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Débat humanitaire : droit, politiques, action

Revue fondée en 1869
et publiée par le
Comité international
de la Croix-Rouge
Genève

Review founded in 1869
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International Committee
of the Red Cross
Geneva

International Review of the Red Cross

Humanitarian Debate: Law, Policy, Action

Mission de la Revue internationale de la Croix-Rouge

La *Revue internationale de la Croix-Rouge* est un périodique publié par le Comité international de la Croix-Rouge (CICR) qui entend favoriser la réflexion sur la politique, l'action et le droit international humanitaires et, en même temps, renforcer le dialogue entre le CICR et les autres institutions ou personnes intéressées par l'humanitaire.

● La *Revue* est au service de l'analyse, de la réflexion et du dialogue sur l'humanitaire en temps de conflit armé et d'autres situations de violence collective. Elle porte une attention particulière à l'action humanitaire elle-même, mais elle entend également contribuer à la connaissance de son histoire, à l'analyse des causes et des caractéristiques des conflits – pour mieux saisir les problèmes humanitaires qui en découlent – et à la prévention de violations du droit international humanitaire. La *Revue* entend stimuler un débat d'idées.

● La *Revue* sert de publication spécialisée sur le droit international humanitaire, rédigée à la fois pour un public académique et pour un public général. Elle cherche à promouvoir la connaissance, l'examen critique et le développement de ce droit. Elle stimule le débat entre, notamment, le droit international humanitaire, le droit des droits de l'homme et le droit des réfugiés.

● La *Revue* est un vecteur de l'information, de la réflexion et du dialogue relatifs aux questions intéressant le Mouvement international de la Croix-Rouge et du Croissant-Rouge et, en particulier, à la doctrine et aux activités du Comité international de la Croix-Rouge. Ainsi la *Revue* entend-elle contribuer à promouvoir la cohésion au sein du Mouvement.

La *Revue* s'adresse à plusieurs publics à la fois, notamment aux gouvernements, aux organisations internationales gouvernementales et non gouvernementales, aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, aux milieux académiques, aux médias et à toute personne spécifiquement intéressée par les questions humanitaires.

Mission of the International Review of the Red Cross

The *International Review of the Red Cross* is a periodical published by the International Committee of the Red Cross (ICRC). Its aim is to promote reflection on humanitarian policy and action and on international humanitarian law, while at the same time strengthening the dialogue between the ICRC and other organizations and individuals concerned with humanitarian issues.

● The *Review* is a forum for thought, analysis and dialogue on humanitarian issues in armed conflict and other situations of collective violence. While focusing particular attention on humanitarian action per se, it also strives to spread knowledge of the history of such activity, to analyse the causes and characteristics of conflicts – so as to give a clearer insight into the humanitarian problems they generate – and to contribute to the prevention of violations of international humanitarian law. The Review wishes to encourage the exchange of ideas.

● The *Review* is a specialized journal on international humanitarian law, intended for both an academic and a more general readership. It endeavours to promote knowledge, critical analysis and development of the law. Its also fosters the debate on such matters as the relationship between international humanitarian law, human rights law and refugee law.

● The *Review* is a vector for information, reflection and dialogue on questions pertaining to the International Red Cross and Red Crescent Movement and, in particular, on the policy and activities of the International Committee of the Red Cross. The *Review* thus seeks to promote cohesion within the Movement.

The *Review* is intended for a wide readership, including governments, international governmental and non-governmental organizations, National Red Cross and Red Crescent Societies, academics, the media and all those interested by humanitarian issues.

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Texts published by the *Review* reflect the views of the author alone and not necessarily those of the ICRC or of the *Review*. Only texts bearing an ICRC signature may be ascribed to the institution.

Editorial

Le premier texte publié dans ce numéro est un appel à la communauté internationale : « Les voix de la guerre : Appel solennel ». Lancé le 12 août 1999 à l'occasion du 50e anniversaire des Conventions de Genève de 1949, cet Appel s'adresse d'abord aux gouvernements, premiers garants du respect des engagements humanitaires en période de conflit armé. Mais le texte fait aussi, et peut-être surtout, appel à tous ceux qui, d'une manière ou d'une autre, peuvent influencer le comportement des acteurs de la violence. Ainsi, le 12 août 1999 a donné l'occasion de célébrer un fait important dans l'histoire de l'humanitaire. En même temps, cet événement a permis à la communauté internationale de renforcer son engagement en faveur des valeurs sur lesquelles s'érige le droit international humanitaire.

En publiant l'Appel du 12 août 1999 dans les premières pages de son numéro de septembre 1999, la Revue *tient également à rappeler qu'elle a pour mission, elle aussi, de favoriser l'action humanitaire. La réflexion est nécessaire, mais elle n'est pas tout. En fin de compte, c'est l'action qui compte : assurer le respect des obligations humanitaires, protéger et secourir les victimes de conflits et agir quand le droit international humanitaire est violé. La* Revue *entend apporter sa contribution, aussi modeste qu'elle puisse paraître.*

La XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge se tiendra du 31 octobre au 6 novembre 1999 à Genève. Elle réunit les délégués des États parties aux Conventions de Genève, ainsi que les représentants des différentes composantes du Mouvement international de la Croix-Rouge et du Croissant-Rouge : Sociétés nationales, Comité international de la Croix-Rouge et Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge.

La Conférence internationale est un des forums humanitaires les plus importants. Elle entend être une force de cohésion entre les États par-

ties aux Conventions de Genève et les diverses composantes du Mouvement. Cette année, deux grands thèmes sont à l'ordre du jour : « l'engagement humanitaire – les belligérants, les victimes et la communauté internationale » et « l'engagement humanitaire – les gouvernements et les Sociétés nationales ». En marge des débats en commission et en séance plénière, un certain nombre d'ateliers seront organisés. Ils permettront des discussions informelles sur des questions d'actualité.

La Revue *publie ci-après plusieurs articles qui ont trait à l'un ou l'autre des thèmes qui seront examinés, soit lors de la Conférence elle-même, soit dans le cadre des ateliers. Qu'il nous soit permis d'attirer tout particulièrement l'attention du lecteur intéressé par des questions générales relatives à l'action humanitaire sur les contributions de Sir Alan Munro, de François Bugnion et du Dr Ali Said Ali. Par ailleurs, la* Revue *publie la seconde partie de l'article de Catherine Rey-Schyrr sur l'élaboration et l'adoption des Conventions de Genève du 12 août 1949.*

LA REVUE

A note from the Editor

This issue of the Review *opens with an appeal to the international community: "People on War: Solemn Appeal". Launched on 12 August 1999 to coincide with the 50th anniversary of the 1949 Geneva Conventions, the Appeal is addressed first and foremost to governments, which are primarily responsible for ensuring the fulfilment of humanitarian commitments in times of armed conflict. But also, and perhaps even more so, it is addressed to everyone who, in one way or another, can influence the behaviour of those involved in violence. While the ceremony of 12 August was thus held to mark an important event in the history of mankind, it also enabled the international community to strengthen its commitment to the values on which international humanitarian law is based.*

In devoting the first pages of this issue to the Solemn Appeal, the Review *wishes to remind its readers that its mission is also to encourage humanitarian action. Reflection is important, but it is not enough. In the final analysis, action is what counts: ensuring that humanitarian obligations are met, protecting and assisting conflict victims and taking suitable measures when international humanitarian law is violated. The* Review *would like to make its own modest contribution to these aims.*

The 27th International Conference of the Red Cross and Red Crescent is to be held in Geneva from 31 October to 6 November. It will bring together delegates of the States party to the Geneva Conventions and representatives of the various components of the International Red Cross and Red Crescent Movement: the National Societies, the ICRC and the Federation.

The International Conference is one of the most important humanitarian forums in the world. Its purpose is to bring about greater unity between the States party to the Geneva Conventions and the various com-

ponents of the Movement. This year two major themes are on the agenda: "Humanitarian commitment – Belligerents, victims and the international community" and "Humanitarian commitment – Governments and National Societies". In addition to the discussions in commission and plenary, a number of informal workshops will be held on issues of topical interest.

Several of the articles in this issue deal with themes that are to be examined either during the Conference itself or during the workshops. We should like to draw particular attention to the contributions of Sir Alan Munro, Dr Ali Said Ali and François Bugnion, which will be of interest to readers concerned with humanitarian action in general. Finally, this issue also contains the second part of Catherine Rey-Schyrr's article on the drafting and adoption of the Geneva Conventions of 12 August 1949.

THE REVIEW

Appel lancé à l'occasion de la célébration du 50e anniversaire des Conventions de Genève de 1949

Les voix de la guerre : Appel solennel

Les Conventions de Genève, universellement reconnues, ont été adoptées dans cette ville il y a 50 ans aujourd'hui. Les États disaient alors leur refus de voir se répéter les horreurs sans précédent de la Seconde Guerre mondiale.

Depuis lors, ces Conventions ont épargné d'innombrables souffrances mais n'ont pu empêcher que des millions de victimes innocentes soient broyées par les conflits armés qui déchirent notre planète.

Souvent bafoués et violés, les Conventions de Genève et les principes qui les fondent gardent néanmoins toute leur valeur et leur actualité.

C'est l'opinion de milliers d'individus qui, à travers le monde, ont souffert de la guerre dans leur chair et leur esprit. Hommes, femmes, enfants, ils se sont exprimés sur leur expérience, leurs préoccupations et leurs attentes : ils sont les voix de la guerre. Leurs espoirs, ce sont aussi nos convictions.

Réunis à Genève, nous lançons à tous les citoyens, peuples et gouvernements de ce monde un Appel solennel. Nous leur demandons :

- de refuser la fatalité de la guerre et de lutter sans relâche contre ses causes profondes ;
- d'exiger de tous ceux qui sont engagés dans des conflits armés et de tous ceux qui peuvent influer sur leur cours d'assurer le respect des principes élémentaires d'humanité et des règles du droit international humanitaire ;
- d'épargner aux civils les affres de la guerre ;

- de développer les relations entre individus, peuples et nations sur les fondements des Conventions de Genève :
  – le respect de la dignité humaine en toutes circonstances ;
  – la compassion pour ceux qui souffrent ;
  – la solidarité.

Nous sommes convaincus que le mépris de ces principes constitue le ferment de la guerre et que leur respect facilite le retour à la paix.

À l'aube d'un nouveau millénaire, engageons-nous tous ensemble pour leur défense et ouvrons la voie de l'espoir aux nouvelles générations.

Genève, le 12 août 1999

Appeal launched on the occasion of the celebration of the 50th anniversary of the Geneva Conventions of 1949

People on War – Solemn Appeal

The universally recognized Geneva Conventions were adopted in this city 50 years ago today. The States Parties thereby declared their refusal to see the unprecedented horrors of the Second World War repeated.

Since then, these treaties have helped to alleviate much suffering but have not been able to prevent millions of innocent people from falling victim to the conflicts that have ravaged our planet.

Although they are often breached, the Geneva Conventions and the principles on which they are founded remain as valid and relevant as ever.

That is the opinion of thousands of individuals across the world who bear the physical and mental scars of war. Men, women and children have all talked about their experiences, their fears and their expectations. They are the voices of war, and we are convinced that these expectations can be met.

We have come together in Geneva to make a solemn appeal to all peoples, nations and governments. We call on the world:

- to reject the idea that war is inevitable and to work tirelessly to eradicate its underlying causes;
- to demand of all those involved in armed conflicts and all who are in a position to influence the course of such conflicts that they respect the essential humanitarian principles and the rules of international humanitarian law;
- to spare civilians the agony of war;

- to foster relations between individuals, peoples and nations on the basis of the principles that inspired the Geneva Conventions, namely,
  – respect for human dignity in all circumstances;
  – compassion for those who suffer;
  – solidarity.

We are convinced that disregard for these principles sets the stage for war and that respecting them during wartime facilitates the restoration of peace.

On the eve of a new millennium, let us all undertake to defend these principles and thus give hope to future generations.

Geneva, 12 August 1999

Llamamiento lanzado con motivo de la conmemoración del 50° aniversario de los Convenios de Ginebra de 1949

Testimonios sobre la guerra: Llamamiento solemne

Hoy hace 50 años se aprobaron los Convenios de Ginebra, universalmente reconocidos, en esta ciudad. Los Estados expresaron entonces su rechazo a que se reproduzcan los horrores sin precedentes cometidos en la Segunda Guerra Mundial.

Desde esa fecha, los Convenios de Ginebra han permitido evitar muchísimos sufrimientos, pero no impedir que millones de víctimas inocentes sean aplastadas por los conflictos armados que asolan nuestro planeta.

Aunque, a menudo, conculcados y violados, los Convenios de Ginebra y los principios en los que se fundan mantienen todo su valor y su actualidad.

Es lo que piensan miles de personas que, en todo el mundo, han sufrido la guerra en carne propia y en su espíritu. Hombres, mujeres y niños se han expresado acerca de su experiencia, sus preocupaciones y sus expectativas: dan sus testimonios sobre la guerra. Sus esperanzas son también nuestra convicción.

Reunidos en Ginebra, hacemos a todos los ciudadanos, pueblos y Gobiernos de este mundo, un llamamiento solemne. Pedimos que:

- se rechace la fatalidad de la guerra y se combatan sin tregua sus raíces;
- se exija a los que están involucrados en conflictos armados y a los que pueden influir en su desarrollo que respeten los principios elementales de humanidad y las normas del derecho internacional humanitario;
- se proteja a las personas civiles de los horrores de la guerra;

- se entablen las relaciones entre individuos, entre pueblos y entre naciones sobre la base de los Convenios de Ginebra:
  – el respeto de la dignidad humana en todas las circunstancias,
  – la compasión por los que sufren,
  – la solidaridad.

Estamos convencidos de que el hecho de desdeñar estos principios es el fermento de la guerra y que respetarlos facilita el regreso a la paz.

Al alba de un nuevo milenio, hemos de comprometernos todos a defenderlos y a abrir paso a la esperanza para las nuevas generaciones.

Ginebra, 12 de agosto de 1999

Humanitarianism and conflict in a post-Cold War world

by
ALAN MUNRO

THE definitive sign that the Cold War had run its course came, not with the breaching of the Berlin Wall on 9 November 1989, but on 2 August 1990 when Iraq's belligerent leader defied his Arab neighbours and the international community by marching into Kuwait. His rash action was in part the product of anger and impetuosity. But it also reflected a miscalculation, derived from the experience of forty-five years of stalemate between east and west, that he could get away with his act of piracy under the umbrella of mutual restraint which had been provided by this bipolar superpower antagonism. What Saddam Hussein failed to perceive was that the extent to which the Soviet Union could inhibit international counteraction on behalf of it clients had dwindled to no more than a hollow facade, and that in consequence a critical shift had occurred in the equation of global power.

The Cold War equilibrium, maintained under the ominous, yet also stabilizing, shadow of nuclear confrontation, certainly did not avert the outbreak of regional conflicts. At best it contained them to the point where more wholesale hostilities to preserve the margins of the superpowers' ideological empires were prevented. There were occasions when it was touch and go, as over Korea, Cuba and Viet Nam. But in the event the line of mutual deterrence held.

Yet just as the balance exerted a restraint on local combat, it also acted paradoxically as an inhibitor of solutions. The policy of mutual stand-off between the western and eastern power blocs, of which the successive warnings by Presidents Carter and Reagan to the Soviet Union not to interfere with vital American interests in the Persian Gulf offer a

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classic manifestation, may have helped to keep at bay wider warfare, and in this particular case to ensure the flow of oil through the arteries of navigation. But it also tended to permit, indeed encouraged, a situation of political impasse at the diplomatic level, and most frequently in the Security Council, which inhibited meaningful action to prevent or put a stop to outbreaks of localized hostilities, whether trans-frontier or internal in nature. Hence the bystander role, extending surreptitiously to that of auxiliary, played by west and east during the eight years of Iraq's bitter war with Iran. There is a host of other instances where this Cold War stand-off effect contributed towards a perpetuation of inconclusive and recidivist conflicts: the successive Arab-Israel confrontations since 1948; the civil wars of the 1980s in Afghanistan, Lebanon and Nicaragua and particularly across Africa, where local power struggles under the banners of rival political systems erupted with increasing frequency in the wake of decolonization; Ethiopia's bloody revolution of 1977, followed by war with Somalia; Soviet-fostered civil conflict in Angola and in Mozambique; and western endorsement of Mobutu's corrupt despotism in Zaire.

In all these episodes action by the major powers on humanitarian grounds to extinguish the fires of aggression came a clear second to considerations of Cold War influence. The main emphasis was on the containment of conflict, through mechanisms of diplomatic and physical restraint such as United Nations peacekeepers and observer groups. The extensive apparatus of relief agencies, which had been established under the aegis of the United Nations as a result of the human suffering and displacement caused by the Second World War, found itself occupying a supernumerary position to considerations of the power balance.

During this period the International Red Cross and Red Crescent Movement, as a result of the unique role assigned to it by successive Geneva Conventions and its internationally recognized status in war, sought to uphold basic standards of humanity in conflict through the application of international humanitarian law and the protection of victims. This formal mandate was reinforced under the terms of the four Geneva Conventions of 1949. From the 1950s however, international humanitarian law faced an additional challenge in the form of the proliferation of conflicts of a less clear-cut nature in which new techniques of warfare called into question the distinction drawn hitherto between combatants and civilian non-combatants. This led to the two Protocols of 1977, which

increased the protection afforded to civilians against the effects of armed conflict. Yet violations of the Conventions continued, and the International Committee of the Red Cross often found itself denied access to the victims by the parties to conflicts in which Cold War patronage prevailed.

As for privately funded aid agencies, later as non-governmental organizations (NGOs), which were concerned with the victims of conflict, these were still in their infancy. The public emphasis was on economic development and the alleviation of poverty; warfare was a matter for governments. Indeed, when the private charity, Christian Aid, was reported in the late 1970s as having had the temerity to involve itself with (political) liberation movements in certain African countries, there was disapproval not only on the part of western governments but at the public level too. Politics was not a field for charities, and so fundraising stagnated.

A new reality of global power

Iraq's invasion of Kuwait, and that country's liberation by a genuinely international alliance eight months later, thus marked a seminal change in the reality of global power. With the discrediting of the communist system and with the United Nations unleashed from the inhibitions of superpower polarity, some analysts were even seduced into believing that conflict arising from the clash of political cultures was now to be a thing of the past. We were entering a world in which tolerance, reason and flexibility, seen as predominant characteristics of the social democracy now supreme in human conduct, would prevail in an environment free from the distortions of ideology, religious rivalry or ethnic partisanship. This faith in the advent of a new age of liberal reason was proclaimed with undue haste by the American political theorist, Francis Fukuyama, in his study "The End of History and the Last Man", an individual whose role was not to put out the lights on mankind but rather to carry the candle of peaceful accord into a New World Order.

The exit, or perhaps merely occultation, of the communist component within the superpower equation indubitably contributed towards the unwinding of certain long-running hostilities which the bipolar umbrella had allowed to rumble on. Bereft of their Soviet-sponsored prop, client parties in a variety of intractable disputes were either toppled, as in Afghanistan and occupied Kuwait, or sought a settlement, with beneficial effects in Lebanon, South Yemen, Namibia, Angola, Mozambique,

Ethiopia and Eritrea, Cambodia, for the peace process in the Middle East and above all the reunification of Germany. The list is impressive.

Yet the euphoria has proved premature. The removal of the equilibrium established by the dualism of the Cold War has left a political vacuum, opening the way to the resurgence of other pressures and antagonisms which have lain masked or latent beneath the artificial stability which an east-west balance tended to enforce. As an Arab proverb has it, when the lions leave the field the hyenas take over. Fresh causes for dispute are now being unleashed which represent a new challenge to the authority, and even the existence, of States. They have their roots in a globalized diversity of grievances deriving from ethnic and tribal rivalries, irredentism, economic pressure, religious sectarianism, the narcotics trade or plain political expediency. Nor are they proving easily susceptible to control, being often anarchic and protean, with forms typical of guerilla warfare and warlordism where it is the civilian community that is most at risk. There are also more sinister ingredients, such as access to weapons of mass destruction and the uncontrolled traffic in arms. Nowhere is this proliferation in instability more graphically demonstrated than by the fact that, in the brief span of nine years between the ending of the Cold War and June 1999, 584 resolutions were passed by the Security Council, almost equal to the total of 659 recorded during the whole forty-five years which preceded them. Moreover, the United Nations is currently involved in a military capacity in some seventeen locations around the world, and in an even wider spread of crisis relief work in conflict situations where the Security Council has not taken a hand in standing guard.

This proliferation of hostilities, not only trans-national but increasingly of an intra-state nature, has been accompanied by, and may in part be a consequence of, serious hesitations on the part of the United States — as the world's first global superpower, and perhaps its last too — to play the role of what Secretary of Defense Richard Cheney defined during the Kuwait crisis as the world's number one gunslinger. Initial signs of readiness to take the lead in global policing of a New World Order took an early knock as a result of military setbacks suffered in the vicious crossfire of Somalia's civil war. The consequent negative effect on American public opinion accounted in large part for the abstention of the United States from direct involvement in United Nations military efforts to protect the citizens of Bosnia from the worst ravages of ethnic and sectarian

civil war during three years of savage conflict before the political will could be mustered to take a diplomatic hand at the table and bring off a precarious accommodation between the exhausted factions at Dayton.

The ending of the Cold War has thus seen the introduction of a new dimension to the responsibility of the global community to take a direct hand in the resolution of disputes involving gross violations of human rights and which threaten to generate wider instability or unacceptable human suffering. This "right" of intervention, extending to a military option, challenges the hitherto cherished principle of national sovereignty. There is a real dilemma here. As UN Secretary-General Kofi Annan has written, "The implications of human rights abuses and refugee (...) flows for international peace and security are forcing us to take a fresh look at sovereignty from a different perspective: sovereignty as a matter of responsibility, not just power".[1] Yet questions will continue to arise over whether and in what circumstances armed military intervention in support of humanitarian ends can be justified. Moreover political factors inevitably dictate a selective and invidious application of the principle.

At the same time such action can be frustrated for lack of political will on the part of leading States to commit resources, including military forces, to the resolution of disputes which do not directly engage their national security or economic interests. The belated and partial international military action to stem the genocide in Rwanda in 1994 affords one example; some would argue that the laborious mobilization of a bombing campaign adequate to reverse Serbia's action to expel the Albanian population of Kosovo falls into the same category. Indeed, whether or not the objectives of this latest military intervention are achieved, the turbulent and costly experience of that prolonged campaign may well result in international reluctance to replicate the exercise elsewhere. It is one thing to proclaim a moral foreign policy based on human rights, but another to enact it.

A stronger humanitarian commmunity

To an impressive extent, however, this gap between intent and action is being filled, albeit in uncoordinated and often haphazard fashion,

1 Kofi A. Annan, "Peacekeeping, military intervention, and national sovereignty in internal armed conflict", in Jonathan Moore (ed), *Hard Choices*, Rowman and Littlefield, Lanham, Md., 1998, p. 57.

by a force from outside the framework of government intervention in the shape of charitable institutions, acting as an expression of public sympathy for the suffering and hardship of those caught up in the backwash of hostilities. The outburst of antagonisms which has characterized the post-Cold War environment, and the uncivilized violations of international humanitarian law and acute situations of human disaster to which these have given rise, have all had the effect of galvanizing the humanitarian community to an unprecedented level of public consciousness. Here again a moral imperative has been substituted for an earlier political one.

This sense of concern is not just a contemporary phenomenon. Nor is it exclusive to the "Christian" west; it is characteristic of Muslim and Jewish communities as well as oriental societies. The founding of the Red Cross in Geneva 135 years ago was a response to a growing awareness across the world, fostered by more rapid media communication, of the suffering of those caught up in war. The process has, however, accelerated greatly since the Second World War with the proliferation of international agencies and private charities dedicated to the alleviation of suffering caused by warfare or natural disasters. Between 1980 and 1993 alone the number of registered NGOs in the northern hemisphere nearly doubled from 1,600 to 2,970.

It is these bodies which are now in the vanguard of a more forthright and proactive approach, not only through direct and dedicated involvement on the ground with refugees and other victims of conflict, but by mobilizing public sentiment, together with the media, to oblige reluctant governments to take a hand in relief work and protection, and in conflict resolution too. Early milestones in this process were the dambursts of public concern during the mid-1980s at the famine which ravaged the people of Ethiopia, partly in consequence of an interminable civil war, and evoked a global response in the shape of Band Aid; and on a narrower scale at the plight of Palestinian refugees under siege in camps in Lebanon. It was public reaction which led the British government in April 1991 to take a lead in the Security Council over the establishment of a safe haven in northern Iraq to protect Kurds from Saddam Hussein's repression, a concept which we now see being carried to new lengths of formal international protection in the Balkans. In all these instances the media again demonstrated their new-found role of stakeholder by bringing, through the technology of instant television coverage, vivid images of suffering

directly into homes in the west and elsewhere, and arousing a powerful public response.

Today relief agencies are showing an increasing readiness to spread their newly fledged wings, and to arrogate to themselves a role in the mobilization of public opinion. The prominent international medical NGO, *Médecins sans Frontières*, split in two a few years back when its French founder tried to take his brainchild in a more partisan direction than his colleagues were prepared to accept. Since then, however, we have seen an increase in outspoken and coordinated advocacy from the humanitarian quarter over the causes as well as the consequences of human suffering. This intercession has its controversial side and can lead to resentment by governments, who perceive it as meddling in issues of policy. A notable example was the successful campaign, led by a collection of western NGOs including Red Cross Societies, to persuade governments to prohibit the use of anti-personnel landmines and culminating in the agreement signed in Ottawa in the autumn of 1997.

The Red Cross Movement occupies a position of particular significance in this new ferment of activity. In the exercise of its fundamental role to make warfare less inhuman, the International Committee has shown greater readiness to exert its moral authority as a custodian of international humanitarian law and to lead campaigns on a variety of issues, such as the banning of blinding laser weapons and the recruitment of child soldiers, as well as the introduction of stricter controls on the transfer of small arms which play so pernicious a part in fuelling the current rash of local conflicts. It has also joined with other NGOs in the successful advocacy of a permanent war crimes tribunal, as an ultimate sanction against abuses of international humanitarian law and the human rights enshrined therein.

The changes in this balance of engagement have also had the effect of giving the United Nations' own family of humanitarian agencies a new lease of life. Hitherto held at arm's length by the Security Council apparatus and often at odds with each other, these agencies have benefitted from the emergence of the humanitarian agenda as a motor for political action. The budget of the UN High Commissionner for Refugees multiplied from $570m in 1989 to $1,430m in 1996.[2] The issue of the agencies'

2 Adam Roberts, "The role of humanitarian issues in international politics in the 1990s", *IRRC*, No. 833, March 1999, p. 22.

relationship with the UN's political apparatus came to a head in the early stages of the crisis in Somalia when Mohamed Sahnoun, the Algerian diplomat who was serving as the Secretary-General's representative on the ground, resigned over the lack of effective coordination between the organization's political and humanitarian wings. This experience, followed by the intensive involvement of the agencies in Bosnia and elsewhere in the Balkans, prompted overdue action through the creation of a Department for Humanitarian Affairs to bring their operations into closer harmony with each other as well as with the objectives set by the Security Council. The initiative soon ran aground on the shoals of vested interests within the Organization, and has since been given a less formal profile.[3] It marks, however, a step in the right direction.

This access of confidence on the part of the humanitarian community is even producing a new frontier in the shape of NGOs dedicated specifically to the prevention and the resolution of conflicts through a facilitating role. It is understandable that members of the NGO fraternity should feel frustration at the unending stream of relief operations and what is seen as reluctance or incapability on the part of governments to forestall the disputes which underlie them. Accordingly, some groups are turning their attention not just to the exposure of political and human rights abuses, as in the case of Amnesty International, but to setting their own agendas for peace by seeking to tackle the causes of the conflicts themselves. The record so far, however, has been discouraging, despite real commitment on the part of those engaged in mediation. Useful work has been undertaken at grassroots level, for example in Rwanda by the London-based NGO, International Alert, to foster a sense of intercommunal partnership. A Rome-based Catholic foundation, *Santo Egidio*, played a significant part in reconciling the warring factions in Mozambique. To engage in actual conflict resolution, however, requires political authority, and sometimes battalions too, to buttress conciliation resolution. Moreover, it depends crucially on preserving an image of impartiality. Private intercession can also cut across behind-the-scenes efforts at mediation by governments. All in all it is difficult to see NGOs arrogating to themselves a significant primary role in the resolution of factional strife.

3 Office for the Coordination of Humanitarian Affairs (OCHA)

Calls have also emerged for the traditional humanitarian agencies to take a hand in this more political arena, for example by providing an early warning system for potential unrest or conflict within communities where they are conducting relief operations. Such firsthand intelligence might, for example, have helped alert the international community to the impending orgy of bloodletting which has marked the past seven years within the Great Lakes region of Africa. It goes without saying that all NGOs involved with humanitarian work share a concern to see conflict averted. But to institutionalize such a role once again puts at risk the crucial image of impartiality.

The new prominence achieved by the humanitarian community, whether official or private, over the past ten years is nevertheless here to stay. Contrary to suggestions that the humanitarian approach to crises may have peaked,[4] one lesson of the Kosovo experience may be once again to boost recourse to indirect action through economic and humanitarian measures in preference to military options. Governments, and the European Commission too, are themselves helping to consolidate the trend through the growing use they make of NGOs as channels for the distribution of relief. In 1980 emergency humanitarian relief constituted a mere 1.5% of total spending by governments on overseas aid; by 1994 the proportion had grown to around 10%.[5] The British Red Cross has seen the funds channelled through it by government for the Movement's humanitarian purposes rise fivefold since 1990 to a total of some £25.5m last year. Yet relief itself can prove a two-edged affair; humanitarian activity has what has been called its "dark side", with a capacity to fuel conflict as well as to alleviate its effects if its application is not integrated into a broader political strategy.

