four Geneva Conventions of 1949, includes on the list of minimum standards to be observed by all parties even in non-international armed conflicts a prohibition on “[v]iolence to life and person, in particular . . . mutilation, cruel treatment and torture”. Similarly, Protocol II prohibits “violence to the life, health and physical or mental well-being of persons, in particular . . . cruel treatment such as torture, mutilation or any form of corporal punishment”.⁵ The Third Geneva Convention obliges State Parties and their authorities to treat prisoners of war of international armed conflicts humanely at all times and to respect their persons in all circumstances.⁶ The Fourth Convention prohibits acts of violence against and the torture of protected civilians in time of war.⁷ Finally, Article 75 of Protocol I extends this prohibition to all persons in such situations and clarifies that “torture of all kinds, whether physical or mental” is absolutely prohibited.⁸

The subject of torture is an area where human rights law and humanitarian law clearly converge and where the two sets of norms reinforce each other. The different provisions on torture are a good example of how norms for the protection of human beings today are often based on unified

⁴ A prohibition of torture can also be deduced from other Articles, including 44 and 46; see M. Cherif Bassiouni, “An appraisal of torture in international law and practice: The need for an International Convention for the prevention and suppression of torture”, *Revue internationale de droit pénal*, Vol. 48, 1977, Nos. 3 and 4, p. 71.

⁵ Article 4, para. 2(a) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

⁶ Articles 13 and 14 of the Third Geneva Convention relative to the treatment of prisoners of war of 12 August 1949.

⁷ Articles 27 and 32 of the Fourth Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949.

⁸ Article 75, para. 2(a)(ii) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

concepts that underlie different institutional frameworks.⁹ This paper explores the relationship of these norms on different levels. To this end, it is useful to distinguish between the three complementary aspects of effective human rights implementation: prevention; enforcement and repression; and reparation.

Prevention

Because of its far-reaching psychological effects, the harm inflicted by torture on the victim cannot be undone. Therefore, prevention is of primary importance. In the area of human rights law, Article 2, para. 1, of the Convention against torture obliges each State to “take effective legislative, administrative, judicial or other measures to prevent acts of torture”. Such measures include not only clearly outlawing acts of torture,¹⁰ but also training police and security personnel, implementing precise guidelines on the treatment of persons deprived of their liberty, implementing domestic inspection and supervision mechanisms and/or introducing machinery for the effective investigation of complaints regarding ill-treatment. As the former Special Rapporteur on Torture of the UN Human Rights Commission, Peter Kooijmans, has rightly stressed, torture is never an isolated phenomenon: “It does not start in the torture chambers of this world. It begins much earlier, whenever respect for the dignity of all fellow human beings and the right to have this inherent dignity recognized are absent”.¹¹ Therefore, safeguards against torture must already be built up in the treatment of prisoners and other detained persons.¹²

Humanitarian law has long recognized the need for detailed provisions concerning the treatment of persons deprived of their liberty as a safeguard against ill-treatment. The many provisions of the Third Geneva

⁹ See Theodor Meron, *Human rights in internal strife: Their international protection*, Cambridge, 1987, p. 28, and Walter Kälin/Larisa Gabriel, “Human rights in times of occupation: An introduction”, in Walter Kälin (Ed.), *Human rights in times of occupation: The case of Kuwait*, Bern, 1994, pp. 26-29.

¹⁰ On the obligation to declare torture as an offence under domestic criminal law, see Article 4 of the Convention against torture.

¹¹ Peter H. Kooijmans, “The role and action of the UN Special Rapporteur on torture”, in Antonio Cassese (Ed.), *The international fight against torture — La lutte internationale contre la torture*, Baden-Baden, 1991, p. 65.

¹² *Ibid.*

Convention, especially those on the internment of prisoners of war (Article 21 ff.) and those on the relations between prisoners of war and the authorities (Article 78 ff.), can be read as a codification of norms to effectively prevent torture and cruel or inhuman treatment or punishment for this category of protected persons. The same is true for many of the provisions on the treatment of internees contained in the Fourth Geneva Convention.¹³

The duty to prevent torture is of paramount importance as violations are often hidden. Peter Kooijmans has accurately called torture the most intimate human rights violation, as it takes place in isolation and is very often inflicted by a torturer who remains anonymous to the victim and who regards the victim as a faceless object.¹⁴ Visits to places of detention help to eliminate this anonymity and are therefore very effective in preventing torture. Such visits also make it possible to identify situations conducive to torture and initiate appropriate measures to reduce the risk of such acts. International humanitarian law recognizes the value of these visits. According to Article 143 of the Fourth Geneva Convention, delegates of the ICRC or the Protecting Powers “shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work”.¹⁵ The same right is granted in Article 126 of the Third Geneva Convention for visiting prisoners of war.¹⁶ In situations of non-international armed conflicts, the ICRC may offer its services to the parties to the conflict¹⁷ and thus receive permission to visit persons deprived of their liberty as a result of these conflicts too. The right of initiative is also recognized in situations of tension and internal disturbances where the ICRC might visit (with the consent of the state concerned) persons detained for reasons related to that particular situation, i.e. “political” or “security” prisoners.

¹³ Art. 79 ff.

¹⁴ “Torture and other Cruel, Inhuman and Degrading Treatment or Punishment”, Report of the Special Rapporteur, Mr P. Kooijmans, 21 December 1991, UN Doc. E/CN.4/1992/17, para. 277.

¹⁵ Article 143(1) of the Fourth Geneva Convention. According to para. 5 of the same Article, the occupying power has to approve the appointment of delegates of the ICRC but not the principle of visits as such.

¹⁶ Article 81 of Protocol I reiterates these rights in general terms.

¹⁷ Common Article 3(2).

In their visits, the ICRC and its delegates will make confidential approaches to the authorities to ameliorate the detainees' conditions.¹⁸ Additionally, the mere physical presence of persons from outside the place of detention can often effectively prevent torture and ill-treatment and lead to improvements in the conditions of detention. The ICRC's experience has shown that "[a]ccording to the detainees and even the governments who have chosen to accept the services of the ICRC, the visits of the delegates of the ICRC are generally positive."¹⁹

Jean-Jacques Gautier, a Geneva-based private banker, shared this positive assessment. In 1977, Gautier founded the Geneva-based Swiss Committee Against Torture (now named the Association for the Prevention of Torture). His vision was to extend to all prisoners the system of preventive visits to places of detention by international experts and thus to apply an instrument developed in humanitarian law in the sphere of human rights protection.²⁰

After it became clear that the time was not ripe for the adoption of a treaty-based obligation to accept such visits at the United Nations level, the Council of Europe took up the matter and, in 1987, adopted the European Convention for the prevention of torture and inhuman or degrading treatment or punishment. This Convention allows a body of independent experts (known as the European Committee for the Prevention of Torture) to carry out regular or *ad hoc* visits to all places of detention in the territory of States Parties and to make confidential recommendations to the country concerned in order to improve situations conducive to

¹⁸ On the visits carried out by the ICRC see, in particular, Hans Haug, *Humanity for all – The International Red Cross and Red Crescent Movement*, Berne/Stuttgart/Vienna, 1993, pp. 97-162; Françoise Comtesse, "Activities of the ICRC in respect of visits to persons deprived of their liberty: conditions and methodology", in Association for the Prevention of Torture (Eds), *The implementation of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment (ECPT) – Assessment and perspectives after five years of activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, Geneva, 1994, pp. 239-248; Philippe de Sinner/Hernan Reyes, "Activités du CICR en matière de visites aux personnes privées de liberté: Une contribution à la lutte contre la torture", in Cassese, *supra* (note 11), pp. 153-171.

¹⁹ Comtesse, *supra* (note 18), p. 247.

²⁰ See the contributions by Renaud Gautier and François de Vargas in *20 ans consacrés à la réalisation d'une idée*, Recueil d'articles en honneur de Jean-Jacques Gautier, APT, Genève, 1997, pp. 21-26 and 27-46.

torture and ill-treatment. This has had considerable success in the fight against torture.²¹

At the same time, the idea of creating an effective instrument of prevention at the global level has not been dropped. In 1991, the UN Human Rights Commission received Costa Rica's submission of a draft Optional Protocol to the 1984 Convention against torture.²² The draft aims to introduce a system of preventive visits to places of detention "with a view to strengthening, if necessary, the protection of . . . [detained persons] . . . from torture and from cruel, inhuman or degrading treatment or punishment". If this Protocol is ratified, such visits will be carried out by a sub-committee composed of independent experts.²³ Negotiations of this draft continue in the working group set up by the UN Human Rights Commission.

The human rights instruments for the prevention of torture would not exist without the model provided by international humanitarian law. Experience has shown, however, that the European Convention on the prevention of torture is not just a duplication of the ICRC's visits to detainees. The Convention has evolved its own identity.²⁴ For instance, the Convention covers all situations of detention, whereas ICRC visits are limited to particular situations in the context of armed conflict and violent disturbances.

More significantly, the ICRC is primarily concerned with *individuals* while the European Committee for the Prevention of Torture (CPT) focuses mainly on *situations*. The ICRC maintains a long-term presence in the places it visits : to visit prisoners repeatedly and to give them material aid if necessary is one of the basic principles of this work. The CPT's visits are generally one-off,²⁵ serving as a point of departure for an

²¹ On the European Convention for the prevention of torture (note 20) see Malcolm Evans and Rod Morgan, "The origins and drafting of the ECPT — a salutary lesson?", *supra*, pp. 85-97; Antonio Cassese, The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in Cassese, *supra* (note 11), pp. 135-152.

²² Draft Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment, annexed to the letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights, UN Doc E/CN.4/1991/66.

²³ The proposed full title is "Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture".

²⁴ See Hans-Peter Gasser, "Suivre les travaux du groupe Gautier . . .", *supra* (note 20), p. 67.

²⁵ Follow-up visits are possible but their primary purpose is not to revisit individual prisoners.

ongoing dialogue with the government regarding measures to reduce the risk of torture and ill-treatment. As a consequence, the CPT has become deeply involved in issues relating to the rights of persons in police custody (e.g. measures against being detained *incommunicado*) or improvements in sub-standard conditions of detention.²⁶

Like the ICRC's visiting activities, the work undertaken by the CPT remains confidential. However, the emphasis on reform explains why States found it necessary to depart from the principle of full confidentiality and to include in the European Convention the possibility of making a public statement if the State Party concerned "fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations."²⁷ If the Draft Optional Protocol to the Torture Convention enters into force, the emphasis on situations and reform might be even stronger, particularly as the draft has been amended during negotiations to create a fund which would allow States with limited means to implement costly reforms.²⁸

Regarding the methodology of visits to places of detention, humanitarian law has also created the model for human rights instruments. According to Article 143 of the Fourth Geneva Convention, delegates are permitted to go to all places of detention and internment selected by them and are to have "access to all premises" there.²⁹ Delegates must be able to interview in private any detainee they wish, without limits on the duration and frequency of such visits. These conditions must also be met before the ICRC carries out visits on the basis of its right of initiative.

These basic principles have been incorporated into the European Convention on the prevention of torture.³⁰ The Inter-American Commission on Human Rights also has the right of access to places of detention

²⁶ See Roland Bank, "Preventive measures against torture: An analysis of standards set by the CPT, CAT, HCR and Special Rapporteur", *supra* (note 20), p. 129; Ralf Alleweldt, "Präventiver Menschenrechtsschutz — Ein Blick auf die Tätigkeit des Europäischen Komitees zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe (CPT)", *Europäische Grundrechte-Zeitschrift*, 1998, pp. 245-271.

²⁷ Article 10(2), European Convention for the prevention of torture and inhuman or degrading treatment or punishment.

²⁸ Article 16 of the Draft Optional Protocol, UN Doc. E/CN.4/1998/42, 2 December 1997, Annex I.

²⁹ See also Article 126 of the Third Geneva Convention.

³⁰ Article 8 of the European Convention on the prevention of torture.

and of talking to detainees without witnesses³¹ and the UN Special Rapporteurs insist on the same possibilities when they carry out visits to places of detention.³² The Draft Optional Protocol to the Torture Convention now before the UN Human Rights Commission follows the same pattern, but the relevant provision has not been adopted yet. It is to be hoped that what has been established as standard operating procedures for international mechanisms carrying out visits to places of detention will not be jeopardized when this Optional Protocol is adopted!

Enforcement and repression

Human rights law has developed a multitude of instruments for enforcing the prohibition on torture. The 1984 Convention against torture provides an example of the full range of possibilities: the obligation of States Parties to submit, on a regular basis, "reports on the measures they have taken to give effect to their undertakings under this Convention"³³ forces them to justify their behaviour and provides the Committee Against Torture with an opportunity to enter into a dialogue with the government concerned and to criticize it publicly if necessary to improve the situation. Such a reporting system is also part of the Covenant on Civil and Political Rights which allows, *inter alia*, questions to be raised regarding the infliction of torture.³⁴ The Convention against torture allows the Committee to investigate situations of systematic violations and, with the consent of the State Party concerned, to carry out on-site visits.³⁵ Investigations of systematic violations of the prohibition on torture (including visits to the countries concerned³⁶) are also undertaken by the Special Rapporteur on Torture³⁷ and other Rapporteurs and Working Groups appointed by the

³¹ Article 59 of the Regulations of the Inter-American Commission on Human Rights.

³² See Association for the Prevention of Torture, "Standard operating procedures of international mechanisms carrying out visits to places of detention", Workshop, 24 May 1997, Geneva, 1997.

³³ Article 19(1).

³⁴ Articles 7 and 40.

³⁵ Article 20 of the Convention.

³⁶ Such visits need the consent of that country.

³⁷ See Kooijmans, *supra* (note 11), pp. 56-72.

UN Commission on Human Rights³⁸ who have to report on allegations of torture and their findings. Finally, the Convention against torture provides for the possibilities of interstate and individual complaints.³⁹ Such procedures also exist within the framework of the Covenant on civil and political rights and in regional human rights conventions. In the case of the European Convention on human rights, these mechanisms are mandatory and the decisions of the European Court of Human Rights binding and enforceable.

Enforcement mechanisms are relatively weak in international humanitarian law. In cases of torture, Protecting Powers and the ICRC may make representations to the responsible State Party to the Geneva Conventions and the Protocols, but there are no formal procedures that allow the enforcement of the prohibition on torture. Article 90 of Protocol I has instituted the International Fact-Finding Commission which, *inter alia*, could investigate serious cases of torture.

In contrast, humanitarian law has played a vital role in developing concepts for penal repression of grave breaches of basic obligations under the Geneva Conventions and their Additional Protocols. Torture is explicitly mentioned in the definition of grave breaches in all four Geneva Conventions.⁴⁰ States are obliged to “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” such acts; they are also “under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” if these persons are not extradited to another State Party.⁴¹ In view of this clear recognition of torture as an act which entails individual penal responsibility of the perpetrators, it is not

³⁸ Besides the Special Rapporteur on Torture, many of the country-specific Rapporteurs, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions and the Working Groups on Arbitrary Detention and on Disappearances are concerned with cases of torture and ill-treatment.

³⁹ Articles 21 and 22. These procedures can take place only if the country concerned has made a declaration recognizing the competence of the Committee against Torture to receive such communications.

⁴⁰ Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention.

⁴¹ Article 49 of the First, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth Geneva Convention.

surprising that torture is also among the acts punishable by the International Tribunals established to deal with crimes committed in the former Yugoslavia and in Rwanda.⁴² Furthermore torture is also listed in the Draft Code of Crimes against the Peace and Security of Mankind.⁴³

Human rights law is normally not concerned with individual responsibility. It is therefore crucial for the struggle against torture that, according to Articles 4 and 5 of the Convention against torture, States must enact legislation allowing for the punishment of perpetrators of torture who are their own nationals or, in the case of aliens, are not extradited. While, according to the *travaux préparatoires*, these provisions have been inspired by conventions dedicated to the struggle against terrorism,⁴⁴ the foundation on which they are based is the concept of individual responsibility for grave breaches of international humanitarian law.

Reparation

As mentioned above, acts of torture cannot be undone and psychological damage continues long after the physical wounds inflicted on the victim are healed. Yet human rights law recognizes that reparation and compensation for such victims may enhance the healing process by supporting the victim's sense of justice. The most explicit provision of human rights law on reparation is Article 14 of the Convention against torture. This provision obliges every State Party to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation". In principle, reparation and compensation can also be granted by the international bodies whose task it is to decide about individual applications. Article 41⁴⁵ of the European

⁴² Articles 2(b) and 5(f) of the Statute of the International Tribunal for the persecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, 32 *I.L.M.* 1170 (1993), and Articles 3(f) and 4(a) of the Statute of the International Tribunal for Rwanda, 33 *I.L.M.* 1602 (1994).

⁴³ Articles 18(c) and 20(a)(ii) of the Draft Code of crimes against the peace and security of mankind, *Human Rights Law Journal*, Vol. 18, 1997, pp. 96-134. See also Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add. 1 (14 April 1998), draft article on crimes against humanity.

⁴⁴ See J. Herman Burgers/Hans Danelius, *The United Nations Convention against torture*, Dordrecht/Boston/London, 1988, pp. 56-57 and p. 130, who mention as sources of inspiration the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, the Convention against the taking of hostages or the Convention for the suppression of the unlawful seizure of aircraft.

⁴⁵ Formerly Article 50, ECHR.

Convention on human rights provides that the European Court of Human Rights shall, in a decision binding on States, “afford just satisfaction to the injured party”.⁴⁶ The Inter-American Court of Human Rights has developed similar case law⁴⁷ and other treaty bodies have, on several occasions, recommended the payment of compensation to victims of human rights violations.⁴⁸

International humanitarian law addresses the question of reparation for States,⁴⁹ but does not provide for compensation to be paid to victims on torture. In this regard, the Iraqi occupation of Kuwait presents an interesting case, as the Security Council, in Resolution 687 (1991), decided that Iraq was obliged to pay reparations through a Compensation Fund for the resulting injuries. The UN Compensation Commission has decided to grant payments of fixed amounts⁵⁰ to persons who “as a result of Iraq’s unlawful invasion and occupation of Kuwait . . . suffered serious personal injury”,⁵¹ including torture.⁵² It remains to be seen whether this will serve as a model for future cases of grave breaches of international humanitarian law.

⁴⁶ For details see the study by Gerhard Dannemann, *Schadenersatz bei Verletzung der Europäischen Menschenrechtskonvention*, Köln/Berlin/Bonn/München, 1994. See also, e.g., ECHR, *Kurt v. Turkey* judgment of 24 May 1998, Reports 1998 (not yet printed), paras. 171-175.

⁴⁷ Velasquez Rodriguez Case, Judgment of July 29, 1988, Series C No. 4 (1988).

⁴⁸ See Theo van Boven, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms”, dated 2 July 1993 and submitted to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, paras. 60-79. Especially rich is the case law of the Human Rights Committee established under the Covenant on Civil and Political Rights (van Boven, paras. 50-59).

⁴⁹ See Article 3 of the Hague Convention regarding the laws and customs of war on land, 18 October 1907. The Four Geneva Conventions all provide that parties cannot absolve themselves of liability in respect of grave breaches, and Protocol I, in Article 91, stipulates that parties to a conflict shall be “liable to pay compensation” for violating provisions of the Conventions or of the Protocol.

⁵⁰ According to Decision 1 of the Governing Council of the Compensation Commission, paras. 11-13 (30 *I.L.M.* 1713 [1991]) the amounts were set at between 2,500 and 10,000 US\$. These amounts were later raised to 30,000 US\$ per claimant and 60,000 US\$ per family unit (Governing Council Decision 8, para. 3 and 4, 31 *I.L.M.* 1036 [1992]).

⁵¹ UN Compensation Commission, Governing Council Decision 1, para. 10, 30 *I.L.M.* 1713 (1991).

⁵² UN Compensation Commission, Governing Council Decision 3 defining the terms “personal injury and mental pain and anguish” as consequences *inter alia* arising from torture.

Conclusion

International humanitarian law and human rights law have both made specific contributions to the struggle against torture. The ICRC has developed a methodology for prison visits which has deeply influenced human rights law instruments for the prevention of torture. Basic concepts regarding penal responsibility for acts of torture also have been elaborated in the context of norms applicable in situations of armed conflict. Human rights law has significantly contributed to the development of mechanisms for the enforcement of the prohibition on torture, including individual complaint procedures and fact-finding methods. It is also in human rights law that the idea of reparation for victims of torture is explicitly recognized.

The present state of international law shows that together humanitarian law and human rights instruments offer a comprehensive set of norms and procedures for the prevention, implementation and repression of acts of torture, and for reparation for such acts. Historically, the two areas have influenced each other positively. Today, weaknesses in one area can most often be compensated by invoking instruments belonging to the other. The continuing existence of torture in many countries is not caused by legal gaps, but rather by a lack of political will to implement the obligations of States under international humanitarian and human rights law.

Bridging the gap between human rights and humanitarian law: The punishment of offenders

by John Dugard

In 1948, when the Universal Declaration of Human Rights was adopted, human rights and humanitarian law were treated as separate fields. Since the 1968 Tehran International Conference on Human Rights, the situation has changed dramatically and the two subjects are now considered as different branches of the same discipline. A number of factors have contributed to this merger, including the growing significance of international criminal law and the criminalization of serious violations of human rights. This is the theme of the present comment.

The law of Geneva aims to protect individuals by ensuring that those who have been placed *hors de combat* or who do not take part in hostilities are treated in a humane manner. The law of The Hague, on the other hand, seeks to restrict the freedom of belligerents by proscribing methods of warfare that cause unnecessary suffering. Although a number of non-coercive measures are employed to secure compliance with the rules of international humanitarian law, in the final resort the laws of both Geneva and The Hague contemplate prosecution and punishment of those individuals who violate their norms.

Such punishment has a long, albeit inconsistent, history. Indeed, some consider the first international war crimes trial to have been the prosecution of Peter von Hagenbach in 1474 — for atrocities committed during an attempt to compel Breisach to submit to Burgundian rule — by a

John Dugard is a professor of law at the University of the Witwatersrand, Johannesburg, and a member of the International Law Commission.

tribunal comprising judges drawn from different States and principalities.¹ Today the rules governing the prosecution of offenders are principally to be found in the 1949 Geneva Conventions, which oblige States to try or extradite (*aut dedere aut judicare*) individuals responsible for having committed “grave breaches” of the Conventions,² and in Article 85 of Additional Protocol I.

Human rights law is different as it is primarily concerned with relations between States and their nationals in time of peace. The Charter of the United Nations³ and the Universal Declaration of Human Rights expound fundamental human rights standards. Later treaties, both universal and regional, elaborate on these standards and provide mechanisms for their enforcement. Monitoring bodies have been established to consider national reports, individual petitions and, albeit rarely, inter-State complaints. These bodies have varying powers of enforcement, ranging from the legally binding orders of the European Court of Human Rights to the “views” of the UN Human Rights Committee, which was set up under the International Covenant on Civil and Political Rights. Publicity and persuasion rather than coercion ensure compliance. With the exception of the Convention against Torture,⁴ human rights treaties do not contemplate enforcement by means of the punishment of offenders. “On this point”, said Professor Dietrich Schindler in 1979,⁵ “the difference between the law of war and the system of human rights is fundamental”.

Human rights treaties are largely designed to deal with individual and not systematic violations of protected rights. In such circumstances, rectification, amendment of the law and redress for the injured person are appropriate remedies. Where, however, the violations assume systematic proportions, there is a need for a more coercive response that looks to

¹ See T.L.H. McCormack and G.J. Simpson (eds), *The law of war crimes: National and international approaches*, Kluwer Law International, The Hague/London/Boston, 1997, p. 37.

² Articles 49-50 of the First Geneva Convention, Articles 50-51 of the Second Geneva Convention, Articles 129-130 of the Third Geneva Convention and Articles 146-147 of the Fourth Geneva Convention.

³ Articles 55 and 56.

⁴ Article 4 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) requires States to prosecute offenders under national law.

⁵ Dietrich Schindler, “The International Committee of the Red Cross and human rights”, *IRRC*, No. 208, January-February 1979, p. 12.

retribution and deterrence. The 1993 World Conference on Human Rights thus stated, in its Vienna Declaration and Programme of Action:

“The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, ‘ethnic cleansing’ and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.”⁶

As for international humanitarian law, it was powerless to impose criminal sanctions in the case of an internal armed conflict. “Grave breaches”, as defined in the Geneva Conventions and subsequently in Protocol I, occur only in international armed conflicts; and the law of The Hague is largely inapplicable in non-international armed conflicts. Moreover, neither Article 3 common to the four Geneva Conventions nor Protocol II, which deal with humanitarian standards in non-international conflicts, contemplate the prosecution of anyone who violates these standards.

Initially, the concepts of war crimes and crimes against humanity were considered to apply in international wars only.⁷ Moreover, although Article 6 of the Nuremberg Charter clearly contemplated prosecution of the major Nazi leaders for crimes against humanity committed *before* the war, the Nuremberg Tribunal chose to link such crimes with the war in order to avoid any suggestion that the law had been applied retrospectively to cover acts committed in peacetime.

Thus, gross and systematic violations of human rights in time of peace or internal conflict were not deemed punishable under international law. Of course one may add that even had such crimes been punishable, there was no international tribunal before which they could have been tried.

Developments in international humanitarian law and international criminal law in recent years have radically changed the situation. Atrocities committed in internal armed conflicts are today punishable as a result of a new approach taken to such acts and the broader definition given to international crimes.

⁶ UN Doc. A/CONF.157/24 (Part 1), 13 October 1993, para. 28, in *International Legal Materials*, Vol. 32, 1993, p. 1661.

⁷ See “Judgment of the Nuremberg International Military Tribunal”, reported in the *American Journal of International Law*, Vol. 41, 1947, p. 172.

Non-international armed conflicts and international crimes

The law of Geneva distinguishes clearly between international and internal conflicts in respect of criminal sanctions. "Grave breaches" are committed only in international conflicts and they alone can give rise to prosecution or extradition. Article 1(4) of Protocol I, does, however, expand the concept of international armed conflict to cover essentially internal conflicts in which national liberation movements are engaged in a struggle against colonial domination, alien occupation or racist regimes.

Some argue that this provision, which was introduced to extend the protection of international humanitarian law to the conflicts in Rhodesia, Namibia, South Africa and Israel/Palestine, has run its course as a result of dramatic political changes in these territories. The language of Article 1(4) is, however, broad and geographically unlimited. Consequently, there is no reason why it should not be applied, for instance, to conflicts arising out of China's occupation of Tibet, Indonesia's occupation of East Timor or the struggle of ethnic Albanians against Serbian domination in Kosovo. Article 1(4) therefore has the potential to effect a substantial change in the distinction made between international and non-international conflicts as regards the imposition of criminal sanctions for grave breaches, provided that the concepts of colonial domination, alien occupation and racist regime are freed from their historical origins.

The most significant extension of criminal sanctions to acts involving the systematic violation of human rights in internal conflicts has been brought about through the broadening of the scope of international crimes.