For all their vaunted rediscovery of an ethical dimension to foreign policy, there is also unease on the part of governments at the NGOs' growing predilection to act as pressure groups. The latter's forthright part in the recent campaign over landmines may have accentuated this caution. In the case of the British government, some latent resentment may have underlain a claim, in connection with last year's appeal for food aid for southern Sudan, that NGOs, including the Red Cross, were straining public sympathy by exaggerating the scale of

4 Roberts, *op. cit.*, p. 25.

5 See the statistics of the UK Department of International Development.

crises, and in effect acquiring a stake in disaster. The massive public support, within the United Kingdom and across the world, to appeals on behalf of those forced into exile from Kosovo serves to contradict this assertion and bears eloquent witness to the power of humanity in today's society.

For their part the relief agencies themselves, while readily accepting official funding, remain wary of being used as instruments for the politicization of aid. To some degree, the official resources they secure are bound to be conditioned by priorities of foreign policy rather than criteria of absolute need. There is always the temptation for governments, and warring parties too, to see humanitarian assistance as a respectable substitute for political involvement in disputes. To go a step further, it has been uncharitably suggested in quarters opposed to the NATO bombing of Serbia that the generous humanitarian resources disbursed through NGOs to support the Kosovars amount to a cynical salve for government consciences. Agencies and governments need to work out paths to accommodate this inherent dissonance and focus on common objectives; they cannot have it both ways.

The humanitarian dimension as a political factor

The humanitarian dimension has thus achieved the status of an influential factor in the international league of power politics. It reflects a new and genuine degree of public concern and sympathy towards those who suffer deprivation or dislocation as a consequence of local conflict. It has also, however, introduced new complexities. One persistent problem to have emerged is the damaging effect which international military protection and peacekeeping activity can have on local perceptions of the agencies whose relief operations these forces are there to safeguard. Experience in Somalia and in Bosnia has demonstrated that synergy of operation is not easy to sustain here. An international protection regime in Kosovo may afford a yet greater test. "Defence diplomacy" has become a fashionable way for governments to describe the international protection and security role for which armed forces are being retailored. It has a downside, however. A military presence dedicated to holding the ring between two warring factions can all too easily find itself drawn into confrontation with one side or the other. At this point its impartiality is called into question and its capacity for deter-

rence loses credibility. Inexorably protection and peacekeeping can slide into peace enforcement.

Meanwhile, humanitarian agencies find their neutrality put at risk and the immunity of their operations caught in the crossfire as the result of their association with the very forces intended to facilitate their activities. The light blue flag becomes a liability instead of an asset and relief operations have to be suspended. Yet experience in Somalia and elsewhere of the alternative of paying local militias to ride shotgun on aid deliveries has proved to have its negative side. Faced with this quandary, the ICRC has favoured the policy of going it alone under the Red Cross flag, relying on respect for the emblem and on the status of the Movement to see it through. This is a courageous option, but a quixotic one too, where aid workers run grave personal, even mortal risks. In Bosnia the emblem itself became a liability, when taken by Muslims for a Christian symbol rather than an inversion of the Swiss flag.

Furthermore, their presence in the vanguard of relief and protection can pose a moral dilemma for the agencies themselves. Impartiality is essential as a guiding principle, but becomes a platitude when humanitarian work comes up against persecution or flagrant abuses of human rights by one or more parties, as in Bosnia and in Afghanistan, or instances where the blunt instrument of sanctions leads to suffering among the civilian population, as in Iraq. To the five key ingredients of humanitarian relief — provision of food, water, shelter, medical care and physical security — is now being added the moral, and legal, obligation of respect for human rights. The reconciliation presents a particularly acute issue for the Red Cross, for which impartiality and neutrality constitute principles it is perilous to jeopardize, yet which is also committed to assist all victims of conflict. Moreover, there is a distinction between international humanitarian law and the norms of human rights treaties, though the two are increasingly coming to overlap. Should a blind eye be turned in the interests of continued relief operations? Or does a measure of partiality become inescapable if the organisation's credibility is to be sustained, despite the cost to the relief work in hand? Recent studies into the outlook for humanitarian aid have detected a growing readiness on the part of agencies to take a more forthright stand. Among British commentators, Adam Roberts has pointed up how the need to ensure protection for victims may require

departures from the unsullied principles of impartiality and neutrality,[6] while Hugo Slim has spoken of a "hardened impartiality".[7] Yet this has to be a course of last resort.

This new humanitarian agenda has created a market place in which agencies find themselves competing for funds and duplicating activity in the field. Crises that are in the eye of the television camera lens can also acquire a factitious fashion among agencies and their donors, at the expense of less visible but equally deserving causes. This can skew aid priorities. Characteristic of today's intractable yet media-neglected emergencies are the acute upheavals in Liberia, Sri Lanka and Sierra Leone, with their massive displacement of communities, and the legacy of indiscriminate mine-laying in parts of Africa and south-east Asia. The decision by the British government to shift a higher proportion of official aid away from humanitarian work towards longer-term development makes some sense in relief terms, but it will intensify competition among the emergency NGOs. This aid *mêlée* has led to outbreaks of turf warfare between individual agencies, amateur and professional, engaged on the same humanitarian playing-field. In Central Africa's pandemic refugee crisis there have even been operational rivalries between the two wings of the Red Cross Movement itself.

The situation calls out for regulation. The United Nations agencies, and the Red Cross and Red Crescent Movement too, have now pledged themselves to coordinate their activities in a more systematic fashion. The inter-agency Sphere Project represents an important step towards the setting of universal standards.[8] For its part the Red Cross has devised a Code of Conduct for agencies engaged in international operations,[9] and under the "Seville Agreement"[10] seeks to eradicate competition between its components in theatres of activity. There is also a British initiative to

6 Adam Roberts, *Humanitarian Action in War*, Adelphi Paper 305, International Institute for Strategic Studies, Oxford University Press, 1996.

7 Hugo Slim, "International humanitarianism's engagement with civil war in the 1990s: A glance at evolving practice and theory", a briefing paper for Actionaid UK, December 1997.

8 See Peter Walker, "Victims of natural disaster and the right to humanitarian assistance: A practitioner's view", *IRRC*, No. 325, December 1998, p. 615.

9 "Code of conduct for the International Red Cross and Red Crescent Movement and NGOs in disaster relief", *IRRC*, No. 310, January-February 1996, p. 119.

10 "Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement", *IRRC*, No. 322, March 1998, p. 159.

create an "ombudsman" to oversee humanitarian aid activities and introduce an element of accountability that has so far been lacking.[11] Too much regulation, however, risks stifling that inspirational spirit of voluntarism which the changes in today's international environment have released. It may be that the tensions which are evident between the humanitarian agendas of the autonomous agencies, and the objectives of the political authorities engaged, whether local or international, have to be accepted as an untidy but intrinsic feature of a new anarchic power equation. What is clear is that the forces which are creating this unprecedented demand for humanitarian assistance show no sign of abating as the world shakes itself out of the Cold War's monolithic mould.

An ongoing task

I recently visited a refugee camp in Malawi, a country which remains an oasis of stability in a region of turbulence. The tens of thousands of Mozambicans who took refuge from their civil war have mercifully returned home. But the residue in the camp was symptomatic of the intractability of Africa's tensions. They came from Rwanda, Burundi, the Congo, Angola, and even as far afield as Somalia and Sudan, all victims of the penumbra of conflict. They personified the Cold War's uncovenanted legacy of upheaval, and an international response which, while reflecting credit on the power of public compassion, has yet proved erratic and discordant.

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11 A proposal emanating from the World Disaster Forum of 1997.

Résumé

L'humanitaire et les conflits dans le monde de l'après-guerre froide

par ALAN MUNRO

La fin de la guerre froide, caractérisée entre autres, par des relations relativement stables entre les super-puissances, a laissé un vacuum dans les rapports internationaux. Dans certaines parties du monde, les conflits font rage. Cette situation accroît les responsabilités de tous les acteurs sur la scène internationale — États, Nations Unies, organisations non gouvernementales —, en vue de résoudre ces tensions. Les organisations à but humanitaire jouent un rôle plus important à cet égard et ont acquis une légitimité internationale, en même temps qu'une position de force. Mais pour elles aussi, les données ont changé. Dans son article, l'auteur examine le nouvel environnement dans lequel ces organisations doivent trouver leur chemin. Le rôle du Mouvement international de la Croix-Rouge et du Croissant-Rouge est particulièrement mis en évidence.

The future of development work in the Red Cross and Red Crescent Movement

Between the need for assistance and the requirements of prevention

by
ALI SAID ALI

AT the beginning of the past decade, the international community witnessed major, rapid developments that affected social, economic and political relations and had repercussions on individual countries.[1] Although there is little doubt that international relations are still in a transitional phase and have not yet taken final and durable shape, recent events in many regions of the world have, in one way or another, caused priorities to be set that require joint national, regional and international endeavours.[2] These priorities definitely differ

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1 See Zaki Laïdi (ed.), *L'ordre mondial relâché: sens et puissance après la guerre froide*, Presse de la Fondation nationale des sciences politiques, Paris, 1993.

2 See e.g. Ernst-Otto Czempiel, James N. Rosenau (eds), *Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s*, Lexington Books, Lexington, 1989.

from those of the Cold War era that followed the Second World War, when the States' main concerns — security, armament, conflict, expanding zones of influence, etc. — drained the resources of many governments, especially in the Third World, and unquestionably delayed development projects in most of those States.

The present article will deal with one of the main concerns of the Red Cross and Red Crescent Movement in the post-Cold War era, i.e. development, by examining the relationship between the need for the assistance expected by the victims of natural and man-made disasters and the requirements of prevention, the aim of which is to promote complementary action to avert such disasters. At the same time, this article will review some of the operational priorities that could be used as guidelines by the components of the Red Cross and Red Crescent Movement in meeting the requirements for development in the humanitarian and social spheres.

The concept of peace and security

After the end of the Second World War, when international relations entered the tunnel of the Cold War, thinking polarized around military security and the resulting concern about the strategies, programmes and means needed to deal with armed conflict and the arms race, to achieve supremacy in one's zones of influence, etc. The material resources devoted to these activities, which continued for over 50 years, were deployed at the expense of social development. Today the world is aware of the adverse consequences of that era. These are illustrated in particular by the structural imbalance in relations between States and the increased marginalization of poverty-stricken communities in the most needy countries.

One of the main challenges for international peace and security in the past was conflict between States, which often took the form of direct aggression by one State against another.[3] The international community can be said to have succeeded in developing specific mechanisms with which to respond to such conflicts and secure the adoption of preventive and other positive measures to deter aggression.

3 See Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*, Random House, New York, 1987.

However, this was not the only type of conflict of primary concern to the States. The steady increase in internal conflicts prompted some States, particularly in the Third World, to allocate most of their resources to dealing with just such situations, thereby paralysing their development plans, further aggravating their social, economic and political circumstances and ultimately creating an unstable situation with which they were unable to deal on their own.

This imbalance coincided with the following series of challenges.

Challenges from a humanitarian point of view

There was a significant increase in the number of natural disasters of various types, along with an alarming increase in the number of victims and in the magnitude of material losses.[4]

Many States have been unable to meet this major challenge in spite of the international assistance that has often been provided. It has clearly become difficult to deal with the socio-economic effects of these disasters through the traditional approach which, in most of the affected countries of the Third World, relies on action by official institutions. Hence, the governments of the States concerned should be encouraged to review how they go about disaster preparedness, with a view to making use primarily of local capacities and private initiatives supplemented, if necessary, by international assistance.

Social challenges

Not all the changes that the world has witnessed during this period have been conducive to optimism, since States have begun to suffer from dangerous social phenomena such as the marginalization from the mainstream of certain groups and individuals, rising crime rates and increasing delinquency among young people. The result has been to push societies into a tunnel of social unrest and conflict. States should be encouraged to consider responding to these challenges in a carefully balanced manner based not on confrontation but rather on a meticulous

4 See the periodical *World Disasters Reports*, edited by the International Federation of Red Cross and Red Crescent Societies, Geneva.

study of the social structure and its economic requirements, and greater encouragement of local private endeavours.

Health-care challenges

Most States are facing a threat that is just as dangerous as the threat posed by war: the alarming spread of infectious diseases such as AIDS and the ongoing pollution of the environment. It seems evident that individual States and even the international community as a whole are unable to deal with these problems, which they regard as being beyond their control. Since these health-care challenges, by their very nature, do not recognize borders it is impossible to predict where they will be encountered in the future. Therefore, countermeasures should be reprogrammed to include preventive action among their priorities. In addition, private action should be expanded and direct participation by local communities and individuals promoted.

Economic challenges

The rapid changes discussed above and the increasingly serious challenges that result have caused an acute feeling of insecurity — mounting fear of material loss, ongoing marginalization of those who fall behind and the looming, and very dark, tunnel of unemployment.[5] All this constitutes an economic crisis which has had a grievous impact on the countries of the Third World. It has become necessary to devise new ways to meet the challenge that human society is facing.[6]

It appears evident that States may not be able individually to meet and overcome these challenges, which in some instances transcend their geographical borders and their human and material capacities. Although international assistance is often required in such cases, there seems to be an even more pressing need to mobilize the indigenous capacities of these States and especially private, non-governmental organizations. Non-governmental organizations, and in particular the National Red Cross and Red Crescent Societies with their wealth of accumulated know-how and efficient structures, could make an effective contribution in support of government endeavour to alleviate such crises, by setting pri-

5 Robert Gilpin, *The Political Economy of International Relations*, Princeton University Press, Princeton, 1987.

6 Muhammad Hassanein Heikal, *Egypt and the Twenty-first Century: A Discussion Paper*, Dar al-Shuruq, Cairo, 1994 (in Arabic).

orities to guide the formulation of programmes to meet local community needs and by increasing the scope of the contributions made by the Movement's components in the realm of development, with particular emphasis on particularly vulnerable individuals and groups.

The National Red Cross and Red Crescent Societies

The crises affecting many States as a result of the changes that have swept through their societies have highlighted the weakness of the official mechanisms adopted in numerous countries to counter them. In view of the increasing interest in non-governmental endeavour, and particularly the humanitarian, social and health-related role of the National Red Cross and Red Crescent Societies, advantage should be taken of this favourable climate in which the National Societies could obviously play a more dynamic role in enhancing local community capacities especially as regards the particularly vulnerable.

The National Red Cross and Red Crescent Societies enjoy a special status. This is the case not only by virtue of their functions in wartime, when the ICRC takes humanitarian initiatives to protect the victims, but also in peacetime, when the International Federation and the National Societies themselves provide services for local communities with a view to promoting human dignity and meeting local humanitarian, social and health-care needs. The various components of the Red Cross and Red Crescent Movement have benefited from the increasing respect accorded to them by the international community and have worked diligently to alleviate human suffering regardless of its cause. However, the changing nature of the root causes of disaster means that new situations might force the Movement to abandon some of its traditional operating methods as inconsistent with the nature of contemporary challenges. This necessarily implies that the Movement's future programmes should be formulated not only according to its customary procedures but also in the light of the lessons that it has learnt, particularly the need to avoid expanding the range of Red Cross and Red Crescent activities since, if the Movement attempted to do everything, it might find itself unable to respond effectively to the increasing demands of humanitarian action.

When development work in the Movement is reprogrammed, therefore, a careful balance should be struck between the need to help disaster victims and the requirements of preventive action to limit

the impact of disasters and strengthen the infrastructure required to deal with them. Future development programmes could therefore address the following issues.

Prevention

The circumstances of the Cold War imposed a programming pattern that focused on assistance and protection in the event of any type of disaster, the aim being to deal with the consequences of disasters. However, striving to deal with disasters as soon as they occur could be said to have delayed the effective provision of assistance by the Movement's components, particularly given the increasing magnitude and multiple causes of disasters.[7] The ICRC's work in the field of protection has remained an important factor in strengthening the presence of the Movement and has increased the respect that it enjoys.

In view of future challenges, the Movement must stop regarding disasters as unexpected occurrences and must take steps to prevent them by standing ready to deal with their causes and not solely their consequences. To this end, the Movement might need to compile a detailed index of its human and material resources and clearly define its mechanisms of operational coordination, especially when there is a need for the joint presence of and action by the Movement's components (the ICRC, the International Federation and the National Societies).

Complementarity

Various circumstances have prompted some National Societies to select programmes of action without careful study and adequate planning that would meet the requirements of and the priorities dictated by the local environment. This gives the impression that those Societies' programmes are being implemented in isolation from environmental factors and without regard for their social impact and their economic cost. Now that there is an increasing need for complementarity in terms not only of endeavours but also of the nature of the programmes undertaken, these Societies are facing a test of their ability to enhance their capacity to remedy shortcomings that might cause human suffering or impede development in the social sphere. Hence, they should take care to

7 See further: Michael Edwards, David Hulme, *Making a Difference: NGOs and Development in a Changing World*, Earthscan, London, 1992.

ensure that their programmes of action clearly define their contribution within the context of the priorities dictated by local conditions. In so doing, the efforts, capacities and resources of the National Societies will complement, instead of being isolated from, the endeavours made by others in the same environment.

Self-reliance

In the past, the Red Cross and Red Crescent Societies won increasing praise for their sustained action in connection with problems of humanitarian and social concern in a number of States. To make that action possible, the Societies had to rely on their own resources and on unconditional support from their respective governments. However, owing to the expanded scope of their activities, growing needs and the shortage of funds in many States, many Societies have faced severe financial crises.[8] Consequently, it has been necessary to review funding programmes and promote greater self-reliance by increasing the role of fixed sources of income and gradually reducing reliance on support from others. The self-development programmes, which are a basic aspect of the role that the National Societies are playing in social development, therefore require a definition of production-related sources of funding for the benefit of humanitarian and social activities. However, the concept of entrepreneurial profit should not be misconstrued; there is a need for an economic evaluation of projects that serve the local community and, at the same time, generate profits for the Society which can be used to meet the requirements of humanitarian action.

Support

During the 1990s, the Movement decided that providing support should be one of its obligations towards particularly vulnerable members of society. Although the limits to such action are still being debated within the Movement because of its sensitive nature and the difficulties that it might create, especially vis-à-vis the governments concerned, the fact that a clear statement was made about the need to make greater efforts to protect and defend vulnerable categories of the population showed the seriousness with which the Movement takes the matter.

8 Amir Salim, *Human Rights: Ongoing Battles between the North and the South*, Centre for Legal Studies and Information on Human Rights, Cairo, 1994 (in Arabic).

There appears to be a need to expand the scope of the practical programmes designed to protect and safeguard the particularly vulnerable. At this stage, it might be helpful if the Movement's components could work to strengthen the essential programmes of the ICRC, under which humanitarian initiatives are taken in support of these people, while the organization remains careful to maintain its status as a neutral party.

Summary

The adverse effects of the Cold War era and the human suffering and social upheaval that they entailed have placed the international community before a difficult task; this calls for a concerted effort to address the resulting problems and challenges by viewing social development, including its humanitarian dimension, in the light of priorities to be set for the future and by taking into consideration the important contribution that can be made by non-governmental organizations. In the coming years the Red Cross and Red Crescent Movement will have to shoulder an enormous responsibility, which will require broader participation, within the context of development work to meet the needs of local communities, and which will strengthen the vital role of the Movement's components.

Résumé

L'avenir des activités de développement dans le Mouvement international de la Croix-Rouge et du Croissant-Rouge : répondre à la fois aux besoins de l'assistance et aux exigences de la prévention

par SAID ALI SAID

La fin de la guerre froide a notamment modifié l'environnement dans lequel travaillent les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge. Si la communauté internationale semble avoir trouvé les moyens de résoudre les conflits traditionnels entre États sans recourir aux armes, il en est autrement sur le plan interne, où des facteurs liés à un développement insuffisant continuent d'engendrer la violence. L'auteur s'intéresse, entre autres, à la question de savoir de quelle manière les Sociétés nationales peuvent faire face aux deux tâches principales qui leur incombent : l'assistance d'urgence aux victimes de catastrophes naturelles ou de conflits, d'une part, et la prévention des situations d'urgence, d'autre part. Même si elles sont accaparées par l'urgence, les Sociétés nationales ne doivent pas négliger les activités liées au développement, car seules ces activités permettront de prévenir d'autres urgences. Enfin, l'auteur plaide pour une Croix-Rouge et un Croissant-Rouge forts et innovateurs.

Le droit international humanitaire à l'épreuve des conflits de notre temps

par
FRANÇOIS BUGNION

LE monde a retenu son souffle lors des manifestations qui ont conduit à la chute du mur de Berlin, le 9 novembre 1989, comme lors de la tentative de coup d'État du 19 août 1991 à Moscou, dont l'échec devait précipiter l'éclatement de l'Union soviétique. Les chars n'étaient pas loin et le souvenir de la répression des émeutes de Berlin en juin 1953, du soulèvement hongrois d'octobre 1956, de l'écrasement du «printemps de Prague», le 21 août 1968, et de la proclamation de l'état de guerre en Pologne, le 13 décembre 1981, était dans toutes les mémoires. Pour une fois, cependant, le pire ne s'est pas produit et cette transition, qui devait bouleverser le destin des peuples d'Europe orientale et d'Asie centrale, s'est effectuée, dans la plupart des pays, presque sans violence[1]. Jamais dans l'histoire un bouleversement de cette impor-

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1 Nous nous référons ici uniquement aux bouleversements politiques, au remplacement d'un système économique, politique et social par un autre. L'éclatement de l'URSS a précipité des conflits d'ordre territorial ou ethnique, dont on ne saurait sous-estimer la gravité, mais qui n'altèrent pas le caractère essentiellement pacifique du changement de système politique des pays qui faisaient autrefois partie du bloc soviétique.

tance ne s'était produit qui n'ait débouché sur un bain de sang. Sans doute faut-il voir dans la transition pacifique qu'ont connue les pays d'Europe orientale et d'Asie centrale une preuve de la maturité politique des dirigeants et des populations de ces États.

À n'en pas douter, la fin de la guerre froide a constitué un bouleversement de l'ordre international d'une amplitude comparable à celle des mutations engendrées par les grands conflits qui ont endeuillé l'Europe et le monde : guerre de Trente Ans, guerres napoléoniennes, Première et Seconde Guerres mondiales. Mais tandis que chacun de ces conflits avait été suivi de l'instauration d'un nouvel ordre international — les Traités de Westphalie en 1648, l'Acte final du Congrès de Vienne en 1815, le Traité de Versailles en 1919 et la Charte de San Francisco en 1945 —, on ne voit pas encore émerger un nouvel ordre international susceptible de remplacer l'ordre de Yalta, qui s'est effondré avec la chute du mur de Berlin.

La fin de la guerre froide a également transformé la nature et la typologie des conflits armés auxquels notre époque est confrontée et, par ce biais, les conditions d'application du droit international humanitaire. Quelles ont été les conséquences de ces transformations sur la mise en œuvre de ce droit et sur les possibilités d'action des organisations humanitaires ? Telles sont quelques unes des questions qu'il convient d'examiner à la lumière des conflits de ces dernières années, notamment du récent conflit du Kosovo.

La guerre froide et ses suites

Il n'y a pas lieu de regretter la guerre froide. La division du monde en deux blocs antagonistes que tout opposait a engendré d'interminables conflits sur les lignes de fracture de ces deux blocs : en Indochine, en Corée, en Afghanistan et en Afrique australe. Ces conflits ont provoqué d'indicibles souffrances et d'innombrables victimes, en raison de la violence des affrontements, de l'armement massif dont les belligérants disposaient, de l'intervention occulte ou avouée des grandes puissances. Les clivages idéologiques ont fait obstacle à la mise en œuvre du droit international humanitaire et le Comité international de la Croix-Rouge, qui a pour mission d'apporter protection et assistance aux victimes de la guerre, a subi, dans le cadre de ces conflits, de douloureux échecs. Enfin, durant toutes ces années, le monde a vécu sous la menace que les armes nucléaires

et thermonucléaires faisaient peser sur les populations civiles de part et d'autre du rideau de fer et même, sur l'avenir de l'humanité.

C'est donc une illusion de croire que, sous l'empire de la guerre froide, l'action humanitaire était plus facile ou que le droit humanitaire était mieux respecté. Les difficultés auxquelles s'est heurtée l'action humanitaire étaient différentes de celles auxquelles nous sommes aujourd'hui confrontés; elles n'étaient pas moindres.

La chute du mur de Berlin et l'éclatement de l'Union soviétique n'ont malheureusement pas apporté l'apaisement généralisé que les peuples du monde étaient en droit d'espérer. La fin de l'antagonisme entre deux blocs que tout opposait a, certes, permis de trouver des solutions à certains conflits, notamment en Amérique centrale, au Cambodge et en Afrique australe. Dans l'atmosphère de pessimisme que nous connaissons aujourd'hui, qui se nourrit des images des massacres et des atrocités dont nous sommes jour après jour les témoins, ne manquons pas de relever le miracle sud-africain: une transition pacifique a permis de mettre un terme à un conflit séculaire et de rétablir la concorde dans un pays qui était au bord de la guerre civile. En revanche, d'autres conflits ont perduré, des causes endogènes prenant le relais de l'ancienne confrontation idéologique qui les occultait. C'est notamment le cas en Angola, en Colombie, au Pérou et en Afghanistan.

Mais surtout, la fin de la guerre froide a libéré des antagonismes et des haines longtemps réprimés et a débouché sur l'éclatement de nouveaux conflits d'une rare violence, notamment dans les Balkans et sur les marches de l'ancienne URSS, dans le Caucase et en Asie centrale.

Mais la guerre froide imposait un moule relativement uniforme aux conflits qui étaient le fruit douloureux de la division du monde en deux blocs antagonistes, chacun des adversaires se voyant contraint de formuler ses objectifs en termes idéologiques et de solliciter l'appui de l'une ou l'autre des grandes puissances qui dominaient la scène internationale — États-Unis et Union soviétique. Elle obligeait aussi chacun des supergrands à maintenir un minimum d'ordre dans sa zone d'influence, sous peine de donner à son rival l'occasion d'intervenir dans son arrière-cour. Aujourd'hui, en revanche, nous assistons à la prolifération de conflits qui échappent aux schémas auxquels nous étions habitués.

Il convient de s'arrêter sur la typologie de ces nouveaux conflits, puisque celle-ci va déterminer les possibilités de mise en œuvre du

droit international humanitaire, ainsi que les possibilités d'action des organisations humanitaires.

Quels en sont les éléments essentiels?

Le facteur décisif est la disparition de la bipolarité, sur la scène internationale comme sur le théâtre de la plupart de ces nouveaux conflits. Disparition de la bipolarité, donc prolifération des factions, des groupes armés, et apparition de nouveaux acteurs qui ne reconnaissent pas être liés par le droit humanitaire. Dans certains cas, la multiplication des factions et des groupes armés se traduit par l'effondrement de tous les services publics, et même par la disparition de toute structure étatique. Les chefs de guerre se taillent des fiefs sur lesquels ils règnent en maître, rançonnant les populations et se livrant une guerre presque permanente. La Somalie donne depuis plusieurs années l'exemple extrême d'un État sans État.

Ne pouvant plus compter sur l'appui de leurs anciens parrains, les belligérants s'assurent leurs propres sources de financement en pillant les ressources naturelles ou le patrimoine archéologique des régions qu'ils contrôlent, en s'adonnant à des trafics illicites de drogue ou de pierres précieuses et en rançonnant les populations civiles et les organisations humanitaires. L'économie de guerre débouche sur une économie de prédation. La distinction entre l'action politique et le crime organisé tend à disparaître. Les objectifs politiques de la lutte sont oubliés; le pillage et le crime deviennent les maîtres mots.

Enfin, et c'est sans doute l'un des paradoxes de notre époque, alors que l'on assiste à un développement fulgurant des moyens de transport et des échanges, alors que le monde est enserré dans un réseau de plus en plus dense de moyens de communication qui atteint chaque village et bientôt chaque famille, on assiste aussi à la montée des particularismes et des revendications identitaires. Ces comportements s'appuient sur la peur de l'autre pour déboucher sur le rejet de l'autre, sur l'exclusion et sur le racisme. Ce phénomène touche, à des degrés divers, tous les pays. Les démocraties libérales ne sont pas épargnées, mais c'est dans les situations de transition qu'il débouche sur les manifestations les plus virulentes: purification ethnique ou génocide. Les drames de la Bosnie-Herzégovine, du Rwanda et du Kososvo sont dans toutes les mémoires, mais les mêmes dérives ont été observées, à une moindre échelle sans doute, sur d'autres théâtres d'affrontements: Abkhazie, Haut-Karabakh, Tadjikistan, Tchétchénie...

On doit dès lors s'interroger sur les possibilités de mise en œuvre du droit humanitaire dans le cadre de ces nouveaux conflits. Quelles sont les conséquences de cette évolution?

Le droit humanitaire et les conflits de notre temps

Le droit humanitaire est né de la confrontation sur le champ de bataille entre souverains égaux en droits. Il s'est agi longtemps d'un corps de règles coutumières que les rois observaient vis-à-vis de leurs semblables, mais qui ne s'appliquaient pas aux rapports entre un souverain et ses sujets révoltés. De même, les premiers traités de droit humanitaire — la Convention de Genève de 1864, la Déclaration de Saint-Pétersbourg de 1868 et les Conventions de La Haye de 1899 et de 1907 — ne faisaient droit qu'entre les parties contractantes, c'est-à-dire entre des États.

Il a fallu toutes les horreurs de la guerre civile russe, puis de la guerre d'Espagne, pour que les États se décident enfin à reconnaître quelques principes humanitaires fondamentaux qui devaient être respectés en toutes circonstances, même en cas de guerre civile. C'est le cas aujourd'hui de l'article 3, commun aux Conventions de Genève du 12 août 1949, et du second Protocole additionnel à ces Conventions.

Mais il ne s'agit que d'une réglementation minimale.

Encore faut-il que les parties au conflit se reconnaissent liées par ces instruments. Encore faut-il que les combattants en connaissent les dispositions. Encore faut-il que les belligérants aient la volonté de les respecter et d'en imposer le respect à leurs troupes. Encore faut-il un minimum d'organisation, une structure hiérarchique et des lignes de commandement qui permettent d'imposer le minimum de discipline sans lequel le droit humanitaire restera lettre morte, et sans lequel l'action humanitaire est vouée à l'échec.

On en est malheureusement très éloigné. Le CICR a trop souvent été contraint de retirer ses délégués et ses équipes médicales de théâtres d'opération, alors même que les besoins d'assistance humanitaire étaient pressants, car les conditions minimales de sécurité n'étaient plus réalisées. C'est ainsi qu'il a dû retirer ses délégués du Burundi, de Somalie, de Tchétchénie, du Libéria et de Sierra Leone. Dans certains cas, la suspension des opérations du CICR n'a été que temporaire, mais dans d'autres, les conditions minimales de sécurité qui permettraient au CICR de reprendre ses opérations ne sont pas encore réalisées. Le CICR et d'autres

organisations humanitaires ont été victimes de menaces, d'enlèvements et de meurtres.

Seule une action qui s'inscrit dans la durée, visant à nouer des contacts avec toutes les factions et tous les groupes armés, afin de faire connaître les principes essentiels du droit humanitaire et de s'assurer de l'acceptation de l'action humanitaire, peut permettre de surmonter progressivement ces obstacles. Cela, à force de persévérance et au prix de risques qu'on ne saurait sous-estimer. Mais il s'agit d'une lutte inégale. Ici comme ailleurs, ce sont trop souvent les plus violents et les moins scrupuleux qui imposent leur loi.

Toutefois, force est de reconnaître que les pires exactions impliquent toujours la responsabilité d'un État ou d'un groupe organisé. Ni le génocide cambodgien, ni le génocide plus récent du Rwanda, ni l'épuration ethnique dont nous avons été les témoins en Bosnie-Herzégovine, en Croatie, puis au Kosovo n'auraient été possibles sans un plan concerté et sans la volonté politique d'un gouvernement ou d'un parti fortement structuré. Il en va de même pour la Shoah et pour le massacre des Arméniens au tournant du siècle.

La question se pose donc en ces termes : comment protéger les populations civiles, comment assurer le respect du droit international humanitaire, alors qu'on est confronté à des politiques — épuration ethnique ou génocide — qui sont la négation même de tout principe humanitaire ?

Ne disposant pas de la force, les organisations humanitaires ne peuvent user que de la persuasion. On en connaît les limites dans des situations de cette nature.

En vérité, c'est en premier lieu aux États qu'il appartient d'assurer le respect des traités auxquels ils ont souscrit et qu'ils se sont engagés non seulement à respecter mais à faire respecter[2].

Les pressions diplomatiques et les résolutions des organismes internationaux peuvent assurément exercer une influence. Toutefois, si ces pressions ne sont pas appuyées par des mesures d'exécution, dans l'ordre interne des États comme sur le plan international, elles finiront par se révéler inopérantes.

2 « Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances » proclame l'article 1er des Conventions de Genève du 12 août 1949 et du Premier Protocole additionnel à ces Conventions.

L'instauration de tribunaux pénaux internationaux ne manquera pas d'exercer à l'avenir une action dissuasive, puisqu'elle met fin à une culture de l'impunité. Ceux qui seraient tentés de commettre ou d'ordonner de commettre des violations graves du droit humanitaire ou des droits de l'homme réfléchiront à deux fois avant de passer aux actes, s'ils savent qu'ils peuvent avoir à répondre de leurs forfaits devant une juridiction internationale. L'expérience prouve cependant qu'il est difficile, aussi longtemps que les hostilités se poursuivent, de se saisir des auteurs des pires exactions, et plus encore de ceux qui les ont ordonnées ou tolérées.

Les sanctions économiques permettent d'accroître la pression sur les parties au conflit, et c'est pourquoi le Pacte de la Société des Nations et la Charte des Nations Unies en ont fait une pièce importante des mécanismes de la sécurité collective. Toutefois, dans la durée, leurs effets touchent infiniment plus durement les populations civiles, et en particulier les petites gens, que les forces armées ou les membres des cercles dirigeants.

Reste enfin l'option militaire.

Celle-ci peut prendre deux formes : celle d'escortes armées, pour ouvrir des corridors humanitaires, pour protéger des convois de vivres et d'autres secours destinés aux populations civiles, ou encore pour protéger des zones de sécurité où les populations civiles trouveront refuge. On ne doit pas en négliger l'importance, notamment au vu de l'opération *Provide Comfort* dans le nord de l'Irak et de l'expérience de la guerre en Bosnie-Herzégovine. Toutefois, cette action risque de faire passer les acteurs humanitaires dans la dépendance des responsables des forces armées. Et surtout, ce type d'intervention risque de demeurer sans effet sur les causes des souffrances infligées aux populations civiles, sur les comportements des belligérants, sur les atrocités commises et sur les politiques dont ces atrocités sont la manifestation.

Faut-il recourir à la force pour prévenir les violations graves du droit international humanitaire ou pour y mettre un terme, pour arrêter des massacres, rétablir l'ordre dans un pays déchiré par la guerre civile, ou permettre aux réfugiés de rentrer chez eux ? Telle est la question à laquelle la communauté internationale se trouvera confrontée. La guerre pour rétablir le droit, la guerre pour protéger les victimes de la guerre, tel était bien l'un des enjeux de la récente intervention des forces de l'OTAN au Kosovo.

Cette intervention a contraint le gouvernement de Belgrade à retirer ses troupes du Kosovo et à accepter le déploiement des forces de l'OTAN dans la province. Les réfugiés albanais du Kosovo ont commencé à rentrer chez eux. Ainsi, l'intervention des forces de l'OTAN a permis d'atteindre les principaux objectifs qui lui étaient assignés. Elle n'en soulève pas moins de délicates questions au regard du droit international humanitaire[3]. Ces questions, il est possible de les identifier, mais il serait prématuré de prétendre y apporter aujourd'hui déjà des réponses.

En dépit de la sophistication des armes et des précautions prises, les bombardements aériens ont provoqué de grandes souffrances, des morts et des blessés, sans doute plus nombreux parmi les populations civiles que parmi les combattants. Ces bombardements ont réduit à néant de larges pans de l'infrastructure économique de la Yougoslavie, et même de celle du Kosovo.

Dès lors, on ne peut manquer de s'interroger sur le rapport entre les souffrances que cette intervention armée avait pour but de prévenir et celles que l'usage de la force a engendrées. Dans cette arithmétique sanglante, l'analyse ne peut se limiter à comptabiliser les victimes de cette seule opération ; les effets à plus long terme devront également être pris en compte, comme ceux — impossible à quantifier — qu'aurait entraîné l'inaction.

En outre, l'intervention de l'OTAN n'a pas encore apporté l'apaisement que l'on avait espéré. Sur les routes de l'exil, les réfugiés serbes ont remplacé les Albanais du Kosovo. Seul l'avenir montrera s'il est possible de restaurer la cohabitation de deux communautés qui prétendent à une même terre, mais que sépare depuis des années le fossé d'une insondable méfiance et des haines que les événements de ces derniers mois ont exacerbées.

L'utilisation du terme humanitaire pour qualifier et même pour justifier le recours à la force des armes soulève également des questions délicates. Elles ne peuvent manquer de préoccuper des organisations dont les possibilités d'action sont tributaires de l'accord des parties au conflit.

3 Nous n'entendons pas aborder ici la question de la légalité de l'intervention des forces de l'OTAN au regard du *jus ad bellum* et, en particulier, au regard des dispositions de la Charte des Nations Unies, puisque la présente étude porte uniquement sur l'examen des conditions de mise en œuvre du droit international humanitaire dans le cadre des conflits contemporains.

Enfin, il est illusoire de penser que ce modèle d'intervention puisse être aisément transposé à d'autres théâtres d'affrontements. Verra-t-on demain les pays de l'OTAN ou les membres d'autres organisations internationales engager leurs forces armées pour rétablir l'ordre au cœur de l'Afrique, dans le sud-Caucase ou en Afghanistan ? On a tout lieu d'en douter. En effet, une intervention de l'Alliance atlantique en dehors du contexte européen provoquerait sans doute une levée de boucliers de tous ceux qui verraient dans cette initiative une résurgence du colonialisme. Quant aux autres organisations, leurs moyens d'action sont infiniment plus limités.

Inversement, il est incontestable que la passivité face à des violations graves et délibérées des lois et coutumes de la guerre ou des droits de l'homme, face à des politiques qui visent à déraciner des populations, face au génocide — et cela, où que ces faits se produisent — ne peut manquer de ruiner l'autorité du droit international humanitaire et celle du système international de protection des doits de l'homme. De façon plus générale, l'histoire a montré que la passivité face à de telles atrocités ne peut que saper l'autorité du droit international, la stabilité des relations internationales et la paix. L'inaction est porteuse de nouveaux drames, de nouveaux conflits et de nouvelles victimes. « La violence engendre la violence » observait déjà Eschyle[4].

On mesure à travers ces questions la nécessité d'une concertation, d'une action commune des États — et, notamment, des grandes puissances —, ainsi que la nécessité d'une mobilisation de la société civile en vue de prévenir et d'endiguer les conflits pendant qu'il en est encore temps. Car, tous les exemples récents l'ont montré, la guerre a sa dynamique propre : lorsque la violence s'est donné libre cours, il est presque impossible de l'arrêter.

De nouveaux modes de dialogue et de coopération doivent être trouvés pour épargner au monde de retomber dans les clivages de la guerre froide, la lutte pour la domination planétaire prenant le relais de l'ancienne confrontation idéologique.

L'histoire nous enseigne en effet qu'aucun ordre durable ne peut être fondé sur un simple rapport de force. Seule l'instauration d'un nouvel ordre international fondé sur le dialogue, la concertation et le res-

4 Eschyle, *Agamemnon*, vers 763.

pect du droit permettra d'affranchir le siècle prochain de la menace de la guerre qui a si lourdement pesé sur celui qui va bientôt prendre fin.

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Abstract

International humanitarian law stands the test of today's conflicts

by FRANÇOIS BUGNION

The fall of the Berlin Wall has fundamentally changed Europe, and this has come about in a surprisingly peaceful way. However, the events of 1989-1991 have not produced a new and stable order. Conflicts have erupted in many parts of the former Soviet Union, in particular in Eastern Europe and Central Asia. Tensions between the former superpowers have been replaced by a large number of local conflicts, i.e. civil wars. After analysing the characteristics of these internal armed conflicts, the author discusses the responses of existing international humanitarian law to the humanitarian issues they raise. The different measures capable of strengthening the respect for the rules are of particular importance. Recent events show, however, that the use of military force may not necessarily be the appropriate reaction to violations of humanitarian law, in particular if the number of casualties and the material damage caused by such intervention are likely to be disproportionately high. A durable international order cannot be built on force, but only on dialogue and mutual respect.

Les Conventions de Genève de 1949 : une percée décisive

seconde partie

par
CATHERINE REY-SCHYRR

Les principaux résultats de la Conférence diplomatique

Quelles sont les principales innovations des Conventions de 1949 par rapport au droit international humanitaire antérieur et quels sont les principaux problèmes auxquels la Conférence diplomatique s'est achoppée ?

Nous tenterons de répondre à ces questions au travers du survol des quatre Conventions, tout d'abord de leurs dispositions communes, puis de chaque Convention en particulier, enfin des articles qui touchent directement le CICR [95].

CATHERINE REY-SCHYRR, licenciée en science politique, est chargée de recherches historiques au CICR. En cette qualité elle collabore à la rédaction de l'histoire du CICR pour la période 1945-1955. La première partie de cette étude a été publiée dans le numéro de juin 1999, pages 209-239.

95 Pour une analyse détaillée des Conventions de Genève du 12 août 1949, nous renvoyons le lecteur au *Commentaire*, publié sous la direction de Jean S. Pictet, avec le concours de Roger Boppe, Henri Coursier, Claude Pilloud, Jean de Preux, Jean-Pierre Schoenholzer, Frédéric Siordet, Oscar M. Uhler, René-Jean Wilhelm et M.W. Mouton, 4 vol., CICR, Genève, 1952-1959 (ci-après «Commentaire». Par ailleurs, nous nous sommes principalement basés sur les *Actes de la Conférence diplomatique de Genève de 1949*, *op. cit.* (note 56), ainsi que sur les publications suivantes : G.I.A.D. Draper, *The Red Cross Conventions*, Stevens & Sons Limited, London, 1958 ; Joyce A. C. Gutteridge, «The Geneva Conventions of 1949», *The British Yearbook of International Law*, vol. XXVI, 1949, pp. 294-326 ; Paul de La Pradelle, *op. cit.* (note 81); Jean S. Pictet, *La Croix-Rouge et les Conventions de Genève*, *op. cit.* (note 46); Jean Pictet, «The New Geneva Conventions for the Protection of War Victims», *American Journal of International Law*, vol. 45, n° 3, July 1951, pp. 462-475; Jean Pictet, «La formation du droit international humanitaire», *op. cit.* (note 47). — Précisons que Joyce A. C. Gutteridge et Paul de La Pradelle ont participé à la Conférence diplomatique en tant que membres respectivement des délégations du Royaume-Uni et de Monaco.

Au préalable, nous aborderons deux problèmes d'ordre général qui s'étaient posés au CICR dès le début des travaux préparatoires.

Le premier touche un point de méthode ou d'opportunité juridique : valait-il mieux des codes très détaillés, réglant avec minutie tous les cas susceptibles de se produire, ou plutôt des conventions se limitant aux principes essentiels, en renvoyant le règlement des détails à des accords spéciaux à conclure entre les belligérants ? Le CICR penchait pour la seconde solution. Il privilégiait des conventions simples, craignant que des textes trop détaillés ne se révèlent difficilement applicables. C'est toutefois la première conception qui a prévalu, les délégués gouvernementaux ayant eu à cœur de régler les maux précis dont leurs pays respectifs avaient souffert durant la Seconde Guerre mondiale, afin d'en éviter le retour. Le CICR s'est efforcé d'y apporter une modération, d'une part, en inscrivant en tête des Conventions des principes généraux et imprescriptibles relatifs au traitement humain, au respect et à l'inaliénabilité des droits des personnes protégées, et d'autre part, en leur annexant des accords-types et des projets de règlements[96].

Le second point soulevait la question de savoir s'il convenait d'avoir une convention par catégorie de personnes à protéger, ou un seul instrument juridique pour l'ensemble des victimes de la guerre, qui serait composé de différentes parties. Cette dernière suggestion fut finalement abandonnée lors de la XVIIe Conférence internationale, en raison de la complexité des problèmes qu'elle engendrait[97]. Il est cependant évident que les quatre Conventions de Genève appartiennent à un ensemble homogène, comme en témoignent leurs dispositions communes.

1. Les dispositions communes aux quatre Conventions

Outre les principes généraux relatifs au traitement humain et à l'intangibilité des droits des personnes protégées, il s'agit des

96 Max Huber, «Principes, tâches et problèmes de la Croix-Rouge dans le droit des gens», *RICR*, n° 310, octobre 1944, pp. 810-812. Discours de Max Huber lors de l'ouverture de la Conférence d'experts gouvernementaux de 1947, *RICR*, n° 340, avril 1947, pp. 285-286. *Commentaire*, vol. I, p. 11. Pictet, *op. cit.* (note 47), pp. 11-12.

97 *Dix-Septième Conférence internationale de la Croix-Rouge, Compte rendu*, p. 73. Gutteridge, *op. cit.* (note 95), pp. 296-297.

dispositions, groupées au début et à la fin de chaque Convention, qui traitent principalement de leur respect, des conditions d'application et des mesures de mise en œuvre, telles que le contrôle et la répression des infractions. Certaines d'entre elles méritent une attention particulière.

Les Conventions de 1929 se référaient, sans autre définition, au temps de guerre. Celles de 1949 précisent les situations appelant l'application des Conventions.

Ainsi, l'article 2 commun qui régit les conflits armés internationaux stipule que les Conventions s'appliqueront à tous les conflits entre États, « même si l'état de guerre n'est pas reconnu (...) »[98]. Elles s'appliqueront également « dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire »[99]. Or, au cours de la Seconde Guerre mondiale, nombre de victimes s'étaient vu refuser le bénéfice de la Convention « prisonniers de guerre », parce que la puissance détentrice prétendait qu'il n'y avait pas de guerre, ou déniait à ses adversaires la qualité d'État[100], ce qui rendait du même coup les Conventions inapplicables.

Mais le succès le plus marquant dans ce domaine a été l'adoption de l'article 3 commun, sorte de convention miniature aux termes de laquelle les parties à un conflit armé non international s'engagent à respecter les droits fondamentaux de la personne humaine.

Cette question a donné lieu à l'une des discussions les plus longues et les plus difficiles de la Conférence diplomatique, parce qu'elle heurtait de plein fouet la souveraineté nationale. Le fait que plusieurs États présents étaient confrontés à des situations de guerre civile sur leur propre territoire ou dans leurs colonies explique également la méfiance de certains participants.

Dans ses premiers projets, le CICR avait suggéré que, dans tous les cas de conflit armé ne présentant pas un caractère internatio-

98 Par exemple, lors du conflit sino-japonais, en 1937, les deux pays avaient nié l'existence d'un état de guerre.

99 Cas des pays envahis et occupés par l'Allemagne, voire annexés sans opérations militaires, avant et après le déclenchement de la Seconde Guerre mondiale.

100 Telle la Pologne, dont la partie occidentale a été incorporée au «Reich» en octobre 1940, et dont l'Allemagne ne reconnaissait pas le gouvernement en exil à Londres.

nal, chacun des adversaires soit tenu d'appliquer les dispositions des Conventions. La XVIIe Conférence avait retenu cette proposition, mais en y ajoutant, pour les Conventions «prisonniers de guerre» et «civils», la condition que la Partie adverse s'y conforme également[101], et sans définir la notion de guerre civile.

Cependant, lors des réunions préparatoires, cette notion avait toujours été comprise au sens strict du terme, excluant les situations de troubles intérieurs et de tensions internes. La question avait principalement été soulevée lors de la XVIIe Conférence par le représentant du Congrès juif mondial, Gehrart Riegner. Se référant aux événements qui avaient précédé la Seconde Guerre mondiale en Allemagne, celui-ci avait exprimé le vœu que les futures Conventions de Genève s'appliquent en principe dans les «cas d'urgence dus à la violence ou à des troubles visant des groupes nationaux, raciaux et religieux», ou alors que l'on établisse un nouveau traité international pour ce genre de situation. Ces propositions n'avaient pas été retenues, de crainte d'affaiblir le projet de disposition relatif à la guerre civile en voulant trop le préciser, voire de compromettre le sort même des Conventions en les étendant à des situations si délicates et si difficiles à définir[102].

Lors de la Conférence diplomatique se pose immédiatement la question de savoir ce qu'il faut entendre par «conflit armé ne présentant pas un caractère international». De nombreuses délégations s'opposent, sinon à toute disposition concernant la guerre civile, du moins à une extension trop large du champ d'application des Conventions. Elles craignent en effet de voir conférer par ce biais à une poignée de rebelles, voire à de simples bandits, la qualité de belligérant, peut-être même une reconnaissance légale.

Les partisans du texte de Stockholm voient au contraire dans celui-ci un acte de courage. Ils font valoir que lorsque des rebelles

101 *Commentaire*, vol. III, pp. 36-38. Frédéric Siordet, «Les Conventions de Genève et la guerre civile», *RICR*, n° 374, février 1950, p. 121.

102 En revanche, la XVIIe Conférence avait voté une résolution sur le problème des détenus politiques en tant que tel, et indépendamment des propositions relatives aux conflits armés non internationaux. Jacques Moreillon, *Le Comité international de la Croix-Rouge et la protection des détenus politiques*, Institut Henry-Dunant/Éditions de L'Âge d'Homme, Genève/Lausanne, 1973, pp. 103-112.

se conforment aux règles humanitaires, on ne peut parler de terrorisme, d'anarchie ou de désordre.

Diverses propositions tendent à poser une série de conditions à remplir par l'une ou l'autre des parties au conflit pour que les Conventions soient applicables, afin d'en limiter les cas. Mais la surenchère est telle que l'on ne parvient à aucune solution praticable.

C'est la délégation française qui permet finalement d'arriver à une solution, en suggérant que dans tous les cas de conflits non internationaux, l'application des Conventions soit limitée à leurs seuls principes.

Le texte élaboré sur cette base, tel qu'il figure à l'article 3 commun des quatre Conventions de 1949, stipule ainsi que :

> « 1) Les personnes qui ne participent pas directement aux hostilités, y compris les membres de forces armées qui ont déposé les armes et les personnes qui ont été mises hors de combat par maladie, blessure, détention, ou pour toute autre cause, seront, en toutes circonstances, traitées avec humanité, sans aucune distinction de caractère défavorable basée sur la race, la couleur, la religion ou la croyance, le sexe, la naissance ou la fortune, ou tout autre critère analogue.
>
> « À cet effet, sont et demeurent prohibées, en tout temps et en tout lieu, à l'égard des personnes mentionnées ci-dessus :
>
> « a) les atteintes portées à la vie et à l'intégrité corporelle, notamment le meurtre sous toutes ses formes, les mutilations, les traitements cruels, tortures et supplices ;
>
> « b) les prises d'otages ;
>
> « c) les atteintes à la dignité des personnes, notamment les traitements humiliants et dégradants ;
>
> « d) les condamnations prononcées et les exécutions effectuées sans un jugement préalable, rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés.
>
> « 2) Les blessés et malades seront recueillis et soignés.
>
> « Un organisme humanitaire impartial, tel que le Comité international de la Croix-Rouge, pourra offrir ses services aux Parties au conflit.

«Les Parties au conflit s'efforceront, d'autre part, de mettre en vigueur par voie d'accords spéciaux tout ou partie des autres dispositions de la présente Convention.

«L'application des dispositions qui précèdent n'aura pas d'effet sur le statut juridique des Parties au conflit.»

Sans ce dernier paragraphe, l'article 3 n'aurait sans doute jamais été accepté.

Ce texte est loin du projet initial du CICR, qui prévoyait l'application intégrale des Conventions. En revanche, il permet un champ d'application beaucoup plus vaste, puisque l'article 3 s'applique à tous les conflits armés non internationaux. Tout compte fait, le CICR estimera que, puisque son projet n'avait aucune chance d'être accepté par les gouvernements et qu'il fallait se rabattre sur une solution intermédiaire, c'était, entre les textes élaborés au cours de la Conférence diplomatique, celui auquel il fallait accorder la préférence[103].

L'apparition d'un article de ce genre dans une convention internationale, constitue, à l'époque, une importante innovation[104]. Celle-ci va toutefois dans le même sens que la Déclaration universelle des droits de l'homme, adoptée par l'Assemblée générale des Nations Unies le 10 décembre 1948. Elle s'inscrit dans la tendance moderne du droit international à reconnaître que la question du respect des droits fondamentaux de la personne a cessé de relever de la juridiction interne exclusive des États[105].

En ce qui concerne le contrôle de l'application des Conventions, celle de 1929 («prisonniers de guerre») mentionnait déjà la possibilité de recourir à la collaboration des puissances protectrices (art. 86). Cette disposition avait confirmé son utilité pendant la guerre, mais elle avait aussi fait ressortir les lacunes suivantes: non seulement aucune règle conventionnelle n'autorisait l'action des puissances protectrices en faveur des civils ennemis ou dans les territoires occupés, mais encore de nombreux prisonniers de guerre n'avaient

103 *Commentaire*, vol. 4, pp. 39-40.

104 Draper n'hésite pas à qualifier l'article 3 de «révolutionnaire» en ce que les parties contractantes, soit des États, reconnaissent par avance une personnalité légale limitée à de futurs groupes d'insurgés opposés dans un conflit armé au gouvernement *de jure*. *Op.cit.* (note 95), p. 102. Voir aussi Siordet, *op. cit.* (note 101), p. 105.

105 Gutteridge, *op. cit.* (note 95), p. 301.

bénéficié d'aucune puissance protectrice pour défendre leurs intérêts durant la Seconde Guerre mondiale. Pour fonctionner, ce système implique, en effet, l'existence de gouvernements reconnus. Or, le refus de l'Allemagne de reconnaître l'existence de nombreux gouvernements en exil, tout comme, d'ailleurs, l'absence de tout gouvernement allemand après la capitulation, avaient privé de puissance protectrice un grand nombre de victimes. Le CICR considérait donc comme particulièrement important d'étendre à toutes les Conventions le contrôle exercé par les puissances protectrices et de prévoir une procédure de remplacement en cas de défaillance, afin que les victimes ne restent pas sans protection.

Le concours des puissances protectrices dans le contrôle de l'application du droit est désormais prévu dans les quatre Conventions (art. 8/8/8/9)[106]. Les nouveaux textes stipulent que, si des personnes protégées ne bénéficient pas ou plus de l'activité d'une puissance protectrice, la puissance détentrice aura l'obligation de demander soit à un État neutre, soit à un organisme présentant toute garantie d'impartialité, d'assumer les fonctions dévolues aux puissances protectrices. Si une protection ne peut ainsi être assurée, la puissance détentrice devra demander à un organisme humanitaire tel que le CICR d'assumer les tâches humanitaires attribuées aux puissances protectrices ou devra accepter les offres de service émanant d'un tel organisme (art. 10/10/10/11). En multipliant les organes habilités à fonctionner en cette qualité, on partait de l'idée que les États seraient d'autant plus disposés à accepter l'activité d'un substitut de la puissance protectrice[107].

Quant à la répression des infractions, les événements de la Seconde Guerre mondiale avaient conduit le CICR à la conviction que les nouvelles Conventions devaient inclure un chapitre réservé à cette question.

La Convention «blessés et malades» de 1929 contenait une disposition stipulant que les parties contractantes «prendront ou

106 Les numéros d'articles sont donnés dans l'ordre des Ire, IIe, IIIe et IVe Conventions.

107 Cette hypothèse devait cependant être démentie par la suite, le système des puissances protectrices et de leurs substituts n'ayant que très rarement fonctionné. Cette question sera reprise lors de l'élaboration du Protocole additionnel I de 1977 aux Conventions de Genève de 1949. Voir à ce sujet Bugnion, *op. cit.* (note 2), pp. 1041-1060.

proposeront également à leurs législatures (...) les mesures nécessaires pour réprimer, en temps de guerre, tout acte contraire aux dispositions de la présente Convention» (art. 29). Mais cette formule était restée inopérante, la plupart des États ayant insuffisamment légiféré en la matière. En outre, une telle disposition ne figurait pas dans la Convention «prisonniers de guerre» de 1929, laquelle avait été violée à maintes reprises au cours du récent conflit mondial.

On a vu que, donnant suite à la résolution XXIII de la XVIIe Conférence internationale, le CICR avait convoqué à Genève, en décembre 1948, quelques experts internationaux pour approfondir la question. Il en était résulté le projet de quatre nouveaux articles, à incorporer dans chacune des Conventions[108].

À la Conférence diplomatique, la délégation des États-Unis, appuyée par plusieurs autres, s'oppose à l'adoption des dernières propositions du CICR comme base de travail. Celles-ci n'étant parvenues dans les capitales que peu de temps avant l'ouverture de la Conférence, ces délégations invoquent l'absence d'instructions de la part de leur gouvernement à ce sujet. La délégation des Pays-Bas reprend alors ces propositions à son compte et la Conférence diplomatique s'en trouve officiellement saisie[109].

De longues délibérations aboutissent à l'adoption d'un article commun aux quatre Conventions de 1949 (art. 49/50/129/146) qui renforce l'obligation des États signataires d'incorporer à leurs lois nationales les dispositions desdites Conventions. Il stipule ainsi que les États parties devront «prendre toute mesure législative nécessaire pour fixer les sanctions pénales adéquates à appliquer aux personnes ayant commis, ou donné l'ordre de commettre» des infractions graves aux Conventions, lesquelles infractions sont définies. «Chaque Partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis, ou d'avoir ordonné de commettre, l'une ou l'autre de ces infractions graves, et elle devra les déférer à ses propres tribunaux, quelle que soit leur nationalité.» Elle pourra aussi «selon les conditions

108 Ces quatre articles sont présentés aux pp. 18-23 de la brochure *Remarques et Propositions du Comité international de la Croix-Rouge*, élaborée à l'intention de la Conférence diplomatique.

109 Procès-verbaux des séances du 05.05 et 23.06.1949 du Conseil de Présidence, ACICR.

prévues par sa propre législation» les remettre pour jugement à une autre Partie contractante intéressée à la poursuite.

Par ailleurs, des garanties de procédure sont réservées en faveur des inculpés.

Le projet du CICR contenait des innovations qui allaient plus loin, qualifiant les violations graves de «crimes contre le droit des gens» et envisageant le renvoi de la cause devant une juridiction internationale, qui restait à créer, et dont les Parties contractantes auraient reconnu la compétence[110]. Mais plusieurs délégations s'y étaient opposées, estimant qu'il n'appartenait pas à la Conférence diplomatique d'élaborer des règles de droit pénal international ni d'interférer dans les travaux confiés à la Commission du droit international des Nations Unies dans ce domaine[111].

Le nouveau système mis en place, prévoyant l'universalité de la juridiction pour les infractions graves, n'en constitue pas moins alors un réel progrès, même s'il laisse aux juridictions nationales le soin de sanctionner lesdites infractions et si l'extradition des inculpés peut être limitée par les lois internes du pays qui les détient. Mais au cas où cette extradition n'aurait pas lieu, l'État qui détient l'inculpé a l'obligation de le déférer à ses propres tribunaux[112].