Genocide is an international crime that may be committed "in time of peace or in time of war".⁸ The crime of apartheid is likewise one that may be committed in time of peace.⁹ The Convention against Torture of 1984, which requires parties either to prosecute or extradite torturers, applies in time of peace, war and "internal political instability or any other public emergency".¹⁰

Although hostage-taking and terrorist bombings may result in the systematic violation of human rights in internal conflicts, the instruments

⁸ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

¹⁰ Article 2.

that criminalize these acts under international law do not provide for the punishment of offenders in all situations. The 1979 International Convention against the Taking of Hostages, which obliges parties to prosecute or extradite hostage-takers, is apparently designed for peacetime use only as it provides that it shall not apply where “the Geneva Conventions of 1949 (...) or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker”.¹¹ The prohibitions on hostage-taking found in common Article 3 and Protocol II,¹² unlike those concerning acts listed as “grave breaches”,¹³ are not, however, subject to the obligation of *aut dedere aut judicare*, which means that the International Convention against the Taking of Hostages must apply in non-international conflicts. The Convention nevertheless provides that it is not applicable where the hostage-taking occurs within a single State, where both the offender and the victim are nationals of the same State, and where the offender is arrested in that State.¹⁴ In such situations the offender is beyond the reach of international law but will, presumably, face prosecution under domestic law.

The 1998 International Convention for the Suppression of Terrorist Bombings follows a similar pattern: it is inapplicable to armed forces during an armed conflict, when international humanitarian law applies,¹⁵ and in situations where the crime occurs entirely within a single State.¹⁶ Strangely, the Convention is also inapplicable in respect of “the activities undertaken by the military forces of a State in the exercise of their official duties”,¹⁷ which means that these forces may be exempt under international law from prosecution for wanton bombings causing loss of life unless these acts qualify as war crimes. Although the two conventions suffer from imperfections, they nevertheless illustrate the determination of the international community to extend the reach of international criminal law to acts that

¹¹ Article 12.

¹² Article 4(2)(c).

¹³ Article 147 of the Fourth Geneva Convention.

¹⁴ Article 13.

¹⁵ Article 19.

¹⁶ Article 3.

¹⁷ Article 19(2).

constitute serious violations of human rights but fail to qualify as “grave breaches” under the Geneva Conventions and Protocol I.

War crimes and crimes against humanity, which were the main charges brought against Nazi and Japanese war leaders, are historically tied to international armed conflicts. However in recent times these two crimes, which have their origins in both custom and convention, have been freed from this limitation and their scope extended to non-international armed conflicts.

As already mentioned, under the Nuremberg Charter crimes against humanity were intended to include peacetime acts. Yet the Nuremberg Tribunal, in order to avoid any suggestion that it had applied the law retrospectively, interpreted the concept narrowly to mean only crimes committed during the war. Subsequent developments have, however, made it clear that crimes against humanity can also occur in peacetime.¹⁸ The International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind (Article 18) defines crimes against humanity as comprising acts such as murder, torture, enslavement and forced disappearance “when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group, without making any reference to the nature of the conflict.”¹⁹ As for the Statute of the International Criminal Tribunal for the former Yugoslavia, it expressly gives the Tribunal jurisdiction over crimes against humanity “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”.²⁰ Moreover, the Appeals Chamber of the Tribunal stated, in *Prosecutor v. Tadic*: “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed (...) customary international law may not require a connection between crimes against humanity and any conflict at all”.²¹

By their very nature, war crimes are acts that are committed in international armed conflicts. Yet, here too, there has been a relaxation of this

¹⁸ Cherif Bassiouni, *Crimes against humanity in international criminal law*, Nijhoff, Dordrecht, 1992.

¹⁹ Report of the International Law Commission, 48th Session, UN Doc. A/CN.4/L. 522, 31 May 1996.

²⁰ Article 5.

²¹ Decision of 2 October 1995, Case No. IT-94-1-AR72, p.72, para 141. See *International Legal Materials*, Vol. 35, 1996, p. 35.

requirement in recent years.²² In *Prosecutor v. Tadic*, the Tribunal accepted the principle that “grave breaches” — now equated with “war crimes”²³ — are committed in international armed conflicts only²⁴ (although Judge Abi-Saab, in a separate opinion, suggested that a “strong case” might be made for the proposition that such crimes were committed in internal conflicts too).²⁵ However, in the same decision the Appeals Chamber held, on the basis of State practice, that the provision in the Statute of the Tribunal dealing with violations of the laws or customs of war applied to both internal and international armed conflicts.²⁶ The International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind moreover accepts that certain acts committed in violation of the laws or customs of war — acts prohibited under common Article 3 and Protocol II — and severe damage to the natural environment unjustified by military necessity constitute war crimes when committed in internal conflicts.²⁷

The punishment of systematic human rights violations

The blurring of the distinction between international and non-international armed conflicts and the expansion of the definition of international crimes have led to the criminalization of human rights violations, particularly where they are committed in a systematic manner or on a large scale. Efforts are now underway to extend the reach of criminal law still further through the adoption of a multilateral treaty — drafted along the lines of the conventions on hostage-taking and terrorist bombings — that will punish the crimes of developing, producing, stockpiling or using biological or chemical weapons.²⁸

²² See generally on this subject, Thomas Graditzky, “Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts”, *IRRC*, No. 322, March 1998, pp. 29-56.

²³ See Protocol I, Article 85(5).

²⁴ *Supra* (note 21), p. 48, para. 84.

²⁵ *Supra* (note 21), Separate Opinion of Judge Abi-Saab, p. 5.

²⁶ *Supra* (note 21), p. 71, para 137.

²⁷ *Supra* (note 19), Article 20(e)-(g).

²⁸ On 1-2 May 1998 a meeting was held at the Lauterpacht Research Centre for International Law, Cambridge (U.K.), to discuss the proposal for a convention on the prevention and punishment of the crime of developing, producing, stockpiling or using biological or chemical weapons. The meeting was organized in association with the Harvard Sussex Programme on Chemical and Biological Weapons Armament and Arms Limitation and the Common Security Programme on Disarmament and Security. Professor Matthew Meselson, Department of Molecular and Cellular Biology of Harvard University, is the driving force behind the proposal.

The question of universal jurisdiction over international crimes is controversial. While it is generally accepted that such jurisdiction arises in respect of war crimes committed in international armed conflicts and crimes against humanity, it is doubtful whether the same can be said for acts held to be crimes under treaties that confer jurisdiction on the States parties only. Moreover, it is difficult to contend that contemporary international law recognizes universal jurisdiction for war crimes perpetrated in non-international conflicts.

The debate over the extent of universal jurisdiction is of little practical importance, however. What is important is whether persons guilty of systematic human rights violations in an internal conflict will be prosecuted and, if so, before which court.

There is a growing momentum in favour of the establishment of a permanent international criminal court. Although such a court will probably have jurisdiction over genocide, war crimes and crimes against humanity only, the modern definitions of war crimes and crimes against humanity are wide enough to encompass the acts of torture, hostage-taking and wanton terrorist bombings as defined in various treaties. Whether the court would have jurisdiction over war crimes committed in internal armed conflicts remains to be seen.

A permanent international criminal court will clearly have limited powers. Moreover, many years will go by before it receives sufficient ratifications to make it a realistic forum for the punishment of international crime. In these circumstances the need remains for domestic courts to prosecute international crimes and for States to enact legislation giving effect to their obligations under international law. While many States have adopted legislation to comply with their duty under the Geneva Conventions to prosecute grave breaches that occur in international armed conflicts, few have gone so far as to take legislative action regarding crimes against humanity and war crimes committed in non-international conflicts. In 1993 Belgium enacted a law that classifies as war crimes serious violations of international humanitarian law that take place in non-international armed conflicts²⁹ and a number of other countries have war crimes statutes that draw no clear distinction between international and

²⁹ Law of 16 June 1993. See A. Andries, E. David, C. Van den Wyngaert, J. Verhagen, "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.

internal conflicts.³⁰ Domestic legislation of this kind is not, however, common.

National courts have a poor record when it comes to the prosecution of war crimes and other international crimes arising out of armed conflicts.³¹ Where the offender is a national, and particularly a member of the security or armed forces of the State, there are usually political reasons for non-prosecution. Moreover, successor regimes that favour reconciliation (for example, South Africa) or that fear a resurgence of the military (for example, Chile and Argentina) often prefer amnesty, despite its dubious validity under international law, to prosecution. Although domestic statutes may permit prosecution of non-nationals for crimes committed abroad, there is usually little political incentive for such action and in practice it is rare.

Human rights law has borrowed the institution of *aut dedere aut judicare* from international humanitarian law. Today, the systematic violation of human rights is thus punishable — at least in theory. This is a far cry from the situation in 1948 when the Universal Declaration of Human Rights proclaimed certain standards for the behaviour of States in respect of human rights. Such an achievement should not, however, blind us to the fact that there is still much to be done to make the prosecution and punishment of human rights violators a reality. The challenge of the next millennium will be to establish a viable international criminal court and effective domestic procedures for the prosecution of those who commit systematic or large-scale violations of human rights — whether in international or internal armed conflicts.

³⁰ See Thomas Graditzky, *supra* (note 22), pp. 38-44.

³¹ Antonio Cassese, "On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law", *European Journal of International Law*, Vol. 9, 1998, pp. 5-6.

The minimum humanitarian rules applicable in periods of internal tension and strife

by **Djamchid Momtaz**

Many States have in the course of their history faced internal tension and strife, sometimes so serious as to threaten their fundamental interests. These situations, characterized as they are by acts of revolt and violence committed by more or less organized groups fighting either the authorities or amongst themselves, are distinct from those termed non-international armed conflicts, in which the violence is more intense. In order to bring these internal confrontations to an end and restore order, the authorities frequently make massive use of police force or even the armed forces. The inevitable result is a weakening of the rule of law, marked by serious, large-scale human rights violations causing widespread suffering among the population.

It is generally accepted that governments may declare a state of emergency and, provided that the situation so demands (and only then), take steps that depart from international human rights law and suspend some of those rights. There are fundamental rights inherent to human dignity — the so-called inalienable rights from which no derogation is possible under any circumstances. The safeguards provided by those rights to individuals caught up in the maelstrom of internal violence appear today to be inadequate. Initiatives are being taken at the international level to furnish better protection and make up for the shortcomings of international

Djamchid Momtaz is a professor at the Faculty of Law and Political Science of the University of Tehran.

Original: French

human rights law in cases of internal violence, in which atrocities continue to be committed.

Guarantees afforded people caught up in internal tension

Though it is true that all States have relative freedom in assessing whether a situation presents a danger to the public and whether to declare a state of emergency, this option is nevertheless subject to certain conditions of form and substance. No matter how serious the circumstances that have caused the State to resort to such measures, it nevertheless cannot depart from certain fundamental rules, termed *erga omnes* obligations.

Guarantees laid down by national legislation regarding states of emergency

Pursuant to the draft articles on State responsibility, recently adopted on the first reading by the United Nations Commission on Human Rights, a state of emergency can be invoked by a government only if it is “the only means of safeguarding an essential interest (...) against a grave and imminent peril”.¹ The seriousness of the situation must therefore be such that, in order to maintain public order and avoid a threat to the very existence of the State, recourse to emergency legislation is inevitable. It is generally agreed that, in order to provide sturdier guarantees, this legislation should already exist before a crisis arises, and it should include mechanisms to monitor implementation before or after; it should also be designed to be applied as an interim measure.² This issue was recently studied by an international workshop on minimum humanitarian rules, held in Cape Town, South Africa. The participants were categorical that national constitutions should clearly define that which amounts to a state of emergency and a real danger, and that the declaration of a state of emergency should be made known to the other States.³ This obligation to notify the other States is obviously intended to avoid the establishment

¹ Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996. UN document A/51/10, p. 137.

² Nicole Questiaux, “Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency”, UN doc. E/CN.4/Sub.2/1982/15, 27 July 1982, p. 8.

³ “Report of the international workshop on minimum humanitarian standards” (Cape Town, South Africa, 27-29 September 1996), UN doc. E/CN.4/1997/77/Add.1, 28 January 1997.

of *de facto* states of emergency. This is the reason why human rights instruments comprising derogation clauses generally require participating States making use of them to inform the other States Parties as soon as possible of the provisions from which they have departed and their grounds for so doing.⁴ In the series of resolutions on minimum humanitarian rules adopted by it in recent years, the UN Human Rights Commission recognizes the vital importance of suitable national legislation to deal with emergencies whilst respecting the rule of law. It invites the States to re-examine their legislation in order to ensure this.⁵

Guarantees provided by fundamental rules known as erga omnes obligations

Most of the human rights instruments that authorize participating States to restrict their obligations in periods of crisis enumerate the rules from which it is forbidden to depart in any circumstances.⁶ These are generally rules with which compliance in the event of internal violence offers the best protection against the most serious human rights violations. The rules most frequently involved are the right to life, the prohibition of slavery, the prohibition of inhuman, cruel or degrading treatment — especially torture — and the non-retroactive nature of penal laws.⁷ These rules, from which no departure is possible and which are enshrined in the constitution of many States, are known as fundamental rules. The International Court of Justice has on several occasions had cause to remind the international community of the importance of these rules, which it

⁴ According to Article 4, paragraph 3 of the International Covenant on civil and political rights, the States exercising the right of derogation must, through the agency of the UN Secretary-General, immediately inform the other States Parties of the provisions from which they have departed, and the reasons for this departure. Similarly, paragraph 3 of Article 15 of the European Convention for the protection of human rights and fundamental freedoms stipulates that the States Parties who exercise this right must keep the Secretary-General of the Council of Europe fully informed of the measures taken and grounds for taking them.

⁵ See resolution 1997/21, paragraph 3, of 11 April 1997 of the Human Rights Commission.

⁶ Article 4 of the International Covenant on civil and political rights, Article 15 of the European Convention for the protection of human rights and fundamental freedoms, and Article 27 of the American Convention on human rights.

⁷ Theodor Meron, *Human Rights in internal strife: their international protection*, Grotius Publications, Cambridge, 1987, p. 52, and Hans-Peter Gasser, "A measure of humanity in internal disturbances and tensions: proposal for a Code of Conduct", *IRRC*, No. 262, January-February 1988, p. 43.

describes variously as “elementary considerations of humanity”⁸ and “rules concerning the basic rights of the human person” and which are an integral part of general international law.⁹ Moreover, the Court takes care to classify them among the *erga omnes* obligations,¹⁰ whose importance for the international community is such that all States may be viewed as having a legal interest in their being protected in all circumstances. Such a description would alone justify the ineluctable nature of these rules. It was with this in mind that the International Law Commission concluded in the above-mentioned draft articles that under no circumstances may a State cite a state of emergency as grounds for placing itself above the law if the international obligation with which the State’s actions are not in accordance is itself based on an imperative norm of general international law.¹¹

Ensuring greater protection for people caught up in internal violence

The guarantees afforded by the fundamental rules today appear to be insufficient. These rules do not cover all situations arising from internal tension, especially those that are a consequence of judicial power being made dependent on the executive power. To cover these areas, initiatives are being taken to encourage the international community to adopt a text inspired by international humanitarian law, i.e. one that solemnly affirms the fundamental rights of the individual in periods of internal violence and strife.

The grey areas of international human rights law applicable in times of internal tension

The fundamental rules applicable in times of internal tension do not cover all the cases of serious violations of humanitarian principles that frequently occur in this type of situation. Two that cause large-scale suffering are mass arrests and the suspension of judicial safeguards.

Authorities facing internal tension and strife generally invoke security considerations as grounds for arresting selected individuals from political

⁸ The Corfu Channel case (United Kingdom v. Albania), *I.C.J. Reports 1949*, p. 22.

⁹ Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), *I.C.J. Reports 1970*, p. 32.

¹⁰ *Ibid.*

¹¹ *Supra* (note 1), Article 33, paragraph 2.

circles, the labour movement and the media. Periods of administrative detention are unduly extended and the detainees unfortunately sometimes ill-treated. They are frequently held in isolation, with no possibility of communicating with their loved ones. In some cases, the authorities do not even announce their arrest. This practice has become widespread in some areas of the world among governments, opposition movements and paramilitary groups. The aim is to intimidate the population.

Rules have been drawn up to deal with arbitrary arrest and extrajudicial detention and to improve protection for detainees. These are the "Standard minimum rules for the treatment of prisoners", adopted on 30 August 1955 by the first United Nations Congress on the prevention of crime and the treatment of offenders.¹² Their purpose is to provide a well-ordered penal arrangement so as to preserve the human dignity of the detainee. They were updated by the UN General Assembly in a resolution entitled "Body of principles for the protection of all persons under any form of detention or imprisonment".¹³ These are applicable without any distinction founded on the race, colour, sex, language, religion, social origin or political opinions of the detainee.

Irregularities in penal procedure are common in periods of internal strife. The right — enshrined in the law — of every detainee to receive a fair and public hearing before an independent and impartial court is often ignored. There are restrictions on the rights of the defence. The detainee generally is allowed neither access to his dossier nor an opportunity to learn the reasons for his arrest and the accusations levelled against him. Caught up in the difficulties of dealing with internal violence, the authorities frequently exploit the resulting state of emergency to amend rules of judicial procedure making these retroactive so that they can be applied to trials already in progress. Innocent people arrested by ill-luck during violent street demonstrations may be sentenced to severe punishment or even summarily executed at the end of hurried proceedings, without receiving a fair trial.

¹²Stephen P. Marks, "The principles and norms of human rights applicable in emergency situations", in Karel Vasak (ed.), *The international dimensions of human rights*, UNESCO, Paris, 1978, p. 218.

¹³UN General Assembly resolution 43/173 of 9 December 1988. See Peter H. Koojmans, "In the shadowland between civil war and civil strife: some reflections on the standard-setting process in humanitarian law of armed conflict", in Astrid J.M. Delissen and Gerard J. Tanja (Eds.), *Humanitarian law of armed conflict — challenges ahead, Essays in honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 239.

Both the International Covenant on civil and political rights and regional treaties for the protection of human rights contain provisions ensuring the fundamental rights of detainees and defendants both in detention and before the courts. With the exception of the African Charter on human and peoples' rights, these instruments nevertheless leave the States party to them free to exercise the specified right of derogation and to suspend the application of those rights when an exceptional public danger exists.

Broadening the field of application of international humanitarian law to include internal violence

The question of whether certain rules of international humanitarian law should be broadened to cover internal violence was first raised in 1949 at the diplomatic conference called to adopt the new Geneva Conventions. During deliberations on Article 3 common to the four Conventions, which relates to conflicts of a non-international nature, the lack of any definition of this category of conflict gave rise among many of the delegations to the fear that its field of application might extend to any act of force, including any form of anarchy or rebellion. The Conference's refusal to list conditions for Article 3's application enabled the International Committee of the Red Cross to declare itself in favour of the widest possible application. The commentary on Article 3 published by the ICRC insists that such an interpretation in no way limits the State's right to exercise repression and in no way increases the power of rebel groups.¹⁴ This view is in keeping with the role of intermediary which the ICRC has played since 1921 in connection with internal violence, with the aim of preserving human dignity and preventing the fundamental rights of the individual from being violated.¹⁵

Article 3 lays down rules described by the International Court of Justice as "general principles of humanitarian law".¹⁶ They are indisputably apt to improve protection of people caught up in internal tension:

¹⁴ Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Commentary published under the direction of Jean S. Pictet, ICRC, Geneva, 1952, pp. 56 and 61.

¹⁵ Marion Harroff-Tavel, "Action taken by the International Committee of the Red Cross in situations of internal violence", *IRRC*, No. 294, May-June 1993, pp. 195-220.

¹⁶ Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *I.C.J. Reports 1986*, p. 114, para. 220.

apart from the safeguards afforded by the principle of inalienability, which are enshrined in the instruments of international human rights law, this article prohibits the passing of sentences and the carrying out of executions without due process of law. Verdicts must be returned by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples.

Since then, several drafts prepared as individual initiatives have taken as their basis the rules contained in Article 3 and the provisions of Article 75 of Protocol I additional to the Geneva Conventions to strengthen protection for persons affected by internal violence by providing them with, among other things, additional guarantees while in detention and on trial. The declaration drafted in 1984 by Theodor Meron should be cited in particular.¹⁷ Meron hoped that his declaration would lead in time to the adoption of a new instrument codifying a body of rules applicable in this type of situation. This is also the approach of the draft adopted in 1987 by the Norwegian Human Rights Institute¹⁸ and that drawn up in 1990 by the Institute for Human Rights at the University of Turku/Åbo, in Finland, entitled: "Declaration of minimum humanitarian standards".¹⁹ For his part, Hans-Peter Gasser, editor-in-chief of the *International Review of the Red Cross*, would prefer having a code of conduct to serve as a reminder of the existing rules binding on the parties involved in situations of internal strife.²⁰

The idea of grouping together the fundamental rights of the individual as set out by international human rights law and international humanitarian law in a single body of rules taking the form of a declaration intended to improve protection for people affected by internal violence was favourably received by the member States of the Organization for Security and Co-operation in Europe. In the Moscow Declaration of 1991, they renounced their right to depart from human rights guarantees recognized by the legal instruments to which they are party.²¹ Then, at the Budapest

¹⁷ Theodor Meron, "Towards a humanitarian declaration on internal strife", *American Journal of International Law*, Vol. 78, 1984, pp. 859-868.

¹⁸ Hans-Peter Gasser, "Humanitarian standards for internal strife", *IRRC*, No. 294, May-June 1993, p. 223.

¹⁹ Text published by the *IRRC*, No. 282, May-June 1991, pp. 330-336, and by the *American Journal of International Law*, Vol. 85, 1991, pp. 375-381.

²⁰ *Supra* (note 7).

²¹ Conference on Security and Co-operation in Europe, Moscow Declaration of 3 October 1991, *International Legal Materials*, Vol. 30, 1991, p. 1670 ff.

summit in 1994, they stressed the importance of a declaration setting out the minimum standards applicable in all situations. Such a declaration, which they propose to have adopted in the UN framework, will take account of the relevant rules of international human rights law and international humanitarian law.²²

For its part, the UN Human Rights Commission is asking the Secretary-General to prepare, in conjunction with the ICRC, an analytical report on the question of the fundamental rules of humanity, taking into account: "(...) the rules common to human rights law and international humanitarian law which are applicable in all circumstances".²³

When internal violence erupts, governmental authorities are unfortunately not the only ones to resort to violence and to abuse fundamental human rights. Groups opposing the authorities or each other are not always above such conduct and cause innocent persons to suffer. These groups must also be called upon to moderate their actions and respect minimum humanitarian laws. However, since international law does not address them directly, they are generally little disposed to respect its rules. We may hope that the setting up of an international criminal court with the task of instituting proceedings against individuals suspected of any serious violations of international humanitarian law or international human rights law, and pursuing them wherever they may be, will put an end to impunity, thus ensuring universal respect for those rules.

²² Observations of Switzerland, Report of the Sub-Commission on prevention of discrimination and protection of minorities, UN doc. E/CN.4/1997/77/Add.1, 28 January 1997, p. 2.

²³ Human Rights Commission, resolution 1997/21, 11 April 1997.

Codification of international rules on internally displaced persons

An area where both human rights and humanitarian law
considerations are being taken into account

by **Robert K. Goldman**

This past April the Representative of the United Nations Secretary-General on Internally Displaced Persons, Francis M. Deng, presented to the UN Commission on Human Rights, at its 54th session, a report with an addendum entitled *Guiding Principles on Internal Displacement*¹ (hereinafter “Guiding Principles”). The Commission adopted by consensus a resolution² co-sponsored by more than 50 States which, *inter alia*, took note of the decision of the Inter-Agency Standing Committee welcoming the Guiding Principles and encouraging its members to share them with their Executive Boards, and also of Mr. Deng’s stated intention to make use of these principles in his dialogue with governments and intergovernmental and non-governmental organizations. These principles are an important milestone in the process of establishing a generally accepted normative framework for the protection of the estimated 20 to 25 million internally displaced persons worldwide.

The Guiding Principles are largely the outgrowth of the conclusions of an elaborate study entitled *Compilation and Analysis of Legal Norms*,

Robert K. Goldman is Professor and Louis C. James Scholar and Co-Director of the Center for Human Rights and Humanitarian Law, Washington College of Law, American University, Washington D.C.

¹ Text reprinted *infra*, p. 545.

² UN Doc. E/CN.4/1998/53/Add. 2 of 17 April 1998.

which was prepared by a team of legal experts under the direction of Mr Deng and presented to the Commission on Human Rights in 1996.³ The purpose of the study was to determine the extent to which international human rights law, international humanitarian law and refugee law, by analogy, meet the basic needs of the internally displaced in three recognized situations in international law. These situations, which cover most cases of internal displacement, are: (1) situations of tension and disturbances, or disasters in which human rights law is applicable; (2) situations of non-international armed conflict governed by the central principles of humanitarian law and by many human rights guarantees; and (3) situations of inter-State armed conflict in which the detailed provisions of humanitarian law become primarily operative and many fundamental human rights norms remain applicable.

The study concluded that while existing international law covers, albeit in a dispersed and diffuse manner, many aspects of particular relevance to internally displaced persons, there are many areas in which the law provides insufficient legal protection owing to inexplicit articulation or normative and other kinds of gaps. One example of a normative gap is the fact that no international instrument contains an express right not to be arbitrarily displaced. Other such gaps are the absence of a right to restitution of property lost (or compensation for its loss) as a consequence of displacement during armed conflict situations, a right to have access to protection and assistance during displacement, and a right to personal documentation. Further gaps occur where a legal norm is not applicable in all circumstances. For example, because human rights law is generally binding only on State agents, the internally displaced lack sufficient protection in situations of tension and disturbances where violations are perpetrated by non-State players. Another instance of insufficient protection occurs in situations falling below the threshold of application of humanitarian law, in which restriction or even derogation of human rights guarantees might be permissible.

In addition, there are numerous areas where a general norm exists, but a corollary, more specific right relevant to the needs of the internally displaced has not been articulated. For example, although there is a general norm guaranteeing freedom of movement, there is no explicit right to find refuge in a safe part of the country, nor any express guarantee against the forcible return of internally displaced persons to dangerous areas within

³ UN Doc. E/CN.4/1996/52/Add. 2.

their own country. Another example can be found in the area of non-discrimination, where treaties prohibit discrimination, *inter alia*, on the basis of any “other status” of the person concerned. Although this can be interpreted to include the status of being internally displaced, no authoritative body has yet rendered such a decision. Similarly, although human rights treaties prohibit arbitrary detention, the preconditions for lawful detention of internally displaced persons in closed camps are unclear. Finally, there are “ratification” gaps which are still numerous. Such gaps can result in a vacuum as regards legal protection for the internally displaced in those States that have not ratified key human rights treaties and/or the Additional Protocols to the 1949 Geneva Conventions.

These findings were sufficiently compelling to prompt Francis Deng to ask his team of legal experts to assist him in the formulation of a set of guiding principles specifically tailored to meet the needs of internally displaced persons. This document would both restate general principles of protection in more specific detail and address the grey areas and gaps identified in the *Compilation and Analysis of Legal Norms*. It was also felt that restating and clarifying legal norms in a single coherent document could reinforce and strengthen existing protection. Significantly, both the International Committee of the Red Cross and the Office of the UN High Commissioner for Refugees endorsed the preparation of guiding principles relating to the internally displaced on the basis of the conclusions of this study.