110 Relevons que la première proposition sérieuse de créer une cour criminelle internationale permanente est due à Gustave Moynier, l'un des fondateurs du CICR et son président de 1864 à 1910. Christophe Keith Hall, «Première proposition de création d'une cour criminelle internationale permanente», *RICR*, n° 829, mars 1998, pp. 59-78. Le Statut de la Cour pénale internationale a été adopté le 17 juillet 1998 par la Conférence diplomatique de Rome. Le CICR y a participé activement en proposant une liste de crimes de guerre en trois parties — soit les infractions graves aux quatre Conventions de Genève, d'autres violations graves du droit international humanitaire et des violations graves commises dans les conflits armés non internationaux — qu'il considérait comme devoir relever de la compétence de la Cour. La Conférence a tenu compte de ces propositions, tout particulièrement de l'inclusion de crimes de guerre commis dans les conflits internes. — Pour une première évaluation du Statut de la Cour voir Marie-Claude Roberge, «La nouvelle Cour pénale internationale: évaluation préliminaire», *RICR*, n° 832, décembre 1998, pp. 725-739.

111 D'où l'utilisation du terme «infractions graves» et non «crimes de guerre» dans les Conventions de 1949. Voir Gutteridge, *op. cit.* (note 95), p. 304 et suiv. *Actes 1949*, II B, 10e et 11e séance de la Commission mixte, pp. 31-32; 29e séance du Comité spécial de la Commission mixte, p. 81; Quatrième Rapport du Comité spécial à la Commission mixte, pp. 109-113; Rapport de la Commission mixte à l'Assemblée plénière, p. 127.

112 *Commentaire*, vol. III, pp. 657-658. Draper, *op. cit.* (note 95), p. 22. — Il est très regrettable de constater que, dans la pratique, l'obligation de poursuivre les personnes soupçonnées d'infractions graves n'a été suivie que de peu d'effets.

2. Les première et deuxième Conventions (blessés, malades et naufragés)

La Convention de 1864, devenue la *première Convention* de 1949, consacre le grand principe selon lequel les militaires blessés et malades doivent être respectés et soignés sans distinction de nationalité. À cet effet, les ambulances et les hôpitaux militaires, de même que le personnel sanitaire, sont également protégés. L'emblème distinctif de la croix rouge sur fond blanc est le signe visible de cette immunité.

Déjà révisée en 1906 et 1929, la Convention connaît sa troisième révision en 1949. Il ne s'agit pas d'une refonte. À part l'inclusion des dispositions communes aux quatre Conventions, elle maintient les règles de base en les précisant et en les adaptant à l'évolution de la guerre.

Le principal changement concerne le personnel sanitaire, qui bénéficiait d'un statut particulièrement favorable. C'est ainsi que, selon la Convention de 1929, les membres de ce personnel, de même que ceux du personnel religieux, qui tombent entre les mains de l'ennemi ne seront pas traités comme prisonniers de guerre (art. 9). Ils ne pourront être retenus en captivité, mais devront, sauf accord contraire, être renvoyés au belligérant dont ils relèvent (art. 12).

Or, la Seconde Guerre mondiale avait montré la difficulté d'appliquer ces stipulations. Le nombre élevé des prisonniers et la longueur de la captivité plaidaient en effet en faveur de la rétention d'une partie de ce personnel, afin que les prisonniers puissent être soignés et réconfortés par du personnel de leur propre pays.

Durant la Conférence d'experts, deux opinions étaient apparues. Certains étaient d'avis que tout le personnel médical capturé devait être assimilé à des prisonniers de guerre ; d'autres étaient pour le maintien de l'immunité traditionnelle, la rétention de ce personnel devant rester exceptionnelle.

En vue de mettre fin à cette controverse, un compromis, non dénué d'ambiguïté, a finalement été adopté par la Conférence diplomatique : l'article 28 de la Convention I de 1949 stipule ainsi que les membres du personnel sanitaire et les aumôniers ne seront retenus, s'ils tombent en captivité, « que dans la mesure où l'état sanitaire, les besoins spirituels et le nombre de prisonniers de guerre l'exigeront ». Ils « ne seront pas considérés comme prisonniers de guerre. Toutefois,

ils bénéficieront pour le moins de toutes les dispositions» de la IIIe Convention relative au traitement des prisonniers de guerre. D'autres avantages, destinés à faciliter l'exercice de leur mission médicale ou spirituelle, sont également prévus. Il est enfin indiqué que «les Parties au conflit s'entendront au sujet d'une relève éventuelle du personnel retenu et en fixeront les modalités».

La protection de la population civile qui se porte au secours des blessés et des malades sort, en revanche, renforcée de la révision de 1949.

La Convention de 1929 stipule que «l'autorité militaire pourra faire appel au zèle charitable des habitants pour recueillir et soigner, sous son contrôle, des blessés ou des malades des armées, en accordant aux personnes ayant répondu à cet appel une protection spéciale et certaines facilités» (art. 5). L'article correspondant (art. 18) de la Convention révisée ajoute que «l'autorité militaire doit autoriser les habitants et les sociétés de secours, même dans les régions envahies ou occupées, à recueillir et à soigner spontanément les blessés et les malades à quelque nationalité qu'ils appartiennent (...)». Cette disposition est d'importance : elle permet de ne pas laisser sans soins des militaires parachutés, par exemple, ou encore des résistants. Durant la Seconde Guerre mondiale, il avait souvent été défendu de leur porter secours sous peine de sanctions extrêmement graves.

Par ailleurs, très peu de références étaient faites à la Croix-Rouge en tant qu'organisme de secours. Les nouveaux textes comblent ces lacunes, et tant les Sociétés nationales que le CICR peuvent appuyer leur action sur des bases plus solides.

Parmi les autres innovations, mentionnons encore : la possibilité de créer, par accord entre les parties, des zones et localités sanitaires pour protéger des effets de la guerre les militaires blessés et malades, le personnel soignant et celui chargé de l'administration de ces zones (art. 23 et projet d'accord-type annexé à la Convention) ; la révision des articles relatifs à l'aviation sanitaire, tout en subordonnant la protection qui lui est accordée à des conditions plus restrictives, de façon à prévenir les abus constatés lors de la Seconde Guerre mondiale. Enfin, la Convention I précise les droits et les devoirs des pays neutres concernant, d'une part, leurs activités secourables sur le terri-

toire des belligérants, et, d'autre part, la conduite à tenir par rapport aux personnes protégées (personnel sanitaire, blessés et malades) qui viendraient à se trouver sur le territoire de ces pays.

La *deuxième Convention* de 1949, conçue dès son origine à La Haye en 1899, comme une adaptation à la guerre maritime des principes humanitaires formulés pour la guerre sur terre, procède étroitement de la première. Elle avait subi une révision en 1907, mais aucune en 1929, ce qui impliquait une véritable refonte.

Le défaut d'une signalisation moderne, visible à grande distance, paraît avoir été la cause de la plupart des attaques de navires-hôpitaux durant la Seconde Guerre mondiale[113]. L'aviation de guerre, en effet, n'existait pas en 1907. Aussi la Conférence diplomatique s'est-elle attachée à améliorer cette signalisation.

Il serait trop long d'entrer ici dans le détail de la deuxième Convention, qui a pris un développement considérable, ne comptant pas moins de 63 articles (contre 28 pour la Xe Convention de La Haye de 1907), soit autant, à un article près, que la première Convention de 1949. Pour la première fois, elle reflète la presque totalité des dispositions de la Convention terrestre, dont elle suit l'ordre des matières avec un parallélisme rigoureux.

Relevons tout de même que le principe de l'exemption de capture du personnel sanitaire y a subsisté beaucoup plus largement, ce personnel faisant partie intégrante des navires-hôpitaux.

Certains ont en effet jugé que la première Convention de 1949 accusait un recul du droit international humanitaire, vu qu'elle entérine le principe de la rétention du personnel sanitaire et que, par ailleurs, elle ne favorise pas le développement de l'aviation sanitaire[114]. D'autres estimaient que le contraire aurait été irréaliste. En fait, la Conférence diplomatique est restée dans le domaine du possible, ne voulant pas maintenir ou instaurer des règles inapplicables[115].

Bien que l'on en soit resté au statu quo, la question générale de l'unité et de la pluralité des emblèmes a néanmoins été

113 *Rapport d'activité du Comité international de la Croix-Rouge sur son activité pendant la Seconde Guerre mondiale*, *op. cit.* (note 4), vol. I, pp. 213-214.

114 Le Protocole additionnel I aux Conventions de Genève de 1949, du 8 juin 1977, consacrera la renaissance de l'aviation sanitaire immunisée, grâce à une signalisation moderne hautement technique et à l'utilisation de l'hélicoptère pour l'évacuation des blessés.

115 *Commentaire*, vol. I, p. 16.

débattue par la Conférence diplomatique, à l'occasion de l'examen des projets d'articles des première et deuxième Conventions sur le signe distinctif.

La règle de l'unité du signe, posée par la Convention de 1864 et réaffirmée en 1906, avait été officiellement rompue par la Conférence diplomatique de 1929[116], qui avait admis le croissant rouge ou le lion-et-soleil rouge sur fond blanc comme signe distinctif, à la place de la croix rouge, pour les pays qui les employaient déjà (art. 19 de la Convention «blessés et malades» de 1929).

L'éventualité d'un retour à l'unité du signe de la croix rouge, considérée comme garante d'une meilleure protection, avait été évoquée lors des réunions préparatoires. Faute d'un accord à ce sujet, le texte de l'article 19 n'avait toutefois pas été modifié dans les projets approuvés par la XVIIe Conférence.

Lors de la Conférence diplomatique de 1949[117], la délégation de l'État d'Israël, indépendant depuis peu, relance le débat par le dépôt d'un amendement proposant la reconnaissance d'un nouveau signe d'exception, le bouclier-de-David rouge. Ce signe est utilisé comme signe distinctif des services de santé des forces armées et de la Société nationale israéliennes[118]. Le représentant israélien se déclare toutefois prêt à renoncer à sa requête au cas où les exceptions déjà admises viendraient à disparaître.

D'autres signes, considérés comme neutres et dénués de toute connotation religieuse par leurs protagonistes, sont proposés, en particulier par le représentant des Pays-Bas[119], ainsi que diverses solu-

116 En fait, dès 1876, la Turquie, alors engagée dans la guerre d'Orient, avait notifié au Conseil fédéral suisse que son service sanitaire arborerait à l'avenir un croissant rouge et non pas la croix rouge, parce que «la nature de ce signe blessait les susceptibilités du soldat musulman». Par la suite, la Perse revendiqua la reconnaissance du lion-et-soleil rouge.

117 Pour plus de détails, voir *Actes 1949*, II A, pp. 87-90 et 145-146, et II B, pp. 215-224, 248-255 et 391. Voir également François Bugnion, *L'Emblème de la Croix-Rouge, Aperçu historique*, CICR, Genève, 1977, pp. 39-54.

118 Cet amendement se lit comme suit: «Toutefois pour les pays qui emploient déjà à la place de la croix rouge, le croissant rouge ou le lion et le soleil rouge sur fond blanc comme signe distinctif ou qui ont en usage le bouclier de David rouge sur fond blanc, ces emblèmes sont également admis dans le sens de la présente Convention», *Actes 1949*, III, annexe 42, p. 40).

119 Qui suggère de remplacer la croix par un cœur rouge, cœur stylisé en forme de triangle, dont la pointe serait tournée vers le bas.

tions alternatives, notamment par le CICR[120] et par la délégation de l'Inde, appuyée par celle de Birmanie[121]. Le CICR s'attache à souligner que le signe de la croix rouge est un signe que l'on a voulu international, neutre et sans signification religieuse, puisque le principe de la Croix-Rouge est d'aider celui qui souffre, indépendamment des frontières et des confessions[122].

Dans une déclaration générale faite en Assemblée plénière, le président du CICR, Paul Ruegger, adresse une mise en garde contre le danger de la prolifération des emblèmes: «L'adoption par la présente Conférence de nouveaux signes préparera la voie à d'autres exceptions dans l'avenir. Or, l'affaiblissement progressif du signe de l'aide aux victimes de la guerre serait un véritable désastre, puisque l'enjeu est ici la protection des vies humaines.» Il relève en outre «les avantages — si un retour sur le passé pouvait être envisagé — d'un signe unique de la Croix-Rouge» et va jusqu'à déconseiller l'adoption d'un signe d'exception géométrique. Il émet la crainte qu'une multiplication des signes entraîne non seulement un affaiblissement de la valeur universelle de l'emblème, mais également celle du mot «Croix-Rouge»[123].

La délégation suisse invoque, quant à elle, l'argument de l'efficacité du signe de la croix rouge: «Le signe le meilleur sera celui qui a la valeur de protection la plus grande (...) Est-il dans l'intérêt [des victimes] qu'on abandonne l'emblème de la croix rouge ou qu'on l'affaiblisse en lui enlevant, toujours davantage, son caractère de signe

120 *Remarques et propositions*, pp. 15-17. et *Actes 1949*, II A, p. 88.

121 Le projet de résolution de l'Inde recommande aux parties contractantes de créer un organisme chargé d'examiner la question de la croix rouge et des autres emblèmes déjà utilisés, ou dont l'utilisation est proposée, et d'étudier la possibilité de créer un signe géométrique nouveau, sans signification religieuse, culturelle ou autre. *Actes 1949*, II B, p. 223.

122 Sur la position du CICR à cette époque, voir Jean S. Pictet, «Le signe de la croix rouge», *RICR*, n° 363, mars 1949, pp. 167-201.

123 *Actes 1949*, II B, compte rendu de la 9e séance plénière, pp. 215-217. La déclaration du président du CICR est également reproduite dans *RICR*, n° 368, août 1949, pp. 627-630. — Depuis lors, la position du CICR a évolué. Il est d'avis que la solution d'un troisième emblème nouveau, aux côtés de la croix rouge et du croissant rouge (l'Iran ayant abandonné le lion-et-soleil-rouge), présente des avantages importants et mérite un examen approfondi. Voir Cornelio Sommaruga, «Unité et pluralité des emblèmes», *RICR*, n° 796, juillet-août 1992, pp. 347-352. Cette question est à nouveau à l'étude au sein du Mouvement international de la Croix-Rouge et du Croissant-Rouge depuis 1995.

unique et universel? (...) les avantages que représente pour tous le maintien d'un signe universellement connu, sans autres exceptions que celles admises jusqu'ici, dépassent pour chaque État ceux qu'il pourrait tirer de l'admission d'un nouvel emblème »[124].

C'est cette opinion qui prévaut en fin de compte. La requête israélienne est écartée — une première fois en Commission I, puis à deux reprises en Assemblée plénière —, de même que la proposition de la délégation de l'Inde, qui avait notamment pour objet l'examen d'un signe géométrique nouveau. Devant la réticence manifestée par certains pays à utiliser la croix rouge, mais espérant néanmoins qu'un jour une solution pourrait être trouvée qui rétablirait l'unité du signe, la Conférence diplomatique confirme donc l'usage établi. De peur de créer un nouveau précédent et de rendre plus difficile encore cette unité, elle n'admet pas de nouveaux symboles.

En signant, le 8 décembre 1949, les quatre Conventions, la délégation d'Israël fera au sujet des Conventions I, II et IV la réserve que, tout en respectant l'inviolabilité des emblèmes et signes distinctifs prévus, Israël se servira du bouclier-de-David rouge[125].

3. La troisième Convention (traitement des prisonniers de guerre)

Dans les conflits où elle était applicable[126], la Convention « prisonniers de guerre » de 1929 avait offert une protection efficace à des millions de captifs durant la Seconde Guerre mondiale. Cepen-

124 *Actes 1949*, II B, pp. 221-222.

125 *Actes 1949*, I, p. 342. De ce fait, le CICR ne pourra pas reconnaître formellement la Société israélienne du Bouclier-de-David-Rouge (*Magen David Adom*), puisqu'elle ne remplit pas l'une des conditions de reconnaissance des nouvelles Sociétés nationales: pour être reconnue, la société postulante doit en effet « faire usage du nom et de l'emblème de la croix rouge ou du croissant rouge conformément aux Conventions de Genève ». Le statu quo confirmé par la Conférence diplomatique de 1949 présentait donc de sérieux inconvénients, portant atteinte au principe de l'unité et de l'universalité de la Croix-Rouge. Ce point est développé dans François Bugnion, « L'emblème de la croix rouge et celui du croissant rouge », *RICR*, n° 779, septembre-octobre 1989, pp. 424-435.

126 Rappelons que, faute de ratification, ni l'URSS ni le Japon n'étaient parties à la Convention de 1929 relative au traitement des prisonniers de guerre. De ce fait, et en dépit des démarches tentées par le CICR pour y remédier, celle-ci n'avait pas été appliquée dans les conflits de l'Est européen (hostilités entre la Pologne et l'URSS en septembre 1939, guerre soviéto-finlandaise en 1939- 1940, et hostilités entre les Puissances de l'Axe et l'URSS de 1941-1945) ; elle n'avait été que très partiellement appliquée dans le conflit d'Extrême-Orient.

dant, les bénéficiaires comme les responsables de son application étaient d'avis qu'il y avait lieu de la réviser sur certains points.

L'un des principaux concernait la définition des catégories de personnes pouvant bénéficier de la Convention, qu'il convenait de préciser, afin de lever les doutes qui s'étaient fait jour à ce sujet.

La Convention de 1929 désignait les personnes protégées par simple référence aux trois premiers articles, traitant de la qualité de belligérant, du Règlement annexé à la IVe Convention de La Haye de 1907. Celle de 1949 va au-delà, en définissant elle-même, à son article 4, les bénéficiaires de ses dispositions.

Parmi ceux-ci les «partisans»[127], auxquels la qualité de belligérant avait souvent été déniée pendant la guerre. La question est réglée par l'assimilation des mouvements de résistance aux milices et corps de volontaires ne faisant pas partie des forces armées d'une partie au conflit, pour autant que ces mouvements remplissent les quatre conditions énumérées à l'article 1 du Règlement de La Haye, soit: d'avoir à leur tête une personne responsable pour ses subordonnés, d'arborer un insigne visible, de porter ouvertement les armes et de se conformer aux lois de la guerre[128]. Il est également admis que ces mouvements peuvent agir en territoire occupé, ce qui constitue une innovation.

Les nouvelles catégories suivantes sont également incluses, à la suite des expériences de la guerre: les membres des forces armées qui se réclament d'un gouvernement ou d'une autorité non reconnus par la puissance détentrice; les membres des équipages de la marine marchande et de l'aviation civile tombés au pouvoir de l'ennemi; les militaires démobilisés se trouvant dans un territoire occupé et qui sont arrêtés par la puissance occupante en raison de leur appartenance à l'armée du pays occupé, notamment après une tentative manquée pour rejoindre les forces armées auxquelles ils appartiennent.

127 Par exemple, les combattants français, partisans du Général de Gaulle, les partisans du Mouvement de la résistance italienne après l'armistice Badoglio en septembre 1943 ou les partisans polonais, slovaques et yougoslaves (cf. *Rapport du Comité international de la Croix-Rouge sur son activité pendant la Seconde Guerre mondiale*, vol. I, pp. 538-558).

128 Jugées très restrictives (voir Draper, *op.cit.* (note 95), pp. 39-40), ces conditions seront assouplies lors de l'adoption du Protocole I du 8 juin 1977, additionel aux Conventions de Genève de 1949.

La Convention de 1929 ne comprenait aucune disposition sur la responsabilité en cas de transfert des prisonniers de guerre d'une puissance à une autre. Il est désormais précisé que la puissance détentrice ne peut pas transférer les prisonniers à une puissance non partie à la Convention. Elle doit s'assurer auparavant que la puissance en question est désireuse et à même d'appliquer la Convention. Au cas où cette dernière manquerait à ses obligations, la puissance ayant transféré les prisonniers de guerre doit prendre les mesures adéquates pour remédier à la situation, ou demander que les prisonniers de guerre lui soient renvoyés (art. 12).

Autre modification importante : celle concernant la libération et le rapatriement des prisonniers de guerre à la fin des hostilités. La Convention de 1929 prévoyait que le rapatriement aurait lieu, si possible, dès l'armistice, et dans tous les cas le plus rapidement possible après la conclusion de la paix (art. 75). Or, la Seconde Guerre mondiale devait se terminer, pour certaines Puissances, sans armistice ni traité de paix, et de très nombreux prisonniers de guerre avaient vu leur captivité prolongée[129]. Aussi l'article 118 de la Convention de 1949 pose-t-il le principe que « les prisonniers de guerre seront libérés et rapatriés sans délai après la fin des hostilités actives ». À défaut d'une convention d'armistice, ajoute-t-il, « chacune des Puissances détentrices établira elle-même et exécutera sans délai un plan de rapatriement ». On voit que cet article revêt un caractère unilatéral, destiné à éviter que les opérations de rapatriement ne soient retardées faute d'un accord entre les parties. Lors de la Conférence d'experts gouvernementaux, le CICR avait vainement attiré l'attention, d'une part, sur le cas des prisonniers de guerre rapatriés contre leur gré, et d'autre part, sur celui des prisonniers qui demandaient à être transférés dans un autre pays que leur pays d'origine. Soulevée à nouveau lors de la Conférence diplomatique par la délégation autrichienne, cette question a finalement été éludée[130].

129 *Rapport d'activité du Comité international de la Croix-Rouge sur son activité pendant la Seconde Guerre mondiale*, vol. I, pp. 409-417.

130 *Commentaire*, vol. III, pp. 570-579. — Depuis lors, tenant compte de l'évolution des conflits et de celle du droit international allant dans le sens d'un renforcement des intérêts essentiels de l'individu, le CICR a adopté, dans le cadre de sa propre action et de sa propre doctrine, une position selon laquelle il refuse de s'associer à tout rapatriement forcé.

De manière générale, les divers aspects du régime de captivité des prisonniers de guerre sont réglés avec davantage de précision (lieux d'internement, camps et sécurité; logement et alimentation; hygiène et soins médicaux; religion, activités intellectuelles et physiques; discipline; travail; ressources financières; relations avec l'extérieur; rapports des prisonniers de guerre avec les autorités; sanctions pénales et disciplinaires).

En ce qui concerne les sanctions pénales, une règle entièrement nouvelle est introduite à l'article 85 de la nouvelle Convention, selon laquelle «les prisonniers de guerre poursuivis en vertu de la législation de la puissance détentrice pour des actes qu'ils ont commis avant d'avoir été faits prisonniers resteront, même s'ils sont condamnés, au bénéfice de la présente Convention». Cette règle provoque force controverse lors de la Conférence diplomatique, l'URSS et ses alliés souhaitant que les criminels de guerre condamnés soient exclus du bénéfice de la Convention et connaissent le sort que la Puissance détentrice réserve aux criminels de droit commun. L'opinion prévaut toutefois que même les prisonniers de guerre condamnés pour crimes de guerre doivent pouvoir se réclamer des garanties de la Convention, qui correspondent d'ailleurs au régime pénitentiaire minimum des nations civilisées. Il est également tenu compte que le droit interne des États admet parfaitement que celui qui viole le droit reste, sans préjudice de son châtiment, au bénéfice de ce droit[131].

4. La quatrième Convention (protection des civils)

Avec ses 159 articles, la nouvelle Convention relative à la protection des civils est encore plus longue que celle sur les prisonniers de guerre, qui en compte 143. Elle comporte deux parties principales distinctes.

La première concerne la protection générale des populations contre certains effets de la guerre. Elle s'applique à l'ensemble des populations des pays en conflit, c'est-à-dire non seulement aux étrangers sur le territoire d'un belligérant, mais également aux ressortissants

131 *Actes 1949*, II A, p. 557. Cependant, l'URSS et ses alliés feront à ce propos une réserve lorsqu'ils signeront la Convention. Voir *Actes 1949*, I, p. 350, et Claude Pilloud, «Les réserves aux Conventions de Genève de 1949», *RICR*, n° 464, août 1957, pp. 427-432.

nationaux et aux populations des territoires occupés, dans des domaines précis tels que la création de zones de refuge, la protection des blessés et des malades, ainsi que des hôpitaux et de leur personnel, les envois de médicaments, les mesures spéciales en faveur de l'enfance et les familles dispersées.

À l'instar de la première, la quatrième Convention prévoit ainsi la création de zones sanitaires et de sécurité (art.14) — destinées à mettre à l'abri des attaques terrestres ou aériennes les blessés et les malades, les personnes âgées, les enfants, les femmes enceintes et les mères d'enfants en bas âge — et, dans les régions mêmes où ont lieu les combats, de zones neutralisées (art. 15), pour abriter les blessés et malades, combattants ou non, et les personnes civiles qui ne participent pas aux hostilités. La création de ces zones n'est toutefois pas obligatoire. Il s'agit d'une simple faculté, soumise à l'accord des parties au conflit, lesquelles peuvent s'inspirer à cet effet, pour ce qui est des zones sanitaires et de sécurité, du projet d'accord-type annexé à la Convention.

En outre, les stipulations les plus importantes de la première Convention sont étendues aux blessés et malades civils. Les hôpitaux civils, reconnus comme tels par l'État, sont protégés et ont le droit d'être signalés par l'emblème distinctif (art. 18). Le personnel de ces hôpitaux est également protégé et a droit au port du brassard (art. 20).

Afin d'atténuer les rigueurs du blocus, les États parties doivent accorder, sous certaines conditions, le libre passage des envois de médicaments et de matériel sanitaire destinés à la population civile (art. 23). Des mesures spéciales sont prévues en faveur des enfants et des orphelins (art. 24). Enfin, le droit de donner et de recevoir des nouvelles familiales est spécifié, alors que les recherches en vue de réunir les familles dispersées doivent être facilitées (art. 25 et 26).

La deuxième partie constitue le corps essentiel de la Convention, qui devait régler deux types de situations : celle des étrangers sur le territoire d'un belligérant et celle de la population dans un territoire occupé. Mais certains principes régissent ces deux types de situations. D'où une division en trois sections — dispositions communes, dispositions relatives aux étrangers sur le territoire d'une partie au conflit, dispositions concernant les territoires occupés —

auxquelles s'en ajoutent deux autres, relatives au traitement des internés et à l'Agence centrale de renseignements.

Les dispositions communes stipulent que «les personnes protégées ont droit, en toutes circonstances, au respect de leur personne, de leur honneur, de leurs droits familiaux, de leurs convictions et pratiques religieuses, de leurs habitudes et de leurs coutumes. Elles seront traitées, en tout temps, avec humanité (...) sans aucune distinction défavorable, notamment de race, de religion ou d'opinions politiques» (art. 27). Cet article réserve, cependant, dans son paragraphe final, les mesures de contrôle et de sécurité exigées par la guerre. Mais cette réserve ne rétablit pas l'arbitraire gouvernemental et elle laisse subsister les prohibitions générales imposées par les principes humanitaires de la Convention[132]. C'est ainsi que sont expressément mentionnées les interdictions strictes de la contrainte (art. 31), de «toute mesure de nature à causer soit des souffrances physiques, soit l'extermination des personnes protégées», de la torture et des expériences pseudo-médicales (art. 32), des peines collectives, du pillage et des représailles (art. 33), de la prise d'otages (art. 34) .

En ce qui concerne les étrangers sur le territoire d'une partie au conflit, objet de la deuxième section, le droit de quitter le territoire au début ou en cours de conflit leur est reconnu, sous réserve des intérêts nationaux de l'État. Il devra être statué sur la demande selon une procédure régulière et la personne qui s'est vu opposer un refus a le droit d'obtenir qu'il soit reconsidéré par un collège ou un tribunal spécialement créé à cet effet (art. 35). L'internement ou la mise en résidence forcée des personnes protégées ne pourra être ordonné que si la sécurité de la puissance au pouvoir de laquelle elles se trouvent le rend absolument nécessaire (art. 42) ; dans ce cas également, la personne protégée a le droit d'obtenir qu'un collège ou un tribunal spécial statue sur la décision prise à son égard (art. 43).

La troisième section concerne la population des territoires occupés. Elle comble les lacunes du Règlement annexé à la IVe Convention de La Haye qui avaient particulièrement été mises en évidence à la suite de l'occupation allemande dans plusieurs pays euro-

132 *Actes 1949*, Rapport de la Commission III à l'Assemblée plénière, II A, p. 805.

péens au cours de la Seconde Guerre mondiale. Pour l'essentiel, relevons que les déportations hors du territoire occupé sont strictement interdites. Les déplacements de population à l'intérieur du territoire occupé ne sont autorisés qu'à titre temporaire, pour des raisons de sécurité ou si d'impérieuses raisons militaires l'exigent. Le transfert par la puissance occupante d'une partie de sa propre population dans le territoire occupé, autrement dit les implantations de population, est prohibé (art. 49). Les destructions de biens mobiliers ou immobiliers sont également proscrites (art. 53). Cette section définit encore les droits et les devoirs de la puissance occupante dans les domaines suivants : travail (les personnes protégées ne peuvent être astreintes à servir dans les forces armées ni à aucun travail qui les obligerait à prendre part aux opérations militaires), ravitaillement, santé publique, législation pénale (la législation pénale du territoire occupé restera en vigueur sauf si elle constitue une menace pour la sécurité de la puissance occupante), procédure pénale. Sur ce dernier point, aucune condamnation ne pourra être prononcée sans avoir été précédée d'un procès régulier (art. 71) ; la peine de mort ne pourra être prononcée que dans les cas graves et seulement si ceux-ci sont passibles de la peine de mort aux termes de la législation en vigueur dans le territoire occupé, avant l'occupation (art. 68) ; aucune condamnation à mort ne sera exécutée avant l'expiration d'un délai d'au moins six mois (art.75). Enfin, la puissance occupante ne pourra procéder à la mise en résidence forcée ou à l'internement des personnes protégées que pour d'impérieuses raisons de sécurité et selon une procédure régulière (art.78).