The Guiding Principles on Internal Displacement consist of 30 principles which are comprehensive in scope. They identify key rights and guarantees relevant to protecting persons against forced displacement, and to protecting and assisting them both during displacement and during their return or resettlement and reintegration. For the purposes of these principles, internally displaced persons are:

“persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.”⁴

As stated in the document itself, the Guiding Principles reflect and are consistent with international human rights and international humanitarian

⁴ Introduction, para.2.

law. Indeed, many of them, particularly those relating to protection during displacement, are essentially declaratory of customary law. Most of the principles blend basic humanitarian law rules and principles with key human rights guarantees, thereby underscoring the shared purpose of both bodies of law, that is, to safeguard human life and dignity. Many of the principles are either modelled on or are near verbatim transcriptions of provisions that appear in humanitarian and human rights treaties. In addition, the principles relating to return, resettlement and reintegration were largely inspired by and reflect certain basic tenets of refugee law.

It is important to note that these principles do not alter, replace or modify existing international law or rights granted to individuals under domestic law. Rather, they are designed in large measure to provide guidance on how the law should be interpreted and applied during all phases of displacement. By calling on “all authorities and international actors” to respect their obligations under international law, including human rights and humanitarian law, the principles also seek to prevent and avoid conditions that might lead to displacement in the future.

As the most comprehensive, if not authoritative, restatement of norms specifically applicable to the internally displaced, the Guiding Principles should be disseminated as widely as possible. Such dissemination is particularly necessary since the rights of the internally displaced are often disregarded or even violated simply because of lack of awareness. They should prove an indispensable tool for orienting and facilitating the work of States and intergovernmental and non-governmental organizations providing protection, assistance and other necessary services to the internally displaced.

Guiding Principles on Internal Displacement

A few comments on the contribution
of international humanitarian law

by **Jean-Philippe Lavoyer**

The very intense international debate that has taken place in recent years on the subject of internally displaced persons has recently undergone a major development — the drafting of the Guiding Principles on Internal Displacement (hereinafter referred to as the “Guiding Principles”). The distinguishing feature of these Guiding Principles is that they incorporate elements of three branches of public international law in a single document: international humanitarian law, human rights law, and refugee law. This combination calls for special comment.

The aim of this article is to place the Guiding Principles in a wider context and to highlight the importance of international humanitarian law and the role of the ICRC with regard to internally displaced persons. In so doing, the author examines both the advantages and the shortcomings of a document that covers a very broad range of contexts, whereas existing international law contains a number of rules which are precise but apply only to specific situations.

Internally displaced persons and international humanitarian law

Identifying the link between internal displacement and international humanitarian law is a simple matter, for persons internally displaced as a result of armed conflict are protected under the terms of this law. The

Jean-Philippe Lavoyer is Deputy Head of the ICRC Legal Division.

Original: French

link is in fact a very close one, since armed conflicts are one of the major causes of displacement.

While humanitarian law affords protection to the internally displaced, it is important to bear in mind that its scope extends a great deal further. Indeed, its aim is primarily to *prevent* displacement, and many forced population movements could be avoided if the rules of humanitarian law — and human rights law for that matter — were duly respected.

International humanitarian law seeks first and foremost to protect the civilian population from the harmful effects of war. The 1977 Protocols additional to the 1949 Geneva Conventions, which reaffirm and expand the provisions of the four Conventions for the protection of war victims, contain numerous rules setting standards of conduct for the warring parties in order to spare the civilian population as a whole. Some of these rules afford general protection, while others relate more specifically to displacement.

With 188 States Parties, the Geneva Conventions of 12 August 1949 are universal. A total of 150 States are bound by Additional Protocol I, which relates to international armed conflicts, and 142 States by Additional Protocol II, which concerns non-international armed conflicts.¹ These figures are very encouraging and bear witness to the importance that the international community attaches to the ideals upheld by humanitarian law.

Preventing displacement in general

As regards the conduct of hostilities, the rules of humanitarian law stipulate that, in the event of armed conflict, it is imperative at all times to distinguish between the civilian population and combatants, and between civilian objects and military objectives.² Consequently, only attacks against combatants and military objectives³ are lawful. It is expressly prohibited to attack civilians — insofar as they do not take an active part in the hostilities — or to launch indiscriminate attacks which strike military objectives and civilians without distinction.⁴

¹ As at 1 July 1998.

² Additional Protocol I, Art. 48.

³ The term “military objectives” is defined in Article 52 of Additional Protocol I.

⁴ Additional Protocol I, Art. 51, and Protocol II, Art. 13.

The Additional Protocols also provide for protection of objects indispensable to the survival of the civilian population (such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation works), cultural objects and places of worship, works and installations containing dangerous forces (dams, dykes and nuclear power stations), and the natural environment.⁵

In order to strengthen such protection, humanitarian law requires belligerents to take numerous precautions when planning or executing an attack. They must always ensure that their objective is indeed a military one.⁶

Protection of the civilian population against the effects of hostilities is thus assured in the event of both international and non-international armed conflicts.

Furthermore, humanitarian law requires that persons who take no active part or have ceased to take an active part in the hostilities shall be treated humanely and without any adverse distinction. The purpose of this requirement is to protect civilians above all. Article 3 common to the four Geneva Conventions expressly prohibits acts of violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentences without previous judgment pronounced by a regularly constituted court.⁷ It also provides that the wounded and sick shall be collected and cared for. Additional Protocol II of 1977 further consolidates these prohibitions.⁸

One of the advantages of humanitarian law over human rights law is that, in internal armed conflicts, its provisions — in this instance, common Article 3 and 1977 Additional Protocol II — are also binding on armed opposition groups. Moreover, there can be no derogation from the rules of international humanitarian law.

Displacement is expressly prohibited

Some rules of humanitarian law deal directly with the issue of displacement. For example, in situations of internal conflict it is expressly

⁵ Additional Protocol I, Arts 53-56, and Protocol II, Arts 14-16.

⁶ Additional Protocol I, Art. 57.

⁷ According to the International Court of Justice, Article 3 common to the Geneva Conventions contains rules that reflect elementary considerations of humanity and is applicable in *all* armed conflicts (*Nicaragua v. USA*, Judgment, 27 June 1986, para. 218).

⁸ Additional Protocol II, Arts 4-6.

forbidden to compel civilians to leave their place of residence unless the security of the persons involved or imperative military reasons so demand.⁹

Furthermore, the inhabitants of occupied territory may not be expelled from such territory by the Occupying Power.¹⁰ In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.¹¹

Protection of internally displaced persons

Internally displaced persons do not fall into a separate category under humanitarian law. They are included in the term “civilian population”, and thus benefit from all the provisions that afford protection to civilians (including those mentioned above).

All armed conflicts cause a degree of suffering among civilians, even when humanitarian law is fully respected. Strict compliance with the law would considerably reduce the number of victims and hence the number of forced population movements, meaning that there would be fewer internally displaced persons and refugees.

The ICRC and internally displaced persons

The States have entrusted the ICRC with the task of monitoring respect for international humanitarian law. As the promoter and custodian of this body of law, the organization endeavours to ensure compliance with its provisions in times of peace as well as war. In peacetime, the States’ primary responsibility in this respect is to provide instruction in humanitarian law for their armed forces — for whom it is principally intended — and to adopt measures for implementation of the law at the national level, particularly with a view to ensuring the prosecution of war criminals.¹²

⁹ Additional Protocol II, Art. 17.

¹⁰ Fourth Geneva Convention, Art. 49.

¹¹ Fourth Geneva Convention, Art. 45.

¹² The ICRC’s Advisory Service on International Humanitarian Law provides States with technical assistance and supports their efforts to implement humanitarian law at the national level.

When an armed conflict breaks out, the ICRC reminds the belligerents of their obligations, stemming mainly from the Geneva Conventions of 1949 and their Additional Protocols of 1977. It also seeks to establish a constructive dialogue with them, based on mutual trust. For this reason the ICRC prefers persuasion over denunciation as a working method. In the event of serious violations of humanitarian law, however, and if its policy of discretion fails to put a stop to such violations, the ICRC reserves the right to denounce them.

The ICRC also reminds States of their responsibility to *ensure respect* for humanitarian law, as stipulated in Article 1 common to the four Geneva Conventions and to Additional Protocol I.¹³

In the field, the ICRC performs a variety of tasks, which include providing protection and assistance for the civilian population, conducting health-related activities (such as war surgery, supplying drinking water, rehabilitation), visiting prisoners of war and security detainees, and restoring contact between family members separated by war.¹⁴

The ICRC's understanding of the term "civilian population" is the same as that defined in humanitarian law. It thus encompasses all civilians, without any distinction. Internally displaced persons are therefore obviously covered by the ICRC's mandate to afford protection and assistance to the civilian population, and the ICRC deploys large-scale activities to help the displaced all over the world. Almost every one of its operations — in Colombia, Uganda, Sierra Leone, the Horn of Africa, Sri Lanka, Afghanistan and the Caucasus, to name but a few — includes a component that deals with displaced persons.

While the ICRC strives to tend to the needs of all victims of armed conflict and internal disturbances, it is well aware of the extreme vulnerability of internally displaced persons, who, like refugees, have generally been forced to leave everything behind in their flight.

While concern for internally displaced persons is indeed crucial, there are obviously other categories of people whose needs may be just as pressing and just as acute — for example the wounded and the sick,

¹³ "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances."

¹⁴ The Geneva Conventions confer upon the ICRC the right to visit prisoners of war and civilian internees (Arts 126 and 143 of the Third and Fourth Conventions, respectively). Furthermore, the Conventions and the Statutes of the International Red Cross and Red Crescent Movement grant the ICRC a right of humanitarian initiative.

children separated from their families, persons deprived of their freedom, and all those who find themselves trapped in the fighting and who want to flee but are unable to do so. A global view of the different needs and an impartial response to them will prevent any unjustified distinction between the various categories of victims.

The ICRC has never attempted to define the term “internally displaced person”, simply because all displaced persons fall within the category “civilian population”. In terms of legal protection, it is immaterial whether an individual is displaced or not, for all civilians — whether they are living in their own homes, staying temporarily with friends or relatives, admitted to hospital, or forced to flee their homes — are equally entitled to protection.

The international debate on internally displaced persons

The debate on internally displaced persons intensified after the issue was submitted to the Commission on Human Rights, and following the appointment in 1992 of Francis M. Deng as the Representative of the UN Secretary-General on Internally Displaced Persons. Given the increasingly widespread incidence of the problem, such concern for the plight of the displaced was entirely justified.

From the outset, the ICRC made a point of taking an active part in the debate. It maintains a regular dialogue with the Secretary-General's Representative; it has also exchanged views on the matter with other humanitarian players, particularly the Office of the United Nations High Commissioner for Refugees; and it has participated in numerous discussions in several fora, including the UN General Assembly and the Commission on Human Rights. The ICRC is also involved in the work of the Inter-Agency Standing Committee, which attaches great importance to internally displaced persons, and has placed one of its senior staff members at the disposal of the United Nations Office for the Coordination of Humanitarian Affairs to strengthen coordination in matters relating to the internally displaced.

As part of its contribution to the debate, in October 1995 the ICRC organized a three-day symposium in Geneva on internally displaced persons, at which experts discussed the operational and legal aspects of the problem.

The ICRC followed with great interest the work of the Secretary-General's Representative and a team of international legal experts to

prepare a compilation and analysis of legal norms for the protection of internally displaced persons (hereinafter referred to as the “Compilation and Analysis”).¹⁵ This reference document, which was submitted to the Commission on Human Rights in 1996, gave a clearer picture of the rules of human rights law and international humanitarian law (and, by analogy, refugee law) pertaining to internally displaced persons. The conclusion was that existing law provides substantial coverage of the needs of the internally displaced; there were, however, shortcomings and a need for clarification in some areas. It was also considered advisable to make some of the general rules more explicit so as to respond more effectively to the specific needs of displaced persons.

The most serious shortcomings were to be found in contexts not covered by humanitarian law (such as internal disturbances), as a number of human rights may be waived in emergency situations. It should further be pointed out that international law fails to make sufficient provision for the return of internally displaced persons (i.e., the right to return home in safe and dignified conditions) or the right to seek refuge in a safe place. Furthermore, it does not provide for the restitution of property lost as a consequence of displacement or stipulate the right of the displaced to obtain official documents (which are often required to gain access to public services).

To give a more “operational” slant to the Compilation and Analysis, Francis Deng undertook to draw up the Guiding Principles on Internal Displacement, which were drafted between 1996 and 1998 with the assistance of a small group of experts. The ICRC was invited to contribute to the process and readily agreed to take part. Working sessions were held in Geneva in October 1996 and June 1997, and a consultation of experts took place in Vienna in January 1998, at the invitation of the Austrian government. The Guiding Principles were finalized thereafter.

The UN Secretary-General submitted the Representative’s report, along with the Guiding Principles, to the Commission on Human Rights for consideration at its April 1998 session.¹⁶ The Commission discussed the issue and took note of the report and the Guiding Principles. It decided to keep the subject on its agenda and to extend the Representative’s mandate.¹⁷

¹⁵ UN doc. E/CN.4/1996/52/Add.2 of 5 December 1995.

¹⁶ UN doc. E/CN.4/1998/53/Add.2 of 11 February 1998.

¹⁷ Resolution 1998/50 of 17 April 1998. See below, pp. 545-556.

Guiding Principles on Internal Displacement

The Guiding Principles are an important document, and some of its features deserve special comment.

General approach to the problem

As a general rule, protection of the individual can be viewed either in terms of situations or in terms of categories of persons. In the first instance, protection is afforded to persons caught up in certain types of situation. Thus humanitarian law, which applies in either international or internal armed conflicts, sets out an elaborate system of protection of the individual that is designed to meet specific needs arising from the situations covered. In such contexts, certain categories of persons may be entitled to special protection. Such would be the case, for example, of prisoners of war or the inhabitants of occupied territory.

In the second instance, provision may be made to protect specific categories of individuals in a variety of situations. This is the case, for example, of the Convention on the Rights of the Child. The advantage of this approach is that it focuses on protecting one category of persons, regardless of the situation in which they find themselves. The drawback is that it may fail to cover all their needs for protection, since it is impossible to take detailed account of all the rules governing the different situations that may arise.

The Guiding Principles provide for the second form of protection described above, and their strongest point is that they address a wide range of needs arising from diverse situations. However, it should be borne in mind that they do not necessarily provide the same level of protection as that afforded by the various bodies of international law.

Definition of internally displaced persons

The introduction to the Guiding Principles contains a very broad definition of the term “internally displaced person”. While the definition does not confer any legal status upon the persons covered, it serves to specify the document’s field of application. Laudable though this endeavour may be, it does, however, entail the risk of diminishing the scope of the protection to which the civilian population is entitled. Indeed, in an armed conflict internally displaced persons form part of the civilian population — whether the population in question is displaced or not. According to the definition, some people might not qualify as internally displaced persons if the reasons for their displacement are unclear. This

means that they might not be covered by the Guiding Principles, but they would be entitled to protection under international humanitarian law.

The Guiding Principles endeavour to counter this shortcoming by stipulating, in Principle 1, that internally displaced persons are on an equal footing with the rest of their country's population. Care must, however, be taken not to leap to conclusions when interpreting the definition of internally displaced persons.

The definition is somewhat arbitrary, and hence so are overall statistics regarding internally displaced persons. Caution must be exercised in regard to the figures quoted, as they do not always appear reliable. The ICRC for its part has consistently refrained from estimating the number of internally displaced persons worldwide.

Scope of the Guiding Principles

The document fully covers the problem of internal displacement. It deals with the various stages and issues involved, i.e., protection of and humanitarian assistance to the displaced, and their return, resettlement and reintegration.

The Guiding Principles also seek to prevent displacement by reaffirming the obligation to respect and ensure respect for human rights and international humanitarian law (Principle 5).

Legal nature of the Guiding Principles

The purpose of the document is neither to modify nor to replace existing law, as is clearly stated in Principle 2, paragraph 2:

“These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. (...)”

Although the Guiding Principles can thus be viewed as falling within the province of soft law, they contain numerous rules that form part of treaty law and that are therefore legally binding. It is crucial to bear this in mind and to invoke first and foremost the relevant binding rules, such as the detailed provisions of international humanitarian law in situations of armed conflict.

Those for whom the Guiding Principles are intended

As stated in their introductory section, the Guiding Principles are intended primarily for States, armed opposition groups, intergovernmental

and non-governmental organizations, and the Secretary-General's Representative in carrying out his mandate.

While the document may indeed be useful for governmental and non-governmental organizations and the Secretary-General's Representative, the Guiding Principles are intended first and foremost for governments and armed opposition groups, which are also bound by international humanitarian law. Indeed, both are responsible for ensuring respect for humanitarian law, which plays a primary role in matters relating to forced population movements. Principle 3 states, in a more general fashion, that national authorities have the primary duty to provide protection and assistance to internally displaced persons.

The ICRC, along with other organizations, has made it known that it intends to inform its delegates of the contents of the Guiding Principles and to promote them. When faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. The Guiding Principles could nonetheless serve a useful purpose in contexts where humanitarian law does not make specific provision for certain needs (such as the return of displaced persons in safe and dignified conditions). The Guiding Principles could also play a very useful role in situations not covered by international humanitarian law, such as disturbances or sporadic violence.

The principle of non-discrimination

The Guiding Principles are based on the principle of non-discrimination (referred to in Principles 1, 2, 4, 18, 22 and 29 in particular). This principle is the cornerstone of both human rights and humanitarian law.

Protection of women and children

The Guiding Principles rightly place special emphasis on the protection of women and children, as they are particularly vulnerable. After setting out the general rule (Principle 4), the document deals with the recruitment of children in armed forces and their participation in hostilities (Principle 13), and the right of displaced children to receive education (Principle 23). The document stipulates that special attention shall be paid to women, particularly in terms of their health needs (Principle 19) and education (Principle 23).

Restoring family ties

Principles 16 and 17 deal with the issue of missing persons and the reunification of dispersed family members. They refer to the right of

internally displaced persons to be informed of the fate and whereabouts of relatives reported missing and to be reunited with them as quickly as possible. In both cases the Guiding Principles stipulate that the authorities concerned shall cooperate with the humanitarian organizations engaged in such tasks. Indeed, tracing missing persons, conveying messages between separated family members and arranging for family reunifications form part of the traditional activities conducted by the ICRC.

Assistance and protection

One entire section of the Guiding Principles (Principles 24-27) is based on the rules of humanitarian law providing for relief to be delivered to the civilian population in an impartial manner. The document further reaffirms that offers of services made by humanitarian organizations shall not be regarded as interference in a State's internal affairs nor arbitrarily refused.

The Guiding Principles also contain provisions aimed at affording better protection to internally displaced persons. Principle 27, for example, stipulates that:

“International humanitarian organizations (...) when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. (...)”

The decision to link assistance and protection is a judicious one indeed, for no operation strictly limited to the delivery of relief supplies can be fully effective. This confirms the ICRC's long-standing view that the concepts of assistance and protection are closely linked, if not virtually indissociable. In practice, assistance very often serves as a means of protecting the population concerned.

The Guiding Principles nonetheless stress the special role and responsibilities of organizations that have been entrusted with a specific mandate to afford protection:

“The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.”

This refers in particular to the mandate that the States have conferred upon the ICRC. Lastly, Principle 27 states that humanitarian organizations and other players should respect the relevant international standards and codes of conduct. This includes, for example, the Code of Conduct for

the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief,¹⁸ which has been endorsed by a large number of NGOs.

The right to leave one's own country

The Guiding Principles stipulate that all persons have the right to leave their country and, in particular, to seek asylum in another country (Principles 2 and 15). This is an important reminder, for one tends to forget that in some instances the option to flee to another country can save lives. This right is all the more crucial as attempts are sometimes made to prevent displacement so as to avoid creating refugee movements.

Return of internally displaced persons

An entire section of the Guiding Principles (Principles 28-30) is devoted to the return of internally displaced persons. This aspect of the problem deserves special attention, for in practice it has often been relegated to the background. The document takes up the principle of voluntary repatriation, as stipulated in refugee law. It also reaffirms the principle that internally displaced persons have the right to return in safety and with dignity, and that it is the duty of the competent authorities to assist them. Furthermore, the authorities must help the displaced to recover the property and possessions they left behind or, when such recovery is not possible, to obtain appropriate compensation or another form of just reparation.

Principle 15 reaffirms what is tantamount to the principle of *non-refoulement*: it specifically protects internally displaced persons against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Towards a development in the law?

What of the proposal to develop a legally binding instrument on the subject of internally displaced persons? Appealing though the idea may be at first glance, it undeniably has certain disadvantages. Quite aside from whether such a proposal would be politically acceptable to States, a new instrument of this kind might well fall short of, and thus weaken, existing law. Generally speaking, the main problem facing civilians today is blatant

¹⁸ Text reproduced in *IRRC*, No. 310, January-February 1996, pp. 119 ff.

lack of respect for the most fundamental rules. The question is therefore whether the introduction of new rules would serve any useful purpose. Such lack of respect can sometimes be attributed to ignorance, but it mostly stems from a deliberate lack of political will to apply humanitarian law.

This implementation problem is particularly acute in contexts where ethnic or religious concerns are the overriding issue and provoke a spate of violence aimed first and foremost at civilians. A prime example is the policy of “ethnic cleansing”, in which humanitarian law no longer holds any sway. Enormous difficulties also arise in situations where State structures have collapsed, where the chains of command — so vital to ensuring respect for humanitarian law — are lacking, and where the political vacuum has been filled by disorganized bands. In such cases, little heed is paid to the rules of law.

In the face of these considerable challenges, the development of new legal instruments would not appear *a priori* to be the answer to the problem; moreover, the proliferation of new rules might weaken existing law.

Rather than developing new instruments, the international community should, in our opinion, focus its efforts on promoting existing treaties and advancing respect for international humanitarian law among parties to conflicts. For example, States should be reminded of their responsibility to “ensure respect” for the Geneva Conventions and their Additional Protocols, as stipulated by Article I common to the four Geneva Conventions.

That being said, humanitarian law is part of a dynamic process, as evidenced by the recent bans on blinding laser weapons and anti-personnel landmines.

Conclusion

The international debate on the subject of internally displaced persons has undeniably advanced their cause. In particular, the work of the Secretary-General’s Representative has served as a catalyst and has brought about a deeper understanding of their plight and needs. The Compilation and Analysis and, more recently, the Guiding Principles have identified and clarified the rules for the protection of internally displaced persons.

The Guiding Principles are a working tool that serves to reaffirm and clarify existing law. It is to be hoped that they will help sensitize States (as well as warring parties, in the event of armed conflict) to the distressing problem of displacement, and guide them in their action.

The text has the merit of combining, in a single document, elements from different branches of international law, and makes it possible to address the numerous needs of internally displaced persons in a comprehensive fashion. However, it is necessary to remember that such an approach also entails a number of risks — particularly as regards the definition of the term “internally displaced person” — and to bear in mind the many rules of international humanitarian law that serve to protect the civilian population as a whole in the event of armed conflict.

Trends in the application of international humanitarian law by United Nations human rights mechanisms

by **Daniel O'Donnell**

UN human rights mechanisms continue to proliferate, producing numerous decisions and voluminous reports. This article reviews the ways in which such mechanisms apply international humanitarian law, including the law of Geneva and the law of The Hague. In doing so, it focuses mainly on the practice of the rapporteurs appointed by the UN Commission on Human Rights to investigate the human rights situations in specific countries and on that of the thematic rapporteurs and working groups which the Commission has entrusted with monitoring specific types of serious human rights violations wherever they occur, in particular the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Representative of the Secretary-General on Internally Displaced Persons, whose mandates most often lead them to examine abuses occurring in the context of armed conflicts. Reference is also made to two innovative mechanisms which functioned in El Salvador: the first UN-sponsored "truth commission" and the first human rights monitoring body established as part of a comprehensive mechanism for monitoring compliance with a UN-sponsored peace agreement. Certain observations made by treaty monitoring bodies are also mentioned.

Daniel O'Donnell is a member of the New York Bar. He is a former deputy chief of the United Nations Secretary-General's Investigative Team for the Democratic Republic of the Congo, a former chief investigator of the Historical Clarification Commission of Guatemala and a former assistant to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to the Special Rapporteur on the former Yugoslavia and to the Representative of the Secretary-General on Internally Displaced Persons.

This review does not claim to be comprehensive; it merely seeks to identify and illustrate recent trends. The topic is an important one and would deserve to be studied in greater depth.

Application of international humanitarian law

UN human rights mechanisms do not apply international humanitarian law consistently. Many reports make no reference to it, even when they recognize the existence of an armed conflict. Others contain vague affirmations that humanitarian law has been violated, but do not mention the specific facts of the case or the relevant provisions of that law. Nevertheless, the application of humanitarian law by UN human rights mechanisms is increasing. It occurs in four types of situations:

- when humanitarian law standards are expressly designed to cover a specific practice, which human rights standards cover only indirectly;
- when humanitarian and human rights standards are equally applicable;
- when humanitarian law is more appropriate than human rights law because of the identity of the offender;
- when the applicable humanitarian standards merge with human rights law.

These categories are not mutually exclusive. Indeed the boundaries between them are fluid and depend mainly on how broadly the relevant provisions of international human rights law are interpreted. Examples of how humanitarian standards are applied to each type of situation are given below.

Humanitarian law standards as the most appropriate legal framework

Humanitarian standards are often applied with regard to practices which do not easily fit the traditional parameters of human rights violations, particularly when a rapporteur wishes to take a position on a method of warfare as such and not on specific acts affecting the rights of identifiable victims: in other words, when the analysis focuses on the duties of the State and not on rights as such.

The use of mines is one example. In 1993, referring to the situation in northern Iraq, the Special Rapporteur on Iraq concluded:

“... in some cases, the mines have been laid ... more to prevent the civilians from living and farming in their traditional ways. In this way, many civilians have no choice but to move into the amalgamized [sic]

villages built by the Government. In this connection, the Special Rapporteur draws attention to the Land Mines Protocol of 1981. According to this humanitarian instrument, measures should be taken to protect civilians from the effects of mines, while prohibiting the indiscriminate use of mines.”¹

The use of chemical weapons provides another example. In 1994, the Special Rapporteur on Iraq concluded that Iraq’s use of such weapons against Kurdish villages demonstrated “State responsibility for serious breaches of the 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare”.² While in the light of human rights law the use of chemical weapons could be regarded as incompatible with the right to life, the right to health and even as a form of torture, it would seem unnecessarily circuitous to invoke these standards in such a case. Assuming that the prerequisites for application of the relevant humanitarian standards are met, the approach followed by the Special Rapporteur on Iraq has the advantage of clarity and simplicity.

Forced displacement of the civilian population is a third example. Rapporteurs tend to view such displacement as a violation of international standards only when Protocol II³ is applicable. The report on Burundi by the Representative of the Secretary-General on Internally Displaced Persons is a case in point.⁴ Forced displacement is an area where international humanitarian law could be used to interpret international human rights law, the relevant provisions being the substantive standards contained in Article 17 of Protocol II and the provisions of human rights law concerning freedom of movement and residence (an example of the fourth type of situation). Indeed, the Guiding Principles on internal displacement in effect provide that displacement that is not in conformity with Article 17, para. 1, of Protocol II constitutes an arbitrary deprivation or restriction of such freedom.⁵ It is surprising that this conclusion has not been drawn in the Representative’s reports on countries that are not party to Protocol II.