La quatrième section comprend un ensemble de règles (art. 79 à 135), élaborées sur le modèle de celles applicables aux prisonniers de guerre, relatives au traitement de tous les civils protégés internés, quelles que soient les raisons de leur internement.

La cinquième et dernière section prévoit la création, pour les civils, d'une Agence centrale de renseignements qui pourra être organisée par le CICR et être la même que celle pour les prisonniers de guerre.

Contrairement à ce que le CICR pensait, il n'y eut pas de discussion sur le principe même de la Convention « civils » lors de la Conférence diplomatique. La Commission III fut au contraire sub-

mergée par les projets d'amendements provoquant une véritable surenchère humanitaire. Mais, dans le même temps, une autre tendance visait à édulcorer les obligations des États et à remplacer les impératifs par des formules plus souples[133].

Comparé au projet de Stockholm, le texte de la IVe Convention contient, il est vrai, davantage de restrictions. Il résulte d'un équilibre qui était particulièrement difficile à trouver entre, d'une part, les pays qui avaient été occupés pendant la Seconde Guerre mondiale et qui avaient de la peine à considérer les problèmes d'un autre point de vue que celui des victimes; et d'autre part, les pays qui, sans avoir souffert de l'occupation, occupaient eux-mêmes des territoires à l'issue de la guerre et souhaitaient préserver les intérêts légitimes de la puissance occupante[134]. Il n'en constitue pas moins un important progrès dans le droit international humanitaire.

Par ailleurs, rappelons qu'en marge du débat sur la Convention «civils», la délégation soviétique avait saisi la Conférence diplomatique d'un projet de résolution condamnant l'emploi des armes de destruction massive, en particulier l'arme atomique.

Il se lisait comme suit:

> «La Conférence décide que: (...)
>
> «c) Le devoir des gouvernements de tous les pays est d'obtenir la signature immédiate d'une Convention concernant la prohibition de l'arme atomique en tant que moyen d'extermination en masse de la population.»[135]

Dans son exposé des motifs, le chef de la délégation soviétique relevait: «L'examen du Projet de Convention pour la protection des personnes civiles en temps de guerre touche à sa fin. (...) Son défaut essentiel réside dans le fait qu'il ne contient pas de garanties suffisantes pour la protection de la population civile contre les effets les plus redoutables de la guerre moderne. (...) Il est évident qu'une Conférence qui s'est réunie dans le but d'élaborer le texte de quatre Conventions pour la protection des victimes de la guerre ne peut pas passer cette question sous silence (...)»[136]

133 Procès-verbal de la séance du Conseil de Présidence du 19 mai 1949, ACICR.

134 Gutteridge, *op. cit.* (note 95), p. 326.

135 *Actes 1949*, III, annexe 396, p. 183.

136 *Actes 1949*, II A, p. 745.

Mais la recevabilité de la proposition avait été formellement contestée par une lettre adressée au président de la Conférence par les chefs de délégation de quinze pays[137]. Ceux-ci estimaient qu'une telle résolution était hors de la compétence de la Conférence diplomatique, pour les raisons suivantes:

1) Les invitations adressées par le gouvernement suisse et les documents fournis à l'appui indiquaient clairement que le but de la Conférence était de préparer de nouvelles Conventions destinées à la protection des victimes de la guerre sur la base des quatre projets approuvés par la XVIIe Conférence internationale de la Croix-Rouge. À aucun moment le gouvernement suisse n'avait indiqué comme objet de la Conférence la question de savoir quelles armes seraient autorisées, et les quatre projets mentionnés ci-dessus concernaient les victimes de la guerre, non les armes de guerre.

2) La plus haute instance internationale existante, à savoir l'Organisation des Nations Unies, s'était saisie de cette question[138].

La délégation soviétique avait vainement fait valoir que sa proposition ne visait pas à faire interdire par la Conférence l'emploi des armes de destruction massive ni à lui demander de prescrire aux gouvernements la conclusion immédiate d'une Convention à cet effet, mais qu'elle ne suggérait qu'une simple déclaration aux fins de recommandation. La résolution présentée, poursuivait-elle, ne présentait en outre aucune disposition mettant en cause la compétence de l'ONU. Enfin, elle s'inscrivait dans la suite de la résolution XXIV de la XVIIe Conférence internationale de la Croix-Rouge concernant les armes aveugles[139].

Après avoir entendu les arguments des tenants et des adversaires, l'Assemblée plénière avait été appelée à se prononcer, préalablement, sur la recevabilité de la proposition et l'avait rejetée.

137 Australie, Brésil, Canada, Chili, Chine, Colombie, Cuba, États-Unis, France, Italie, Nouvelle-Zélande, Pakistan, Royaume-Uni, Uruguay et Venezuela. *Actes de 1949*, III, annexe 395, pp. 182-183.

138 En 1946, à la Commission de l'énergie atomique de l'ONU, l'URSS avait repoussé le plan du délégué américain Baruch, qui proposait la création d'un organisme international chargé de contrôler la production et les applications de l'énergie atomique. Les Soviétiques, alors en retard sur les Américains, préconisaient l'interdiction de l'usage de l'énergie atomique à des fins militaires et la destruction des bombes existantes.

139 *Dix-Septième Conférence internationale de la Croix-Rouge tenue à Stockholm du 20 au 30 août 1948, Compte rendu*, Croix-Rouge suédoise, Stockholm, p. 97.

Bien que non signataire de la lettre en contestant la recevabilité, la délégation suisse avait voté contre la proposition soviétique. Elle s'en était expliquée par le fait qu'au cours des travaux préparatoires de la Conférence diplomatique, et pour en augmenter les chances de succès, le gouvernement suisse avait été amené à donner à plusieurs gouvernements invités « l'assurance que la Conférence traiterait exclusivement de la révision des trois Conventions de 1907 et de 1929 et de l'élaboration de la nouvelle Convention pour la protection des personnes civiles en temps de guerre et ne quitterait pas le domaine humanitaire pour aborder les questions ayant un aspect politique »[140].

Le CICR n'était pas intervenu dans ce débat, hautement politisé dans le contexte de guerre froide et de course aux armements qui prévalait alors. L'artifice de procédure utilisé pour éluder le débat de fond lui avait toutefois « laissé une impression assez pénible »[141].

5. Le CICR et les nouvelles Conventions de 1949

Jusqu'en 1929, le CICR ne disposait d'aucune base dans le droit international positif sur laquelle appuyer son action : il n'était mentionné ni dans les Conventions de Genève de 1864 et 1906, ni dans celles de La Haye. Il le sera pour la première fois dans la Convention de 1929 relative au traitement des prisonniers de guerre, qui lui octroie le droit de proposer aux Puissances la création d'une Agence centrale de renseignements sur les prisonniers de guerre (art. 79), et, surtout, lui reconnaît ce que le CICR appelle son droit d'initiative. L'article 88 stipule en effet que les dispositions de la Convention « ne font pas obstacle à l'action humanitaire que le Comité international de la Croix-Rouge pourra déployer pour la protection des prisonniers de guerre, moyennant l'agrément des belligérants intéressés ».

140 *Actes 1949*, compte rendu de la 34e séance plénière, II B, pp. 496-511.

141 Procès-verbaux de la séance du 07.07.1949 du Conseil de Présidence et de la séance de travail du Comité du 11.08.1949, ACICR. — En avril 1950, le CICR adressera aux gouvernements signataires des Conventions un appel les enjoignant à « tout mettre en œuvre pour aboutir à une entente sur la prohibition de l'arme atomique et, d'une manière générale, des armes aveugles ». Voir *Appel du Comité international de la Croix-Rouge du 5 avril 1950 concernant les armes atomiques et les armes aveugles. Réponses des gouvernements*, CICR, Genève, 1952.

C'est sur cette base que le CICR avait exercé la plus grande partie de ses activités pendant la Seconde Guerre mondiale, tirant profit de la liberté d'action qui lui était ainsi impartie pour offrir ses services dans des cas non expressément réglés par les Conventions, voire dans des situations où elles n'étaient pas applicables ou pas considérées comme telles[142].

Fort de cette expérience et conscient de l'impossibilité de prévoir toutes les particularités des guerre futures, le CICR attachait une importance primordiale au maintien de son droit d'initiative, garant de son indépendance et d'une souplesse d'action suffisante pour secourir les victimes même dans les situations non prévues par le droit. Si une seule mention de l'institution devait subsister dans les nouvelles Conventions, estimait-il, c'était celle-là, et tout devait être fait pour la maintenir[143].

Sans que cela prête à discussion, la Conférence diplomatique de 1949 réaffirme le droit d'initiative du CICR et l'étend aux quatre Conventions de 1949 (art. 9/9/9/10). Bien plus, ce droit lui est même reconnu dans les situations couvertes par l'article 3 commun, soit les conflits armés non internationaux, ce qui est particulièrement précieux dans ce type de conflit, où secourir l'ennemi est souvent perçu comme aider des criminels ou s'ingérer dans les affaires intérieures d'un État.

Les deux autres mentions de l'institution, considérées à l'époque par le CICR comme «très souhaitables» et «souhaitables» concernent, la première, les Agences centrales de renseignements et, la seconde, le rôle des délégués [144].

La Conférence diplomatique confirme les compétences du CICR en ce qui concerne l'Agence centrale de renseignements sur les prisonniers de guerre, dont le mandat est élargi et qui se voit accorder des facilités et moyens pour s'acquitter au mieux de ses tâches (art. 123 et 124 de la IIIe Convention). Ces compétences sont étendues à l'Agence centrale sur les personnes civiles, dont la création est prévue par l'article 140 de la IVe Convention.

142 Jean S. Pictet, «Le Comité international de la Croix-Rouge dans les nouvelles Conventions de Genève», *RICR*, n° 425, mai 1954, pp. 353-367 et 354.

143 Indications générales destinées aux représentants du CICR à la Conférence diplomatique de 1949, document confidentiel non signé et non daté, ACICR — CR 221. Procès-verbaux des séances du Conseil de Présidence des 5 et 12 mai 1949, ACICR.

144 *ibid.*

Quant au rôle des délégués du CICR, il est désormais codifié, ce qui n'était pas le cas auparavant, même si ceux-ci avaient accompli 11 000 visites de camps pendant la Seconde Guerre mondiale. Aux termes des articles 126 de la IIIe et 143 de la IVe Convention, qui traitent du contrôle, les délégués du CICR bénéficient en effet des mêmes prérogatives que les représentants des puissances protectrices. C'est ainsi qu'ils seront autorisés à se rendre dans tous les lieux où se trouvent des prisonniers de guerre, à s'entretenir sans témoin avec ceux-ci, en particulier avec leur homme de confiance. Toute liberté leur sera laissée quant au choix des endroits qu'ils désirent visiter; la fréquence et la durée des visites ne seront pas limitées. Il en va de même pour tous les lieux où se trouvent des personnes civiles protégées, notamment des lieux d'internement, de détention et de travail. Par ces articles, le CICR se voit conférer un véritable droit d'accès aux prisonniers de guerre et aux internés civils; aussi un État qui lui refuserait cet accès violerait-il les Conventions.

Nous citerons encore les mentions du CICR dans les domaines suivants, certaines d'entre elles ayant déjà été évoquées précédemment: transmission de secours aux prisonniers de guerre, aux internés civils et dans les territoires occupés; comme substitut possible des puissances protectrices; droit d'utiliser le signe de la croix rouge; procédure de conciliation en cas de désaccord entre les belligérants sur l'application des Conventions; organisation de zones sanitaires et de sécurité; constitution des Commissions médicales mixtes.

Au total, une soixantaine d'articles — dont presque la moitié dans la IVe Convention — mentionnent le CICR ou l'Agence centrale de renseignements. Le CICR se voit ainsi désormais fortement ancré dans le droit international.

Conclusion

L'adoption des quatre Conventions de Genève de 1949 par l'ensemble de la communauté internationale[145], à un moment où le monde est scindé en deux blocs antagonistes et où la guerre froide

145 À l'exception des États vaincus. Le Japon adhérera en 1953, la République fédérale d'Allemagne en 1954 et la République démocratique allemande en 1956.

bat son plein[146], constitue une véritable victoire et confère à ces textes une importance particulière.

Le choc moral causé par les horreurs de la Seconde Guerre mondiale n'y est certainement pas étranger. La volonté de remédier aux maux immenses dont le monde avait eu à souffrir a dominé les débats de la Conférence diplomatique et a permis de surmonter les divergences de vues.

À cet égard, les Conventions de Genève procèdent du même idéal et s'inscrivent dans la même mouvance que la Déclaration universelle des droits de l'homme, adoptée huit mois plus tôt par l'ONU, dont elles confirment, en temps de guerre, certains des droits fondamentaux[147]. Si les Conventions ont bénéficié d'un courant favorable, il appartient au CICR d'avoir su le mettre à profit, ce qui n'était pas gagné d'avance, comme en témoigne cette intervention de Jean Pictet devant la Commission juridique du CICR : « Il ne faut pas jouer perdant. Après les horreurs de la guerre, nous avons pour nous l'opinion publique. Le moment est bon pour progresser dans le domaine du droit humanitaire. Il faut donc demander le plus possible et les positions de repli, il convient de les garder très confidentielles »[148]. L'institution a été la véritable cheville ouvrière des nouvelles Conventions et la très bonne préparation de la Conférence diplomatique compte aussi pour beaucoup dans son succès.

Rapidement devenues universelles[149], les Conventions de 1949 marquent un progrès décisif dans le droit international humanitaire : elles élargissent son champ d'application — qu'il s'agisse des personnes et du personnel protégés ou des types de conflits — le déve-

146 Rappelons que le blocus de Berlin prend place de juin 1948 à mai 1949.

147 Discours de Max Petitpierre, président de la Conférence diplomatique, lors de la cérémonie officielle de signature du 8 décembre 1949, *Actes 1949*, II B, p. 541 ; Gutteridge, *op.cit.* (note 95), p. 325; de La Pradelle, *op. cit.* (note 81), p. 7. Claude Pilloud, « La déclaration universelle des droits de l'homme et les Conventions internationales protégeant les victimes de la guerre », *RICR*, n° 364, avril 1949, pp. 252-258. Voir aussi Robert Kolb, «Relations entre le droit international humanitaire et les droits de l'homme. Aperçu de l'histoire de la Déclaration universelle des droits de l'homme et des Conventions de Genève», *RICR*, n° 831, septembre 1998, pp. 437-447.

148 Procès-verbal de la Commission juridique du 16 janvier 1948, ACICR — CR 211.

149 Début 1999, 188 États sont parties aux quatre Conventions de 1949.

loppent et le renforcent, tout en s'efforçant de l'adapter aux nouvelles conditions de la guerre. Sans être exemptes de défauts ou d'omissions, elles comblent en effet les plus graves lacunes révélées par la Seconde Guerre mondiale et les conflits qui l'ont précédée.

Les civils — aussi bien les étrangers en territoire ennemi que la population dans les territoires occupés — sont désormais protégés par une Convention spécifique, à l'instar des autres victimes de la guerre[150]. Qualifiée de «miracle» par le président du CICR Paul Ruegger[151], l'adoption de la IVe Convention constitue un événement historique : « Ce que la Croix-Rouge avait obtenu des Gouvernements par la première Convention en faveur des blessés et malades, alors presque les seules victimes de la guerre, ce qu'en 1929 elle [avait] obtenu pour les prisonniers de guerre, le respect de l'être désarmé et souffrant, elle l'[obtenait] pour tous les non-combattants que la guerre moderne frappe aussi bien, si ce n'est plus, que les combattants. »[152]

En ce qui concerne ces derniers, non seulement leurs droits sont précisés et étendus, mais encore les catégories de personnes mises au bénéfice du statut de prisonnier de guerre sont élargies ; elles incluent, en particulier, les membres des mouvements de résistance et ceux des forces armées qui se réclament d'un gouvernement non reconnu par la puissance détentrice.

Les principes humanitaires fondamentaux, que trop d'exactions commises lors de la Seconde Guerre mondiale avaient remis en question, sont réaffirmés et font l'objet de règles précises, qui revêtent un caractère prohibitif absolu.

Le contrôle de l'application des Conventions est renforcé — par le biais du système des puissances protectrices et de leurs substituts — de même que la répression des infractions qui prévoit, pour les infractions graves, un régime spécial, caractérisé par la

150 En revanche, même si elle avait déjà existé, la IVe Convention n'aurait que très partiellement couvert les atrocités commises par le IIIe Reich à l'égard des civils allemands, en particulier des juifs allemands, vu que, exception faite du Titre II relatif à la protection générale des populations contre certains effets de la guerre, la Convention ne s'applique pas aux ressortissants d'un État contractant vis-à-vis de leurs propres autorités.

151 Procès-verbal de la Commission juridique du 11.11.1949, ACICR — CR 211.

152 Frédéric Siordet, «La Conférence diplomatique de Genève», *RICR*, n° 368, pages 554-557, p. 555.

responsabilité des États en vertu du principe de la juridiction universelle.

Parmi les principaux acquis figure encore l'article 3 commun, qui étend l'application des principes humanitaires fondamentaux des quatre Conventions de 1949 aux conflits armés non internationaux. Les trop nombreux conflits internes survenus depuis lors ont pleinement démontré son importance.

En ce qui concerne le CICR, les Conventions contiennent désormais de nombreuses références à ses activités en faveur des victimes de la guerre, lui valant ainsi une véritable reconnaissance internationale. Point essentiel, il se voit confirmé dans son droit d'initiative, qui lui permet d'offrir ses services dans toute situation de conflit où son intervention lui semble nécessaire.

On peut regretter que la Conférence diplomatique de 1949 n'ait pas abordé la question de la protection générale des populations civiles contre les bombardements aériens[153] et qu'elle se soit limitée à prévoir la création, facultative, de zones sanitaires et de sécurité réservées à certaines catégories de personnes. Selon François Bugnion, «on aboutit ainsi à un résultat paradoxal: alors que la Conférence diplomatique avait remanié dans ses moindres détails l'ensemble des règles protégeant les victimes de la guerre, la plus grave incertitude pesait sur la validité du principe général de l'immunité des populations civiles qui sous-tend une grande partie des règles humanitaires, et notamment la Quatrième Convention que la Conférence venait d'adopter»[154]. Mais cette question relevait du droit de La Haye (qui fixe les droits et les devoirs des belligérants dans la conduite des hostilités et limite le choix des moyens de nuire) et non du droit de Genève, qui a pour objet de sauvegarder les personnes mises hors de combat et celles ne participant pas aux hostilités tombées au pouvoir de l'ennemi[155]. Or, la révision des Conventions de La Haye ne figurait

153 Si ce n'est, de façon marginale, par le biais de l'intervention soviétique contre l'arme atomique, voir *supra*, chap. IV. 4.

154 Bugnion, *op. cit.* (note 2), pp. 837-838.

155 Cette distinction entre les deux branches du droit international humanitaire n'est plus très pertinente depuis l'adoption des deux Protocoles additionnels de 1977 aux Conventions de Genève, qui traitent aussi bien de questions relevant du droit de La Haye que du droit de Genève.

pas à l'ordre du jour de la Conférence diplomatique[156], et elle n'a pas voulu aller au-delà[157].

On a par ailleurs reproché à la Conférence diplomatique d'avoir « préparé la dernière guerre »[158], c'est-à-dire d'avoir élaboré des Conventions trop calquées sur la Seconde Guerre mondiale et d'avoir insuffisamment anticipé les nouvelles formes de conflit qui allaient bientôt surgir, notamment, dans le cadre du processus de décolonisation, les guerres de libération nationale, ou encore la guérilla.

Ces deux questions figureront en première place lorsque, près de vingt ans plus tard, le CICR s'engagera dans la nouvelle étape du développement du droit international humanitaire qui débouchera sur l'adoption des deux Protocoles additionnels aux Conventions de Genève de 1949, du 8 juin 1977[159]. C'est ainsi qu'ils confirmeront expressément l'immunité générale dont bénéficie la population civile, prohibant les attaques indiscriminées, dont les bombardements aériens. Le Protocole additionnel I assimilera les guerres de libération nationale aux conflits armés internationaux, alors que l'article 3 commun sera complété par le Protocole II.

Cela dit, la Conférence diplomatique de 1949 a largement atteint les buts qui lui étaient assignés. Les quatre Conventions de Genève résultent, certes, d'un équilibre entre les exigences humanitaires, d'une part, et les nécessités militaires et politiques, de l'autre. Cette tension constitue, selon Jean Pictet, « l'âme même du droit des conflits armés »[160]. La plupart des auteurs de l'époque s'accordent à

156 À l'exception de la Xe Convention de 1907 pour l'adaptation à la guerre maritime des principes de la Convention de Genève, laquelle relevait toutefois, comme son nom l'indique, du droit de Genève quant à son objet.

157 De même, le Projet de règles limitant les risques courus par la population civile en temps de guerre, présenté par le CICR à la XIXe Conférence internationale de la Croix-Rouge (New-Delhi, 1957), ne recueillera pas l'adhésion des gouvernements, notamment parce qu'il impliquait l'interdiction de l'emploi des armes nucléaires.

158 Pictet, *op. cit.* (note 47).

159 Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), du 8 juin 1977, et Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), du 8 juin 1977. — Sur l'origine de cette nouvelle étape du développement du droit international humanitaire, voir Jean Pictet, « La restauration nécessaire des lois et coutumes applicables en cas de conflit », *RICR*, n° 609, septembre 1969, pp. 533-553, en particulier p. 546 et suiv.

160 Pictet, *op. cit.* (note 47), p. 16.

reconnaître qu'en 1949 la part belle a été faite à l'humanité. Mais, en dernier ressort, l'efficacité réelle des Conventions dépendra toujours, pour une bonne part, de la volonté que montreront les belligérants à les appliquer.

●

Abstract

The Geneva Conventions of 1949: a decisive breakthrough

by CATHERINE REY-SCHYRR

At the outbreak of the Second World War, international humanitarian law was made up of the various Hague Conventions of 1907 and the two 1929 Geneva Conventions, none of which dealt in a satisfactory manner with the risks faced by the civilian population. Experience during the war made a major revision of international humanitarian law a priority after 1945. This articles traces the history of that endeavour up to the adoption by a diplomatic conference, on 12 August 1949, of the four Geneva Conventions for the protection of war victims. Particular emphasis is laid on the link between the ICRC's wartime experience with the inadequate law of the day and the negotiations for new legal provisions. The second part of the article identifies the major advances represented by the 1949 Geneva Conventions, one of the more important being the fact that the law's scope was extended to non-international armed conflicts. Though making no claim to perfection, the new Geneva Conventions nevertheless laid a sound basis on which adequate solutions may be found when military considerations and humanitarian exigencies clash.

The evolution of individual criminal responsibility under international law

by
EDOARDO GREPPI

THE international legal provisions on war crimes and crimes against humanity have been adopted and developed within the framework of international humanitarian law, or the law of armed conflict, a special branch of international law which has its own peculiarities and which has gone through an intense period of growth, evolution and consolidation in the last 50 years.

The rules of humanitarian law concerning international crimes and responsibility have not always appeared sufficiently clear. One of the thorniest problems is that relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of humanitarian law.[1] As regards the traditional tripartition — crimes against

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[1] See M. C. Bassiouni/P. Nanda, *A Treatise on International Criminal Law*, Springfield, 1973; S. Glaser, *Droit international pénal conventionnel*, Brussels, 1970-78; G. Sperduti, "Crimini internazionali", *Enciclopedia del diritto*, XI, 1962, p. 337; N. Ronzitti, "Crimini internazionali", *Enciclopedia giuridica*, X, 1988; F. Francioni, "Crimini internazionali", *Digesto delle discipline pubblicistiche*, IV, 1988, p. 464.

peace, war crimes and crimes against humanity — this paper will be devoted essentially to the latter two categories, which are more closely linked to the core of international humanitarian law and are of major interest at this tormented end of the twentieth century. Indeed, the world today is confronted by a disturbing proliferation of conflicts which are no longer international in nature,[2] as was traditionally the case, and in which the basic problem regarding the classification of offences seems to be that the borderline between war crimes and crimes against humanity appears blurred. In any case, both types of crime, together with the crime of genocide, come under the broader concept of *crimina juris gentium*. The category of crimes against peace has been left aside as its scope is more uncertain and the particular features it presents imply a close connection with *jus ad bellum* issues.

The following section will attempt to analyse the development of crimes within the international legal and jurisdictional framework, starting with the most doubtful precedents (even from the distant past) and then concentrating primarily on the decisions of the Nuremberg and Tokyo International Military Tribunals. The activities of these Tribunals marked the beginning of an important legal evolution, which was later more clearly defined with the setting-up of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and, last but not least, with the diplomatic conference that adopted the Rome Statute of the International Criminal Court.

A brief conclusion will provide some general remarks and touch on the prospect of evolution in the international system in keeping with various trends manifested within the United Nations,[3] especially within its International Law Commission.

War crimes and crimes against humanity: origin and evolution of a legal sphere

Before the Nuremberg and Tokyo trials

Already in the Ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to

2 On the problems arising from non-international armed conflicts, see T. Meron, "International criminalization of internal atrocities", *AJIL*, 1995, p. 554; T. Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", *IRRC*, No. 322, March 1998, p. 29.

3 See L. Condorelli, A. La Rosa, S. Scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, Éditions Pedone, Paris, 1996.

the conduct of hostilities and — on pain of death — acts of violence against women and unarmed priests, the burning of houses and the desecration of churches were prohibited. Provisions of the same nature were included in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570 (humanitarian rules are found in Articles 8 and 9) and by King Gustavus II Adolphus of Sweden in 1621.[4] Article 100 of the Articles of War decreed by Gustavus II Adolphus established that no man should "tyrannise over any Churchman, or aged people, Men or Women, Maydes or Children".

The earliest trial for war crimes seems to have been that of Peter von Hagenbach, in the year 1474.[5] Already at the time — as during and after the Nuremberg Trial — punishment of the accused hinged on the question of compliance with superior orders.[6] Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible, had placed *Landvogt Peter von Hagenbach* at the helm of the government of the fortified city of Breisach, on the Upper Rhine. The governor, overzealously following his master's instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were also committed against inhabitants of the neighbouring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) put an end to the ambitious goals of the powerful Duke (who also wanted to become king and even to gain the imperial crown), the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat, as a

4 See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. II: *The Law of Armed Conflict*, Stevens, London, 1968, p. 15; K. Ögren, "Humanitarian law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden", *IRRC*, No. 313, July-August 1996, p. 438. The Swedish Articles of War had considerable influence in Europe; at the same time, they were based on the first continental models of the sixteenth century.

5 See Schwarzenberger, *op. cit.* (note 4), p. 462.

6 See Y. Dinstein, *The Defence of "Obedience to Superior Orders" in International Law*, Leyden, 1965; E. Muller-Rappard, *L'ordre supérieur militaire et la responsabilité pénale du subordonné*, Paris, 1965; L.C. Green, *Superior Orders in National and International Law*, Leyden, 1976; G. Sacerdoti, "A proposito del caso Priebke: la responsabilità per l'esecuzione di ordini illegittimi costituenti crimini di guerra", *Rivista di diritto internazionale*, 1997, p. 130; P. Gaeta, "Rilevanza dell'ordine superiore nel diritto internazionale penale", *Rivista di diritto internazionale*, 1998, p. 69.

prelude to Charles' death in the battle of Nancy (1477). Already the year before Charles was killed, the Archduke of Austria, under whose authority von Hagenbach was captured, had ordered the trial of the bloody governor. Instead of remitting the case to an ordinary tribunal, an ad hoc court was set up, consisting of 28 judges of the allied coalition of States and towns. In his capacity as sovereign of the city of Breisach, the Archduke of Austria appointed the presiding judge. Considering the state of Europe at the time — the Holy Roman Empire had degenerated to the point where relations among its different entities had taken on a properly international nature, and Switzerland had become independent (even though this had not yet been formally recognized) — it can be concluded that the tribunal was a real international court.[7]

At the trial, a representative of the Archduke acted as plaintiff, stating that von Hagenbach had "trampled under foot the laws of God and man". More precisely, the defendant was charged with murder, rape, perjury and other *malefacta*, including orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy. The defence essentially played the card of compliance with superior orders, considering that "Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy", whose orders he could not dispute. "Is it not known that soldiers owe absolute obedience to their superiors?" This basic consideration was underlined by the fact that the Duke himself had personally confirmed and ratified *ex post factum* "all that had been done in his name". Von Hagenbach requested an adjournment to ask for confirmation from the Duke, but the tribunal refused, because this request was considered contrary to the laws of God and because the defendant's crimes had already been established beyond doubt. Therefore, the tribunal found the accused guilty, and, deprived of his rank of knight and related privileges (because he had committed crimes which he had the duty to prevent), von Hagenbach was executed following the Marshal's order: "Let justice be done".

7 According to Schwarzenberger, in a framework of quasi-international law, whose characteristic is "a state of *de facto* equality in which entities conduct their mutual relations as if they were subjects of international law", the Holy Roman Empire "had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations". *Op. cit.* (note 4), p. 464.

This case is extremely interesting for several reasons. While it is not easy to establish that the acts in question were war crimes, since most of them were committed before the formal outbreak of hostilities, at the time (as today) the borderline between war and peace was difficult to distinguish and more "fluid" than in later centuries. In any case, Breisach had to be considered as occupied territory. Moreover, even if it is difficult to classify these acts as war crimes, they can nevertheless be considered as early manifestations of what are now known as "crimes against humanity".

Several centuries elapsed before the foundations were laid for incriminating individuals for war crimes considered as grave violations of the law applicable in international armed conflicts. During the American Civil War (1861-1865), President Abraham Lincoln issued the Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, of 24 April 1863).[8] Prepared by Francis Lieber, professor of law at Columbia College in New York, and revised by a board of officers, this text represents the first attempt to codify the laws of war. Under Article 44 "all wanton violence committed against persons in the invaded country, all destruction of property", "all robbery, all pillage or sacking" and "all rape, wounding, maiming or killing of such inhabitants" are punishable (these acts are strictly in the field of war crimes). In Article 47, "crimes punishable by all penal codes", like "arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery and rape", committed by an American soldier on the territory of an enemy State, are considered as if they had taken place "at home" and are severely punished. Even if only destined for American soldiers and only binding on them, the Lieber Code had an important influence on military regulations of other armies as well.

A further leap was made in the twentieth century. After the First World War, the Treaty of Versailles of 28 June 1919 — in its Articles 228 and 229 — established the right of the Allied Powers to try and punish individuals responsible for "violations of the laws and customs of war".[9] In particular, Article 228 declared that "the German Government recognizes the right of the Allied and Associated Powers to bring before military tri-

8 Text in D. Schindler/J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 3rd ed., 1988, p. 5.

9 Text in *The Treaties of Peace 1919-1923*, vol. I, Carnegie Endowment for International Peace, New York, 1924, p. 121.

bunals persons accused of having committed acts in violation of the laws and customs of war". The German government therefore had the duty to hand over "all persons accused", in order to permit them to be brought before an allied military tribunal. In the case of an individual "guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers", the possibility of setting up an international tribunal was provided for.

Moreover, Article 227 stated that *Kaiser* Wilhelm II of Hohenzollern was responsible "for a supreme offence against international morality and the sanctity of treaties" and the Allied Powers agreed to establish "a special tribunal" composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused. "In its decision the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality." The Powers also agreed to submit a request to the government of the Netherlands for the Emperor's surrender, an initiative that failed. As can be seen, the provisions of this article anticipated the category of "crimes against peace", which was to emerge after the Second World War.

The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War had no provisions on the punishment of individuals who violated their rules.[10] Only the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field had a somewhat weak provision in Article 30.[11] But these Conventions were to be referred to later in the Nuremberg Judgement.

Nuremberg and Tokyo International Tribunals

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war,[12]

10 Texts in J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Carnegie Endowment for International Peace, New York, 1915; Schindler/Toman, *op. cit.* (note 8).

11 "On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible." (Art. 30). Text in Schindler/Toman, *op. cit.* (note 8), p. 325.

12 "Serious violations of the laws and customs of war" is a broader concept than that of "grave breaches".

with regard both to the traditional responsibility of States[13] and to the personal responsibility of individuals.[14] The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities".[15] These special jurisdictions also took into account the new categories of crimes against humanity[16] and crimes against peace.

Article 6 of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts:

— *Crimes against peace:* the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,[17] agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

— *War crimes:* violations of the laws and customs of war. A list follows with, *inter alia*, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruc-

13 On State responsibility, see R. Ago, *Scritti sulla responsabilità internazionale degli Stati*, 2 vol., Napoli, 1978-1986; I. Brownlie, *State Responsibility*, Oxford, 1983. On crimes of State, see also J. Weiler/A. Cassese/M. Spinedi (eds), *International Crimes of State*, Berlin, 1989; G. Carella, *La responsabilità dello Stato per crimini internazionali*, Napoli, 1985; A. Cassese, "Remarks on the present legal regulation of crimes of States", B. Conforti, "In tema di responsabilità degli Stati per crimini internazionali", and M. Sahovic, "Le concept du crime international de l'État et le développement du droit international", in *Essays in Honour of Roberto Ago*, Milano, 1987.

14 "Pour la première fois, les crimes de guerre, les crimes contre la paix, les crimes contre l'humanité sont expressément prévus et définis dans leurs éléments constitutifs par un texte conventionnel", P. Daillier/A. Pellet, *Droit international public*, Paris, 1999, p. 676. See also D.W. Greig *International Law*, London, 1976, p. 115; M. Giuliano/T. Scovazzi/T. Treves, *Diritto internazionale*, Parte generale, Milano, 1991, p. 183.

15 Art. 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, in Schindler/Toman, *op. cit.* (note 8), p. 911.

16 See E. Schwelb, "Crimes against humanity", *BYIL*, 1946, p. 178; J. Graven, "Les crimes contre l'humanité", *RCADI*, 1950, I, p. 427; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht, 1992; E. Zoller, "La définition des crimes contre l'humanité", *Journal du droit international*, 1993, p. 549.

17 There is no longer any reference to the "sanctity" of treaties, as compared with Art. 227 of the Versailles Treaty.

tion of cities, towns or villages, or devastation not justified by military necessity.

— *Crimes against humanity:* murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[18]

As far as jurisdiction *ratione personae* is concerned, it covered "leaders, organisers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any persons in the execution of such plan".

International legal heritage after the Nuremberg and Tokyo trials

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgements, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law.[19] The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the International Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled "Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg

18 A similar provision (with fewer specifications) is to be found in the Statute of the Tokyo Tribunal, Art. 5.

19 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, Official Documents and Proceedings, Nuremberg, 1947. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, New York, 1992; R.H. Jackson, *The Nürnberg Case*, New York, 1948, and *The Case Against the Nazi War Criminals*, New York, 1945; H. Donnedieu de Vabres, "Le procès de Nuremberg devant les principes modernes du droit pénal international", *RCADI*, 1947, I, p. 481; M. Merle, *Le procès de Nuremberg et le châtiment des grands criminels de guerre*, Paris, 1949; Schwarzenberger, *op. cit.* (note 4), p. 467; G. Ginsburg/V. Kuriastev (eds), *The Nuremberg Trial and International Law*, Dordrecht, 1990. On the Tokyo Tribunal, see B. Röling/A. Cassese, *The Tokyo Trial and Beyond*, Oxford, 1993.

Tribunal".[20] After "having taken note" of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was of considerable legal importance: the General Assembly "affirmed" the principles of international law recognized by both the Charter and the Judgement of the Nuremberg Tribunal. This meant that in the General Assembly's view the Tribunal had taken into account already existing principles of international law, which the court had only to "recognize". The second was a commitment to have these principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgement had "recognized" and which it appeared important to incorporate into a major instrument of codification (either by way of a "general codification of offences against the peace and security of mankind" or even as an "international criminal code"). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.[21]

In 1950, the ILC adopted a report on the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal".[22] The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already "affirmed" that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

Principle I states that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". It constitutes official recognition of the fact that an individual — in the broadest sense ("any person") — may be held responsible for having committed a crime. And this may be the case even if the act is not considered a crime under domestic law (Principle II). Principles III and IV provide that a person who acts in his capacity as head of State or as a government official and one who acts on the orders of the government or of

20 Schindler/Toman, *op. cit.* (note 8), p. 921.

21 "Article 6 of the Nuremberg Charter has since come to represent general international law." I. Brownlie, *Principles of Public International Law*, Oxford, 1991, p. 562. Along the same lines, M. Shaw, *International Law*, Cambridge, 1998, p. 471; Daillier/Pellet, *op. cit.* (note 14), p. 677.

22 Schindler/Toman, *op. cit.* (note 8), p. 923.

a superior are not thereby relieved of responsibility. These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter. Article 8, on superior orders, accepted the possibility of mitigation of punishment "if the Tribunal determines that justice so requires".

Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility "provided a moral choice was in fact possible to him". This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a "moral choice" to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by Article 6 of the Nuremberg Charter. What was defined in the London Agreement as "crimes coming within the jurisdiction of the Tribunal" has now been formulated as "crimes under international law", using the same wording found in Article 6. Principle VI represents the core of a possible international criminal code. The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the International Law Commission were important steps toward the establishment of a code of international crimes entailing individual responsibility. But further progress lay ahead.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide.[23] The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. Article 2 defines genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are

23 Schindler/Toman, *op. cit.* (note 8), p. 231. See also Brownlie, *op. cit.* (note 21), p. 562; R. Lemkin, "Genocide as a crime under international law", *AJIL*, 1947, p. 145; J. L. Kunz, "The United Nations Convention on genocide", *AJIL*, 1949, p. 738; N. Robinson, *The Genocide Convention: A Commentary*, New York, 1960.

various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity. But it is Article 4 that establishes the obligation to punish not only "rulers" or "public officials", but also "private individuals". As for Article 6, it places the competence to try offenders in the hands of both domestic and international tribunals.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are "in the front line" with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.[24]

Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims.[25] The parties to these Conventions undertake the basic general obligation "to respect and to ensure respect" for their rules "in all circumstances" (Article 1 common to the four treaties). An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called "grave breaches"[26] — and not war crimes —,[27] but they are undoubtedly crimes under international law. These acts are defined in detail in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as wilful killing, torture or inhuman treatment (including biological experiments), wilfully causing

24 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, I.C.J. Reports, 1951, p. 23.

25 Schindler/Toman, *op. cit.* (note 8), p. 367. See also the commentaries published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952-1956; G.I.A.D. Draper, "The Geneva Conventions of 1949", *RCADI*, 1965, I, p. 59.

26 G. Doucet, "La qualification des infractions graves au droit international humanitaire", in F. Kalshoven/Y. Sandoz (Eds), *Implementation of International Humanitarian Law*, Dordrecht/Boston/London 1987, p. 79.

27 But there is no doubt that grave breaches constitute "war crimes". See Brownlie, *op. cit.* (note 21), p. 563; J.A.C. Gutteridge, "The Geneva Conventions of 1949", *BYIL*, 1949, p. 294.

great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or wilfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages "not justified by military necessity and carried out unlawfully and wantonly". As far as the scope of application *ratione personae* is concerned, the Conventions establish the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word "person" comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict commits the contracting parties to protecting what is called the "cultural heritage of all mankind". They have "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions" upon those persons "who commit or order to be committed a breach" of the Convention.[28]

The two 1977 Protocols additional to the Geneva Conventions of 1949 have added more precise rules to what has become an extensive legal system.[29] In particular, Article 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, Article 85 adds a great number of violations to the already existing list of grave breaches. Again, with Article 1 of Protocol I, parties undertake "to respect and ensure respect" for the Protocol "in any circumstances".

Evolution in the 1990s: from the ad hoc Tribunals to the International Criminal Court

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with

28 Art. 28, Schindler/Toman, *op. cit.* (note 8), p. 745. Art. 85, para. 4(d) of the 1977 Protocol I makes also attacks against historic monuments, works of art or places of worship under certain conditions a war crime. See M. Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milano, 1986; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Paris, 1996.

29 Texts in Schindler/Toman, *op. cit.* (note 8), p. 621. See also Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987.

the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR). These Tribunals represent major progress towards the institution of a kind of permanent jurisdiction. But they have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I).[30]

The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under international law.[31] In particular, Articles 2, 3, 4 and 5 of the Statute of the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court. Article 2, on grave breaches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons "committing or ordering to commit" such grave breaches. Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces Articles 2 and 3 of the 1948 Genocide Convention.

Article 5 authorizes the Tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts "whether international or internal in character". In the already codified tradition, Article 7 gives a wide scope to "individual criminal responsibility", covering all persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime". The responsibility of a person with an official position (head of State or government,

30 *Op. cit.* (note 20).

31 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted 25 May 1993 by SC Resolution 827/1993; text in UN Doc. S/25704 (1993). See also E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue belge de droit international*, 1992, p. 565; A. Pellet, "Le tribunal criminel international pour l'ex-Yougoslavie — Poudre aux yeux ou avancée décisive?", *Revue générale de droit international public*, 1994, p. 7; D. Shraga/R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal of International Law*, 1994, p. 360; A. Cassese, "The International Criminal Tribunal for the Former Yugoslavia", in *Studi Panzera*, Bari, 1995, I, p. 235; G. Carella, "Il Tribunale penale internazionale per la ex-Yugoslavia", in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Padova, 1995, p. 463; P. Tavernier, "The experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", and M. C. Roberge, "Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over crimes against humanity and genocide", *IRRC*, No. 321, November-December 1997, pp. 605 and 651 respectively.

government official) and the effects of superior orders are treated in Article 7 along the same lines as in the Nuremberg Charter and the ILC report of 1950 (Principles III and IV). Reference is made to the possibility of mitigation "if the International Tribunal determines that justice so requires" (as in Article 8 of the Charter).

The Statute of the Rwanda Tribunal appears slightly different, but the global approach of its provisions does not reveal major differences.[32]

This great *corpus* of principles and rules, all this legal heritage has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.[33] Articles 5 to 8 of the Statute deal with the definition of the crimes coming under the jurisdiction of the ICC. They are "the most serious crimes" and are "of concern to the international community as a whole" (Article 5). This is a comprehensive definition which covers, from a genuinely universal perspective, both "grave breaches" and "serious violations" of the Geneva Conventions and of the laws and customs of war in general. Such offences contravene the legal and ethical rules and principles of the international community.

The Rome Statute has adopted a new typology of crimes, with four categories instead of three: genocide, crimes against humanity, war crimes and crimes of aggression. As indicated earlier, this paper leaves aside the problem of whether or not the crime of aggression constitutes a "crime against peace", as defined in the Nuremberg Charter, or a "crime against the peace and security of mankind", as defined in the Draft Code prepared by the International Law Commission. Article 6 of the Rome Statute confirms, in the same words, the provisions of the 1948 Genocide Convention and represents a further step towards the codification of principles and rules which appear to be generally accepted. It is with Articles 7 and 8 that a major evolution has taken place in respect of crimes against humanity and war crimes. Here, detailed provisions have replaced those of Article 6 of the Nuremberg Charter and of their successive formulations.

32 The Statute lists genocide and crimes against humanity in the first place and adds a reference to Art. 3 common to the Geneva Conventions and to 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences.

33 UN Doc. A/CONF. 183/9. Final Act: UN Doc. A/CONF. 183/10. See also F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, Napoli, 1998; F. Lattanzi/E.Sciso (eds.), *Dai Tribunali penali internazionali ad hoc a una Corte permanente*, Napoli, 1996; P. Ungari/M.P.Pietrosanti Malintoppi, *Verso un Tribunale permanente internazionale sui crimini contro l'umanità*, Roma, 1997.

"Crime against humanity" means — in a comprehensive definition — an act "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Article 7).[34] It belongs to general, customary international law and it has been defined in several instruments subsequent to the Nuremberg Charter and its Article 6. A clear indication of what constitutes a crime against humanity is given by the International Tribunal for the former Yugoslavia in its decision on the *Erdemovic* case: "Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".[35] Obviously, no distinction is made between war and peace, international or internal armed conflicts.[36] What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept: that of mankind. There is a close link here to the Martens Clause, as codified by the Hague Convention No. IV of 1907, which in its preamble refers to "the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience", and confirmed by Article 1 of 1977 Additional Protocol I.[37]

The structure of Article 7, with its two parts, reflects a new approach: the first part enumerates acts that constitute crimes against humanity and the second offers definitions for some of them. The inclusion of murder, extermination, enslavement and deportation simply confirms the

34 Donat-Cattin, "Crimes against humanity", in Lattanzi (ed.), *op. cit.* (note 33), p. 49.

35 Decision of 29 November 1996, UD Doc. IT-96-22-T.

36 This principle was already stated by the ICTY in the *Tadic* case, judgement of 7 May 1997, UN Doc. IT-94-1-T. The Statute of the Rwanda Tribunal makes no distinction, because most of the crimes committed in the first period lacked the character of having taken place in a conflict situation.

37 See S. Miyazaki, "The Martens Clause and international humanitarian law", in C. Swinarsky (ed.), *Studies and Essays in Honour of Jean Pictet*, ICRC, Geneva, 1984, p. 433; P. Benvenuti, "La clausola Martens e la tradizione classica del diritto naturale nellla codificazione del diritto dei conflitti armati", in *Scritti degli allievi in onore di Giuseppe Barile*, Padova, 1995, p. 171.

Nuremberg heritage. What in the Nuremberg Charter was generally referred to as "other inhuman acts committed against any civilian population", in the Rome Statute becomes a list of acts which takes into account the dramatic experiences of populations over the last 50 years in both international and domestic conflicts and even in times of so-called peace: "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; enforced disappearance of persons, *apartheid*". Each one of these acts is defined in the second part of Article 7. As can be seen, a considerable number of them are crimes of a sexual nature. Since the Hagenbach case, the behaviour of certain men in conflicts and other situations of violence has gone dramatically beyond what at the time was considered as the crime of rape: today such crimes have become "widespread" and "systematic".[38] But the seriousness of the crime has always been the same: "He that forces any Woman to abuse her, and the matter be proved, he shall dye for it".[39] Moreover, the acts committed in the former Yugoslavia have given rise to the concept of "ethnic cleansing", which has been commented on by the ICTY, particularly in its decision on the *Review of Indictment against Karadzic and Mladic*.[40] Article 7 ends the list with a broad category: "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health". Such a definition leaves the door open to the future inclusion of other acts, thus taking into account the fact that cases brought before domestic and international jurisdictions have shown men to be only too capable of enlarging on this category of crime, which constitutes the most serious violation of the idea of humanity itself.

Article 8 of the Rome Statute deals with the traditional concept of war crimes. A comparison between the list it contains and that found in Article 6 of the Nuremberg Charter shows that the process of defining

38 See T. Meron, "Rape as a crime under international humanitarian law", *AJIL*, 1993, p. 424; K.D. Askin, *War Crimes against Women, Prosecution in International Law*, The Hague, 1997.

39 Art. 88, *Articles of War*, in Ögren, *op. cit.* (note 4), p. 441.

40 UN Doc. IT-95-5-R61.

various acts as war crimes has developed enormously and led to an enlarged and more detailed codification.[41]

In a broad sense, war crimes come under the jurisdiction of the ICC, in particular when "committed as a part of a plan or policy or as part of a large scale commission of such crimes" (Article 8). This means that the ICC is also given jurisdiction over acts committed by individuals.[42] Several categories of crime are dealt with. The first is the grave breaches established by the Geneva Conventions. The second comprises "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". The list which follows is extremely detailed, with 26 types of act or behaviour. It is the longest list of crimes ever included in an internationally binding instrument. The third category refers to serious violations of Article 3 common to the Geneva Conventions, which pertains to armed conflicts not of an international character and covers acts committed against persons taking no active part in the hostilities (such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment, the taking of hostages and refusal to grant judicial guarantees "recognised as indispensable"). A fourth is related to "other serious violations of the laws and customs applicable in armed conflicts not of an international character". The last two categories are followed by clauses excluding from the ICC's jurisdiction acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence "or other acts of similar nature". The general right of States to maintain or establish law and order or to defend their unity and territorial integrity "by all legitimate means" is

41 See H. H. Jescheck, "War crimes", *Encyclopedia of Public International Law*, 4, p. 294; Y. Dinstein/M. Tabory (eds), *War Crimes in International Law*, The Hague/Boston/London, 1996; T.L.H. McCormack/J. Simpson (Eds.), *The Law of War Crimes. National and International Approaches*, The Hague/Boston/London, 1997; P. Lamberti Zanardi/G. Venturini (eds), *Crimini di guerra e competenza delle giurisdizioni nazionali*, Milano, 1998; C. Keith Hall, "The jurisdiction of the permanent International Criminal Court over violations of humanitarian law", in Lattanzi, *op. cit.* (note 33), p. 19; M. Lachs, *War Crimes: An Attempt to Define the Issues*, London, 1945. Daillier/Pellet, *op. cit.* (note 14), p. 679: "La structure interne d'apparence complexe répond à un souci d'efficacité face à la diversité des conflits armés – internationaux et non internationaux – et à l'opposabilité variable des acquis conventionnels de 1949 et de 1977 aux États."

42 M. C. Roberge, "The new International Criminal Court: A preliminary assessment", *IRRC*, No. 325, December 1998, p. 674.

expressly recognised.[43] In any case, the fourth category applies to situations of "protracted armed conflict between governmental authorities and organised armed groups or between such groups", that is, the vast majority of contemporary internal conflicts.

A few concluding remarks

The categories of war crimes, crimes against humanity and genocide, considered as part of the broader category of *crimina juris gentium*, have developed in a significant and considerable way since the Second World War.[44]

A proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolution described in these pages.

When Article 6 of the Nuremberg Charter was adopted, its provisions on war crimes were already declaratory of general international law of customary origin. War crimes were violations of existing provisions of *jus in bello*. The Nuremberg Judgement stated in that regard that "with respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, Section b, of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable was too well settled to admit of argument".[45] As we have seen, however, the customary origins of rules on war crimes go back nearly half a millennium.

The notion of crimes against humanity appears to have undergone the greatest development. Under the Nuremberg Charter, crimes against humanity were linked to war crimes (which in turn were connected to crimes against peace). The point of reference was the Second World War, and crimes were considered only if committed before or during that war. But the Judgement anticipated the autonomous character of such crimes: Julius Streicher and Baldur von Schirach were convicted solely of crimes against

43 No doubt, these provisions must be interpreted in a very strict way.

44 B. Conforti, *Diritto internazionale*, Napoli, 1997, p. 204.

45 *Trial of the major war criminals before the International Military Tribunal, op. cit.* (note 19), p. 253.

humanity.[46] For Streicher, this led to the death sentence. Although explicitly recognized only after the Second World War, crimes against humanity were taken into account already long before as they were seen to be closely linked to the principle of humanity, which is a cornerstone of humanitarian law. Von Hagenbach and others responsible for *crimina juris gentium*, in war, in peace and in borderline situations, committed acts which could be termed crimes against humanity under international law. After 1946, it appeared beyond any doubt that this category of crimes had become part of customary international law. The judgement of the ICTY in the *Tadic* case affirmed it openly. The Rwanda Statute considers crimes against humanity an autonomous category. The connection with war crimes has disappeared: Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, referring to crimes against humanity under Article 6 of the Nuremberg Charter, completes the wording with "whether committed in time of war or in time of peace".[47]

If war crimes and crimes against humanity are now two autonomous, self-sustained categories, it cannot be denied that they are often closely linked in modern conflicts, especially in connection with crimes against the civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of connection and overlapping. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.

An important contribution to the evolution of the concept of individual criminal responsibility has been made by the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission. Already in the 1951 and 1954 drafts,[48] Article 1 provided that "offences against the peace and security of mankind are crimes under international law, for which the responsible individual shall be punished". Article 1 of the 1996 text now states that "crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law".[49] According to

46 *Ibid.*, pp. 301-304 and 317-320. See also L. Oppenheim, *International Law*, R. Jenning and A. Watts (eds), Part 2, London, 1992, p. 996.

47 Adopted on 26 November 1968. Text in Schindler/Toman, *op. cit.* (note 8), p. 925.

48 *Yearbook of the International Law Commission*, vol. II, 1954.

49 Text in *Yearbook of the International Law Commission*, vol. II(2), 1996.

Article 2, "a crime against the peace and security of mankind entails individual responsibility". As far as the list of acts is concerned, the Draft Code takes into account all the developments described above. The crime of genocide (Article 17) reflects the 1948 Convention, with the same wording as in Article 6 of the Rome Statute. For crimes against humanity, the Code (Article 18) adds that acts are "instigated or directed by a Government or by any organisation or group". The list is, however, less detailed than that in Article 7 of the Rome Statute. In particular, instead of mentioning the crime of *apartheid*, the Code includes it in a general provision on "institutional discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population". War crimes are listed more or less in the same way as that later chosen for Article 8 of the Statute, but in a less extensive formulation. However, all the different categories of crime mention the acts as "committed wilfully in violation of international humanitarian law". A new provision on the protection of the natural environment is introduced which says that "in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population".

Article 19 adds a further provision relating to crimes against UN and associated personnel committed with a view to preventing or impeding an operation involving such personnel. The only exclusion is when UN personnel are engaged as combatants against organized armed forces in an enforcement action authorized by the Security Council under Chapter VII of the UN Charter. In that case, "the law of international armed conflicts applies". The protection of UN personnel under the Rome Statute is included in Article 8 (b) iii and (e) iii.

Not only has the typology of crimes entailing individual responsibility been enlarged and given a clearer outline, but some general principles have also been laid down. When an act is being considered, the crime of omission is taken into account. Starting with the judgement of the US military commission in the *General Yamashita* case on atrocities committed against the civilian population in the Philippines, failure to prevent a crime from being committed has been considered to be an act as serious as the crime itself and deserving of equal punishment. "Where murder and rape and vicious revengeful actions are widespread offences, and there is no effec-

tive attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops."[50] Articles 86 and 87 of Additional Protocol I and the Rome Statute clearly take the same line.

Another important development should be mentioned here in relation to the practice of codifying international law: there is a growing connection between humanitarian law and human rights law. Indeed, some recently adopted provisions of humanitarian law appear clearly influenced by human rights rules and standards of protection. The Rome Statute refers to concepts like "personal dignity", the prohibition of "humiliating and degrading treatment", "judicial guarantees", the prohibition of "persecution" (as "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"), discrimination and *apartheid*. These concepts have all been established in the main instruments adopted by the UN for the protection of the rights of the individual. However, the principle of humanity is at the core of international humanitarian law and forms the basis of all the developments discussed in this paper.[51] Moreover, the principle of individual responsibility has clearly been established by humanitarian law.

Finally, there is a growing reciprocal influence between treaty-based and customary international law. Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution.[52]

50 Judgment of 7 December 1945, UN War Crimes Commission, 4 *Law Reports of the Trials of War Criminals*, 1948, 3.

51 E. Greppi, "Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza", in *La comunità internazionale*, 1996, p. 473. On the relationship between international humanitarian law and human rights law, see the bibliography in *IRRC*, No. 324, September 1998, p. 572.

52 See L. Condorelli, "Il sistema della repressione dei crimini di guerra nelle Convenzioni di Ginevra del 1949 e nel primo Protocollo addizionale del 1977", in Lamberti Zanardi/Venturini, *op. cit.* (note 41), p. 26. Also: T. Meron, "War crimes in Yugoslavia and the development of international law", *AJIL*, 1994, p. 70; A. Cassese, "The International Tribunal for the Former Yugoslavia and the implementation of international humanitarian law", in *op. cit.* (note 3), p. 229.

We have come a long way since the 1474 Hagenbach case. But the basic idea underlying the legal heritage whose foundations were laid many years ago and which has since been developed remains the same: the principle of humanity must be considered as the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in war — whether internal or international — and in peace. This is not only a moral duty, but a basic obligation under international customary law.

The laws of humanity and the "dictates of public conscience", today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of the individual, who is to a dramatically increasing extent the victim of acts of generalized violence. The "peace and security of mankind", together with the protection of human rights and severe sanctions for serious violations and grave breaches of humanitarian law applicable in armed conflicts, are among the international community's major assets. For this, we should be grateful first and foremost to the International Committee of the Red Cross on the 50th anniversary of the Geneva Conventions of 12 August 1949.[53]

53 The 50th anniversary offers an excellent opportunity for reflection, because "some anniversaries are bound to evoke powerful memories" (C. Sommaruga, "Humanitarian challenges on the threshold of the twenty-first century", *IRRC*, No. 310, January-February 1996, p. 20). On the role of the ICRC and with that of the United Nations, see H.P. Gasser, "The International Committee of the Red Cross and the United Nations involvement in the implementation of international humanitarian law", in *op. cit.* (note 3), p. 259.

Résumé

Quelques réflexions sur l'évolution en droit international de la notion de crime commis par une personne physique

par EDOARDO GREPPI

Bien que l'idée de la responsabilité pénale individuelle pour des violations du droit international soit ancienne, ce sont en fait les procès contre les grands criminels de guerre, à l'issue de la Seconde Guerre mondiale, qui en ont fait une réalité incontestable et incontestée. L'auteur retrace l'évolution de la notion de crime international jusqu'à nos jours, en rappelant les premières expériences faites au Moyen- Âge, puis, en examinant la jurisprudence des Tribunaux de Nuremberg et de Tokyo, l'activité des Tribunaux ad hoc pour l'ex-Yougoslavie et le Rwanda, et les dispositions prises pour établir la Cour pénale internationale. Un intérêt particulier est porté au développement de la notion de «crime contre l'humanité». Le renforcement de l'idée de la responsabilité individuelle et sa concrétisation sur le plan pénal mettent également en évidence les liens qui existent entre le droit international humanitaire et les droits de l'homme.

The denial of humanitarian assistance as a crime under international law

by
CHRISTA ROTTENSTEINER

A massacre is not necessarily committed only with knives.
A refugee from Kosovo

THE images we see every day on our television screens are, sadly, all too familiar: civilians fleeing an armed conflict, struggling to survive under difficult circumstances. They lack food, water, appropriate clothing and shelter, and have no access to medical assistance. These images may come from the Balkans, the Great Lakes region in Central Africa, or any other part of the world, but the main problem facing humanitarian organizations in every conflict situation stays the same — that is, how to reach people in need. Fighting often makes it impossible to access an area, sometimes the terrain or meteorological conditions do not allow the passage of relief goods, and in other cases the whereabouts of victims are unknown. Frequently, difficulties in gaining access to those requiring assistance are not, however, a matter of unfortu-

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nate circumstances but are man-made and intentional. Looting of relief supplies, attacks on convoys, or refusal to authorize access can make it difficult for aid to reach its intended beneficiaries. The consequences can be disastrous, as events in Biafra, Somalia, Bosnia or southern Sudan — to name but a few tragic examples — have shown.

The withholding of food and other vital goods is not a new phenomenon. Throughout history, starvation has been used as a method of warfare. The foremost goal of sieges and blockades was not to inflict suffering on the civilian population, which was seen as an inevitable "by-product", but to bring about the surrender of the enemy army. In today's wars, however, humanitarian assistance is increasingly denied as part of a deliberate policy to target civilians, in particular during internal armed conflicts. The often-discussed change in the nature of warfare might be one reason for this development. The other reason might be the change in the nature of humanitarian operations. In the 1990s, there has been an increasing tendency to use them as a substitute for effective political or military action. Besides, the number of relief operations has risen steadily. This has led to a situation where humanitarian assistance is often used as a bargaining chip in political dealings and is therefore regularly impeded. Because the international media is giving more attention to the matter, the withholding of aid has also become more obvious than before.