¹ E/CN.4/1993/45, para. 113.

² E/CN.4/1994/58, paras. 112-116, 185.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

⁴ E/CN.4/1995/Add.2, para. 63.

⁵ E/CN.4/1998/53/Add.2, Principle 6.

The activities of the Human Rights Division of the UN Observer Mission in El Salvador (ONUSAL) are a unique example of the application of humanitarian law by a UN human rights mechanism. The first UN field mission to have been entrusted with a human rights mandate, ONUSAL became operational while negotiations were still underway to settle the internal armed conflict in El Salvador. Although it had an express mandate to monitor violations of international humanitarian law as well as violations of human rights law, ONUSAL decided to give priority to the latter. This decision was based in part on its interpretation of the intent of the parties to the agreement defining its mandate, but it was also taken out of deference to the role of the ICRC and because ONUSAL wished to avoid any unnecessary and potentially counterproductive duplication of efforts.⁶

The Human Rights Division nevertheless decided to investigate some violations of humanitarian law and included a separate category for such violations in the operational guidelines it adopted concerning the scope of its mandate. This category included:

- a. Attacks on the civilian population as such and on civilians;
- b. Acts or threats of violence whose main purpose is to intimidate the civilian population;
- c. Acts involving attacks on material goods essential to the survival of the civilian population or the obstruction of relief operations, and
- d. Arbitrary relocation of the civilian population.”⁷

The apparent intent was to apply humanitarian law to cases or situations not directly addressed by human rights standards. In practice, this category was expanded or interpreted to include acts such as the execution of non-combatants by the guerrillas without respect for due process and the indiscriminate use of land mines.⁸ Ironically, despite its professed intention not to give high priority to violations of humanitarian law, ONUSAL probably applied humanitarian law more often and more

⁶ First Report of the ONUSAL Human Rights Division, A/45/1055-S/23037, Annex, paras. 17-25, reprinted in *The United Nations and El Salvador, 1990-1995*, UN doc. DPI/1475, pp. 152 and 153.

⁷ *Ibid.*, para. 52.

⁸ Third report of the Human Rights Division, A/46/23580-S/23580, paras. 170 and 172, reprinted in *The United Nations and El Salvador, supra* (note 6), p. 235.

systematically than any other UN human rights mechanism has done, with the possible exception of the Salvadorian Truth Commission.

Humanitarian law reinforces human rights law

In the second type of situation, humanitarian law standards are applied, not because they are actually needed to evaluate the legality of a specific practice, but simply because the circumstances of a violation suggest that it is appropriate to refer to them. Massacres of civilians by military units are a typical example: it is well established that the extrajudicial execution of a group of unarmed persons for no reason other than their real or presumed political sympathies or the material support they have given to an illegal armed movement violates the right to life under human rights instruments. Yet the fact that such killings are perpetrated by members of the armed forces using military weapons and tactics in the context of an armed conflict makes it seem appropriate to apply relevant standards of humanitarian law, in addition to human rights law.

In his 1990 report on Colombia, the first Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions (hereafter “Special Rapporteur on Executions”) observed that “in the counter-insurgency campaign, the forces of law and order were failing to comply with certain basic principles of international humanitarian law, such as the principle of not engaging in violence against the civilian populations”.⁹ The examples cited are the deliberate massacres of unarmed villagers and the execution of captured guerrillas.¹⁰ Similarly, the Special Rapporteur on Myanmar found that forced labour and portorage during counter-insurgency operations violated both international human rights law and humanitarian standards.¹¹

There may be a psychological motive, conscious or not, underlying the tendency to apply international humanitarian law in these circumstances. Reference to humanitarian law serves to emphasize the gravity of the offence: not only does a particular act violate human rights law, but it also violates humanitarian law. Technical considerations aside, there is a generalized perception that international humanitarian law is designed to cover war, whereas human rights law is designed to cover ordinary

⁹ E/CN.4/1990/22/Add.1, para. 50.

¹⁰ *Ibid.*

¹¹ E/CN.4/1996/65, para.180.

situations; and since more is permitted in wartime than in peacetime, the affirmation that humanitarian law has been violated — that what has happened is prohibited even during an armed conflict — carries a connotation of greater moral reprobation.

One example is the execution by the Salvadorian Army of a nurse captured in an attack on a Farabundo Martí National Liberation Front (FMLN) hospital, which the Truth Commission concluded was “in flagrant violation of international humanitarian law and international human rights law.” The Commission certainly would have concluded that the extrajudicial execution of a person deprived of her freedom was incompatible with international human rights law, even if humanitarian law had been inapplicable. Yet the finding that the killing of the nun violated the laws of war — especially given the special status under humanitarian law of medical personnel serving in an armed conflict — highlights the gravity of this departure from a universally accepted moral, as well as legal, imperative.

Rapporteurs are also concerned with the general impact of conflict on the population and of its collective economic, social and cultural rights. These issues, too, may be addressed in terms of human rights law, humanitarian law or both. In a 1993 report, the Special Rapporteur on Iraq declared: “The present economic blockade against the Kurdish region is clearly incompatible with Iraq’s obligations under both international human rights law (in terms of economic rights and, to the extent it threatens survival, the right to life) and international humanitarian law, in so far as the blockade amounts to a siege.”¹²

The Special Rapporteur on the former Yugoslavia, in his first report, condemned the siege of Sarajevo and Bihac in terms that were clearly intended to refer to humanitarian law standards. In Sarajevo, he noted, the hospital had been “deliberately shelled on several occasions, despite the proper display of the internationally recognized red cross symbol”.¹³ Regarding the situation in Bihac, he reported: “Shelling occurs daily. There are no significant military targets in the city, and the main reason for the shelling appears to be that of terrorizing the civilian population.”¹⁴ This statement is introduced by the following observation: “Most of the

¹² E/CN.4/1993/45, para. 184.

¹³ E/CN.4/1992/S-1/9, para. 17.

¹⁴ *Ibid.*, para. 20.

territory of the former Yugoslavia, in particular Bosnia and Herzegovina, is at present the scene of systematic violations of human rights, as well as serious grave [sic] violations of humanitarian law.”¹⁵

Some evidence of this trend can also be detected in the work of treaty monitoring bodies. In a comment on the right to housing, which was adopted in 1997, the Committee on Economic, Social and Cultural Rights declared that “[F]orced eviction and house demolition as a punitive measure were ... inconsistent with the norms of the Covenant” on Economic, Social and Cultural Rights. “Likewise”, the paragraph goes on, “the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction.”¹⁶ This demonstrates a conscious effort to emphasize the complementarity of the two bodies of law and the importance of their coordinated, harmonious application.

The application of humanitarian law to non-State actors

The third type of situation, the application of humanitarian law is arguably needed to cover acts that, owing to the identity of those who perpetrate them, lie beyond the scope of international human rights law. Classical human rights doctrine maintains that human rights law is binding only on States, and that human rights standards cannot be applied to acts committed by private individuals or groups unless there is incitement, complicity or tolerance on the part of some public official or authority. This view has been questioned in recent years, but is still shared by most UN human rights mechanisms.¹⁷ Nevertheless, most UN rapporteurs also consider that a thorough, impartial and objective analysis of the situation of human rights in a specific country must take into account grave abuses

¹⁵ *Ibid.*, para. 6.

¹⁶ General comment 7, para. 13, reprinted in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, HR/JGEN/1/Rev.3, 1997, p. 96.

¹⁷ The argument for an expansive interpretation of the applicability of human rights law is stated in the report of the Special Rapporteur on Mercenaries, E/CN.4/1991/14, para. 158. The classical position is defended by the Special Rapporteur on Torture in E/CN.4/1994/31, paras. 12 and 13. Most UN rapporteurs and working groups have not addressed this question expressly but, although their practice is not entirely consistent, they generally apply the position defended by the Special Rapporteur on Torture.

committed by armed groups having no link with the established government as well as those committed by governments and groups associated with them.

When a situation of armed conflict exists, international humanitarian law provides the solution. Some of the decisions adopted by the Salvadorian Truth Commission concerning killings and abductions committed by the FMLN during the civil war in El Salvador may serve to illustrate the point. The Commission concluded that the abduction of the President's daughter and her exchange (together with 25 abducted local public officials) for a number of wounded guerrillas constituted hostage taking, in violation of humanitarian law.¹⁸ It also concluded that the FMLN had violated humanitarian law by killing a judge, a renegade guerrilla, four off-duty US Embassy guards and two US military advisors captured when their helicopter was shot down.¹⁹

The execution of 11 mayors by the FMLN was found to violate both humanitarian law and human rights law. The conclusion that the FMLN was subject to international human rights law was explained in these terms: "... when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding for the State under international human rights law ... The official position of the FMLN was that certain parts of the national territory were under its control, and it did in fact exercise that control."²⁰ Most UN human rights mechanisms have not endorsed this position, and the Commission offered no explanation as to why the other executions committed by the FMLN did not violate human rights law as well as humanitarian law.

The FMLN argued that the execution of the mayors was allowed under humanitarian law. The Commission rejected this argument, stating:

"There is nothing in international humanitarian law to prohibit belligerents from punishing, in areas under their control, individuals who commit acts that, according to the applicable laws, are criminal in nature ... The Commission recalls that, when punishing persons accused of crimes, it is necessary to observe the basic elements of due

¹⁸ "From madness to hope", chap. IV E, reproduced in *The United Nations and El Salvador*, *supra* (note 6), p. 377.

¹⁹ *Ibid.*, pp. 370, 373, 376 and 377.

²⁰ *Ibid.*, p. 297.

process. International humanitarian law does not in any way exempt the parties to a conflict from that obligation ...

In none of the cases mentioned above is there any evidence that a proper trial was held prior to the execution. Nor is there any evidence that any of the individuals died in a combat operation, nor that they resisted their executioners.”²¹

The Special Rapporteur on Sudan applied Article 3 common to the four 1949 Geneva Conventions to the Sudan People’s Liberation Army (SPLA) and found both factions responsible for violations of humanitarian law, in interfactional fighting as well as in the struggle against government forces.²² The violations included indiscriminate attacks on the civilian population, rape, mutilation and looting.²³ The recruitment of child soldiers by the SPLA was also emphasized, although the Rapporteur did not explain how this might be considered a violation of common Article 3 or any other provisions of humanitarian law binding on the SPLA.²⁴ Both SPLA factions subsequently signed an agreement to respect Protocol II, even though it had not been ratified by the government of Sudan.²⁵ The Rapporteur also condemned one SPLA faction for seizing an ICRC aircraft and detaining its passengers and crew as hostages, calling this a “serious breach of international humanitarian law”.²⁶

The joint report on Colombia by the Special Rapporteurs on Torture and on Extrajudicial Executions contains repeated references to violations of humanitarian law and to “abuses” committed by insurgent groups. The report clearly implies that guerrilla groups have violated humanitarian law by engaging in practices such as the assassination of informers, girlfriends of members of the armed forces and hostages abducted for ransom.²⁷

The Special Rapporteur on Violence Against Women has indicated that humanitarian law forms part of the legal framework of her mandate,

²¹ *Ibid.*, p. 367.

²² E/CN.4/1994/48, paras. 23 and 130.

²³ *Ibid.*, para. 115.

²⁴ *Ibid.*, para. 101.

²⁵ E/CN.4/1996/62, para. 87.

²⁶ E/CN.4/1997/58, para. 27.

²⁷ E/CN.4/1995/111, para. 57.

and her 1998 report contains a chapter on “Violence against women in times of armed conflict”, suggesting that this type of violation of humanitarian law will receive particular attention.²⁸ The chapter contains information on cases attributed to both governmental and non-State actors, but the report suggests that humanitarian law is particularly relevant as a legal basis for addressing violations committed by non-State actors.²⁹

In so far as States are concerned, they have been held responsible not only for the behaviour of their armed forces and officially recognized militias, but also for the conduct of irregular militia which, while not under direct government control, are aligned with the government and enjoy impunity for violations of humanitarian law.³⁰ The Rapporteur has implied that Sudan is responsible for violations of human rights and humanitarian law committed by rebel groups based on its territory dedicated to the overthrow of the government of Uganda.³¹

Convergence of humanitarian and human rights standards

The obligations and prohibitions set forth in comprehensive human rights treaties such as the International Covenant on Civil and Political Rights are often defined in broad terms, and the treaty monitoring bodies that apply them frequently turn to more detailed and specific instruments for guidance. In the context of an armed conflict it would be logical, for example, to take humanitarian standards into account in determining whether specific instances of deprivation of life, liberty or property should be considered arbitrary or not. This is where the convergence of humanitarian and human rights law is most obvious.

In his 1992 report, reviewing the methodology and jurisprudence developed during the first decade of this mandate, the first Special Rapporteur on Executions indicated that the legal framework of his mandate extended to deaths occurring during an armed conflict and thus included the Geneva Conventions and their Protocols, in particular Article 3 common to the Conventions, Article 51 of Protocol I and Article 13 of

²⁸ E/CN.4/1998/54, chap. I. See also the report on a mission to Rwanda, E/CN.4/1998/54/Add.1, and the report on a mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, E/CN.4/1996/53/Add.1.

²⁹ *Ibid.*, paras. 16 and 17.

³⁰ Special Representative on Sudan, E/CN.4/1996/62, paras. 39 and 40.

³¹ E/CN.4/1997/58, para. 39; E/CN.4/1998/66 paras. 35 and 36.

Protocol II.³² He explained that these instruments were applied, not because his mandate expressly comprised violations of humanitarian law as such, but because the standards cited could be used to determine whether deaths occurring in the context of armed conflict were “arbitrary” or not, and thus whether or not they violated the human rights standards which constituted his main frame of reference.³³

The Special Rapporteur on Torture has not actually indicated that the legal framework of his mandate includes humanitarian law, but he has referred to that law in interpreting the scope of his mandate. In 1995, in explaining why rape should be considered a form of torture under international human rights law, he gave considerable weight to provisions of humanitarian law under which rape is expressly prohibited.³⁴ Similarly, in his 1997 report, he took into account provisions of humanitarian law prohibiting corporal punishment of prisoners in determining whether this practice is compatible with provisions of human rights law prohibiting torture and cruel, inhuman and degrading treatment.³⁵

Article 38 of the Convention on the Rights of the Child represents another instance in which international humanitarian and human rights law converge. Not only are paragraphs (2) and (3) regarding minimum ages for participation and recruitment inspired by Protocol II, but paragraphs (1) and (4) incorporate vast portions of international humanitarian law into the regime of protection established by this instrument. The Committee on the Rights of the Child has recently begun to evaluate compliance with humanitarian law in its examination of the reports submitted by States Parties involved in armed conflicts. In 1997, the Committee declared that it was “deeply concerned that the rules of international humanitarian law applicable to children in armed conflict were being violated in the northern part of the State Party [Uganda] in contradiction to the provisions of Article 38 of the Convention”.³⁶ Specific mention was made of the abduction, killing and torture of children and of the use of child soldiers. The Committee recommended that the government take measures to make

³² E/CN.4/1992/30, para. 28.

³³ *Ibid.*, paras. 19-28 and 608.

³⁴ E/CN.4/1995/34, para. 17.

³⁵ E/CN.4/1997/7, para. 11.

³⁶ Concluding observations of the Committee on the Rights of the Child: Uganda, of 10 October 1997, UN doc. CRC/C/69, para. 136.

all the parties to the conflict aware of their duty “to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention” and to punish those responsible for violating such rules.³⁷ It also addressed this issue in its examination of the report submitted by Myanmar on its implementation of the Convention, recommending that the government investigate and prosecute rape and other abuse of children by members of the armed forces and cease the recruitment of underage child soldiers and the forcible recruitment of children as porters.³⁸

The third report of the Special Rapporteur on the former Yugoslavia provides an example of the incipient development of a new legal concept drawing on both humanitarian and human rights law. The practice of ethnic cleansing is defined as a combination of practices incompatible with both bodies of law, including killings, torture, inhuman and degrading treatment, the forced movement of civilians and the destruction of historic monuments and places of worship constituting the cultural and spiritual heritage of a people. Killings, torture and cruel, inhuman and degrading treatment violate both international human rights law and common Article 3 — which the Rapporteur refers to as *jus cogens* — while the forced movement of civilians and the destruction of monuments and places of worship violate articles 16 and 17 of Protocol II additional to the Geneva Conventions.³⁹ The Rapporteur’s next report reaffirms that “[e]thnic cleansing violates fundamental principles of international human rights and humanitarian law” and adds rape to the list of practices “deliberately used as an instrument of ethnic cleansing”.⁴⁰

The concept of ethnic cleansing has subsequently been applied to situations in other countries, such as Burundi.⁴¹ The Guiding Principles on internal displacement likewise indicate that displacement intended to perpetuate ethnic cleansing violates international law.⁴²

³⁷ *Ibid.*, para. 151.

³⁸ *Supra* (note 36), paras. 154-156 and 176.

³⁹ A/47/666, paras. 129-132.

⁴⁰ E/CN.4/1993/50, paras. 256 and 260.

⁴¹ Report of the Representative of the Secretary-General on Internally Displaced Persons, E/CN.4/1995/Add.2, para. 68; Report of Special Rapporteur on Executions, E/CN.4/4/Add.1, paras. 43-45.

⁴² E/CN.4/1998/53/Add.2, Principle 7.

The threshold for application of international humanitarian law and related issues

Although UN human rights rapporteurs are applying humanitarian law with increasing frequency, they rarely analyse in any detail the factual circumstances that lead them to do so. There appears to be a risk that UN human rights mechanisms may arrive at different conclusions regarding the question of whether an armed conflict exists in a given country. This threshold question aside, difficulties have also been encountered in determining whether the applicable standards are those that cover international or non-international armed conflicts. The praxis of UN rapporteurs also highlights the importance of issues concerning the temporal and spatial scope of application of humanitarian standards. Some examples are given below.

The 1996 report on Peru by the Representative of the Secretary-General on Internally Displaced Persons found that although military operations had “significantly diminished” and security had “improved considerably”, security was “still fragile”, “pockets” of insurgency remained and armed skirmishes continued to be reported in some remote regions.⁴³ The report concludes: “...where the requirements for its application are fulfilled, in particular in the emergency zones, common Article 3 of the Geneva Conventions and Additional Protocol II should be enforced”.⁴⁴ A year later, the Human Rights Committee observed that Peru had been “affected by terrorist activities, internal disturbances and violence”.⁴⁵

A report based on a mission which the Representative of the Secretary-General on Internally Displaced Persons carried out in Burundi in September 1994 paraphrases the Commentary published by the ICRC on Article 3 common to the Geneva Conventions⁴⁶ and vaguely concludes: “Some of the events that have taken place in Burundi would seem to fall within the ambit of this provision.”⁴⁷ Having gathered specific information on the nature and extent of military activities during a mission that took

⁴³ E/CN.4/1996/52, para. 22.

⁴⁴ *Ibid.*, para. 32.

⁴⁵ A/52/40, para. 148.

⁴⁶ *Geneva Conventions of 12 August 1949*, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952-1960.

⁴⁷ E/CN.4/1995/50/Add.2, para. 50.

place a few months later, the Special Rapporteur on Executions reached the more concrete conclusion that “a low intensity civil war” was taking place in a certain province.⁴⁸

The 1998 report by the Special Representative on Violence Against Women indicates that violations of the rights of women have occurred during armed conflicts in Algeria, China (Tibet), Haiti, India (the Punjab), Indonesia (East Timor), Mexico and the Republic of Korea, among other countries.⁴⁹

In a 1992 report, the Independent Expert on El Salvador declared: “The protection granted by international humanitarian law remains in effect throughout the present period of cessation of the armed conflict.”⁵⁰ It is not clear how this statement can be reconciled with the general rule that humanitarian law applies only until “the general close of hostilities”, except with regard to prisoners who remain in the power of a party to the conflict or with regard to occupied territories.⁵¹ A 1992 report on Afghanistan finds that rocket attacks on cities violate Protocol I, even though it suggests that such attacks were carried out by insurgent forces, not a foreign army.⁵²

In 1995, the Special Rapporteur on Executions undertook a mission to the “Papua New Guinea island of Bougainvillea”, where an independence movement was locked in conflict with the armed forces and pro-government militia. The report urged the government to “take into account” the provisions of the Fourth Geneva Convention.⁵³ Recommendations of this sort are not necessarily predicated on a finding that the instrument in question is legally applicable, but since the Fourth Convention applies to international armed conflicts, it would have been preferable to state explicitly why that instrument might be considered relevant to this conflict.

It would be neither feasible nor desirable to curb the independence of the various UN mechanisms which examine the human rights situation in

⁴⁸ E/CN.4/1996/4/Add.1, paras. 61, 63 and 64.

⁴⁹ E/CN.4/1998/54, paras. 19-57.

⁵⁰ A/47/596, para. 105.

⁵¹ Protocol II, Art. 2 (2); for international armed conflict, see Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 6, and Geneva Convention relative to the Treatment of Prisoners of War, Art. 5.

⁵² E/CN.4/1992/33, paras. 37, 38 and 98.

⁵³ E/CN.4/1996/4/Add.2, para. 104.

specific countries in order to eliminate the risk that these mechanisms will offer different interpretations concerning the applicability of international humanitarian law. There is a tendency towards greater cooperation and coordination among such mechanisms, which has proved beneficial and which hopefully will continue to grow. What does not yet exist, and would be useful, is a forum where UN human rights experts and specialists in international humanitarian law could periodically engage in an informal exchange of views on issues of common concern.

Support for ratification of humanitarian law instruments and for the International Committee of the Red Cross

Ratification of international humanitarian law

When States under scrutiny have not ratified all the relevant instruments of international humanitarian law, rapporteurs may encourage them to do so. The Special Rapporteur on Executions, for example, encouraged the government of Papua New Guinea to ratify the Fourth Geneva Convention, although, perhaps paradoxically, no mention was made of Protocol II.⁵⁴ The Special Rapporteur on Sudan encouraged the government to ratify Protocol II,⁵⁵ and a similar recommendation was addressed to Sri Lanka by the Working Group on Disappearances and by the Representative of the Secretary-General on Internally Displaced Persons.⁵⁶ The Special Rapporteur on Cambodia recommended ratification of the 1980 Convention on Certain Conventional Weapons.⁵⁷

When governments do ratify international instruments of humanitarian law, this is duly mentioned. The 1996 report of the Special Rapporteur on Myanmar notes ratification of the 1949 Geneva Conventions, while calling for ratification of their Additional Protocols.⁵⁸ The 1995 report on Colombia prepared jointly by the Special Rapporteurs on Torture and on Executions “welcomes” the ratification of Protocol II, although it cautiously adds that ratification has “symbolic significance”, and appeals to all parties to the conflict to comply with the Protocol’s provisions.⁵⁹

⁵⁴ E/CN.4/1996/4/Add.2.

⁵⁵ E/CN.4/1997/58, para. 59(c).

⁵⁶ E/CN.4/1994/44/Add.1, para. 80.

⁵⁷ E/CN.4/1994/73/Add.1, para. 79.

⁵⁸ E/CN.4/1996/65, paras. 3 and 180(b).

⁵⁹ E/CN.4/1995/111, para. 129.

Incorporation of international humanitarian law into domestic law

UN human rights rapporteurs have also made recommendations concerning the incorporation of provisions of international humanitarian law into domestic legislation. In 1997, for example, in an analysis of the problem of impunity, the Special Rapporteur on Torture pointed out that both the Geneva Conventions and the Convention Against Torture obliged States Parties to extradite or prosecute torturers found within their jurisdiction, regardless of the nationality of the victim or the accused, or the country where the crime was committed. He urged all States to review their legislation to ensure that their courts had jurisdiction over war crimes and crimes against humanity.⁶⁰

Support for the International Committee of the Red Cross

Their investigations of human rights violations give UN human rights rapporteurs a unique opportunity to appreciate the activities of the ICRC, and recommendations aimed at facilitating its work frequently appear in their reports. In at least one instance, a rapporteur encouraged the government to invite the ICRC to return to the country.⁶¹ Recommendations that the government allow the ICRC to visit prisons or detention centres are common, and have appeared in reports on Cambodia,⁶² Iran⁶³ and the former Yugoslavia.⁶⁴ On occasion, these recommendations have been directed specifically to opposition movements.⁶⁵ After a visit to East Timor, the Special Rapporteur on Torture made such a recommendation in connection with a specific incident in a meeting with the Indonesian Minister of Foreign Affairs.⁶⁶ A similar recommendation was made by the Special Rapporteur on the former Yugoslavia during his first mission.⁶⁷ Governments have also been called on to cooperate with the ICRC in clarifying the whereabouts or fate of persons who have disappeared during an armed conflict.⁶⁸

⁶⁰ E/CN.4/1998/38, para. 230-232.

⁶¹ Myanmar, E/CN.4/1996/65, para. 180(e).

⁶² A/49/635, para. 158(h).

⁶³ E/CN.4/1992/34, paras. 444-446.

⁶⁴ E/CN.4/1992/S-1/9, para. 64.

⁶⁵ Special Rapporteur on Afghanistan, E/CN.4/1992/33, para. 115(e).

⁶⁶ E/CN.4/1992/17/Add.1, para. 55.

⁶⁷ E/CN.4/1992/S-1/9, para. 13.

⁶⁸ Iraq, E/CN.4/1997/57, para. 24; former Yugoslavia, E/CN.4/1996/63, para. 58.

Contributions to the development of international humanitarian law

UN human rights bodies have recently provided the framework for efforts to develop or promote recognition of instruments intended to consolidate and clarify standards in three areas where the two bodies of law converge: states of emergency and situations of internal unrest; the rights of displaced persons; and the right of victims to reparation.⁶⁹ An effort is also underway to raise the age limit for participation in armed conflicts and possibly the age of recruitment through the adoption of an optional protocol to the Convention on the Rights of the Child. Such efforts are beyond the scope of this article.

UN human rights mechanisms also contribute to the development of international law by interpreting and consolidating the law through their practice. In so far as international humanitarian law is concerned, interesting developments can be observed regarding the evolution of certain standards from treaty law to customary law.

In 1994, referring to the provisions of Protocol II to the 1980 Convention on Certain Conventional Weapons which prohibit the indiscriminate use of landmines against the civilian population and oblige States Parties to keep a record of their location, Professor van der Stoep wrote:

“While the Special Rapporteur recognizes that Iraq is not a signatory to the said Convention, he equally observes that the specific standards articulated by the Convention derive from three customary principles of international humanitarian law: (a) that the right to adopt means of warfare is not unlimited; (b) that unnecessary suffering is prohibited; and (c) that non-combatants are to be protected. In so far as land mines appear to have been placed outside the war zone without adequate protection of civilians, and inasmuch as it does not appear that the laying of the minefields was adequately recorded ... the Government of Iraq may be in violation of customary international humanitarian law.”⁷⁰

The Special Rapporteur on Iran, Mr. Galindo Pohl, made a similar contribution regarding the legality of the use of chemical weapons by Iraq during the eight-year conflict with Iran:

⁶⁹ Declaration of minimum humanitarian standards, E/CN.4/1996/80; Guiding Principles on internal displacement, E/CN.4/1998/53/Add.2; and draft Basic Principles and Guidelines on the right to reparation of victims of violations of human rights and international humanitarian law, E/CN.4/1998/34.