This article seeks to clarify under which circumstances the denial of humanitarian assistance can constitute a crime under international law. It examines three core crimes of international law: war crimes, crimes against humanity and genocide. The paper does not suggest creating a new category of crimes, but rather examines the question as to whether the denial of humanitarian assistance fits into the definition of existing crimes. The purpose of covering all three crimes is to gain an overview of the possibilities for prosecuting someone for the denial of humanitarian aid. While the article is limited to situations of armed conflict, the consideration of crimes against humanity and genocide can open a discussion on the withholding of goods essential for survival in times of internal tension and disturbances not covered by international humanitarian law, or even in peacetime.

The study of this topic is of particular interest as these crimes have regained relevance with the work of the *ad hoc* Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), and, most impor-

tantly, with the recent adoption of the Statute for an International Criminal Court (ICC). The future ICC will not only permit that perpetrators of the most serious violations of international law be brought to justice, but it will also contribute to the prevention of such violations.

Humanitarian assistance in international law

Before analysing whether the denial of humanitarian assistance can be considered a crime under international law, we must first define the type of assistance under discussion and give a brief overview of the rules governing it.[1]

For the purposes of this article, humanitarian assistance is defined as including all emergency action to ensure the survival of those directly affected by armed conflict of an international or internal character. It encompasses material aid — food, water, clothing, medicines, fuel, shelter, bedding, hospital equipment, etc. — and the services of trained personnel. In order for assistance to be humanitarian in nature, its sole purpose must be to prevent and alleviate human suffering.[2] The beneficiaries of humanitarian aid are needy civilians, including internees, and prisoners of war. Assistance given during internal disturbances and tension (however difficult the distinction between internal disturbances and internal armed conflict might be at times) and natural disasters will be excluded. Furthermore, only aid given by outside humanitarian organizations, whether international, governmental or non-governmental, will be considered.

The principle of subsidiarity dictates that the primary responsibility for meeting the needs of the civilian population in an armed conflict rests with the warring parties that are in effective control of the territory on which that population lives. Only if those parties are unable to meet their obligations should outside relief action be taken. In an international armed conflict, the Third and Fourth Geneva Conventions regulate the provision of food and other goods for prisoners of war, and persons in

1 See, e.g., Denise Plattner, "Assistance to the civilian population: The development and present state of international humanitarian law", *IRRC*, No. 288, May-June 1992, pp. 249-263; UNESCO (eds), *Le droit à l'assistance humanitaire*, Actes du Colloque international organisé par UNESCO, Paris, 1995; European Commission (eds), *Law in Humanitarian Crises*, Volume II, Brussels/Luxembourg, 1995.

2 See also the statement in the Nicaragua Judgment of the International Court of Justice: *Military and Paramilitary Activities In and Against Nicaragua*, I.C.J. Reports 1986, paras 97 and 242-243.

occupied territories and internees, respectively.[3] The 1977 Additional Protocol II contains further rules on relief action for the civilian population.[4] In non-international armed conflicts, Article 3 common to the four Geneva Conventions and 1977 Additional Protocol II provide for humanitarian assistance for civilians, including those whose liberty has been restricted.[5]

Humanitarian organizations have the right to offer humanitarian aid to States without this being regarded as interference in the internal matters of a State.[6] They further have the right to furnish humanitarian assistance provided that they obtain the consent of the government concerned.[7] Consent must be given when the necessary requirements are fulfilled, i.e., that the international relief operation is of an exclusively humanitarian and impartial nature and conducted without any adverse distinction vis-à-vis those in need.[8] In practice, humanitarian organizations also need the agreement of a non-State party to a conflict which is in *de facto* control of the territory where the relief operation is to be carried out. The ICRC Commentaries on the Protocols state that the fact that consent is required does not mean that the decision on a relief operation is left to the discretion of the parties: "If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) [A] refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat (...)".[9] Once a relief operation is accepted in principle, the authorities are under an obligation to cooperate, for example by facilitating the rapid transit of

3 Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), Arts 26-32 and 72-75; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Arts 23, 55-63 and 108-111.

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Arts 69-71 and 81 (on activities of the ICRC).

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Arts 5.1(b) and (c) and 18.2.

6 Art. 3 common to the four Geneva Conventions; Protocol I, Art. 70.1. Activities of the ICRC are also mentioned in Arts 9/9/9/10 of the Conventions.

7 First Geneva Convention, Art. 27; Protocol I, Arts 64, 70.1 and 81.1; Protocol II, Art. 18.2.

8 Protocol I, Art. 70.1; Protocol II, Art. 18.2.

9 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987. On Protocol II, Art. 18.2, see para. 4885, p. 1479, and on Protocol I, Art. 70.1, see para. 2808, p. 820.

relief consignments and by ensuring the safety of convoys.[10] Parties to the conflict, however, have a right to supervise the operation and impose certain restrictions, such as the arrangement of transits in accordance with a precise timetable and itinerary, and the search of convoys.[11]

Aspects of the denial of humanitarian assistance

The denial of humanitarian assistance will be defined in this paper as follows: a situation where, as a result of the intentional behaviour of certain persons, humanitarian assistance does not reach its intended beneficiaries. In order to shed light on how such a denial can occur in practice, we shall look at some of the main factors identified in different cases. The ways of impeding aid are obviously innumerable; therefore the list of factors and examples given here does not claim to be exhaustive.

First of all, various **actors** may be responsible for hampering assistance, such as agents of a government, representatives of non-governmental groups, and bandits. Sometimes, parts of the civilian population who are not the intended recipients are implicated in the denial of aid to those who need it. In the event of general anarchy, as was the case in Somalia, the affiliation of some actors and the purpose of their looting might be difficult to ascertain.

There are different **means** of preventing aid from reaching potential beneficiaries. A government may, for example, stop aid agencies from entering the country at all and can thus ensure that no assistance is given. Once humanitarian organizations are working in the country, a government may use — or rather abuse — its above-mentioned right to supervise relief consignments by, for example, searching convoys for an excessive length of time. Both governmental and non-governmental forces may confiscate relief or refuse permission to access a certain region. They can also prevent aid from reaching the victims by putting up roadblocks, through the closure or constant shelling of airports, through a sea blockade or by besieging a town. Sometimes, unacceptable conditions are imposed, for example the payment of taxes for the delivery of assistance or the demand that the same amount of aid be given to all sides in the conflict, without regard to actual needs.

10 For international armed conflicts, see Fourth Geneva Convention, Arts 59-61 and 108; Protocol I, Art. 70.2 and 70.3.

11 First Geneva Convention, Art. 27; Fourth Geneva Convention, Arts 59-63, 108 and 109; Protocol I, Arts 64 and 70.3.

A very effective means of impeding the work of humanitarian organizations is simply to state that their security cannot be guaranteed. Any actor — State agents, rebel forces, other non-governmental groups, bandits, or civilians — could obstruct the delivery of assistance by intimidating aid workers or drivers, or by attacking relief convoys, ships or aircraft, or aid personnel. In some cases, snipers have attacked people on their way to collect humanitarian assistance. On many occasions, the fighting itself, whether between State forces, governmental and non-governmental forces, or non-governmental groups fighting each other, has prevented aid from reaching the victims. Mine-laying often makes routes impassable for vehicles, thereby cutting off potential beneficiaries. In the case of camps or prisons, the persons in control of such places could divert relief goods, refuse access to aid agencies or simply deny the fact that these detention centres even exist.

The denial of humanitarian assistance may have various **aims**. In a conflict where civilians are targeted, the displacement of part of the population or their starvation is such an aim; this could, for example, further a policy of "ethnic cleansing". The aim of sieges or blockades is to bring hostilities to a quicker end with less casualties for the besieging forces by obliging the besieged forces to surrender. Furthermore, belligerents may confiscate aid in order to fortify their troops, instead of "feeding useless mouths". Also, bandits or criminal gangs may loot humanitarian assistance for the sole purpose of making profits. However, drawing the line between criminal gangs and forces directly involved in the conflict is not always easy.

The **consequence** of denying humanitarian assistance is a deterioration in the living conditions of the civilians affected. This may in turn lead to malnutrition, the spread of diseases, or even death. Lack of resources may also aggravate inter-community tension, especially between displaced persons and the resident population.

Those who prevent assistance from reaching people in need will not normally disclose their real intentions. The **reasons** given may be of a legalistic nature, for example the claim that such assistance constitutes interference in the conflict, or insistence on the right of supervision. The urgency of the need for outside aid may not be acknowledged. Reprisals, although generally considered illegal when committed against civilians, might also serve as a justification. Military considerations are often put for-

ward to justify starvation, on the ground that only such rigorous measures can bring the hostilities to a speedy close. The civilian nature of a population may also be questioned, with the suggestion that its members belong in reality to rebel forces.

The denial of humanitarian assistance as a crime under international law

This chapter will examine the extent to which denial of humanitarian assistance amounts to a crime under international law. The first step will be to analyse the elements that make an offence under domestic law a crime of international concern. The next step will be to consider the offences that constitute war crimes, crimes against humanity and genocide.

1. War crimes

A war crime is a serious and criminally punishable violation of international humanitarian law[12] committed by any physical person, no matter whether military or civilian.[13] In order for an act to become a war crime, the existence of an armed conflict is essential. The Appeal Chamber of the ICTY established in the *Tadic* case that an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[14] In order for a crime to fall within international jurisdiction, it is not sufficient that it be perpetrated in a State where an armed conflict takes place, but a nexus must be established between the offence and the armed conflict. This, however, does not mean that the crime has to be committed at the exact time and place where active hostilities are under way. "The only question, to be

12 See the provisions on "grave breaches" of the Geneva Conventions, Arts 50/51/130/147. Also: Statutes of the Nuremberg Tribunal, Art. 6(b); Statutes of the two *ad hoc* Tribunals: ICTY, Arts 2 and 3, and ICTR, Art. 4; and ICC Statute, Art. 8.

13 See Geneva Conventions, Arts 49/50/129/146, which speak only of acts committed by "persons". Also: Statutes of the Nuremberg Tribunal, Art. 6, and of the Tokyo Tribunal, Art. 5; Statutes of the ICTY, Arts 6 and 7, and the ICTR, Arts 5 and 6; and Statute of the ICC, Art. 25.

14 ICTY, *Prosecutor v. Dusko Tadic a.k.a. "Dule": Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, Case No. IT-94-1-AR72, para. 70. See Art. 2 common to the Geneva Conventions, Protocol I, Art. 1.4, and Protocol II, Art. 1.

determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict *as a whole*."[15]

Another criterion which has to be fulfilled is that the act must be committed against a person protected under international humanitarian law. In the case of the denial of humanitarian assistance, the victims of such acts will be either civilians, including individuals deprived of their liberty, or prisoners of war (in an international armed conflict). Although Article 3 common to the Geneva Conventions does not mention the term "protected person", protection extends to all "persons taking no active part in the hostilities", who shall be treated humanely.[16] Persons who take a direct part in the hostilities lose their protected status for as long as they are involved in the actual fighting.[17] Regarding violations of international humanitarian law in non-international armed conflicts, it is now accepted that they can give rise to individual criminal responsibility.[18] The denial of humanitarian assistance can therefore constitute a war crime regardless of whether it occurs in international or in non-international armed conflicts.

Particular offences

(a) Wilful killing or murder

"Murder is a crime that is clearly understood and well defined in the national law of every State."[19] Murder is a war crime in both international and non-international armed conflicts.[20] The Geneva Conventions and their Additional Protocols employ the term "wilful

15 ICTY, *Prosecutor v. Dusko Tadic a.k.a "Dule": Opinion and Judgment*, 7 May 1997, Case No. IT-94-1-AR72, para. 573 (emphasis added).

16 Art. 3.I. common to the Geneva Conventions. Fundamental guarantees are also included in Protocol II, Art. 4.

17 See Protocol I, Art. 51.3, and Protocol II, Art. 13.3. The fact that civilians may include those who at one time bore arms was confirmed, *inter alia*, in the *Vukovar* decision of the ICTY: *The Prosecutor v. Mrksic, Radic, Sljavancanin and Dokmanovic: Rule 61 Decision*, 3 April 1996, IT9513R61, para. 29.

18 The first time that the criminality of such violations was asserted by an international tribunal was the *Decision on the Appeal on Jurisdiction* in the *Tadic* case, *op. cit.* (note 14). Further evidence in support of that view is given by the Statute of the ICTR, which confers jurisdiction on the Court with respect to serious violations of common Art. 3 and Protocol II, Art. 4, and by the Statute of the ICC, Art. 8.2(c) and (e).

19 1996 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May–26 July 1996, 51 UN GAOR Supp. (No. 10), UN Doc. A/51/10, p. 96.

20 Murder in internal armed conflicts is recognized as a war crime in, *inter alia*, the Statutes of the ICTR, Art. 4(a), and of the ICC, Art. 8.2(c)(i), as well as in the jurisprudence of the ICTY and the ICTR.

killing" in the context of an international armed conflict, where this is considered a grave breach,[21] and "murder" in the context of an internal armed conflict.[22] Regarding a difference between the two terms, the ICTY found that there "can be no line drawn between 'wilful killing' and 'murder' which affects their content".[23] The elements of murder constituting a war crime are causing the death of a protected person, that the death results from an act or omission contrary to the law of armed conflicts, and that the perpetrator acted wilfully.[24]

The crime of wilful killing can be committed either by act or by omission; this was confirmed by the ICTY and the ICTR.[25] If civilians die as a clear result of the unlawful denial of humanitarian assistance, for instance if a region is completely blocked from the outside world for a long period, then it is arguable that the denial constitutes murder if the other conditions are fulfilled. This could also be the case when detainees are unlawfully deprived of the most essential goods. In its comment on the prohibition of wilful killing, the Commentary published by the ICRC says that "it seems, therefore, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees would be held responsible".[26] Furthermore, the Israeli Statute on crimes against humanity, for example, mentions that death through starvation is tantamount to deliberate killing;[27] and a commentator expressly stated that "the reduction of rations for prisoners of war resulting in their starvation falls into the category of wilful killing".[28]

21 Geneva Conventions, Arts 50/51/130/147.

22 Art. 3.l(a) common to the Geneva Conventions and Protocol II, Art. 4.2(a).

23 ICTY, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic a.k.a. "Pavo", Hazim Delic, Esad Landzo a.k.a. "Zenga"*, Judgment, 16 November 1998, Case No. IT-96-21-T, para. 422.

24 See, e.g., *Paper prepared by the ICRC on Article 8, paragraph 2(a), of the Rome Statute of the ICC*, Preparatory Commission for the ICC, 19 February 1999, PCNICC/1999/WGEC/INF.1 (with references to case law).

25 See, e.g., *Delalic* Judgment, *op. cit.* (note 23), para. 424, and ICTR, *The Prosecutor v. Jean Paul Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 589 (considering murder as a crime against humanity).

26 Jean S. Pictet (ed.), *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, ad Art. 147, p. 597.

27 "Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, Section I (b)", in E. Lauterpacht (ed.), *International Law Reports*, Vol. 36, Butterworths, London, 1968, p. 7.

28 Rüdiger Wolfrum, "Enforcement of international humanitarian law", in Dieter Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, 1995, p. 532.

In order for the element of unlawfulness to apply, a person responsible for impeding the delivery of relief supplies must violate at least one of the provisions on humanitarian assistance mentioned above. The condition that the State must give its consent and has a right to impose certain restrictions sometimes makes it difficult to establish such unlawfulness. However, as stated before, if the survival of civilians or prisoners of war is threatened, a relief operation must be allowed.

The term "wilful" is understood to include "intent" and "recklessness", but to exclude ordinary negligence. This is stated in the ICRC's Commentary on the Geneva Conventions,[29] and was confirmed by various decisions handed down by the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda. In the *Delalic* case, for example, the ICTY held that "the necessary intent (...) required to establish the crimes of wilful killing and murder (...) is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life".[30] In the case of wilful killing committed by omission, intent can be inferred if death is the foreseeable consequence of such an omission.[31]

It would seem therefore that the withholding of relief can under certain circumstances be considered wilful killing. Recent international jurisprudence provides little precedent for this interpretation, however. In three cases currently before the ICTY, depriving inmates of food and other vital services in detention centres constitutes the basis for the charges of war crimes and crimes against humanity; these are, however, being brought under the headings "wilfully causing great suffering or serious injury to body or health", "cruel treatment" and "inhumane acts".[32] Acts which resulted in indictments for wilful killing or murder were killings by shooting, mutilations resulting in death and the like. That the widespread and also well-documented instances of denial of humanitarian

29 See, e.g., ICRC Commentary on Protocol I, *op. cit.* (note 9), Art. 85, para. 3474, p. 994.

30 *Delalic* Judgment, *op. cit.* (note 23), para. 439.

31 ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), Art. 147, p. 597.

32 ICTY, *The Prosecutor v. Dragan Nikolic, a.k.a. "Jenki" Nikolic*, Indictment, 4 November 1994, Case No. IT-94-2; ICTY, *The Prosecutor v. Milorad Krnojelac, a.k.a. "Mico"*, Indictment, 6 June 1997, Case No. IT-97-25-I; *Delalic* Judgment, *op. cit.* (note 23).

aid[33] were not used as a basis for indictments might be due to the fact that, considering the limited time and resources available to the Tribunal, other grave violations of international law are considered more serious and easier to prove because of a more direct relationship between the acts committed and the consequences thereof.

(b) Torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health

"Torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are grave breaches under the Geneva Conventions. In internal armed conflicts common Article 3, para. 1(a), and Protocol II, Article 4, para. 2(a), prohibit "cruel treatment" and "torture". The offence of torture in the context of an international armed conflict carries the same meaning as in the context of a non-international armed conflict; the same is true of inhuman treatment and cruel treatment.[34]

Torture is criminally punishable in both international and non-international armed conflicts.[35] It was defined by the 1984 Torture Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".[36] This definition was considered by the ICTY and the

33 See, e.g., the various Reports by the Special Rapporteur of the Commission on Human Rights for the Former Yugoslavia, in particular: *Sixth periodic report on the situation of human rights in the territory of the former Yugoslavia*, submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993. UN Doc. E/CN.4/1994/110 (21 February 1994), Chapter I.I.: Human rights issues arising from interference with humanitarian aid, pp. 12-14.

34 See, e.g., *Delalic* Judgment, *op. cit.* (note 23), para. 443.

35 The fact that torture also constitutes a war crime in non-international armed conflicts is recognized, *inter alia*, in the Statutes of the ICTR, Art. 4(a), and of the ICC, Art. 8.2(c)(i), as well as in the jurisprudence of the ICTY and the ICTR.

36 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Art. 1 (2) of this Convention contemplates that the term "torture" may have a broader application under other international instruments.

ICTR as representing customary international law, also in international humanitarian law.[37]

If the definition of the Torture Convention is applied, the denial of humanitarian assistance can constitute torture only if it causes severe pain or suffering, for example as a result of a serious shortage of goods essential for the survival of the civilian population. Furthermore, the "purpose" requirement must be fulfilled. The withholding of food from prisoners, for example, could be committed for all the enumerated purposes. The list of purposes is, however, not exhaustive, and the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.[38] Importantly, the ICTY stated that the condition that "the suffering be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" must be interpreted to include officials of non-State parties to a conflict.[39] It also found that torture extends to officials who "take a passive attitude or turn a blind eye to torture".[40] As wilful killing, torture can be committed either by act or by omission.[41] The Special Rapporteur on Torture mentioned the prolonged denial of food as constituting torture in one of his reports.[42]

It might be easier to prove that impeding the delivery of relief amounts to inhuman treatment than to establish that it constitutes torture, as the threshold for the former crime is lower. Inhuman treatment, as a grave breach within the meaning of the Geneva Conventions, involves acts or omissions that cause severe physical or mental suffering or injury or

37 *Delalic* Judgment, *op. cit.* (note 23), para. 459; ICTY, *The Prosecutor v. Furundzija*, Judgment, 10 December 1998, Case No. IT-95-17/1-PT, para. 160; *Akayesu* Judgment, *op. cit.* (note 25), para. 593. There exists, however, some controversy as to whether the specific purpose and an official capacity or connivance are still necessary for the crime of torture. The definition of torture as a crime against humanity in the ICC Statute eliminated these two requirements (Art. 7.2(e)), and the current discussions between States on the elements of war crimes under the Statute of the ICC give an indication that at least the "official" requirement may be eliminated from the definition. See *Discussion paper proposed by the Coordinator of the Preparatory Commission for the ICC*, Working Group on Elements of Crimes, 25 February 1999, PCNICC/1999/WGEC/RT.2, p. 2.

38 This was confirmed in the *Delalic* Judgment, *op. cit.* (note 23), para. 470.

39 *Ibid.*, para. 473.

40 *Ibid.*

41 *Ibid.*, para. 468.

42 *Report of the Special Rapporteur, Mr P. Kooijmans, appointed pursuant to the Commission on Human Rights*, UN Doc. Res. 1995/33, E/CN.4/1986/15, 19 February 1986, para. 119.

constitute a serious attack on human dignity.[43] The threshold is also lower for the crime of "wilfully causing great suffering or serious injury to body or health".[44] Unlike the case of torture, the purpose of an act is not an element of the offence; the definition can, for example, also be held to cover mental suffering.[45]

The ICTY established that all acts or omissions found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment, but that the latter is not limited to those acts already incorporated in the former two. Instead, inhuman treatment extends further to acts which "violate the basic principle of humane treatment, particularly the respect for human dignity".[46] Depriving civilians or prisoners of war of relief will in many cases be contrary to the principle of humanity and therefore constitute inhuman treatment. In the *Delalic* case the Trial Chamber held that the "creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care, constitutes the offence of cruel treatment under Article 3 of the Statute, and wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute".[47]

Denial of assistance could also constitute an "outrage upon personal dignity, in particular humiliating and degrading treatment", an act prohibited under the Geneva Conventions and their Protocols,[48] and an international crime also in internal armed conflicts, as the Statutes of the ICTR and the ICC now clearly confirm.[49]

43 *Delalic* Judgment, *op. cit.* (note 23), para. 442.

44 "Wilfully causing great suffering or serious injury to body or health" was defined by the ICTY as "an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence." *Furundzija* Judgment, *op. cit.* (note 37), para. 511. See also *Delalic* Judgment, *op. cit.* (note 23), para. 442.

45 See, e.g., ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), ad Art. 147, p. 599; *Delalic* Judgment, *op. cit.* (note 23), para. 509.

46 *Ibid.* See also *Furundzija* Judgment, *op. cit.* (note 37), paras 542-544.

47 *Delalic* Judgment, *op. cit.* (note 23), para. 1119.

48 Common Art. 3.1(c), Protocol I, Art. 75.2(b), and Protocol II, Art. 4.2(e).

49 ICTR Statute, Art. 4(e), ICC Statute, Art. 8(2)(b)(xxi) and (c)(ii). See also 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 20(c) and (f).

(c) Starvation

The prohibition to starve civilians as a "method of warfare" is included in Article 54 of Protocol I and Article 14 of Protocol II. "To use starvation as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies."[50] Starvation is not specifically mentioned as a grave breach in Protocol I. However, the Appeal Chamber of the ICTY confirmed in the *Tadic* case that even if the Geneva Conventions and Protocols do not explicitly stipulate that a prohibited act constitutes a crime, it is still possible to establish criminal responsibility for such an act.[51]

The Statute of the ICC explicitly mentions the denial of humanitarian assistance as an example of an act that may lead to starvation. According to the relevant provision, "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions" is a serious violation of the laws and customs of war.[52] However, starvation has been included in the jurisdiction of the ICC only in respect of international armed conflicts, although there has been a considerable amount of lobbying for its inclusion in the list of crimes committed in non-international armed conflicts as well. This is regrettable since the prohibition of starvation is also mentioned in Protocol II.[53] In accordance with Article 10 of the ICC Statute, this omission will not, however, change the customary status of the rule.[54] As a matter of pre-

50 ICRC Commentary on Protocol I, *op. cit.* (note 9), ad Art. 54, para. 2089, p. 653. "The term 'starvation' means the action of subjecting people to famine, i.e., extreme and general scarcity of food." ICRC Commentary on Protocol II, *op. cit.* (note 9), ad Art. 14, para. 4791, p. 1456.

51 *Tadic* Appeal on Jurisdiction, *op. cit.* (note 14), para. 128. The ICRC Commentary on the Conventions states that the list of grave breaches is not to be taken as exhaustive and that criminality may extend beyond grave breaches in any case. *Op. cit.* (note 26), ad Art. 50, p. 371.

52 ICC Statute, Art. 8.2(b)(xxv).

53 Protocol II, Art. 14.

54 Art. 10 of the ICC Statute: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

sent customary international law, starvation can constitute a war crime regardless of the kind of conflict in which it occurs.[55]

In some cases, it might be difficult to prove the specific intent to use starvation as a method of warfare, i.e., as "a weapon to annihilate or weaken the population".[56] However, if the outcome of impeding humanitarian assistance is obvious according to the ordinary course of events, the intention can be inferred. Military necessity cannot serve as a justification, as even during sieges or blockades relief operations must be allowed.[57]

(d) Collective punishments

Article 33 of the Fourth Geneva Convention and Article 4, para. 2(b), of Protocol II prohibit collective punishments, which are defined as "penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed".[58] The Commentary on Protocol II published by the ICRC stresses the fact that the term "collective punishments" should be understood in its widest sense and as including any kind of sanction.[59] Collective punishments were, *inter alia*, qualified as a war crime by the Statute of the ICTR[60] as well as by the ILC Draft Codes of crimes of 1991 and 1996.[61] Since these acts are punishable when committed in

55 Deliberate impeding of the delivery of food and medical supplies to the civilian population in internal armed conflicts was condemned as a violation of humanitarian law by the Security Council on many occasions. It was also stressed that "those who commit or order the commission of such acts will be held individually responsible in respect of such acts" (S/RES/794 (1992), para. 5, on Somalia). See also S/RES/787 (1992), para. 7, on Bosnia-Herzegovina. With regard to Bosnian enclaves, the President of the Security Council declared that "the deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population constitutes a violation of the Geneva Convention of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice" (S/25334, 25 February 1993). Furthermore, the General Assembly and an Independent Commission of Experts called for those responsible for the impediment of humanitarian assistance in Sudan and starvation in Rwanda, respectively, to be "brought to justice" (UNGA res. 52/140 (1997), para. 2; Interim Report of the Commission of experts on the evidence of grave violations of international humanitarian law in Rwanda, S/1994/1125, paras 107 and 150).

56 ICRC Commentary on Protocol I, *op. cit.* (note 9), Art. 54, para. 2090, p. 653.

57 "Moreover, if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area that is particularly weak, the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons." ICRC Commentary on Protocol I, *op. cit.* (note 9), ad Art. 54.1, para. 2096, p. 654.

58 ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), ad Art. 33, p. 225.

59 ICRC Commentary on Protocol II, *op. cit.* (note 9), ad Art. 4.2, para. 4536, p. 1374.

60 Art. 4(b).

61 Art. 22.2(a); Art. 20(f)(ii).

non-international armed conflicts, an argument can be made that they should *a fortiori* be punishable in international armed conflicts. If humanitarian assistance is impeded in order to punish certain persons, this could constitute collective punishment. Depending on the result, the acts in question could at the same time constitute murder, inhuman treatment or other crimes.

2. Crimes against humanity

Recent international jurisprudence and the adoption of the ICC Statute have helped clarify the definition of crimes against humanity, which had been a matter of controversy since the Nuremberg Charter. It is now widely accepted that the following conditions have to be fulfilled: acts have to be committed against any civilian population and in a widespread or systematic manner, and must be based on a policy by a State, an organization or a group.[62] A connection to an armed conflict is no longer necessary, and a majority of sources indicate that a discriminatory intent behind every act is not required.[63]

The requirement that an act be committed against any civilian population will, in the case of humanitarian assistance, generally be fulfilled. "Widespread manner" is normally interpreted as meaning that acts must be directed against a multiplicity of victims. "It therefore excludes an isolated inhumane act committed by a perpetrator acting on his own ini-

62 See, e.g., Statutes of the ICTY, Art. 5, of the ICTR, Art. 3, and of the ICC, Art. 7.1 and 7.2(a). See also the 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 18, and the jurisprudence of the ICTY and the ICTR.

63 Although required in the Nuremberg Charter, such a connection to an armed conflict is now no longer considered to be necessary. The ICTR and ICC Statutes do not stipulate such a requirement. It was, however, reintroduced in the ICTY Statute, but the ICTY Appeal Chamber confirmed in the *Tadic* case that the crime had been defined more narrowly than necessary: "(...) customary international law no longer requires any nexus between crimes against humanity and armed conflict (...)". (*Tadic* Appeal on Jurisdiction, *op. cit.* (note 14), para. 78). Regarding discriminatory intent, there still exists some controversy around the issue whether an offender must have a reason linked to some character trait of the victim, and in particular, whether this ground for commission is relevant to all crimes against humanity or only to the category of persecutions. Although the Trial Chamber in the *Tadic* case adopted the requirement of discriminatory intent for all crimes against humanity, it confirmed that this was not necessary under customary international law (paras 652 and 716). Furthermore, the majority of States decided that murder and other crimes are so grave that the ground for commission is irrelevant and excluded this requirement from the ICC Statute.

tiative and directed against a single victim."[64] The concept of "systematic" has been defined as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State".[65] Furthermore, the crimes committed should "form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people".[66] While some commentators hold that this policy must be that of a State, the more recent view is that acts can be instigated or directed not only by a government but also by any organization or group.[67] Regarding the level of formalization of the policy, the Trial Chamber asserted in the *Tadic* Decision that a policy "need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not".[68]

In order for the denial of humanitarian assistance to become a crime against humanity, it would therefore need to be either systematic or widespread and based on a policy. This excludes random acts of impediment of humanitarian aid that are not committed as part of a broader plan or policy. Examples would be the spontaneous looting of a warehouse containing relief goods by civilians or soldiers, or spontaneous attacks on relief convoys by a group of drunken soldiers. Isolated criminal conduct which brings about the blockade of relief is not a crime against humanity,

64 See, e.g., 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), pp. 94-95. The International Law Commission used the term "large scale" instead of "widespread" to clarify that a territorial extension of acts is not necessarily needed.