⁷⁰ E/CN.4/1994/58, para. 108.

“No one could fail to be moved at the horror of chemical weapons, but emotional reactions aside, it is appropriate to examine the case from the point of view of international law. In the opinion of the Special Representative, the prohibition of the use of chemical weapons, contained in the Geneva Protocol of 1925, has become a rule of *jus cogens*, and therefore binds all States without exception ... It is an imperative prohibition from which no derogation is permitted, because it corresponds to the moral and legal conscience of humanity.”⁷¹

A third example can be found in the 1992 report of the Special Rapporteur on Afghanistan, Professor Ermacora, which is devoted largely to the situation of prisoners. At the time, the Soviet Union had withdrawn from Afghanistan, but fighting continued, especially between rival opposition factions. A paragraph analysing the applicability of the Third Geneva Convention, common Article 3 and Additional Protocol I to different categories of prisoners concludes with the following statement; “In any case, the Protocols additional to the Geneva Conventions serve as guidelines for the organs of the United Nations.”⁷² Subsequently, after citing Article 118 of the Third Geneva Convention concerning the duty to release and repatriate prisoners of war after the cessation of hostilities, the report declares: “The Special Rapporteur is of the opinion that combatants as defined by Article 3 common to the Geneva Conventions are covered by Article 118 (1) of the said Convention on humanitarian grounds.”⁷³ This suggests that the duty to release prisoners, and perhaps some of the other provisions of the Third Geneva Convention and of Protocol I pertaining to the rights of prisoners, are in the process of being recognized as customary international humanitarian law.

This report even suggests that the above-mentioned standards may apply to prisoners in an internal armed conflict, or at least in the internal dimension of an “internationalised internal armed conflict”: “In addition, the so-called political prisoners held in Afghan prisons who belong to the armed forces of the opposition may also be considered as captured combatants within the meaning of the Geneva Conventions and Additional

⁷¹ E/CN.4/1992/34, paras. 398 and 399.

⁷² E/CN.4/1992/33, para. 49.

⁷³ *Ibid.*, para. 56.

Protocol I thereto, irrespective of their internal legal status (most of them are considered to be terrorists within the meaning of the Afghan law concerning terrorism).⁷⁴ One factor which appears to underlie the Rapporteur's conclusions, and which may explain his rather far-reaching proposals regarding the scope of these standards, is the sense that discrimination cannot be tolerated between different classes of combatants imprisoned in connection with the same conflict.⁷⁵

Of course, customary international law is created by States, not by UN Rapporteurs, even those who are authorities on international law. But the interpretations offered by UN Rapporteurs cannot be brushed aside. These are serious efforts by competent international experts to determine how humanitarian law can and should be applied to meet the exigencies of real situations. They make a contribution to the understanding of the law which, despite the limitations inherent in the working methods used, cannot be overlooked.

Even more important is the value of the statements by UN human rights mechanisms as a stimulus for State practice regarding humanitarian law, including the State or States whose conduct is alluded to and the States which make up the UN bodies that receive these reports. The reports referred to here are submitted to the Human Rights Commission, which is composed of 53 UN member States, and in some cases to the General Assembly or, less often, the Security Council. To the extent that the UN human rights mechanisms develop a coherent body of interpretation that is not contested by the States directly concerned and is approved by the political organs of the United Nations, they can, with time, make a real contribution to the development of customary standards of international humanitarian law.

Less frequently, UN human rights mechanisms have suggested the need for new international instruments setting humanitarian standards. In 1994, the first Special Rapporteur on Cambodia voiced support for the convening of an international conference to ban the manufacture and export of anti-personnel landmines.⁷⁶

⁷⁴ *Ibid.*, para. 46.

⁷⁵ See for example paras. 53-55, 105 and 106, which implicitly raise issues concerning discrimination on the basis of nationality, religion and rank.

⁷⁶ E/CN.4/73/Add.1, para. 79.

War crimes and genocide

Some rapporteurs have addressed the question of whether the serious violations of human rights law and humanitarian law which they have found to have occurred might constitute war crimes, crimes against humanity or genocide.

The Special Rapporteur on Iraq concluded that “serious violations of human rights committed against the civilian population of Iraq both in times of war and peace involve crimes against humanity ... Specifically, the use of chemical weapons against numerous communities in northern Iraq ... constitute a crime against humanity.”⁷⁷ He also said that the information he had obtained through his investigation “may prove State responsibility for breaches of the 1948 Genocide Convention”.⁷⁸ According to this Convention, genocide can take place “in time of peace or in time of war.” The possible genocidal acts referred to by the Rapporteur had taken place during a military campaign aimed at eliminating the Kurdish guerrilla forces and the Kurdish civilian population, that is in the context of an internal armed conflict.⁷⁹

In his first report, the Special Rapporteur on the former Yugoslavia stated: “The need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators requires the systematic collection of documentation on such crimes and of personal data of those responsible. A commission should be created to assess and further investigate specific cases in which prosecution may be warranted ...”⁸⁰ The following year, the Rapporteur observed: “Evidence of war crimes during the conflicts in both Croatia and in Bosnia and Herzegovina is mounting.” The destruction of religious sites was among the crimes specifically mentioned.⁸¹

As for the Committee on the Elimination of Racial Discrimination, it adopted a resolution declaring that it “considers that an international tribunal with general jurisdiction should be established urgently to prosecute genocide, crimes against humanity ... and grave breaches of

⁷⁷ E/CN.4/1994/58, para. 189.

⁷⁸ *Ibid.*, para. 185.

⁷⁹ *Ibid.*, para. 112.

⁸⁰ E/CN.4/1992/S-1/9, para. 69.

⁸¹ E/CN.4/1993/50, para. 259.

the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto”.⁸²

UN human rights mechanisms have also demonstrated concern for the rights of those accused of war crimes. In a 1998 report on Croatia, the second Special Rapporteur on the former Yugoslavia expressed deep concern regarding the conviction of an individual for war crimes on the basis of a slight association with a local militia unit.⁸³

Concluding observations

The increasing application of humanitarian law by UN human rights mechanisms is, perhaps, the inevitable consequence of years of promoting the idea that human rights law and humanitarian law are complementary and dedicated to the same ultimate objective. Moreover, as the geographic and thematic coverage of UN human rights mechanisms expands and the global role of the UN human rights system is strengthened, such mechanisms are increasingly called upon to deal with situations of armed conflict — and it is in such situations that the most serious and widespread types of human rights violations occur.

The normative framework provided by international human rights law is sufficient to cover most human rights violations, even those linked to armed conflict. Yet, certain specific types of violations occur in situations where the standards set by humanitarian law are the most directly relevant. The application of international humanitarian law by UN human rights mechanisms to address violations of basic rights committed by non-State parties to an armed conflict reinforces the impartiality and objectivity of the system while respecting basic legal principles concerning State responsibility. And the use of humanitarian standards to interpret human rights standards, and other ways of developing stronger composite standards drawing on both bodies of law to cover practices and situations where both have relevance, enhances the compatibility and effectiveness of the two systems.

In general, the application of substantive humanitarian law standards by UN human rights mechanisms has been judicious. Practice concerning the applicability of international humanitarian law, including when it

⁸² General Recommendation XVIII, operative para. 1, UN doc. A/49/18, 1994, reprinted in “Compilation...”, *supra* (note 16), p. 111.

⁸³ E/CN.4/1998/14, para. 60.

comes to dealing with admittedly sensitive and sometimes complex issues such as whether a situation qualifies as an armed conflict and, if so, whether it is domestic or international in character, has unfortunately been somewhat inconsistent and, on occasion, frankly questionable. Humanitarian law must be taken seriously, and the complementarity of the two bodies of law should not be considered as a licence to act on unexamined presumptions.

The ICRC has a special responsibility for safeguarding the integrity of international humanitarian law and for promoting its implementation and development. Yet it does not have sole responsibility for monitoring compliance with humanitarian law during armed conflicts. That responsibility is shared with national tribunals, and with international tribunals when such tribunals have been established. In some instances, the parties to peace agreements and higher UN political organs have expressly given this responsibility to ad hoc human rights mechanisms. UNICEF and UNHCR have used their influence to help persuade non-State parties to armed conflicts to make commitments to respect humanitarian law.

The ICRC's confidential efforts to raise issues concerning non-observance of humanitarian law with the responsible parties are invaluable. During a conflict, however, operational and humanitarian imperatives inevitably receive highest priority. "Technical" legal issues may be addressed only if doing so will have a beneficial effect on the delivery of relief, access to prisoners and other field activities.

Human rights mechanisms are not subject to such constraints: publication of the results of their investigations is their *raison d'être*, and they have no responsibility for providing humanitarian services. Their efforts to investigate violations of international humanitarian law as an activity subsidiary to the monitoring of human rights violations are, therefore, complementary to the role of the ICRC. The ICRC has broader concerns, it usually has greater and more continuous access to conflict areas, and it uses different procedures. But the roots of inhumanity are deep, and the combined efforts of all concerned are needed to minimize the impact of war on the civilian population and other non-combatants.

It is important to ensure that organizations sharing the same goals do not inadvertently undermine one another's efforts. The independence of the ICRC and the confidentiality of the information it obtains through its field operations preclude the sharing of most types of information with UN human rights investigators and the adoption of joint policies or strategies with regard to specific countries. Other forms of cooperation are possible, however. Greater dialogue would certainly be beneficial, and the

sharing of experiences, within limits, would foster a common perspective on important issues. Activities of this kind would help promote better application of international humanitarian law without sacrificing the principles of independence and confidentiality.

The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* Case

by Liesbeth Zegveld

On 30 October 1997, the Inter-American Commission on Human Rights¹ (hereafter the Commission) adopted its report in the so-called *Tablada* case.² The case concerned an attack launched by 42 armed persons on military barracks of the national armed forces in 1989 at La Tablada, Argentina. The attack precipitated a battle lasting approximately 30 hours and resulting in the deaths of 29 of the attackers and several State agents. The surviving attackers filed a complaint with the Commission alleging violations by State agents of the American Convention on Human Rights (hereafter the American Convention) and of rules of international humanitarian law.³ In its report the Commission examined in detail whether it was competent to apply international humanitarian law directly. It answered this question in the affirmative.⁴

Liesbeth Zegveld holds a degree from the Law Faculty of Utrecht University, the Netherlands. She is currently employed at Erasmus University, Rotterdam, where she is working on a PhD thesis. She did research as a Fulbright Scholar at the Inter-American Commission on Human Rights (Washington, D.C).

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¹ The Inter-American Commission of Human Rights (IACHR) is established under Article 33 of the American Convention on Human Rights, 9 *I.L.M.* 673 (1970).

² *IACHR Report No. 55/97*, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997 (hereafter *IACHR Report*).

³ *IACHR Report*, p. 6, para. 16.

⁴ *IACHR Report*, p. 43, para. 157. The Commission concluded that Argentina did not violate the applicable provisions of international humanitarian law, *IACHR Report*, pp. 92 and 93, para. 327 and 328.

This decision is of considerable importance. It means that the Commission, a regional inter-governmental human rights treaty body, is competent to invoke international humanitarian law and that it can apply the rules thereof to States party to the American Convention. This decision may pave the way for future petitions accusing, for instance, Colombia, Mexico or Guatemala of violations of international humanitarian law. It may encourage other human rights treaty bodies, such as the United Nations Human Rights Committee, set up pursuant to the International Covenant of Civil and Political Rights, and the European Commission and Court of Human Rights, to extend their supervisory functions to international humanitarian law.

Should the *Tablada* decision set a precedent? The answer depends in part on the strength of the arguments for applying international humanitarian law in a given case. The arguments presented by the Commission to this effect are examined below, but first let us say a few words on why the Commission deemed it important that it should apply rules of international humanitarian law at all.

The Commission explained that it should apply humanitarian law because this enhanced its ability to respond to situations of armed conflict. It found that the American Convention, although formally applicable in times of armed conflict, was not designed to regulate situations of war. In particular, the Commission noted that the American Convention did not contain rules governing the means and methods of warfare. It gave the following example:

“[B]oth common Article 3 [of the 1949 Geneva Conventions] and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.”⁵

⁵ *IACHR Report*, p. 44, para. 161.

The Commission is right. Distinguishing between those who have the right to resort to acts of hostility and those who do not, for instance, is an essential feature of international humanitarian law, while human rights law has no rules to this effect.⁶ Two comments are, however, in order. In the first place, we should not overestimate the role of common Article 3 vis-à-vis human rights law. Common Article 3 does not define who is a civilian. Nor does it specify when civilian casualties are a lawful consequence of military operations. Secondly, human rights law may also have an impact on the conduct of military operations.⁷ The European Court on Human Rights, in the case *Akdivar and others v. Turkey*,⁸ restricted the State in its choice of means to combat the PKK. It appeared that even derogable human rights may apply in these situations.⁹ Thus, it is questionable whether, as contended by the Commission, “it would have to decline to exercise its jurisdiction” if it had not applied international humanitarian law.¹⁰

Since it concluded that it should apply international humanitarian law, the Commission had to construe its legal competence. Clearly, it could not find an express legal basis. According to its Statute, the material competence attributed to the Commission is limited to the American Convention and the American Declaration of the Rights and Duties of Man.¹¹ These instruments do not explicitly provide a legal basis for applying international humanitarian law. How, then, could a legal basis

⁶ Along the same lines, the International Court of Justice stated: “[W]hether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [of Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.” - Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 240.

⁷ F. Hampson, “Rules on the Conduct of Military Operations in Non-International Armed Conflicts”, *Humanitäres Völkerrecht*, Nr. 1, 1998, pp. 70 and 71.

⁸ Eur. Court HR, *Akdivar and others v. Turkey*, Judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV.

⁹ The Court condemned Turkey for the deliberate burning of the applicants’ homes and their contents which constituted an illegal interference with the right to respect for family lives and homes laid down in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *loc. cit.*, para. 88. Article 8 is derogable under Article 15 of the European Convention in time of public emergency.

¹⁰ *IACHR Report*, pp. 44 and 45, para. 161.

¹¹ Article 1, Statute of the Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.92, doc. 31 rev. 3, 3 May 1996, p. 121; The American Declaration of the Rights and Duties of Man, 2 May 1948, *ibid.*, p. 17.

be found? One option would have been to refer to rules of humanitarian law as 'sources of authoritative guidance'.¹² However, the Commission wanted to go further. It evaluated the conduct of States party to the American Convention *directly* on the basis of international humanitarian law. To support its view the Commission presented five arguments.

1. Competence to apply international humanitarian law could be derived from the overlap between the substantive norms of the American Convention and the 1949 Geneva Conventions. The Commission stated:

"Indeed, the provisions of common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on [a State], or disadvantages its armed forces *vis-à-vis* dissident groups. This is because Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention."¹³

It is doubtful whether this argument, while in itself true, provides a legal basis for the Commission to apply humanitarian law. In the first place, the fact that the substantive norms of the American Convention cover a part of common Article 3 does not mean that these instruments are interchangeable. If that were indeed the case, why do we have two separate legal systems? Indeed, as the Commission noted, human rights law and humanitarian law specify their own fields of application.¹⁴ Secondly, one should distinguish between the substance of norms and the supervisory means attached to them. The fact that the substantive norms of human rights law and international humanitarian law are complementary in character does not mean that supervisory bodies set up under human rights law are *ipso facto* competent to apply humanitarian law. If States had wished to set up an international mechanism similar to that of the Inter-American Commission to supervise compliance with international humanitarian law, they would have established it directly in the Geneva Conventions.¹⁵

¹² *IACHR Report*, p. 44, para. 161.

¹³ *IACHR Report*, p. 43, para. 158, note 19.

¹⁴ M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, p. 619, cited in the Commission's Report, p. 44, para. 160.

¹⁵ See G.J.H. Van Hoof & K. de Vey Mestdagh, "Mechanisms of International Supervision", in P. van Dijk (Ed.), *Supervisory Mechanisms in International Economic Organizations*, Kluwer, Deventer, 1984, p. 10, which emphasizes the importance of State consent with regard to the creation of rules of supervision.

2. Article 29b of the American Convention could provide a legal basis to apply international humanitarian law. This Article states that no rule of the American Convention shall be interpreted as “[r]estricting the enforcement or exercise of any right or freedom recognized by virtue of ... another convention to which one of the said States is a party”. The Commission argued that:

“[W]here there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort [sic] to the provisions of that treaty with the higher standards applicable to the rights or freedoms in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.”¹⁶

This is a remarkable argument. Article 29b of the American Convention can be invoked against a State which claims that the Convention allows it to limit the protection prescribed by international humanitarian law. To resolve such a claim, the Commission may be required to consider whether the State concerned has indeed limited the application guaranteed by humanitarian law. However, it needs to do so for the sole purpose and only to the extent necessary to decide whether there has been a violation of Article 29b of the American Convention. This article does not require or authorize the Commission to examine the State’s compliance with humanitarian law as such.

3. The Commission argued that competence can be derived from Article 25 of the American Convention, which entitles everyone to an effective remedy before a national court “for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned”. The Commission found that this article obliges States to provide judicial protection against violations of norms set forth in the 1949 Geneva Conventions in so far as they have incorporated these norms in domestic law. However, supposing the Commission’s findings to be correct and even if States had incorporated the norms of humanitarian law in their domestic legislation, the Commission’s competence would be limited to allegations of violations of the right to an effective remedy. This article does not empower the Commission to assess compliance with humanitarian law, or to examine whether States have correctly transformed humanitarian law obligations into law.

¹⁶ *IACHR Report*, p. 46, para. 165.

4. The Commission invoked Article 27, para. 1 of the American Convention, which stipulates that derogation measures taken by States in time of emergency may “not be inconsistent with a State’s other international legal obligations”.

This is a valid argument. The notion “other international legal obligations” is generally interpreted as including international humanitarian law.¹⁷ Article 27, para. 1 empowers the Commission to evaluate the coherence of a State’s derogation measures in time of armed conflict with the norms of humanitarian law by which the State is bound. However, it should be borne in mind that the scope of application of Article 27, para. 1 is limited. First, this provision applies only if the State concerned has formally declared a state of emergency under the American Convention. In practice, States may decide not to derogate from the norms of the American Convention even when an armed conflict has occurred.¹⁸ Second, the Commission can apply international humanitarian law only in so far as it coincides with the substantive norms of the American Convention. Thus, provisions that are not covered by the American Convention cannot be implemented through this instrument.¹⁹

5. The Commission referred to an advisory opinion of the Inter-American Court of Human Rights as a fifth argument to apply humanitarian law. In its opinion the Court observed: “The Commission has properly invoked in some of its reports and resolutions ‘other treaties concerning the protection of human rights in the American States’, regardless of ... whether they have been adopted within the framework or under the auspices of the Inter-American system.”²⁰

This argument seems to provide persuasive evidence that the Court appears to sanction application of international humanitarian law by the Commission. However, it should be noted that the Court’s decision did

¹⁷ J. M. Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, Philadelphia, 1994, pp. 59 and 60; J. Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992, p. 195.

¹⁸ An example is provided by El Salvador, which lifted the state of emergency temporarily in 1987 despite the ongoing civil war, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, 16 September 1988, p. 294.

¹⁹ Oraá, *loc. cit.* (note 18), pp. 190 and 191.

²⁰ “Other Treaties” *Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 September 1982, Inter-Am.Ct.H.R. (Ser. A) No. 1, at para. 42.

not specifically concern humanitarian law. But at some point in the future, the Court may be in a position to give an opinion on the Commission's decision to apply international humanitarian law directly.

Should the considerations of the *Tablada* decision be taken as a precedent? There is no doubt that the objective of applying international humanitarian law, that is to improve protection, is praiseworthy. However, except possibly for the fifth argument, none of the arguments presented by the Commission seems to provide compelling authority for an unqualified application of international humanitarian law. Furthermore, it is not obvious that the aim of protection can only be achieved by applying international humanitarian law. Would it not have sufficed for the Commission to apply provisions of the American Convention interpreted in the light of international humanitarian law?

Be that as it may, the *Tablada* case is unique.²¹ No other human rights treaty body has decided that it is competent to apply international humanitarian law directly. Nevertheless, international humanitarian law has surfaced in the practice of bodies such as the United Nations Human Rights Committee and the European Commission and Court of Human Rights.²² The future will demonstrate whether other human rights treaty bodies decide to follow the Inter-American Commission's example.

²¹ The competence assumed in the *Tablada* case and the likelihood that the Commission will use this competence in the future raise intriguing questions. One question is whether the Commission will extend its new mandate to the other party to the armed conflict, the armed opposition group. In the *Tablada* case, while observing that Argentine military personnel and the armed opposition had the same duties under international humanitarian law, the Commission limited its application to the conduct of the Argentine State. Application to only one party to the conflict, the State, may be considered as contradicting a basic principle of humanitarian law, according to which both parties to the conflict have equal rights and duties. Future cases may show whether the Commission is willing and able to incorporate this basic principle of international humanitarian law.

²² For instance, in an inter-state complaint against Turkey, Cyprus invoked international humanitarian law before the European Commission on Human Rights (4 EHRR 482 at 552, 553 (1976) Commission Report). However, the European Commission did not examine this point. See on this subject Ch. M. Cerna, "Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies", in: F. Kalshoven, Y. Sandoz (Eds.), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 31-67; application of humanitarian law by the United Nations, see H.-P. Gasser, "Ensuring Respect for the Geneva Conventions and Protocols: the Role of Third States and the United Nations", in H. Fox, M.A. Meyer (Eds.), *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49.

The approach of the European Commission and Court of Human Rights to international humanitarian law

by Aisling Reidy

The ever-increasing membership of the Council of Europe, and the accompanying growth in the number of States party to the European Convention on Human Rights (ECHR), promises to create fresh challenges for the new single European Court of Human Rights which will begin to sit full-time in Strasbourg as of 1 November 1998.¹ Speculation varies with regard to the type of challenges that the new Court will have to face, but one which cannot be ignored is the likelihood that the new Court will have to come to terms with more cases arising from situations of conflict. Judge Jambrek, urging judicial restraint and conservatism in a dissenting opinion, warned that the Court may have to look at what happened in the Croat Region of Krajina, in the Republika Srpska, in other parts of Bosnia and Herzegovina or in Chechnya.² If the Court is so required, many cases

Aisling Reidy is Director of the Advocacy, Training and Education Project at the Human Rights Centre, University of Essex, and part-time lecturer in international and human rights law at the Department of Law, University of Essex. She has appeared before the European Commission and Court of Human Rights as an advocate on a number of occasions.

¹ See Protocol 11 which replaces the current two-tiered system (Commission and Court) with a single full-time Court.

² Partly dissenting opinion of Judge Jambrek, *Loizidou v. Turkey*, judgment of 18 December 1996, European Human Rights Reports (EHRR), Vol. 23, p. 543. In view of the requirement that applications to the European Convention machinery must be submitted within six months of a final domestic remedy having been exhausted (Article 26 or Article 35 as amended by Protocol 11) or within six months of the alleged violation if there is no effective remedy, it is unlikely that Strasbourg will have to deal with events which happened at the height of hostilities in any of these regions. Pursuant to Annex 6 of the Dayton Agreement, the ECHR is applicable in Bosnia and Herzegovina and is subject to the supervision of the Human Rights Commission for Bosnia and Herzegovina.

may involve issues which call for consideration of international humanitarian law.

This article proposes to examine how the current European Commission and Court of Human Rights have addressed matters of international humanitarian law to date and to assess the legacy of jurisprudence in this regard which they will pass on to the new single Court.

Invoking international humanitarian law within the European Human Rights Convention

As with similar human rights treaties, the ECHR is applicable with respect to the acts or omissions of any Contracting Party in any armed conflict where the State responsibility of the Contracting Party is engaged.³ This includes responsibility for acts or omissions in an armed conflict within the national territory of the State Party as well as actions undertaken by its armed forces outside its national territory.⁴ It is also part of the well-established case law of the Convention that the responsibility of a State can arise when, as the result of military action — whether lawful or unlawful — a State exercises effective control of an area outside its national territory.⁵ In the foregoing situations, the guarantees provided by

³ The debate concerning the applicability of human rights law in the context of an armed conflict has already been covered extensively in other literature. See in particular D. Weissbrodt and P. L. Hicks, "Implementation of human rights and humanitarian law in armed conflict", *IRRC*, January-February 1993, pp. 120-138, and L. Doswald-Beck and S. Vite, "International humanitarian law and human rights law", *ibid.*, pp. 94-119; F. J. Hampson, "Human rights and humanitarian law in internal conflicts", in M. Meyer (ed), *Armed conflict and the new law*, London, 1989, p. 55; G.I.A.D. Draper, "The relationship between the human rights regime and the law of armed conflicts," *Israeli Yearbook of Human Rights*, Vol.1, 1971, p. 191; K. Suter, "Human rights in armed conflicts", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XV, 1976, p. 394.

⁴ *Cyprus v. Turkey*, 6780/74 and 6950/75 (first and second applications), 2 D & R 125, pp. 136-137 (1975). The responsibility of a State Party can be engaged by acts and omissions of their authorities which produce effects outside their own territory. See *X & Y & Z v. Switzerland*, 7289/75 & 7349/76, 9 D & R 57 (1977); *Drozd and Janousek v. France and Spain*, ECtHR Series A 240, p. 29, para. 91. Application No. 31821/96, pending before the Commission, concerns allegations of unlawful killings by armed forces of the Republic of Turkey while on an operation in northern Iraq. Victims of acts committed by Italian or Belgian troops in Somalia could also have brought a complaint under the ECHR against the respective States for violations carried out during the UN operations in Somalia.

⁵ *Cyprus v. Turkey*, *ibid.*; *Loizidou v. Cyprus* (preliminary objections), ECtHR Series A 310, para. 62 (1995), and *Loizidou v. Cyprus* (merits), ECtHR judgment of 18 December 1996, para. 52, reprinted in EHRR, Vol. 23, p. 513; most recently *Cyprus v. Turkey* 25781/94 (fourth application), 86 D & R 104 (1996).

the Convention under Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (no punishment without law), with the exception of deaths resulting from lawful acts of war, will apply to their full extent. However, should it be a time of war or other public emergency threatening the life of the nation, a State Party does have the right, by entering a derogation under Article 15, to limit its other obligations under the ECHR.⁶ Nevertheless, any derogating measure must not be inconsistent with its other obligations under international law, including obligations under humanitarian law such as the 1949 Geneva Conventions on the protection of war victims.⁷ The Court can examine, and has examined, *proprio motu* whether a derogation meets the requirement of consistency with other international legal obligations, but has never declared a derogation invalid for this reason.⁸

Where a State does not invoke Article 15,⁹ Article 60 of the Convention also provides that nothing in the Convention shall be construed as

⁶ To date there has never been a derogation in time of war, though Greece, Ireland, Turkey and the United Kingdom have sought to claim the existence of a public emergency. — On Article 15 in general, see P. van Dijk and G.J.H. Van Hoof, *Theory and practice of the European Convention on Human Rights*, 2nd ed., Kluwer, 1990, pp. 548-560; D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, pp. 489-507.

⁷ P. van Dijk and G.J.H. Van Hoof, *ibid.*, p. 555. D.J. Harris, M. O'Boyle and C. Warbrick, *ibid.*, p. 502: "The obvious sources of treaty obligations are the [International Covenant on Civil and Political Rights] and the Geneva Red Cross Conventions". J. Pinheiro Farinha, "L'article 15 de la Convention", in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension*, Studies in honour of Gerard J. Wiarda, Carl Heymanns Verlag KG, 1989, pp. 521-529: "La solidarité internationale impose que les engagements des États soient toujours respectés - engagements découlant de traités, coutumes internationales ou de principes généraux de droit international. Parmi les engagements qui doivent être observés, même en cas de guerre, nous soulignerons ceux que le droit humanitaire (Conventions de Genève et de La Haye) établit." — All parties to the European Convention are also party to the 1949 Geneva Conventions.

⁸ *Lawless v. Ireland*, ECtHR Series A 3, paras. 40-41. In the case of *Ireland v. United Kingdom*, the Irish Government did apparently raise the question of the compatibility of British legislation in Northern Ireland with the Geneva Conventions. See Harris, O'Boyle and Warbrick, *supra* (note 6), p. 502, footnote 4. However, the Court itself only held that there was nothing in the data before the Court to suggest the UK disregarded such obligations in that case. In particular, the Irish Government never supplied to the Commission or the Court precise details on the claim formulated in its pleadings. See *Ireland v. UK*, ECtHR Series A 25, para. 222. In *Brannigan and McBride v. UK*, ECtHR Series A 258-B, 26 May 1993, the applicants had pleaded that the derogation was in violation of Article 4 of the International Covenant on Civil and Political Rights to which the UK was also a party, at paras. 67-73.

⁹ The Commission has held that a State cannot rely on Article 15 in the absence of some formal and public declaration of the state of emergency. See *Cyprus v. Turkey*, Report of the Commission, 4 EHRR 482 and 556, para. 528.

limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Parties or under any other agreement to which it is a party.¹⁰ The implementation of humanitarian law through the enforcement of the ECHR can therefore be examined at two levels: the enforcement of non-derogable and derogable rights in situations of armed conflict, and the extent to which restrictions on derogable rights are limited by reference to obligations of humanitarian law.

Despite the ample potential for enforcement of humanitarian law through the ECHR system, it could be said that this potential has not been fully exploited. One may only speculate why this is so. One obvious reason is that the Commission and Court have to date been called upon to examine very few situations where the law of armed conflict is applicable.¹¹ Most state-of-emergency situations have been internal and would only attract the application of Article 3 common to the 1949 Geneva Conventions or Additional Protocol II of 1977 (if ratified), and even then only if the respondent State acknowledged that the internal situation had crossed the threshold of applicability.¹² Yet it should also be noted that when the Commission was first given the opportunity to take account of humanitarian law, with the Turkish invasion of Cyprus, the majority of the Commission chose not to avail itself of it.¹³

The Commission and Court have had more opportunity in recent times to analyse situations where the existence of international humanitarian law norms may have been of assistance to that analysis and also where resolution of the complaints could contribute to their development. One situation is the continuing occupation of northern Cyprus,¹⁴ the other being

¹⁰ Articles 17 and 18 are also relevant with respect to limiting measures aimed at the restriction or destruction of rights.

¹¹ The only complaints arising out of an international armed conflict have been in the context of the Turkish invasion of Cyprus in 1974. Complaints from state-of-emergency regions include complaints from Northern Ireland and south-eastern Turkey.

¹² That is, that the situation was not one of isolated and sporadic acts of violence. For example, the UK has never accepted that common Article 3 or Protocol II applies to Northern Ireland. See F. Hampson, "Using international human rights machinery to enforce the international law of armed conflicts", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XXXI, 1992, pp. 117 and 127.

¹³ *Cyprus v. Turkey*, *supra* (note 9).

¹⁴ In advocating a holistic approach to the jurisdiction issues which arose in cases from northern Cyprus, Judge Pettiti stated that "[a]n overall assessment of the situation ... would make it possible to review the criteria on the basis of which the UN has analysed both

the prolonged state of emergency in south-eastern Turkey. A note of warning should, however, be sounded with regard to the cases from south-eastern Turkey. The Court has noted in many of its judgments in cases stemming from the emergency regime in that area¹⁵ that since approximately 1985 serious disturbances¹⁶ or violent conflicts¹⁷ have raged in the south-eastern regions of Turkey between the security forces and in particular the PKK (Workers Party of Kurdistan), and that 10 out of the 11 provinces of south-eastern Turkey have been subject to emergency rule for most of that period. However, at no stage has the Court commented on whether the situation in the region is of the type which would attract the application of common Article 3 or Additional Protocol II, nor does the Turkish government recognize the applicability of common Article 3 to the region.¹⁸ Whilst these constraints need to be borne in mind, the jurisprudence from these cases provides a significant marker for the use of the Convention in the enforcement of international humanitarian law.

Applying international humanitarian law

From the beginning the Commission and Court have made it clear that, in assessing the legitimacy of derogations entered by States in times of war or other public emergency, they would leave a wide margin of

the problems whether to recognise northern Cyprus as a State and the problem of the application of the UN Charter (occupation, annexation, territorial application of the Geneva Conventions in northern Cyprus, conduct of international relations).” See *Loizidou v. Turkey* (preliminary objections), 23 March 1995, ECtHR Series A 310.

¹⁵ Excluding complaints concerning freedom of expression, there are, at the time of writing, nine judgments from the Court in which the violations involved stem from the emergency regime in south-eastern Turkey: *Akdivar and others v. Turkey*, judgment of 18 September 1996, 23 EHRR 143, and *Aksoy v. Turkey*, judgment of 18 December 1996, 23 EHRR 553, both in *Reports of Judgments and Decisions*, 1996-IV; *Aydin v. Turkey*, judgment of 25 September 1997, 25 EHRR 251, and *Mentes v. Turkey*, judgment of 28 November 1997, both in *Reports of Judgments and Decisions*, 1997-IV; *Kaya v. Turkey*, judgment of 19 February 1998; *Selcuk and Asker v. Turkey*, judgment of 24 April 1998; *Gundem v. Turkey*, judgment of 25 May 1998; *Kurt v. Turkey*, judgment of 25 May 1998, and *Tekin v. Turkey*, judgment of 9 June 1998 — all to be reproduced in *Reports of Judgments and Decisions*, 1998.

¹⁶ *Mentes*, para.12, *Aydin*, para. 14, *Selcuk and Asker*, para. 9: *supra* (note 15).

¹⁷ *Akdivar*, paras. 13-14, *Aksoy*, paras. 8-9, *Gundem*, para. 9: *supra* (note 15).

¹⁸ Turkey has not ratified Additional Protocol II (on non-international armed conflict).

appreciation¹⁹ to States to determine whether or not there is a public emergency threatening the life of the nation.²⁰ On only one occasion has the Commission determined that a public emergency did not exist.²¹ However, some members of the Commission did provide hope earlier on that the rules of humanitarian law could be given a robust role to play. In the context of the Turkish invasion of Cyprus, Mr G. Sperduti, joined by Mr S. Trechsel, stated in his opinion that:

“It is to be noted that the rules of international law concerning the treatment of the population in occupied territories (contained notably in The Hague Regulations of 1907 and the Fourth Geneva Convention of 12 August 1949) are undeniably capable of assisting the resolution of the question whether the measures taken by the occupying power in derogation from the obligations which it should in principle observe — by virtue of the European Convention — where it exercises (*de jure* or *de facto*) its jurisdiction, are or are not justified according to the criterion that only measures of derogation strictly required by the circumstances are authorized It follows that respect for the same rules by a High Contracting Party during the military occupation of the territory of another State will in principle assure that the High Contracting Party will not go beyond the limits of the right of derogation conferred on it by Article 15 of the Convention.”²²

This may have given grounds for suggesting that use of humanitarian law as a guideline could lead to a situation where derogations resulting from a domestic state of emergency would be permissible only where the

¹⁹ For the margin of appreciation concept see W. J. Ganshof van der Meersch, “Le caractère “autonome” des termes et la “marge d’appréciation” des gouvernements dans l’interprétation de la Convention européenne des Droits de l’homme”, in Matscher and Petzold (eds), *supra* (note 7), pp. 201-220; P. Mahoney, “Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin”, *Human Rights Law Journal*, Vol. II, 1990, pp. 57-88.

²⁰ It falls in the first place to each contracting State, with its responsibility for the life of its citizens, to determine whether their life is threatened by a public emergency and if so how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation. *Ireland v. UK*, ECtHR Series A 25, para. 207 (1978).

²¹ *Denmark, Norway, Sweden and the Netherlands v. Greece*, Report of the Commission of 5 November 1969, Yearbook, Vol. 12, 1969, p. 113, para. 229.

²² *Cyprus v. Turkey*, *supra* (note 9).

derogating State acknowledged that common Article 3 of the Geneva Conventions was applicable to the situation.²³ However, this has not been the case and the failure of the Commission and Court to scrutinize more closely situations where derogations have been entered has been criticized.²⁴ Certainly neither Convention body has engaged in an extensive examination of the characterization of any public emergency in terms of humanitarian law (internal disturbances and tensions versus internal armed conflict) as was carried out recently by the Inter-American Commission on Human Rights in the *Abella* case.²⁵ Rather the usual question facing the Commission and Court has been whether a derogating measure was strictly required by the exigencies of the situation. This notwithstanding, one does find examples of the use of humanitarian law, whether explicitly in terms of, for example, the Geneva Conventions or by use of language drawn from humanitarian law (protection of the civilian population, disproportionate use of a combat weapon).

The remainder of this article will examine examples of the implementation of international humanitarian law through the ECHR under the following headings:

- Destruction of property and displacement of the civilian population
- Detention and treatment of detainees
- Conduct of military operations and unlawful killings

Destruction of property and displacement of the civilian population

In northern Cyprus, the rules regarding protection of the civilian population in occupied territory have been of most relevance.²⁶ In the first Cypriot case the Commission found violations arising from the eviction

²³ F. Hampson, *supra* (note 12), pp. 125 and 6.

²⁴ The low point of the Court and Commission in this regard is widely considered to be *Brannigan and McBride v. UK*, ECtHR Series A 258-B (1993). See dissenting opinion of Judge Makarczyk.

²⁵ *Abella v. Argentina*, 18 November 1997, I-AmCHR, Report 55/97, Case 11, p. 137, para. 149.

²⁶ The Republic of Cyprus has brought four inter-State cases against Turkey, arising out of the situation in northern Cyprus: Application Nos. 6780/74, 6950/75, 8007/77 and 25781/94. There are also a number of individual cases which have been heard by or are pending before the Commission and Court, the first of which was *Loizidou*, see *supra* (note 5). In the most recent inter-State case (No. 25781/94, 86 D & R 104) and in the individual cases, it would seem that no pleas in terms of humanitarian law have been submitted to the Commission.

of Greek Cypriots from their homes and their transportation to other places,²⁷ the confinement of civilian persons to detention centres and within private homes, and the deprivation of possessions of Greek Cypriots on a large scale.²⁸ The majority of the Commission did not use humanitarian law as a frame of reference, though Mr Sperduti noted the availability of appropriate humanitarian law obligations to address these issues: "One can cite, for example, Article 49 of the Fourth Geneva Convention, which article related to the prohibition of forced transfers in the occupied territories whether *en masse* or individually, and also to other obligations on the occupying power in relation to the displacement of persons."²⁹

In the third Cyprus case,³⁰ Mr G. Tenekides, again in a separate opinion, stated that persons have been installed "by the occupation forces in the north of the island in violation of Article 49(6) of the Geneva Convention of 12 August 1949 on the protection of civilian persons in time of war ...".³¹ He also noted that it was regrettable that the Commission did not refer to the destruction of cultural property in Cyprus. He stated that the Commission was under a duty to apply Article 1 of Protocol 1 in view of the numerous conventions and agreements relating to the protection of cultural property, first and foremost the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict.³²

Similar issues concerning the destruction of property and the transfer and eviction of civilians have arisen in the context of internal conflict too. In three cases from south-eastern Turkey, the Court has found that security forces in the context of military operations were responsible for the destruction of the applicants' homes and that the applicants as a result had to leave their villages.³³ However, the Court did not raise any questions

²⁷ *Supra* (note 9), paras. 208-211.

²⁸ *Ibid.*, para. 486.

²⁹ *Ibid.*

³⁰ *Cyprus v. Turkey*, Application No. 8007/77, Report of 4 October 1983, Resolution DH (92) 12, 2 April 1992, reprinted in 5 EHRR 509.

³¹ *Ibid.*, p. 557.

³² *Ibid.*, pp. 557 and 558.

³³ *Akdivar and others v. Turkey, Mentés and others v. Turkey, Selçuk and Asker v. Turkey* — *supra* (note 15).

as to whether this was the type of situation to which common Article 3 or Additional Protocol II would apply, and as there was no derogation with respect to Article 8 (right to respect for family life and the home) or Article 1 of Protocol 1 (right to peaceful enjoyment of property),³⁴ the Court's analysis of the acts of the security forces were confined to finding violations of Article 8 and Article 1 of Protocol 1, without any regard to whether there was compatibility with other international obligations.³⁵ In one case, however, the Court agreed to consider the complaint under Article 3 (prohibition of inhuman treatment).³⁶ It found that the acts of the security forces, involving as they did the destruction of the homes of elderly applicants in a premeditated and contemptuous manner, resulting in their forced eviction from their village, should be categorized as inhuman treatment.³⁷ The Court also went on to say that "... [e]ven if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill treatment".³⁸

The reference to justification for the ill-treatment would appear anomalous, given that the prohibition of inhuman treatment is absolute, permitting of no derogation or justification, even in armed conflict, a point which the Court emphasized four paragraphs earlier.³⁹ In the context of an internal or international armed conflict, the acts of the security forces would be in violation of humanitarian law,⁴⁰ and it is clear that such acts

³⁴ By letter dated 6 August 1990 to the Secretary-General of the Council of Europe, Turkey entered a derogation to Articles 5, 6, 8, 10, 11 and 13 of the Convention. By letter of 5 May 1992, Turkey informed the Secretary-General that the derogation continued to apply only in respect of Article 5.

³⁵ *Akdivar*, paras. 83 - 87; *Mentes*, paras. 70 - 73; *Selcuk and Asker*, paras. 83 - 87 — *supra* (note 15). As in the case of *Mentes and others*, only Article 8 had been raised by the applicants, there was no finding of a violation of Article 1 of Protocol 1.

³⁶ In the oral submissions to the Court, the applicants submitted that the acts of the security forces were in violation of humanitarian law. See *Selcuk and Asker*, Verbatim Record of the hearing, 26 January 1998.

³⁷ Judgment of 24 April 1998, paras. 77 and 78.

³⁸ *Ibid.*, para. 79.

³⁹ *Ibid.*, para. 75.

⁴⁰ E.g. Arts. 32, 33 and 49 of the Fourth Geneva Convention; Art. 51 of Additional Protocol I; Art. 3 common to the four Geneva Conventions; Arts. 13 and 17 of Additional Protocol II.

of the security forces will always be incompatible with the Convention, contravening as they do a non-derogable provision. It is also noteworthy that, in this case, the Court found a violation of the right to an effective remedy, in particular specifying that the commanding officer who had been identified as being in charge of the impugned operation had not been questioned.⁴¹ The emphasis which the Court places on the need to investigate violations of this nature and gravity,⁴² and to identify and punish the perpetrators, echoes the obligations existing in humanitarian law to suppress war crimes and grave breaches of the Geneva Conventions.⁴³

Detention and treatment of detainees

In times of armed conflict there are two aspects of detention which need to be addressed separately, the first being the grounds for deprivation of liberty. The permissible grounds for detention, set out as they are in Article 5 of ECHR, may be varied in time of armed conflict by way of derogation, and humanitarian law permits a wider range of justifications for the deprivation of liberty than does human rights law. On the other hand, the treatment of detainees, governed by Articles 2 and 3, is not subject to differential treatment in times of armed conflict or otherwise,⁴⁴ and this relationship between Articles 2, 3 and 5 has implications for the rights of detainees during armed conflict. It is worth noting that, in times

⁴¹ *Supra* (note 37), paras. 97 and 98.

⁴² *Ibid.*, para. 96.

⁴³ See Arts. 49 and 50, First Geneva Convention; Arts. 50 and 51, Second Geneva Convention; Arts. 129 and 130, Third Geneva Convention; Arts. 146 and 147, Fourth Geneva Convention; Arts. 85 and 86, Additional Protocol I. — On the obligation to prosecute for violations of the laws of armed conflict, see T. Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflict," *IRRC*, No. 322, March 1998, p. 29; W.G. Sharp, Sr., "International obligations to search for and arrest war criminals: government failure in the former Yugoslavia?", *Duke Journal of Comparative and International Law*, Vol. 7, 1997, p. 411; D. Plattner, "The penal repression of violations of international humanitarian law applicable in non-international armed conflict", *IRRC*, No. 278, September-October 1990, p. 409.

⁴⁴ This is on the basis that Articles 2 and 3 are non-derogable provisions. It does not mean that, when evaluating whether a particular act or omission would violate either article, the differing circumstances — peacetime, state of emergency, or war — could not be taken into account to see whether the threshold of severity to attract the application of either article had been met. This could conceivably be the case with regard to certain conditions of detention, but there is less scope for flexibility in determining whether positive obligations to protect the right to life differ for detainees in times of war or peace. International humanitarian law, in particular the Third Geneva Convention, includes specific protection against exposure of detainees to life-threatening measures.

of armed conflict, the primary European institution for the protection of detainees, the Committee for the Prevention of Torture,⁴⁵ is excluded from visiting places of detention which representatives or delegates of Protecting Powers or of the ICRC effectively visit on a regular basis by virtue of the Geneva Conventions and their Additional Protocols.⁴⁶ In the Cypriot cases, when the Commission had to consider the detention of POWs by the Turkish army, it took “account of the fact that both Cyprus and Turkey are Parties to the [Third] Geneva Convention of 12 August 1949, relative to the treatment of prisoners of war, and that, in connection with the events in the summer of 1974, Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action ...”.⁴⁷

The Commission therefore did not find it necessary to examine the question of a breach of Article 5 of the European Convention with regard to persons accorded the status of prisoners of war.⁴⁸ Nevertheless, they did find a violation of Article 5 (1), as Article 5 does not include detention as a POW as a legitimate ground for detention. However, as Mr Sperduti again pointed out, “measures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to armed conflict, are to be considered as legitimate measure of derogation from the obligations following from the Convention”.⁴⁹

It follows from that observation that the detention *per se* of the Greek soldiers may indeed have been lawful under humanitarian law. The conditions of their detention, however, do not benefit from reliance on humanitarian law. The treatment of the prisoners in Cyprus, their subjection to inhuman treatment including rape,⁵⁰ the withholding of adequate

⁴⁵ See the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987.

⁴⁶ *Ibid.*, Article 17(3).

⁴⁷ *Cyprus v. Turkey*, *supra* (note 9), para. 313.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 564, para. 7.

⁵⁰ In the case of *Aydin v. Turkey*, *supra* (note 15), the Court found that the rape of the applicant in detention was torture (para. 86), a finding which has implications for the prosecution of persons for violation of the laws of armed conflict or persons indicted for war crimes.

supplies of food and drinking water and of adequate medical treatment, was indeed considered to be a violation of Article 3 of the ECHR. Yet no reference was made to the law on the treatment of prisoners of war except by Mr Ermacora, who in his separate opinion did note that "I consider that such treatment, apart from obligations under the Third Geneva Convention, is also not normal behaviour of soldiers and that military ethics prohibit this form of violence against prisoners".⁵¹

As mentioned above, the application of Articles 2 and 3 of the ECHR to situations of conflict has certain implications, not least of which is that there are limits on the extent to which States can derogate from their obligations under Article 5, obligations that in principle are subject to limitation or partial suspension. The Court clarified this much in a case where it had to determine whether, in view of the fact that the respondent State had entered a derogation to Article 5, the detention of the applicant for at least 14 days without being brought before a judicial officer was permitted.⁵² The Court, agreeing with the Commission, held that the measures permitting prolonged, unsupervised detention, particularly where there was the absence of safeguards such as access to a lawyer, doctor, relative or friend, left detainees vulnerable, not only to arbitrary interference with their right to liberty, but also to torture.⁵³ There was therefore a violation of Article 5 of the Convention, notwithstanding the derogation.

In a separate case the Court also emphasized that to ensure the existence of holding data, recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for detention, and the name of the person effecting it was part of the very purpose of Article 5.⁵⁴ These obligations owed to detainees are therefore

⁵¹ *Supra* (note 49), p. 565, para. 2.

⁵² *Aksoy v. Turkey*, *supra* (note 15), Commission Report of 23 October 1995 and judgment of 18 December 1996. On the derogation, see note 34.

⁵³ See Commission Report, para. 182, and Court judgment, para. 78. Both the Commission and Court already confirmed that Zeki Aksoy, having been subjected to such treatment as suspension in the form of Palestinian hanging, had been tortured in violation of the Convention. See Commission Report, para. 169 and Court judgment, para. 64. In the later case of *Kurt v. Turkey*, judgment of 25 May 1998, which concerned a disappearance, the Court spoke of prompt judicial intervention leading to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (para. 123).

⁵⁴ *Kurt v. Turkey*, *supra* (note 53), para. 125.

clearly not capable of being suspended in times of an armed conflict. The judgments do therefore go some way towards setting boundaries for the measures regarding detention which can be taken in times of armed conflict. It is hoped that further examination of a number of cases where persons have disappeared, allegedly after being detained in a military operation, may also contribute towards delineating those core responsibilities under the Convention, owed by State Parties to detainees in times of armed conflict.⁵⁵

Conduct of military operations and unlawful killings

The situation in south-eastern Turkey has also required the Commission to consider a number of cases where military operations have resulted in considerable injury to or in the death of civilians.⁵⁶ In this context the test laid down by the Court in *McCann and others v. UK* — that the planning and control of an operation must be so as to minimize, to the greatest extent possible, recourse to lethal force,⁵⁷ and that deaths not justified by reference to the second paragraph of Article 2⁵⁸ or resulting other than from lawful acts of war are a violation of the European Convention — provides a secure framework for assessing whether killings are illegal under the laws of armed conflict. Two of the cases to come before the Commission — one concerning an allegation that security forces had used, *inter alia*, a tank to conduct a bombardment in a civilian environment

⁵⁵ E.g. *Akdeniz and others v. Turkey*, Application No. 23954/94, Decision on admissibility of 3 April 1995; *Cakici v. Turkey*, Application No. 23657/94, Decision on admissibility of 15 May 1995; *Timurtas v. Turkey*, Application No. 23531, Decision on admissibility of 11 September 1995; *Tas v. Turkey*, Decision on admissibility of 14 March 1996.

⁵⁶ *Gulec v. Turkey*, No. 21593/93, Decision on admissibility of 30 August 1994, Commission Report of 17 April 1997; *Cagirge v. Turkey*, No. 21895/93, Decision on admissibility of 19 October 1994, Commission Report of July 1995, 82 D & R 20; *Isiyok v. Turkey*, No. 22309/93, Decision on admissibility of 3 April 1995, Commission Report of 31 October 1997; *Ergi v. Turkey*, No. 23818/94, Decision on admissibility of 2 March 1995, 80 D & R 157, Commission Report of 20 May 1997.

⁵⁷ *McCann and others v. UK*, ECtHR Series A 324, para. 194. This test has been employed by the Commission and Court in several cases since, e.g., *Andronicou and Constantinou v. Cyprus*, No. 25052/94, judgment of 9 October 1997, 25 EHRR 491, para. 171.

⁵⁸ Deprivation of life is not regarded as inflicted in contravention of Article 2 when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence, or in order to effect a lawful arrest, or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection.

resulting in death and injury,⁵⁹ and the other concerning an aerial bombardment resulting in widespread damage and injury to civilians and civilian property in a village⁶⁰ — were terminated by way of friendly settlement. In a third case, the Commission and the Court had to examine a military operation in which a woman, standing in the doorway of her home, had been killed in the course of an alleged ambush operation.⁶¹

The Commission considered that the planning and control of the operation needed to be assessed “... not only in the context of the apparent targets of an operation but, particularly where the use of force is envisaged in the vicinity of the civilian population, with regard to the avoidance of incidental loss of life and injury to others”.⁶² It went on to find that the ambush operation was not implemented with the requisite care for the lives of the civilian population, that there was significant evidence that misdirected fire from the security forces had killed a civilian, and that steps or precautions were not taken to minimize the development of a conflict over the village.⁶³ — The Court explicitly noted that the responsibility of the State “may also be engaged where [the security forces] fail to take all feasible precaution *in the choice of means and methods* of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life”.⁶⁴ The Court's reference to means and methods in the conduct of a military operation is one of the clearest examples of the Court borrowing language from international humanitarian law when analysing the scope of human rights obligations. Such willingness to use humanitarian law concepts is encouraging.

These findings, and the language used by the Court and the Commission, can easily be viewed in terms of violations of humanitarian law: it could be said that the Convention bodies examined the operation to see,

⁵⁹ *Cagirge, supra* (note 56).

⁶⁰ *Isiyok, supra* (note 56).

⁶¹ *Ergi v. Turkey, supra* (note 56). Commission Report, paras. 145-149.

⁶² *Ibid.*, para. 145.

⁶³ *Ibid.*, pp. 145 and 149. The applicant also submitted that the rules of engagement and training of the security forces violated Article 2 (para. 140), but the Commission did not address this point. The same submissions were made to the Court (see Verbatim Record of the hearing on 21 April 1998, p.17).

⁶⁴ *Ergi v. Turkey*, judgment of 28 July 1998 (not yet published), para. 79, emphasis added.

inter alia, whether there was a lawful target, whether the attack on the lawful target was proportionate and whether there was a foreseeable risk of death to non-combatants that was disproportionate to the military advantage.⁶⁵ The analysis of the operation in these terms illustrates clearly that humanitarian law can be validly enforced through human rights norms.

In another case pending before the Court, the Commission found that the security forces had killed a civilian through the manifestly disproportionate use of a combat weapon, in violation of Article 2 of the European Convention.⁶⁶ Whilst this killing took place in the context of the efforts to disperse a demonstration and consequently the laws of armed conflict did not apply, one can interpret the findings of the Commission as describing an unlawful killing on the grounds that this was

- an attack with a lawful weapon used in an unlawful way, or
- an unlawful killing due to a disproportionate use of force,

both of which are unlawful killings under the laws of armed conflict.⁶⁷ Given that the Commission also found that the area was in a region under a state of emergency, that civil disturbances were frequent and popular unrest could be expected at any moment,⁶⁸ this indicates that the basic principles of humanitarian law may indeed be applicable to the situation. Significantly, the Commission also held the training and resources of the security forces to be inadequate⁶⁹ — thus presumably implying, at least, improper rules of engagement, or insufficient training in those rules.

Finally and significantly, both the Commission and Court have stated explicitly that the existence of an armed conflict does not exempt killings from scrutiny and investigation to assess their lawfulness. In a case where the applicant's brother was killed in the course of a military operation and

⁶⁵ Lawful and unlawful killings in international and non-international conflict are very helpfully categorized by F. Hampson, *supra* (note 12), pp. 128-130. At its most basic, the author indicates two criteria which can be used to determine the unlawfulness of a killing: (a) the unlawfulness of the target, and (b) absence of proportionality, whether of the attack itself, the weapon used or the manner of its use (*loc. cit.*, p. 128).

⁶⁶ *Gulec v. Turkey*, *supra* (note 56), paras. 235-236. Heard by the Court on 25 March 1998.

⁶⁷ *Supra* (note 65).

⁶⁸ *Supra* (note 66), para. 235.

⁶⁹ *Ibid.*

it was a subject of dispute whether he had been a combatant in the clash or not, the Court made it clear that there was a procedural requirement to investigate the killing to establish whether his killing had been lawful: "Neither the prevalence of violent armed clashes nor the incidence of fatalities can displace the obligation under Article 2 to ensure that an effective independent investigation is conducted into deaths arising out of clashes involving the security forces."⁷⁰

Conclusion

It is clear from the range of recent cases which are being brought to Strasbourg that the overlap between international humanitarian law and the European Convention on Human Rights is becoming a significant issue for the Court. The Convention bodies are therefore having to become adept at examining issues in a humanitarian law context, while they may still be reluctant to invoke explicitly the law of armed conflict or to use it as a tool of analysis. Also, when one seeks to evaluate the scope of the European Convention to enforce rules of humanitarian law, the area which should not be overlooked is the jurisprudence of the Court concerning the right of a victim to an effective remedy for a violation. Now, in the context of grave and serious violations of Articles 2,⁷¹ 3,⁷² 5,⁷³ 8 of the Convention and Article 1 of Protocol 1,⁷⁴ the Court has stated on numerous occasions that the notion of an effective remedy entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. The importance of this obligation, especially in a case where a particular breach of any of the foregoing articles also constitutes a breach of international humanitarian law, must not be underestimated. Demanding accountability and requiring effective remedies — from investigation to prosecution and payment of compensation — is the key to domestic implementation of human rights and humanitarian law.

⁷⁰ *Kaya v. Turkey*, judgment of 19 February 1998, para. 91. The Court reiterated this jurisprudence in its judgment in *Ergi v. Turkey*, *supra* (note 64), paras. 85 and 98.

⁷¹ *Ibid.*, para. 107.

⁷² *Aksoy*, para. 98; *Aydin*, para. 103; *Tekin*, para. 66 - *supra* (note 15).

⁷³ *Kurt*, para. 140, *ibid.*

⁷⁴ *Mentes*, para. 81; *Selcuk and Asker v. Turkey*, para. 96 - *ibid.*

This development is certainly welcome in so far as it contributes to a stronger framework for the protection of rights, particularly in armed conflict, and provides a powerful weapon in the enforcement of humanitarian law, at a time when the establishment of an international criminal court is poised to become a reality. Indeed, of all the component parts of the legacy which the new European Court of Human Rights will inherit from its predecessors, the beginnings of significant case law in the area of international humanitarian law may prove to be one of the most useful.

Non-governmental human rights organizations and international humanitarian law

by **Rachel Brett**

At the heart of human rights work is the attempt to protect individuals from the abuse of power or neglect on the part of their own governments. At the international level, this translates into State responsibility for the way in which the government treats its own people, supplementing the older international law regarding the treatment of aliens and the law of war which also (originally) addressed only the treatment of non-nationals.

It is therefore not surprising that non-governmental organizations (NGOs) involved in safeguarding human rights have always focused on the implementation (or violation) of universal or regional human rights standards by governments. This reflects the traditional view of governments as the centres of power and responsibility as well as the general principle that States are bound by international law (either by virtue of becoming party to a treaty or because the rule is recognized as a norm of customary international law) and the classic human rights view that governments and only governments can violate human rights. Killings committed by individuals or groups are crimes. Such acts become violations of human rights if the perpetrator is the agent of a State or if the State fails in its duty to protect the individual or to prosecute the alleged perpetrator.¹

Rachel Brett, LL.M., is associate representative (human rights and refugees) at the Quaker United Nations Office, Geneva, and a fellow of the Human Rights Centre of the University of Essex, United Kingdom.

¹ See the judgment of the Inter-American Human Rights Court in *Velasquez-Rodriguez v. Honduras*.

Today's problem

However, the world has changed and the law along with it. The growing number of internal (non-international) armed conflicts and the attention they receive internationally has produced a number of developments. International humanitarian law has moved from its exclusive concern for international armed conflict to active interest in internal armed conflicts as well. The first of this was Article 3 common to the 1949 Geneva Conventions. The second came in 1977 with Additional Protocol II, which is applicable to non-international armed conflict. Humanitarian law has thus moved into the human rights arena, as it were, in the sense that it now addresses the relationship between those in authority and the people they govern. This raises the question of the relationship between international humanitarian law and human rights law, since human rights law continues to apply (though with limitations) in time of armed conflict. This same development raises questions about some of the fundamental tenets of international humanitarian law: the equal standing of the parties to an armed conflict and the reciprocal nature of their obligations. Finally, the regulation of internal armed conflicts raises the whole question of accountability on the part of non-State entities under international law.

The response of human rights NGOs

Traditionally, human rights NGOs have tended to feel that international humanitarian law was the province of the International Committee of the Red Cross and that it was complicated, containing as it does all sorts of strange and ambiguous (at least to human rights people) concepts such as "collateral damage" and "military necessity", so that even something as apparently straightforward as the killing of civilians might, though regrettable, not constitute a violation of international humanitarian law. For human rights NGOs, there have been questions about how to interpret the law and whether there is a danger of lowering standards by applying international humanitarian law rather than human rights law.

However, the proliferation of armed conflicts — in particular internal armed conflicts — and the apparent convergence of human rights law and international humanitarian law² has led certain human rights NGOs to

²For an example of such convergence, see the "Guiding Principles on internal displacement", prepared under the auspices of the Representative of the UN Secretary-General on internally displaced persons, UN Doc. E/CN.4/1998/53/Add.2, see *infra* p. 545, and "Compilation and analysis of legal standards", UN Doc. E/CN.4/1996/52/Add.2.

reconsider their position. A basic principle for human rights NGOs is that it is unacceptable to ignore violations on the grounds that they occur during armed conflicts. How then can these organizations respond effectively to such violations? Does international humanitarian law provide a useful framework? These questions will be examined with respect to two issues: applicable standards and the accountability of non-State forces.

The question of applicable standards

Where the government accepts that it is involved in an armed conflict and, therefore, that international humanitarian law applies, there is an advantage in holding the government to the standards established by that law. This avoids any argument about the yardstick: since government and NGOs refer to the same law, they may focus the debate on the facts and their interpretation in relation to that law. A classic example of this is Amnesty International's report on Israel's "Grapes of Wrath" operation in southern Lebanon.³

This was in fact the first time that an Amnesty International report used international humanitarian law to assess a governmental military operation. The alternative approaches of either seeking to apply human rights law to this military action or to ignore it completely obviously would have been unsatisfactory.

Furthermore, as knowledge of international humanitarian law has grown among human rights NGOs, there has been an increasing recognition that at least some of the standards provide a degree of specialization and specificity that human rights standards lack, even in relation to internal armed conflicts. A notable example of this is the rules governing displacement of the civilian population. Such displacement is a common phenomenon in internal armed conflicts but one on which human rights law provides little assistance. By contrast, Article 17, paragraph 1 of Additional Protocol II provides that people may be relocated only for their own security or for "imperative military reasons", and specifies that "all possible measures" must be taken to ensure "satisfactory conditions of shelter, hygiene, health, safety and nutrition" for those displaced. This provision was used by Human Rights Watch in its recent report on Burundi as the yardstick for judging the camps set up by the government.⁴

³ *Israel/Lebanon, Unlawful killings during operation "Grapes of Wrath"*, Amnesty International, London, July 1996 (AI Index MDE 15/42/96).

⁴ *Proxy targets: Civilians in the war in Burundi*, Human Rights Watch, New York, 1998.

Accountability of non-State forces

The reality of today's world is that there are countries with no government or with titular governments only partially in control of the territory. Can (or should?) human rights NGOs either ignore such situations or go on considering only governments accountable under human rights law?

The legal and conceptual ambivalence about non-State forces is not exclusive to NGOs. It is also nicely reflected in the proposed optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflict (another example of convergence of human rights and international humanitarian law) in the latest draft of that text's provision on military recruitment by non-States forces. The preambular paragraph recalls "the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law", while draft Article 3, paragraph 1 balances the moral (not legal) obligation not to recruit children under 18 with a legal obligation on States to prevent such recruitment: "Persons under the age of 18 years should not be recruited into armed groups, distinct from the armed forces of a State, which are parties to an armed conflict. States Parties shall take all feasible measures to prevent such recruitment."⁵

For human rights NGOs, therefore, it might seem that the obvious solution to the problem of non-State entities is to use international humanitarian law. However, it is not as simple as that. Firstly, humanitarian law applies only if there is an armed conflict, and there are situations in which non-State entities are involved without there being an armed conflict. Still other situations are simply difficult to define. Secondly, even where there unequivocally is an armed conflict, human rights law continues to be binding on governments, although in certain circumstances they are permitted to derogate from some of its provisions. Human rights NGOs could, therefore, find themselves invoking both human rights law and international humanitarian law vis-à-vis the government while referring only to international humanitarian law vis-à-vis armed opposition group. Does it matter whether the government is held to higher or different standards than the opposition? Furthermore, Protocol II only applies if the State concerned is party to it. Should the non-adherence of a government prevent

⁵Report of the Working group on a draft Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its fourth session, Annex II, Chairman's Perception, UN Doc. E/CN.4/1998/102.

human rights NGOs from insisting that its provisions be complied with by non-State entities to whom those provisions would otherwise apply?

The disparity between the standards laid down by human rights law and international humanitarian law is greatest where only common Article 3 applies but not Protocol II. This “inequality” of standards may present a problem from the perspective of international humanitarian law. However, for human rights NGOs the application of international humanitarian law standards to the armed opposition group does not amount to putting them on a par with the government. It merely lays down a generally accepted yardstick for their conduct. Applying both sets of standards to the government precludes the risk that the standards to which it is being held will be diluted. In Northern Ireland, for example, to oppose the killing of “civilians” (those not taking active part in the conflict) by the IRA on the basis of common Article 3 could be seen as legitimizing IRA killings of members of the British armed forces. Moreover, if application of Article 3 implies that this is an armed conflict, could it not also legitimize the alleged “shoot to kill” policy of the government, since international humanitarian law permits members of the armed forces to kill members of opposing armed forces? For human rights NGOs, the possibility of legitimizing killings is an issue even if there is definitely an armed conflict. But the question becomes thornier if, as in the example of Northern Ireland, there is not in fact an armed conflict, or where the situation is in doubt. In such circumstances, human rights NGOs are invoking the *principles* of common Article 3 in their dealings with the non-State entities involved in the situation, rather than the provision itself. This avoids the problem of having to hold the government to this same standard and it ensures that certain conduct, such as deliberately killing innocent bystanders, is condemned.

Conclusion

The increasing interest in international humanitarian law on the part of human rights NGOs highlights the problems with which they are wrestling: in particular, how to maintain or improve protection of human rights in armed conflicts and internal disturbances. It is in the nature of NGOs that there will be no unified response to these problems though a number of key points on which they agree emerge from their work and from their discussions. They are as follows.

1. International humanitarian law provides agreed standards specifically designed to address issues arising in armed conflict. On the basis

of these, NGOs can hold governments and armed opposition groups alike accountable for their actions.

2. In the event of non-international armed conflict, NGOs can remind the warring parties of the provisions of Protocol II even where the State is not bound by that treaty or where it is not applicable (because a condition for its applicability is not met, e.g. control of territory), since the Protocol provides authoritative guidance regarding humane treatment. Moreover, at least part of its provisions belong to international customary law.

3. In addition to including violations committed by non-State entities in their reports on government violations, human rights NGOs need to engage non-State entities and to be able frankly to condemn violations committed by them. There are at least four possible bases for such action by human rights NGOs. Their use would depend on various factors, including the sensitive problem of possibly giving “recognition” to such groups, and the body of law which the individual NGO considers most appropriate or with which it feels most comfortable. These bases are:

- *morality* (provided that the human rights NGO and the non-State entity concerned share a common moral system, which is more likely at local or national level than in an international context);
- the *principles of Article 3* common to the Geneva Conventions;
- the *principles of human rights law* (though that law itself binds only States);
- *domestic criminal law* (when compatible with international standards).

Human rights NGOs are unlikely ever to feel completely at ease with international humanitarian law. Its concepts, language and approach are different from those of human rights. However, the strength of the human rights movement is its ability to learn and to adapt in order to meet the changing challenges of the world while guarding the integrity of the human rights concept in the face of pressure from governments and the public. International humanitarian law provides valuable tools for human rights NGOs in their struggle to safeguard human rights.

International Committee of the Red Cross

At its meeting of 24 June 1998, the Assembly of the International Committee of the Red Cross adopted the ICRC's new Statutes. When the Assembly took the decisions arising from the Avenir project (see «The ICRC looks to the future», IRRIC, No. 322, March 1998, pp. 126-136), it also approved new internal structures for the organization, and the relevant articles of the Statutes had to be amended accordingly.

The new ICRC Statutes replace those of 21 June 1973. They came into effect on 20 July 1998.

STATUTES OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

of 24 June 1998

Article 1 — International Committee of the Red Cross

1. The International Committee of the Red Cross (ICRC), founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by the International Conferences of the Red Cross,¹ is an independent humanitarian organization having a status of its own.
2. It is one of the components of the International Red Cross and Red Crescent Movement.²

¹ Since 8 November 1986, the title of the International Conference has been «International Conference of the Red Cross and Red Crescent».

² The International Red Cross and Red Crescent Movement (the Movement) is also known as the International Red Cross. It comprises the National Red Cross and Red Crescent Societies (the National Societies), the International Committee of the Red Cross (the International Committee or ICRC) and the International Federation of Red Cross and Red Crescent Societies.

Article 2 — Legal status

As an association governed by Article 60 and following of the Swiss Civil Code, the ICRC has legal personality.

Article 3 — Headquarters, emblem and motto

1. The headquarters of the ICRC is in Geneva.
2. Its emblem is a red cross on a white ground. Its motto is *Inter arma caritas*. It likewise acknowledges the motto *Per humanitatem ad pacem*.

Article 4 — Role

1. The role of the ICRC shall be in particular:
 - a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
 - b) to recognize any newly established or reconstituted National Society which fulfils the conditions for recognition set out in the Statutes of the Movement, and to notify other National Societies of such recognition;
 - c) to undertake the tasks incumbent upon it under the Geneva Conventions,³ to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
 - d) to endeavour at all times — as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife — to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
 - e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;

³ In the present Statutes, the expression «Geneva Conventions» also covers their Additional Protocols for the States party to those Protocols.

- f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies, the military and civilian medical services and other competent authorities;
 - g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;
 - h) to carry out mandates entrusted to it by the International Conference of the Red Cross and Red Crescent (the International Conference).
2. The ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.

Article 5 — Relations with the other components of the Movement

1. The ICRC shall maintain close contact with the National Societies. In agreement with them, it shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.
2. In situations foreseen in Article 4, paragraph 1 d) which require coordination of assistance provided by National Societies of other countries, the ICRC, in cooperation with the National Society of the country or countries concerned, shall coordinate such assistance in accordance with the agreements concluded with the other components of the Movement.
3. The ICRC shall maintain close contact with the International Federation of Red Cross and Red Crescent Societies. It shall cooperate with the latter in matters of common concern in accordance with the Statutes of the Movement and the agreements concluded between the two organizations.

Article 6 — Relations outside the Movement

The ICRC shall maintain relations with government authorities and any national or international institution whose assistance it considers useful.

Article 7 — Membership of the ICRC

1. The ICRC shall co-opt its Members from among Swiss citizens. It shall comprise fifteen to twenty-five Members.
2. The rights and duties of Members of the ICRC shall be laid down in Internal Regulations.
3. Members of the ICRC shall be subject to re-election every four years. After three terms of four years they must obtain a three-fourths majority of the full membership of the ICRC in order to serve any additional term.
4. The ICRC may elect honorary members.

Article 8 — Decision-making bodies of the ICRC

The decision-making bodies of the ICRC shall be:

- (a) the Assembly;
- (b) the Assembly Council;
- (c) the Presidency;
- (d) the Directorate;
- (e) Management Control.

Article 9 — Assembly

1. The Assembly shall be the supreme governing body of the ICRC. It shall oversee all the ICRC's activities, formulate policy, define general objectives and institutional strategy, and approve the budget and accounts. It shall delegate certain of its powers to the Assembly Council.
2. The Assembly shall be composed of the Members of the ICRC. It shall be collegial in character. Its President and two Vice-Presidents shall be the President and Vice-Presidents of the ICRC.

Article 10 — Assembly Council

1. The Assembly Council shall be a body of the Assembly which acts on the authority of the latter. It shall prepare the Assembly's activities,

take decisions on matters within its area of competence, and serve as a link between the Directorate and the Assembly, to which it shall report regularly.

2. The Assembly Council shall comprise five members elected by the Assembly.
3. The Assembly Council shall be presided over by the President of the ICRC.

Article 11 — Presidency

1. The President of the ICRC shall assume primary responsibility for the external relations of the institution.
2. As President of the Assembly and of the Assembly Council, he shall ensure that the areas of competence of these two bodies are safeguarded.
3. The President of the ICRC shall be assisted in the performance of his duties by a permanent Vice-President and a non-permanent Vice-President.

Article 12 — Directorate

1. The Directorate shall be the executive body of the ICRC, responsible for applying and ensuring application of the general objectives and institutional strategy defined by the Assembly or the Assembly Council. The Directorate shall also be responsible for the smooth running and the efficiency of the Administration, which comprises ICRC staff as a whole.
2. The Directorate shall be composed of the Director-General and the three Directors, all appointed by the Assembly.
3. The Directorate shall be chaired by the Director-General.

Article 13 — Power of representation

1. All commitments made by the President or the Directorate shall be binding on the ICRC. The terms and conditions under which they exercise their powers shall be set out in the Internal Regulations.

2. All documents involving financial commitments on the part of the ICRC towards third parties must bear the signature of two duly authorized persons. The Assembly Council shall determine, on a proposal from the Directorate, the amounts below which this requirement may be waived.

Article 14 — Management Control

1. The ICRC's Management Control shall have an internal monitoring function independent of the Directorate. It shall report directly to the Assembly. It shall proceed through internal operational and financial audits.
2. Management Control shall cover the ICRC as a whole, both field and headquarters. Its aim shall be to assess, on an independent basis, the performance of the institution and the pertinence of the means deployed in relation to the ICRC's strategy.
3. In the area of finance, the role of Management Control shall complement that of the firm(s) of external auditors mandated by the Assembly.

Article 15 — Assets and financial verification

1. The principal assets of the ICRC shall be the contributions of governments and National Societies, funds from private sources and its income from securities.
2. These assets, and such capital funds as it may have at its disposal, shall alone, to the exclusion of any personal or collective liability of its Members, guarantee commitments entered into by the ICRC.
3. The utilization of those assets and funds shall be subject to independent financial verification, both internally (by Management Control) and externally (by one or more firms of auditors).
3. Even in case of dissolution, Members shall have no personal claim to the assets of the ICRC, which shall be used solely for humanitarian purposes.

Article 16 — Internal Regulations

The Assembly shall provide for the implementation of the present Statutes, in particular by establishing Internal Regulations.

Article 17 — Revision

1. The Assembly may revise the present Statutes at any time. Revision shall be the subject of discussion at two separate meetings, on the agendas of which it shall be an item.
2. The Statutes may be amended only if so decided by a final two-thirds majority vote of the Members present and constituting at least half of the full membership of the ICRC.

Article 18 — Entry into force

The present Statutes shall replace the Statutes of the International Committee of the Red Cross of 21 June 1973 and shall take effect as from 20 July 1998.

Future of the ICRC Presidency

On 1 January 2000, the International Committee of the Red Cross will have a change of President. The new incumbent will be Mr Jakob Kellenberger, who is currently Swiss Secretary of State for Foreign Affairs. Professor Jacques Forster will take up the post of permanent Vice-President on 1 August 1999.

In taking this decision the ICRC Assembly settled the question as to who would take over from President Cornelio Sommaruga, due to complete his third term in office at the end of 1999. Professor Forster, member of the ICRC, will replace Vice-President Eric Roethlisberger, whose mandate comes to an end in July 1999.

Accordingly, from 1 January 2000 the ICRC Presidency will comprise:

Mr Jakob Kellenberger, President

Mrs Anne Petitpierre, non-permanent Vice-President

Mr Jacques Forster, permanent Vice-President.

International Committee of the Red Cross

Guiding Principles on Internal Displacement¹

INTRODUCTION: SCOPE AND PURPOSE

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.
2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.
3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
 - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
 - (b) States when faced with the phenomenon of internal displacement;
 - (c) All other authorities, groups and persons in their relations with internally displaced persons; and
 - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
4. These Guiding Principles should be disseminated and applied as widely as possible.

¹ UN Doc. E/CN.4/1998/53/Add.2 of 17 April 1998. The UN Human Rights Commission has taken note of these Guiding Principles. See its Resolution 1998/50 of 17 April 1998.

SECTION I — GENERAL PRINCIPLES

Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children,

female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

SECTION II — PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
 - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
 - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
 - (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the

displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

- (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
- (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
- (c) The free and informed consent of those to be displaced shall be sought;
- (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
- (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
- (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

SECTION III — PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT

Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

- (a) Genocide;
- (b) Murder;
- (c) Summary or arbitrary executions; and
- (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

- (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
- (b) Starvation as a method of combat;
- (c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
- (d) Attacks against their camps or settlements; and
- (e) The use of anti-personnel landmines.

Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.
2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:
 - (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
 - (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and
 - (c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
4. In no case shall internally displaced persons be taken hostage.

Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 15

Internally displaced persons have:

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

Principle 17

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:

- (a) Essential food and potable water;
 - (b) Basic shelter and housing;
 - (c) Appropriate clothing; and
 - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Principle 21

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
 - (a) Pillage;
 - (b) Direct or indiscriminate attacks or other acts of violence;
 - (c) Being used to shield military operations or objectives;
 - (d) Being made the object of reprisal; and
 - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
 - (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
 - (b) The right to seek freely opportunities for employment and to participate in economic activities;
 - (c) The right to associate freely and participate equally in community affairs;
 - (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
 - (e) The right to communicate in a language they understand.

Principle 23

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.

3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

SECTION IV — PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE

Principle 24

1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

Principle 26

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs

and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.

2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

SECTION V — PRINCIPLES RELATING TO RETURN, RESETTLEMENT AND REINTEGRATION

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (Ottawa Treaty)

On 16 September 1998, Burkina Faso deposited its instrument of ratification of the Ottawa treaty banning anti-personnel landmines. The deposit of this 40th instrument of ratification with the United Nations Secretary-General in New York means that on 1 March 1999 the treaty will become binding international law for almost a third of the 130 States which have signed it.

The 40 States which have ratified the Ottawa treaty are: Andorra, Austria, Bahamas, Belgium, Belize, Bolivia, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Canada, Croatia, Denmark, Djibouti, Equatorial Guinea, Fiji, Former Yugoslav Republic of Macedonia, France, Germany, Grenada, Holy See, Hungary, Ireland, Jamaica, Malawi, Mali, Mauritius, Mexico, Mozambique, Niue, Norway, Peru, Samoa, San Marino, South Africa, Switzerland, Trinidad and Tobago, Turkmenistan, United Kingdom, Yemen and Zimbabwe.

**Accession to the Additional Protocols
by the Republic of Venezuela**

The Republic of Venezuela acceded on 23 July 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 Republic of Venezuela on 23 January 1999.

This accession brings to 151 the number of States party to Protocol I and to 143 those party to Protocol II.

Books and reviews

Nicholas O. Berry, *War and the Red Cross — The unspoken mission*, St. Martin's Press, New York, 1997, 159 pp.

Today, as I begin this review, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies have announced that they are withdrawing from the Kosovo region in the Federal Republic of Yugoslavia, after receiving death threats to their expatriate staff. It gives me the sneaking feeling that the author of this book might be right, not so much in his fundamental thesis — that the ICRC has decided upon a new, unspoken mission to abolish war — but rather in his conclusion: that the ICRC's traditional activities are perceived by the players in today's internal conflicts as a threat to their objectives, or, equally, as a means of keeping world media attention focused on their "struggle".

The publishers of *War and the Red Cross — The unspoken mission* sent a copy to our National Society — as it probably did to others — describing it as "the most provocative book about the Red Cross". Immediately afterwards, several of my colleagues certainly seemed to have been provoked (or should I say appeared concerned?), questioning the "unspoken mission" thesis of the book. These were both good reasons at least to read it, and then I was asked by the International Review of the Red Cross to write a review. Clearly trying to deny a hidden agenda, especially as an outsider to the ICRC, is almost a contradiction in terms. This review should therefore be seen as my personal impressions of the book.

In 140 pages, the author — Nicholas O. Berry, Professor of Politics and International Relations at Ursinus College, Pennsylvania, USA — traces recent developments in the field of armed conflict, and repeatedly draws the conclusion that the ICRC has decided upon a new, hidden strategy: behind its traditional assistance and protection operations, the ICRC — Berry argues — is now also trying to "undermine the institution of war, ... by inducing governments and UN agencies to intervene, ... by monitoring instances of brutality, ... by publicizing abuses ... and by influencing the operations of the UN" — to quote but a few examples.

This is certainly provocative! Not so much for anyone who knows that peace — as the opposite of war — is the ultimate goal of the International Red Cross and Red Crescent Movement, as explained in the first of the Fundamental Principles behind its work (namely, humanity) and in one of its principal mottoes (“*per humanitatem ad pacem*”). But it is like the proverbial red rag to a bull for combatants or other persons involved in armed conflicts who rightly accept the neutral and confidential work of the ICRC. The provocative statement quoted above invites them to reach a mistaken conclusion, along the lines of: “Let the ICRC in, and see what they can do to you!” It is also provocative for the ICRC itself, bearing in mind that “*inter arma caritas*” (the other main Red Cross motto) and the Fundamental Principles of neutrality and independence still constitute the foundation of its work, and have recently been reconfirmed in its own “*Avenir*” study.¹

Before any further comment is made on the author’s argument that the ICRC has a “new mission”, the underlying, optimistic message of the book should be emphasized — that the nature of armed conflict has changed drastically since the end of the Cold War, with third party intervention much more able to limit the suffering of war victims and even to resolve armed conflicts. At a time when conflict prevention and resolution is becoming a top priority for the international community, the ICRC is indeed one of these third parties, but, in my view, able to have only limited, consequential effects on the way wars are fought or resolved.

The book provides a good overview of the nature of armed conflicts today, illustrating a general description with concrete examples. During the Cold War most armed conflicts were either international or contained an international dimension, with the two superpowers backing regional or domestic warring factions. Now, however, international wars have become “dysfunctional” because they are too expensive and are considered a threat to the international economic and democratic system, now multi-polar and integrated in character. As Berry optimistically concludes: “Never before has war been less attractive as a method of settling disputes between states. What is called ‘The Long Peace’ will get longer.”

After the Cold War, conflicts became internal in nature and turned increasingly nasty. With government authority lacking and superpower

¹“The ICRC looks to the future: International Committee of the Red Cross, *Avenir* Study: Strategic content”, Geneva, 12 December 1997, *IRRC*, No. 322, March 1998, pp. 126-136.

involvement now absent, domestic differences exploded into war. Civilians became the prime targets of attack, resulting in “religious purification”, “ethnic cleansing”, a 90% civilian casualty rate and a sharp increase in the number of refugees. Involving civilians and small arms, internal conflicts cost relatively little and thus “remain options to settle domestic disputes”. For some conflicts, where warlords reign and violence has become an end in itself, chaos is the only word that approaches an adequate description.

Berry illustrates the horror of internal conflicts by referring to the examples of the former Yugoslavia (ethnic cleansing), Rwanda (genocide), the Sudan (murder and starvation, with a death toll well over 1 million since 1983), Afghanistan (one million deaths, Kabul a wasteland, the economy primitive and millions of active landmines still producing innumerable casualties), Guatemala (murders, disappearances, ambushes, forced migrations and executions) and Chechnya (40,000 dead and about 400,000 displaced). The author is disappointed in particular by the international community’s neglect of some of these wars, especially in the light of his general argument that third party intervention can alleviate suffering and shorten the conflict.

Arguing that third party intervention can “sabotage” these wars, “upset power relations”, “mute the horrors of combat” and “create the basis for a diplomatic settlement”, the author quotes as examples the prevention of victory in the former Yugoslavia by massive UN and NATO intervention; the vast humanitarian operations by NGOs and UN agencies in the African Great Lakes region; and the involvement of human rights monitors, journalists and UN officials in the resolution of the conflict in Guatemala. At the same time, however, he points out the limits to such intervention. For humanitarian organizations, security and access are the main problems, in view of increasing assaults and threats to humanitarian staff, the blocking of food distribution and access to refugees, and the vast quantities of light weapons used. For powerful political entities, peace-keepers and the media, the key issue is how to get involved at all in a conflict, “to shape the end game and engineer a settlement”.

In Berry’s view, the ICRC not only acts as a humanitarian organization — providing protection and assistance on a neutral and impartial basis — but also lobbies international organizations, NGOs and National Red Cross and Red Crescent Societies - presumably including my own. Both activities supposedly fuel the “unspoken mission” to undermine and resolve civil wars, the operational work in the field making the war dysfunctional, the lobbying aiming to involve third parties in the conflict.

The ICRC's activities in situations of armed conflict, presented on the basis of the organization's 1995 Annual Report, are explained as having their legal foundation in the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, and are illustrated with reference to the armed conflicts mentioned above. According to Berry, visits to detainees, tracing and reuniting families, deliveries of relief supplies, surgical operations, agricultural projects and dissemination of international humanitarian law all aim not only "to relieve the suffering caused by war, but also to prevent its success as a strategy". Indeed, the more the belligerents target civilians indiscriminately as a strategy of war, the more such a strategy is undermined by assisting and protecting civilians. The more the root causes of war and dependence on the belligerents are attributed to a lack of socio-economic development, the more relief, rehabilitation and development can be seen as removing those causes. Hence the operational work of the ICRC, and of the International Red Cross and Red Crescent Movement as a whole, *does* undermine the institution of war, but to my mind this is a consequence of the nature of today's internal conflicts rather than an actual new strategy.²

The same can be said about the lobbying of other third parties. As the author explains, the ICRC has been confronted by "the proliferation of novice NGOs" and a growing UN role in armed conflicts, creating problems of coordination and confusion of mandates. It is my experience that, as a result of this, the ICRC will use any occasion to explain its neutral mandate and its limited mission assisting and protecting victims of war, while pointing out the responsibilities of other third parties. Over and over again, the ICRC has been defending its original mandate and mission, precisely to prevent these internal conflicts from dragging the ICRC into the politics of resolving or continuing them. But the author interprets this as a strategy with a hidden agenda.

On the basis of a detailed analysis of the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in disaster relief,³ Berry argues that the ICRC is "guiding the international community" and "the entire Movement", asserting that "the Code has had

²The author touches only briefly on the important role National Red Cross and Red Crescent Societies play in this respect, and on the International Federation's mission and strategy to focus on the most vulnerable and strengthen the National Societies as part of civil society. See Resolution 5 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995), *IRRC*, No. 310, January-February 1996, p. 75, and the International Federation's Strategic Work Plan for the Nineties (unpublished document).

³*IRRC*, No. 310, January-February 1996, p. 119.

war and war relief principally in mind all along". The Code of Conduct was originally conceived with disaster relief as its prime concern and developed and promoted by the International Federation of Red Cross and Red Crescent Societies and six other international humanitarian organizations. The ICRC was not involved until later, after the first draft had been drawn up. With regard to war, the Code "will be interpreted and applied in conformity with international humanitarian law", thereby immediately limiting its scope, in view of the clear sense of sovereignty contained in that body of law. Better coordination (so far 147 NGOs have endorsed the Code) and greater involvement of international governmental organizations and governments (some donor governments use the Code as a guideline) will certainly improve humanitarian assistance and thereby alleviate the suffering caused by war, but, on examination of the Code of Conduct, the argument that it is the ICRC's main vehicle for guiding the international community appears quite implausible.

The same applies to Berry's views on the ICRC's "lobbying objectives" vis-à-vis the UN. Basing his argument on symposium statements and conference working papers, he claims that the ICRC is, *inter alia*, "formalizing UN commitment to intervention", "energizing the UN to engage in preventive diplomacy", or "engaging the UN process in codifying an expanded body of international humanitarian law". These assertions seem to give too much weight to an ICRC strategy that, far from being a hidden agenda, is simply a consequence of today's armed conflicts. Here too, confronted with a more operational UN (from UN humanitarian agencies to UN peace-keeping operations), the ICRC has used every opportunity both to confirm its specific independent mandate vis-à-vis the UN and to seek to convince the UN and its members of their responsibilities under international humanitarian law, including application thereof by UN troops and the general obligation to respect and ensure respect of humanitarian obligations. To my mind, all the rest is personal interpretation.

War and the Red Cross is a strong appeal for third party intervention in today's non-international armed conflicts, with the optimistic view that the end is imminent for war as an institution. The ICRC indeed plays a role in this, but, as indicated above, this is more a consequence of the nature of these conflicts than the objective of an unspoken mission. The book might be interpreted as giving enormous credit to the ICRC in the field of conflict resolution, but such an interpretation, if removed from the wider context, would be likely to make ICRC delegates even bigger targets for warring factions today than they already are.

Only recently the ICRC finalized its "*Avenir*" project, confirming that "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, [and] 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.”⁴ This statement entirely confirms the ICRC’s traditional role. Together with the daily work the Red Cross performs on a neutral and independent basis, the conclusions of the “*Avenir*” project should remove any doubts about the ICRC’s “hidden agenda” in situations of armed conflict. There is no such thing as an “unspoken mission”.

Wilfried Remans
Head, International Affairs Department
Belgian Red Cross-Flanders

Jiří Toman, *La protection des biens culturels en cas de conflit armé*, Paris, Éditions Unesco, 1994, 490 pages

Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing Company, Aldershot / Unesco Publishing, Paris, 1996, 525 pages

Emmanuelle Stavrakí, *La Convention pour la protection des biens culturels en cas de conflit armé*, Athènes, Éditions Ant. N. Sakkoulas, 1996, 306 pages

Jean A. Konopka (ed.), *La Protection des biens culturels en temps de guerre et de paix d’après les conventions internationales (multilatérales)*, Genève, Imprimeries de Versoix, 1997, 163 pages

The extensive damage done to cultural property — ranging from places of worship and monuments to libraries and museums — during the

⁴*Supra* (note 1), p. 130.

conflict in the former Yugoslavia has reminded us once again of the particular vulnerability of cultural property during war. These books are evidence of the renewed interest in this subject and help focus worldwide attention on the legal and diplomatic tools available to protect cultural property.

The foremost of these is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. It therefore comes as no surprise that this treaty has once again been placed in the academic spotlight. It appears that the Hague Convention, as it currently stands, would provide adequate protection to cultural property if applied in good faith by the States party to it. However, the war in the former Yugoslavia proved that the protection afforded by the Convention is not sufficient in practice and that there is a need to improve the mechanisms for its enforcement. For even though the Convention has "only" 88 States Parties, the former Yugoslavia and the warring successor States were all bound by that instrument throughout the armed conflict there. The same is true for Lebanon, which though party to the Convention nevertheless suffered great damage to its cultural property during its recent civil war.

These shortcomings explain the current international initiative to review the 1954 Convention and to convene a diplomatic conference in The Hague in 1999 to adopt a new, improved treaty. This conference would fit nicely into the series of activities celebrating the centenary of the First Hague Peace Conference (1899). Whether it will come about cannot yet be predicted with absolute certainty. The 1954 Hague Convention nevertheless warrants our close attention, understanding and promotion, notwithstanding the possibility of an improved regime in future.

Toman's book on the Convention (there is a French and an English version) meets the need for an article-by-article commentary on it that has existed since the treaty was adopted. The author has made an invaluable contribution to the understanding and interpretation of humanitarian law. The fact that the French original of 1994 was translated and published in English in 1996 is no luxury. Other commentaries on humanitarian law, such as the ICRC commentaries on the four Geneva Conventions of 1949 and their two Additional Protocols, have become much-used standard works and are now the point of departure for those seeking to interpret these treaties. Toman's commentary will undoubtedly assume the same position with regard to the international rules on the protection of cultural property in wartime.

The first part of Toman's work describes the historical development of international law in this realm, the intergovernmental conference on the

protection of cultural property in the event of armed conflict (held in The Hague from 21 April to 14 May 1954) and events since the adoption of the 1954 Convention.

Part II discusses the Convention's various provisions, including the regulations for its execution. The commentary on each provision contains the text itself, references to relevant parts of the official records of the diplomatic conference, a bibliography relating to the legal issues involved, an outline of the historical background and of the preparatory work where appropriate and, finally, a generally detailed paragraph-by-paragraph commentary.

But Toman goes into even greater detail, as suggested by the subtitle of his book: "Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection." In addition to an analysis of the 1954 Convention, the book contains the following: a commentary on the Protocol for the Protection of Cultural Property in the Event of Armed Conflict, which deals with the export of cultural property from occupied territory and with the placing of endangered items from one State party in the custody of another State party; a description, with reference to the official records, of the resolutions adopted by the 1954 conference; and finally a commentary on the relevant provisions of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970), the Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972), and the Protocols additional to the Geneva Conventions.

The 11 annexes, containing all relevant documents, together with the select bibliography and the index, ensure that this book contains the information necessary for anyone seeking an explanation of the law on the protection of cultural property in wartime. Being a commentary, Toman's book is naturally a handbook for use when needed rather than a work to be read from cover to cover.

Emmanuelle Stavraki's book, by contrast, can be read from beginning to end. It is the published version of a doctoral thesis defended in 1988 at the University of Paris and deals exclusively with the 1954 Hague Convention. That this 1988 thesis was published only in 1996 is not surprising given the resurgence of interest in the subject. The strength of Stavraki's book is that she not only sets out the legal regime for the protection of cultural property — including the protection of its transport

of the personnel appointed to protect it and of its emblem — but that she devotes equal attention to the legal regime for the implementation of the Convention. And she does so in a very clear and systematic way. For this is the challenge of most if not all of humanitarian law today: effective implementation of existing law (as opposed to the creation of new law). It shows that, while there is room for improvement, the 1954 Hague Convention does in fact contain various mechanisms to achieve its implementation. Each one of these mechanisms is described by Stavradi: international supervision, repression of breaches, prevention (including the establishment of consultative committees, dissemination, translation, reporting, meetings of States parties and the conclusion of special agreements).

All in all, Toman's commentary and Stavradi's treatise are complementary publications. Both deserve a place in every law library and every collection on international humanitarian law.

Jean Konopka's collection of documents, finally, deals with the protection of cultural property both in time of war and peace. No less than 22 conventions are included in this collection, which not only highlights the renewed interest in the subject but also provides evidence of the wide scope of international law on cultural property in general.

Jean-Marie Henckaerts
ICRC Legal Division

Matthias Pape, *Humanitäre Intervention: Zur Bedeutung der Menschenrechte in den Vereinten Nationen*, Nomos, Baden-Baden, 1997, 350 pp.¹

This book is primarily concerned with the lawfulness and degree of effectiveness in cases of military intervention on humanitarian grounds either by the United Nations directly or under its authority. The study was

¹ Translation of citations by the author of this review.

submitted as a Ph.D. dissertation to the University of Freiburg, Germany. The author, a German lawyer and political scientist, deals with the subject of UN "intervention on humanitarian grounds" in five main parts. He starts by examining what kind of human rights can lawfully be protected by such intervention. He goes on to describe the "classic" intervention on humanitarian grounds as effected by individual States before and after the UN Charter entered into force, and draws a distinction between such intervention and humanitarian assistance. The third part of the study analyses the legal basis for UN intervention on humanitarian grounds while the fourth part consists of case studies of such operations in Iraq, Somalia and the former Yugoslavia. Finally, Pape draws conclusions as to the degree to which human rights have been effectively protected by recent UN intervention, and ways in which the UN's performance might be improved by amendments to the Charter and other measures.

Pape's study is an impressive summary and critical review of UN efforts in the post-Cold-War era to protect human rights by military means. As the bibliography (pp. 316-350) at the end of the book shows, the author has used all the relevant literature published up to the summer of 1996. He also interviewed UN officials in Geneva and Vienna as well as staff from the ICRC, the German Red Cross, and the German Ministries of Foreign Affairs and Defence. The subject is approached from the angle of both international law and political science, which is particularly appropriate in a field like human rights. Accordingly, Pape does not limit himself to a discussion of legal norms and their application but rather seeks to establish whether the various interventions have served their purpose of safeguarding the enjoyment of human rights by the peoples in question. Nor does he deal with the various cases of military intervention in an isolated manner; he looks at them in the context of other UN efforts to put into effect human rights guarantees. Hence the study's ambitious but justified subtitle "On the meaning of human rights at the United Nations". While this broad approach, as well as the author's readiness to reconsider questions considered many times before (such as the character of the "third generation" of human rights, the universality of human rights and the status and powers of the Security Council), account for the study's comprehensiveness, they also make it fairly long and at times — despite the author's diligence — inaccurate. There are simply too many issues raised, even if they all are somehow intertwined.

The first part of the work seems based on the assumption, often voiced in recent scholarly comment, that only a "massive" violation of "fundamental" human rights entitles the Security Council to use military force under Chapter VII of the UN Charter. Pape seeks to identify these fun-

damental rights (and thus to establish a hierarchy of human rights) by comparing universal and regional human rights instruments as well as rights guaranteed under customary international law and the general principles of international law. He distinguishes between rights which are guaranteed in all the relevant treaties and those which are not, and sets those off against obligations from which no derogation is possible even in time of public emergency. He concludes that the right to life and the prohibitions of torture, slavery and discrimination on the ground of race, colour, sex or religion constitute “fundamental” or “absolute” human rights which may be protected by UN military intervention (pp. 68-69).

In the second part of his paper, Pape considers unilateral military intervention by States on humanitarian grounds (which he rightly terms unacceptable owing to the comprehensive prohibition of the use of force laid down by the UN Charter) and humanitarian assistance rendered by States and non-governmental organizations — in particular the ICRC — with the consent of the States or other warring parties (which has nothing to do with military intervention and poses no problem from the point of view of international law). Pape then arrives at the key issue of military intervention by the UN on humanitarian grounds. He rightly asks whether Article 39 of the UN Charter, as the only possible legal basis for such action, allows the Security Council to intervene militarily in order to improve the human rights situation in a given country. In agreement with the majority of scholars working in this area, and the practice of the Council since Somalia, he very briefly concludes that human rights violations may be deemed a “threat to the peace” within the meaning of Article 39 (p. 129). A violation of the fundamental guarantees referred to above can, he says, constitute such a threat (p. 131). This finding, though tenable, makes the extensive analysis in the first part difficult to understand. If it is true (and of course it is) that “the UN Charter is the decisive source of law determining the legality of humanitarian intervention” (p. 27), it would have seemed reasonable to start with an analysis of the Charter, especially Article 39, and not with an abstract comparison of human rights instruments. This comparison could instead have been made part of an interpretation of the Charter, provided the author had demonstrated that it was useful for this interpretative task. In particular, it would have been necessary to establish a link between the concept of “peace” as it appears in Article 39 and that of “fundamental human rights”. Why is it that only a violation of that elevated class of human rights constitutes a “threat to the peace” justifying military intervention under Chapter VII? Incidentally, the fact that the Charter does not provide for UN “intervention on humanitarian grounds” as such, but can be read as allowing the

use of force to counter human rights violations as one among several threats to international peace and security suggests that the terminology conventionally used may be misleading, and that one should not simply apply to UN peace-enforcement measures the problematical concept of such intervention.

The case studies in the fourth section (pp. 155-255) show that only the intervention in Somalia was initiated primarily for humanitarian reasons, and that so far the Security Council has not ordered a single intervention on humanitarian grounds against an effective government in peacetime. "Following the end of the Cold War, intervention by the UN on humanitarian grounds remains the exception, and non-intervention — even in cases of massive human rights violations — is the rule" (p. 254; see also p. 305 ff.). The author rightly emphasizes that the relevant "case law" established by the Security Council is therefore much weaker than it appears in much of the more recent legal literature. It should be borne in mind that the Council has not repeated the view it expressed in resolution 794 (1992) that the "magnitude of the human tragedy" may in itself constitute a threat to international peace and security such that the Council is justified in taking measures under Chapter VII of the Charter. In addition, the notion of "human tragedy" in the 1992 resolution did not specifically refer to governmental violations of human rights.

The shortcomings of the military measures so far taken by the UN for the sole (or, more often, additional) purpose of upholding human rights are something that the author discusses in his case studies and, by way of summary, at the beginning of the fifth part of his study (pp. 257-276). These vividly demonstrate that far-reaching changes in the organization of military intervention and, above all, the attitude of member States (especially the most powerful ones) are required in order to make UN intervention on humanitarian grounds a more effective tool. The author calls for seven main steps: 1) when deciding on intervention, the Council should put aside considerations that have nothing to do with human rights; 2) if an intervention is ordered, the protection of human rights should play a central role; 3) peacekeeping forces should not be overburdened with administrative and humanitarian tasks for which they are not trained and which run counter to the role of impartial mediator that they are supposed to play; 4) the effectiveness of intervention must be enhanced by making available sufficient funds and qualified personnel; 5) measures to prevent conflicts in the first place should be improved and stepped up; 6) the Security Council should be enlarged, the veto power of its permanent members restricted, and its procedures made more transparent; 7) regional organizations and NGOs should have a bigger role to play in the

preparation and implementation of intervention. However, Pape rightly states that even if all these steps were taken (which is very unlikely), military intervention would remain an exceptional means of last resort. “The traditional system for protecting human rights on the basis of universal and regional agreements is still of decisive importance for world-wide respect for those rights” (p. 306).

Such respect, the author holds, would in the end require an international order modelled on the rule of law that can be provided only in a modern constitutional *Rechtsstaat*. The UN Charter and the human rights treaties may be regarded as the basic building blocks of such an order, but from a legal perspective that order is still light-years away from a ‘world State’ structure (p. 311). However, there may be international constitutionalism without a ‘world state’. The author himself refers to the UN Charter as the constitution of the international community (p. 292). This well-founded appraisal reflects — perhaps inadvertently — scholarly efforts to extend the concept of constitution beyond the sphere of the sovereign State and, in particular, to use it to promote the rule of law in the international community.

In conclusion, one cannot but agree with the author’s sceptical outlook. It reflects salutary progress in international law that the broad, generally accepted present-day concept of a “threat to the peace” (Article 39 of the UN Charter) includes widespread violations of human rights (be it a violation attributable to a government or to another organized group, or a deterioration in the human rights situation caused by a general breakdown of governmental authority or with a natural disaster being used as a smokescreen or excuse) allowing the Security Council to intervene with military force. But it is completely groundless to believe that in the foreseeable future the Council will make determined and consistent use of this power. The arduous task of promoting human rights in ways other than by military force remains.

Bardo Fassbender
Institute of International and European Law
Humboldt University, Berlin

Relationship between international humanitarian law and human rights law:

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Jacques Freymond

**Former member of the International Committee of the
Red Cross**

**Former Vice-President
1911 — 1998**

Apart from being a great historian, a strong personality and a brilliant teacher, Jacques Freymond was an open-minded and visionary man of ideas, an achiever who got things done. Often ahead of his time, he established a new approach at the *Institut Universitaire de hautes études internationales* (Graduate Institute of International Studies) in Geneva — which he directed with charisma and authority — towards the communist countries, the third world, multilateral diplomacy, economic upheaval and legal developments. This turned the Institute into one of the top academic establishments for international law, history and economics.

Professor Freymond was co-founder, with Denis de Rougemont, of the *Institut d'études européennes* (Institute of European Studies) and — with the Cooperation Division of the Federal Department of Foreign Affairs — of *Swisscontact au service du tiers-monde*. He was also instrumental in setting up the *Institut africain* (the future Institute of Development Studies) and the *Centre de recherche sur l'Asie moderne*. His universal outlook enabled him to serve the world with the best of his Swiss qualities — conscientiousness, creativity and broad-mindedness.

In the International Committee of the Red Cross, Jacques Freymond played an important role as a member of the Committee from 1959 to 1972, particularly as Vice-President from 1965 to 1971. His influence was crucial during the short period (February to June 1969) for which he was Acting President of the Committee, at the height of the crisis in Biafra (Nigeria).

Just as *Zukunftsmusik* was, according to Richard Wagner, “the music of today which will be understood tomorrow”, so were many of Jacques Freymond’s ideas about the ICRC.

- In October 1967, he submitted to the Committee a set of proposals for internal organization, some of which — such as the establishment of an advisory group of non-Swiss experts — were put into effect after he had left the ICRC, over a decade later. Others, such as the amalgamation of the Executive Board and the Directorate, were not implemented until the early 1990s.
- During the same period, in April 1967, he proposed that greater importance should be attached to international organizations, whether governmental or not, and to informal diplomacy; to the dissemination of knowledge of the ICRC’s fundamental principles and of humanitarian law; to a broad interpretation of this law (particularly of Article 3 common to the Geneva Conventions, relating to non-international armed conflicts); and to ICRC action on behalf of political detainees. All these ideas appeared revolutionary at the time but are now part of the ICRC’s day-to-day activity.
- The strict selection and rigorous training of professional delegates in order to ensure an extensive and credible ICRC presence in the field was one of Jacques Freymond’s leitmotifs, but the idea had still not become a reality by the end of the 1960s.
- Finally, his requirements regarding the selection of and input from his fellow members of the Committee, like those relating to the delegates, were stringent ... but not always popular!

Jacques Freymond carried out many missions for the ICRC — in the United States (where he was well known and greatly respected), in Viet Nam (where his experience as colonel, historian and diplomat was vitally important) and in the Middle East (particularly in Israel, where he resolved some difficult situations). But it was from ICRC headquarters especially, where he served as Acting President in 1969, that he exerted a decisive influence on the future of the institution. A decisive influence ... but one that took a long time to bear fruit, and patience was not one of Professor Freymond’s outstanding qualities. Tired of proposing reforms which were slow to be implemented,¹ he resigned from the ICRC in December 1972.

¹ See in particular “The ICRC within the international system”, *IRRC*, No. 134, May 1972, pp. 245-266.

But Jacques Freymond never abandoned his commitment to the institution, his passionate support of its mission and his respect for the men and women who served it in the field. His work *Guerres, révolutions, Croix-Rouge — Réflexions sur le rôle du Comité international de la Croix-Rouge*, published in 1976, was effectively his “bequest” to the ICRC, rapidly becoming a guide for all those who, while remaining within the institution, wanted it to adopt the reforms he had proposed.² It is to the credit of both the ICRC and Jacques Freymond that practically all his proposals of that time have become a reality today: the institution has thus been able to show that being right too soon did not mean that the great man was actually wrong.

Jacques Moreillon
Member of the ICRC
Former Director General

² Jacques Freymond, *Guerres, révolutions, Croix-Rouge — Réflexions sur le rôle du CICR*, Institut universitaire de hautes études internationales, 1976, Geneva.

Harald Huber
Former member of
the International Committee of the Red Cross
Former Vice-President
1912 — 1998

Harald Huber studied law at the Universities of Geneva, Munich and Zurich. He began his career as a lawyer, then was appointed as judge on the Federal Court, the highest judicial body in Switzerland. In 1969 he was elected a member of the ICRC and then its Vice-President in 1971. He became an honorary member in 1982.

As a member and Vice-President, Harald Huber played a key role for the ICRC in a number of spheres.

He was the chief architect of the agreements between Poland and the Federal Republic of Germany, in which the latter agreed to compensate the victims of pseudo-medical experiments confirmed as such by the ICRC after the Second World War.

Mr Huber also acted as a discreet and valuable adviser during negotiations in Europe, the Far East and, particularly, the Middle East.

Moreover, he brought his experience and wisdom to several important ICRC deliberative bodies such as the Legal Commission, the General Policy and Principles Commission and the Management Commission.

But above all, for 10 years Harald Huber was the outstanding and irreplaceable Chairman of the Peace Commission which the International Red Cross and Red Crescent Movement launched in 1975 and officially set up at the 1977 Council of Delegates in Bucharest. The main purpose of the Commission, which came into being at the height of the Cold War, was to draw up by consensus a programme of action for the Movement

as a factor in promoting peace. Both its membership — men and women working for the Red Cross and Red Crescent throughout the world — and its ambitious but difficult aim made it a very sensitive body to handle. Harald Huber succeeded in this task thanks to that rare quality: uncontested moral authority. He derived his authority from the traits which had made him a President of the Federal Court: integrity, sound judgement, receptiveness, firmness of character and gravity. But his human qualities — particularly his quiet humour and a very special combination of thorough commitment tempered with detachment — also made him well-liked and respected. His vocation for leadership, which stemmed from an exceptional personality that was ideally suited to his work, enabled him to steer the Peace Commission with a firm but gentle hand and in a true Red Cross spirit around the countless pitfalls inherent in its mandate and composition. Thanks to his guidance, the Commission achieved results, always by consensus, without ever violating the Fundamental Principles of the Movement. The Second World Red Cross and Red Crescent Conference on Peace held in Aaland, Finland, in 1984, along with the ensuing programme of action, was its main accomplishment.

Even within the Red Cross, it is only too easy to fight over the topic of peace. Harald Huber not only avoided this but gave the entire Movement a specific direction and sustainable ideas on the path towards a less strife-ridden world.

Jacques Moreillon
Member of the ICRC
Former Director-General

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EDITOR: Hans-Peter Gasser, Doctor of Laws, editor-in-chief

ADDRESS: International Review of the Red Cross

19, avenue de la Paix

1202 Geneva, Switzerland

Tel. (++4122) 734 60 01

Fax (++4122) 733 20 57

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