65 *Ibid.*, p. 94. The wording "against any civilian population" included in most definitions of crimes against humanity has sometimes been interpreted as demanding systematic *and* widespread action. However, the decision in the *Tadic* case stipulated that "(...) it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur either on a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts". *Tadic* Judgment, *op. cit.* (note 15), para. 653. Furthermore, the ICC Statute includes the customary formulation "widespread or systematic" in its Article 7(1).

66 *Public Prosecutor v. Menten*, Netherlands. *International Law Reports*, *op. cit.* (note 27), Vol. 75, pp. 362-363.

67 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 18. Neither the ICTY nor the ICTR Statute make any reference to governmental policy. The Trial Chamber of the ICTY confirmed that a State policy is no longer required (*Tadic* Judgment, *op. cit.* (note 15), para. 654). Furthermore, States recently adopted the wording "pursuant to or in furtherance of a State or organizational policy" for Art. 7.2(a) of the Statute of the ICC.

68 *Tadic* Judgment, *op. cit.* (note 15), para. 653.

however tragic its consequences may be.[69] Acts of impediment of aid after a general breakdown of law and order do not normally qualify as crimes against humanity. However, the breakdown might have been orchestrated to hide the nature of the crimes — seemingly spontaneous acts are often the results of careful planning. Even if there is only a small number of victims, a crime against humanity may still be taking place as long as the "systematic" condition is fulfilled. It can be argued that the commission of a single act injuring one victim can fit the definition if there is an intent thereby to act against or to target other civilians.[70] For instance, only one aid worker would need to be killed in order to make all the agencies pull out of the region, thus leaving the population without assistance. This could be construed as a crime against humanity, depending on the consequences of the act for the population. The possibility that a single act may qualify as a crime against humanity if there is a link with a widespread or systematic attack against a civilian population was, for example, endorsed by the Trial Chamber in the *Vukovar Hospital Case*.[71]

Regarding the intent required for the denial of humanitarian assistance to constitute a crime against humanity, the *Tadic* Judgment confirmed that, in addition to the intent to commit the underlying offence, the perpetrator must know of the broader context in which his act occurs. The Trial Chamber referred to the approach taken by the majority in *R. v. Finta* by the Canadian Supreme Court, which ruled that "the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within crimes against humanity".[72] It is not necessary, however, to establish that the accused knew that his actions were inhumane[73] or that he knew exactly what would happen to the victims.[74]

69 While personal motives for acts resulting in assistance not reaching needy persons may be present, they should not, however, be the sole motivation for the act. See, e.g., *Tadic* Judgment, *ibid.*, para. 658, where several German cases arising from the Second World War are mentioned.

70 Jordan Paust, "Threats to accountability after Nuremberg: Crimes against humanity, leader responsibility and national fora", *New York Law School Journal of Human Rights*, Vol. 12, 1995, p. 60.

71 *Vukovar* Decision, *op. cit.* (note 17), para. 30. This was confirmed in the *Tadic* Judgment, *op. cit.* (note 15), para. 649.

72 *Tadic* Judgment, *op. cit.* (note 15), para. 657.

73 *Ibid.*

74 *Ibid.*

Particular offences

The following offences constituting crimes against humanity could be interpreted to include a denial of humanitarian assistance: murder, extermination, torture, persecution, and other inhumane acts. Murder has already been discussed in the chapter on war crimes and will therefore not be mentioned again.

(a) Extermination

Extermination is normally interpreted as murder on a large scale. The UN International Law Commission explained the difference between murder and extermination as follows: "Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act of extermination involves an element of mass destruction which is not required for murder."[75] Unlike genocide, extermination also applies to situations in which some members of a group are killed while others are spared.

An important step towards regarding the denial of humanitarian assistance as a crime against humanity has been taken in the definition of extermination in the ICC Statute, which affirms that extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population".[76] Since not all the crimes are defined in the Statute and even fewer examples are given, the fact that these acts are the only explicit examples of extermination is remarkable and shows the importance of the prohibition of such conduct. If the circumstances of the denial of humanitarian assistance are such that it can be considered "calculated to bring about the destruction of part of a population", then the conditions for extermination seem to be fulfilled.

(b) Torture

The definition of torture as a crime against humanity seems to differ from its definition as a war crime. The Statute of the ICC contains the following definition: "Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to,

75 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), p. 97.

76 Art. 7.2(b).

77 Art. 7.2(e).

lawful sanctions."[77] The *Akayesu* Judgment, however, used the same definition as the Torture Convention.[78] It is thus not clear whether the ICC definition eliminating the requirements of purpose and some official acquiescence constitutes custom or whether custom is only moving in this direction.[79]

If the definition in the ICC Statute is applied, then it is easier to argue that the withholding of aid constitutes torture. "Under the control" could be interpreted as limiting the crime to acts in a detention situation. In this case, the definition would apply only to persons in a prison camp or other detention facility who are denied vital goods and services. On the other hand, it would also be possible to interpret "under the control" in a broader sense. For example, if a given territory is completely encircled by enemy troops, as was the case in some so-called "safe areas" in Bosnia, or during an occupation by an enemy State, then access to assistance for the people in the encircled or occupied areas lies completely in the hands of the occupying or besieging forces. In such instances, the population can be considered under the effective control of these forces, which may inflict severe suffering on them.

(c) Persecution

While the term persecution has never been clearly defined in international criminal law,[80] it normally covers any severe and wilful deprivation of the fundamental rights of members of an identifiable group. The ICC Statute defines persecution as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity",[81] on "political, racial, national, ethnic, cultural, religious, gender (...) or other grounds that are universally recognized as impermissible under international law".[82] No definite grounds for persecution are required under customary international law; a variety of dif-

78 *Akayesu* Judgment, *op. cit.* (note 25), para. 593. See also the definitions of torture as a war crime in the *Delalic* and *Furundzija* Judgments, note 37.

79 See Art. 10 of the ICC Statute.

80 See M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Nijhoff Publishers, Dordrecht, 1992, p. 318.

81 Art. 7.2(g).

82 Art. 7.1(h).

83 See, e.g., *Tadic* Judgment, *op. cit.* (note 15), para. 711.

84 Even though the ICTY Statute contains the conjunctive "and" (Art. 5(h) mentions "persecutions on political, racial *and* religious grounds"), the Trial Chamber ruled that the discriminatory bases should be read independently of each other. *Tadic* Judgment, *op. cit.* (note 15), para. 713.

ferent grounds have been listed in international instruments.[83] One of these grounds is sufficient for the act to constitute persecution.[84]

The *Tadic* Judgment confirmed the view that persecution is a crime *per se*, and does not have to refer to other crimes: "Because the 'persecution type' is separate from the 'murder type' of crimes against humanity it is not necessary to have a separate act of an inhumane nature to constitute persecution; the discrimination itself makes the act inhumane."[85] The crime of persecution thus encompasses acts of varying severity, from acts that are mentioned under other crimes which are inhumane *per se*, to acts that become inhumane through the discrimination behind them. In addition to the criminal liability which attaches to certain inhumane acts, there is an additional element of culpability when they are committed with discriminatory intent; this was stated to constitute customary international law by the Trial Chamber in the *Tadic* case.[86]

Apart from the crimes that could be interpreted to include the denial of humanitarian assistance and that would also count as persecution if committed for discriminatory reasons, it is arguable that any withholding of assistance based on discrimination constitutes persecution, without regard to the consequences of the withholding. The Trial Chamber in the *Tadic* case found, for example, that economic measures of a personal type, such as the deprivation of food, can constitute persecutory acts.[87]

(d) Other inhumane acts

The category of "other inhumane acts" ensures that new forms of crimes against humanity will not escape international criminal responsibility. The notion of other inhumane acts is circumscribed by two requirements. First, according to the *ejusdem generis* principle of interpretation, other inhumane acts include only acts that are of a nature similar to

85 *Ibid.*, para. 697. The last draft of the ICC Statute before the Rome Conference included the options that all crimes had to be based on discriminatory grounds, and that persecutions had to be committed in connection with other crimes within the jurisdiction of the Court. Unfortunately, instead of excluding both possibilities as not in conformity with customary international law, a consensus was found that kept a link to other crimes or acts: "Persecution (...) in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". ICC Statute Art. 7.1(h). However, this will in practice not make a big difference, as in most cases there will be a link to another act.

86 *Ibid.*, para. 699.

87 The Trial Chamber referred to several cases of the Nuremberg Tribunal. See *Tadic* Judgment, *op. cit.* (note 15), para. 707.

those listed before, such as murder, extermination, enslavement, deportation, and torture. Second, the acts must in fact cause injury to human beings in terms of physical or mental integrity, health or human dignity. In the ICC Statute, other inhumane acts are mentioned at the end of the list of crimes against humanity: "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[88]

Deprivation of assistance can be an example of an inhumane act, if it intentionally causes great suffering, or serious injury to body or to mental or physical health. Importantly, the UN Secretary-General in his analysis of the Nuremberg Judgment suggested that depriving part of the civilian population of their means of subsistence might be one example of such an "other inhumane act".[89] In the *Nikolic* Indictment, the Prosecutor of the ICTY stated: "Nikolic (...) committed a crime against humanity by participating in inhumane acts against more than 500 civilians (...) by endangering the health and welfare of detainees by providing inadequate food, endangering the health and welfare of detainees by providing living conditions failing to meet minimal basic standards (...)."[90]

3. Genocide

Genocide is often regarded as the most atrocious international crime. One should therefore be very careful to preserve its special status and not to water down its definition to any instance of mass killing. Genocide is the only crime against humanity which has been authoritatively codified in one international instrument, the 1948 Genocide Convention.[91] The treaty's generally accepted definition of genocide is "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions

88 Art. 7.1(k).

89 *The Charter and Judgement of the Nurnberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Sales No. 1949.V.7, 1949, p. 67.

90 *Nikolic* Indictment, *op. cit.* (note 32), para. 24.1. See also other cases cited in note 32.

91 The Advisory Opinion of the I.C.J. on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, of 28 May 1951, confirmed that the prohibition of genocide is part of customary international law. *I.C.J. Reports 1951*, p. 12.

of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures to prevent births within the group; (e) Forcibly transferring children of the group to another group".[92] No nexus to an armed conflict or to another crime is therefore necessary. The provision of the Genocide Convention is reproduced in the Statutes of the ICTY, the ICTR and the ICC.[93] For the denial of humanitarian assistance to constitute genocide, the following three elements must thus be present: the denial must amount to one of the enumerated acts, the act in question must be directed against one of the mentioned groups, and the perpetrator must have the intent to destroy the group in whole or in part.

The attributes defining protected groups are not addressed by the Genocide Convention. In particular, the definition of nationality and the difference between ethnic and racial group are problematic. The Trial Chamber in *Akayesu* held that "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".[94] "An ethnic group is generally defined as a group whose members share a common language or culture. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors. The religious group is one whose members share the same religion, denomination or mode of worship."[95]

Another open question is whether the targeted group has to be separate from the perpetrator's group. It is clear that the definition does not require the complete annihilation of a group, but not how large the part of the targeted group has to be for the act to constitute genocide. This must be decided on a case-by-case basis, depending on the nature of the victims and the proportion they represent of the complete population of the group. As in the case of crimes against humanity, if the leadership of a group is targeted, the number of victims may be lower but the impact will be stronger. Contrary to war crimes and crimes against humanity, in the case of genocide even the direct and public incitement to commit the crime is punishable.[96] A leader who publicly calls for the impeding of relief

92 Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, Art. 2.

93 Arts 4/2/6 respectively.

94 *Akayesu* Judgment, *op. cit.* (note 25), para. 512.

95 *Ibid.*, paras 513-515.

96 See Art. 3(c) of the Genocide Convention.

to a certain group with the intent to destroy that group could therefore be held responsible.

Intent is the most difficult element of genocide to prove. In the absence of a confession, intent can be inferred only from certain factual circumstances. In the case of denial of humanitarian assistance this might be particularly difficult: it is already complicated to establish a link between the act of impeding and the result, but even more so to prove that the intended result of the denial is destruction of a particular group. The ICTY found that the specific intent "may be inferred from a number of facts such as the general political doctrine which gave rise to the acts in Article 4 [of the ICTY Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct".[97] The judges in the *Akayesu* case stated that the "general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others (...)"[98] has to be taken into account. Even if a general genocidal intent can be established, that intent must be imputed to individual perpetrators to convict them. The closer an individual is associated with an organization with genocidal intent, the easier this can be proved.

Particular offences

The denial of humanitarian assistance could fit into the categories of "killing members of the group", "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", provided that the prerequisites for genocide are fulfilled. What was said for murder as a war crime is also applicable, *mutatis mutandis*, to genocide.

97 ICTY, *The Prosecutor v. Radovan Karadzic and Ratko Mladic: Review of Indictment pursuant to Rule 61*, 11 July 1996, Cases No. IT-95-5-R61 and No. IT-95-18-R61, para. 94.

98 *Akayesu* Judgment, *op. cit.* (note 25), para. 523.

99 *Ibid.*, para. 502.

(a) Causing serious bodily or mental harm to members of the group

The ICTR found in the *Akayesu* Judgment that it is not necessary that the harm caused be permanent and irremediable.[99] It stated that "the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution".[100] This definition would include a very wide range of acts which certainly encompass the wilful impediment of relief. This view was confirmed by the Israeli Court in the *Eichmann* case, which considered the following acts to constitute infliction of serious physical or mental harm: "by the enslavement, *starvation*, deportation and persecution (...) and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture".[101]

(b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

By including this act, the Genocide Convention expanded the definition of murder and extermination as international crimes. In the *Eichmann* case it was held that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" included acts committed with the intention to kill, even if the victims stayed alive.[102] The ICTR concluded that the crime "should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction." It gives the example of subjecting a group of people to a subsistence diet and the reduction of essential medical services below minimum requirements.[103]

As long as the intent requirement is fulfilled, the impeding of relief could fall within the definition of this act. In an authoritative commentary on the Genocide Convention, the following examples are given for "conditions of life": placing a group on a subsistence diet, reducing

100 *Ibid.*, para. 504.

101 *Eichmann* case, *International Law Reports*, *op. cit.* (note 27), p. 238 (emphasis added).

102 *Ibid.*, pp. 235-236.

103 *Akayesu* Judgment, *op. cit.* (note 25), para. 506.

medical services below a certain minimum level, and withholding sufficient living accommodation.[104]

Conclusion

The discussion of the previous chapter clearly shows that the withholding of relief can constitute any of the three crimes considered, provided that their specific requirements are fulfilled. It will be easier to prove that the denial of humanitarian assistance is a war crime, as its threshold is lower.[105] On the other hand, crimes against humanity and genocide need not be committed during an armed conflict; furthermore, it will be possible to prosecute them once the ICC is established, whereas in the case of war crimes the Statute provides for an "opting out" for a period of seven years.[106] In respect of war crimes, but not the crime of genocide or crimes against humanity, the ICC also provides that superior orders may under strict conditions be a defence.[107]

One difficulty that is common to most instances of denial of humanitarian assistance is to prove that assistance has been withheld intentionally. On the other hand, as mentioned, the intent to commit certain acts can often be deduced from the way in which aid is actually impeded and from the general conduct of hostilities. These factors can also be conclusive for the policy behind the acts required for crimes against humanity and the special intent for genocide. A further problem is the issue of causality: how can one prove that there was a direct link between the act of denial and a certain result, for example the death of a person? Furthermore, in some instances it might be difficult to ascribe an act to a specific person. In the case of a prison or a besieged city causality can be established more easily than in a more complex environment.

104 Nehemiah Robinson, *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, New York, 1960, pp. 63-64.

105 The ICC Statute includes a threshold for war crimes in its Art. 8.1. "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes". This should, however, not introduce a new threshold for war crimes but should be interpreted as advice to the Prosecutor to concentrate on the most serious crimes.

106 ICC Statute, Art. 124. This article permits a State to declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes when they are alleged to have been committed by its nationals or on its territory. Still, following the principle of universal jurisdiction, States are already under an obligation to prosecute or extradite perpetrators regardless of their nationality or where the crime was committed.

107 Art. 33.1.

Another question that arises in the context of humanitarian assistance is whether parties are obliged to suspend the fighting in order to allow for relief to be delivered and whether their refusal would constitute a crime. There is no easy answer to this question. Although humanitarian organizations should not impede military operations, the view that parties to a conflict should conduct hostilities in such a way as to allow access to the civilian population is increasingly gaining ground.[108] Still, the problem remains how to prove an intent or a policy behind the fighting.

Having established that under certain circumstances the denial of aid can constitute a crime under international law, we need to ask ourselves what difference this will make in reality. As with international humanitarian law in general, the crucial point is whether the law will be enforced. As States are generally reluctant to comply with their obligations to repress violations of humanitarian law, optimism is not appropriate. While the creation of the ICC is a big step forward, it remains to be seen how effective it will be. It is to be hoped that the Court will consider the wilful impediment of relief supplies not only as starvation, which is specifically mentioned in the Statute, but also as the other crimes discussed in this article, if the necessary conditions are fulfilled.

It is undoubtedly essential to show caution when declaring a certain conduct a crime under international law, in particular where crimes against humanity or genocide are concerned. However, it should not be forgotten that — although not always as obvious or as easy to prove in the reality of armed conflicts — the impact of the denial of humanitarian assistance can be just as strong as massacres "committed with knives".

108 In the case of Somalia, for example, the Security Council demanded a cease-fire throughout the whole country in order to "promote the process of relief distribution". SC res. 794 (1992), 3 December 1992, para. 1.

Résumé

Le refus d'assistance humanitaire, un crime en droit international

par CHRISTA ROTTENSTEINER

Le droit international humanitaire interdit le recours à la famine contre la population civile en temps de conflit armé. En même temps, les Conventions de Genève et les Protocoles additionnels obligent les parties au conflit à s'assurer que les personnes civiles reçoivent l'assistance dont elles ont besoin. Le présent article examine dans quelles circonstances le refus d'accorder cette assistance humanitaire devient un crime en droit international. L'auteur approche la question sous trois angles différents : crime de guerre, crime contre l'humanité et crime de génocide. Cette étude se base sur une analyse du droit conventionel et des règles coutumières, complétée par l'examen du Statut de la Cour pénale internationale et de la jurisprudence des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda. Toutes les voies pour traduire en justice ceux qui refusent d'accorder une assistance humanitaire aux victimes de la guerre sont ainsi passées en revue.

Review of the legality of weapons: a new approach

The SIrUS Project

by
ROBIN M. COUPLAND, FRCS, and **PETER HERBY**

Part I — Abhorrent weapons and "superfluous injury or unnecessary suffering": a surgeon's view[1]

by ROBIN M. COUPLAND, FRCS

Buried or "point-detonating" anti-personnel mines are the only weapons in widespread use which cause specific and severe injury resulting in specific and permanent disability. The treatment of the injury requires, on average, twice as many operations and four times as many blood transfusions as an injury from other weapons. This is a surgeon's view.

There was no particular point at which I became interested in the global problem of anti-personnel mines; I was just confronted with mine-injured people. From 1987 to 1991, I worked in hospitals set up by the International Committee of the Red Cross on the borders of

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1 See Robin M. Coupland, "Abhorrent weapons and 'superflous injury and unnecessary suffering': from field surgery to law", *British Medical Journal*, Vol. 315, 29 November 1997, p. 1450 (also on BMJ website: www.bmj.com).

Afghanistan and Cambodia, two of the most heavily mined countries in the world. During those last years of the Cold War, the full extent of the impact of mines on whole societies was as yet unknown. New international legislation to ban the devices was not being discussed. I simply found myself dreading the radio call announcing that another mine-injured person was on his or her way to hospital. The dread was generated by the knowledge that my team would be faced with a long and difficult operation which entailed excising large amounts of damaged tissue or amputating a limb. This quickly turned into abhorrence for the weapons which caused such injury as a function of their design. In brief, my own reason for finding these weapons abhorrent was the nature of the injury they caused; it was appalling and somehow excessive.

In 1990, the ICRC was alerted to the development of blinding laser weapons, a development which was founded on the notion that it would be better to blind an enemy soldier than to kill him or her. Expert opinion informed us that even in the best ophthalmological centres there was no effective treatment for laser-induced retinal hemorrhage. Here we had another weapon system which, as a function of its design, would produce a severe permanent disability. (Fortunately, such weapons were banned in 1995; unfortunately, this ban came after the first blinding lasers had been produced.) It was becoming clear to me that however severe the effects of bullets or fragmentation munitions, there existed weapons which were, in some indefinable way, worse. This was the first time I heard of "superfluous injury or unnecessary suffering" — a fundamental concept of international humanitarian law governing weapons. Nobody could tell me what it was, but I was sure I had seen it caused by anti-personnel mines.

The stigmatization of anti-personnel mines as abhorrent and much of the subsequent thrust of the campaign to ban them have quite rightly been based on the argument that they kill or injure both combatants and non-combatants without distinction and continue to do so long after the conflict has ended. However, I urge those who have worked hard on the mines campaign not to lose sight of the nature of the injury as a basis for deeming a weapon illegal. This is important because, if the injury or suffering resulting from a weapon's nature or technology could be proved to be excessive compared with the military advantage gained from its use, the weapon would be illegal whether the victim was a soldier or a civilian.

Weapon development continues. Other technologies are appearing on the horizon such as beams and waves that could produce certain specific effects on the central nervous system, including depression and convulsions. Do armies really need these? Are they "abhorrent"? What can or should doctors do about them? Lawyers tell me that they cannot give governments and their military advisers a definition of what constitutes "superfluous injury or unnecessary suffering".

Doctors trying to understand this phrase step into the no-man's land between the effects of weapons on health and the international law of war. I can see only one way to navigate this no-man's land, and that is to translate a field surgeon's concept of abhorrent weapons into a tool which can be used for making a legal determination of whether a specific weapon will inflict "superfluous injury or unnecessary suffering".

The origins of the SIrUS Project

The medical profession has a responsibility to use health-related data to help the international community define objectively which weapons are inherently "abhorrent" and which weapons cause "superfluous injury or unnecessary suffering". This was one of the major findings of a symposium on *The medical profession and the effects of weapons*, organized by the ICRC in Montreux, Switzerland, in March 1996.[2]

The Montreux symposium, which represented the start of the SIrUS Project, addressed this responsibility by drawing together data and expert opinion from the fields of weapons, medical ethics, trauma surgery and law. The project takes its name from that which it seeks to prevent: **S**uperfluous **I**njury o**r** **U**nnecessary **S**uffering (**SIrUS**). It is an attempt to bring objectivity to the legal notion of "superfluous injury or unnecessary suffering" and so aims to facilitate the review of the legality of weapons.[3]

A study of the effects of weapons

The group of experts who worked on the SIrUS Project, most of whom were health professionals, collated data relating to the effects of weapons used in conflicts over the last 50 years. These data originated from both military medical publications and the ICRC wound database of

2 *The Medical Profession and the Effects of Weapons*, Symposium (Montreux, Switzerland, 1996), ICRC, Geneva, 1996.

3 *The SIrUS Project: Towards a Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering"*, ICRC, Geneva, 1997.

26,636 weapon injuries. In relation to different causes of injury, the following information was retrieved:

- the proportion of large wounds (according to the Red Cross wound classification);
- overall mortality;
- the relative proportions of central and limb injuries;
- the duration of hospital stay;
- the number of operations required;
- the need for and volume of blood transfusions;
- the number of lower limbs amputated among the survivors.

From these data, the expert group found that the weapons which cause injury by explosions or projectiles but which do not target a specific part of the body as a function of their design:

- do not cause a field mortality of more than 22% nor a hospital mortality of more than 5%;
- cause grade 3 wounds (as measured by the Red Cross wound classification) in less than 10% of those who survive to hospital; and
- cause wounds that can be treated for the most part by well-established medical and surgical methods.

High-mortality or large wounds can obviously be caused by legitimate weapons such as rifle bullets and fragmentation munitions under certain circumstances. Whether an individual is wounded slightly or severely, or is killed by such weapons, is determined by the design of a weapon, how it is used and random factors such as his or her proximity to the detonation (of a munition) and the part of the body that is hit. The data in the SIrUS Project about the effects of weapons commonly used in recent conflicts take all these factors into account.

On the other hand, some weapons can be expected to inflict certain effects virtually all the time. These effects result specifically from the nature or technology of the weapon, i.e., they are design-dependent. Examples include: exploding bullets, which are usually lethal or cause grade 3 limb wounds; chemical and biological weapons, which inflict specific diseases or abnormal physiological states; blinding laser weapons which cause specific permanent disability to the eyes and have effects for which there is no proven medical treatment; and "point-detonated" anti-personnel mines, which result in a severe (grade 3) injury to the foot or leg which in turn results in specific disability and disfigurement.

The SIrUS Project has been endorsed by a growing part of the international medical community. In October 1998, the World Medical Association called on all its member national medical associations to endorse the criteria contained in the SIrUS Project. Thirteen national medical associations and 16 other medical institutions had endorsed the SIrUS Project as of April 1999. By doing so, these institutions recognize the validity of the study and recommend that the findings be used when making a determination of which weapons cause "superfluous injury or unnecessary suffering".

PART II — The ICRC and the SIrUS project

by PETER HERBY

The concept of "superfluous injury or unnecessary suffering"

States have an obligation to review the legality of the weapons they intend to use. This principle, as it applies to new weapons, is enshrined in Article 36 of Protocol I additional to the Geneva Conventions of 1949. One reason that a weapon might be deemed illegal is that it causes "superfluous injury or unnecessary suffering".

Since the 1868 Declaration of St. Petersburg the principle that the only legitimate purpose of war is to weaken the military forces of an opponent has been an accepted fundamental principle of international humanitarian law.[1] It was established that this purpose would be served by disabling enemy combatants and that it "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable".[2] This principle has been reaffirmed in various international instruments in the form of a prohibition on the use of "weapons, projectiles and material and methods of war of a nature

1 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 1868. Even before 1868, the ancient laws of war in India, Greece, Rome, and the Middle East had prohibited poison weapons because of their excessive effects. The 1863 Lieber Instructions: Instructions for the Government of Armies of the United States in the Field (General Orders No. 100, of 24 April 1863) also "wholly excluded" this means of warfare on the same grounds.

2 St. Petersburg Declaration.

to cause superfluous injury or unnecessary suffering".[3] In 1996, the International Court of Justice stated that this rule constitutes one of the "intransgressible principles of international customary law" and is a fundamental rule to be observed by all States.[4]

Despite the firmly established nature of this prohibition, its application has often been difficult or has not even been attempted due to the difficulty for lawyers, weapon designers and political leaders to determine the degree of human injury or suffering inflicted. Judgements as to whether a specific weapon causes "superfluous injury or unnecessary suffering" have most often been made primarily on the basis of subjective influences, often prompted by generalized public abhorrence of a particular weapon, rather than of an appraisal of whether the weapon's effects might outweigh military need.

The notion of "superfluous injury and unnecessary suffering"[5] relates to the design-dependent effects of specific weapons on health. Indeed the prohibition refers to weapons "of a nature to cause"[6] these effects. Although much of humanitarian law is aimed at protecting civilians from the effects of armed conflict, this rule of customary international law constitutes one of the few measures intended to protect combatants from certain weapons which are deemed abhorrent or which inflict more suffering than required for their military purpose.

All weapons the use of which is already controlled or prohibited under international humanitarian law exceed the baseline of weapon injuries seen in recent conflicts, as described by the SIrUS Project. Had such an approach existed when the problems related to these weapons

3 In the words of Article 35, para. 2, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). See also the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980.

4 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 79.

5 Both terms are translations from the single French concept of *maux superflus* contained in the 1899 and 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Article 23 (e). The French text is the only authentic text of the 1899 and 1907 Hague Regulations.

6 This term is translated from the original French *propres à causer*. The term was incorrectly translated into the English "calculated to cause" in the 1907 Hague Regulations, which introduced the subjective element of the weapon designer's intention. This error was corrected when the original "of a nature to cause" was restated in Protocol I of 1977, Article 35, para. 2.

were being discussed, their control or prohibition might have occurred through a more rational and efficient process. Subsequently, consensus on and universalization of the relevant rules might also have been achieved more rapidly.

Weapons, law and health

The ICRC's work relating to chemical weapons early in this century and its more recent work on landmines[7] and blinding laser weapons[8] was driven by its concern at their horrific effects on health. The whole body of humanitarian law is based on concern about the effects of certain weapons rather than the specific technologies which cause these effects. The ICRC's support for the SIrUS Project reflects the institution's commitment to a health-based approach to weapons under international humanitarian law.

The ICRC considers that the data provided by the SIrUS Project constitute a tool for determining which weapons may be deemed abhorrent or to be of a nature to cause "superfluous injury or unnecessary suffering". These data do not and will not provide a definition of these concepts.

Use of the findings of the SIrUS Project in weapon reviews would not prevent governments from prohibiting weapons, by treaty, on the basis of other considerations, such as public abhorrence, public interest criteria or the specific effects of a weapon. The proposals would have no effect on existing treaties.

ICRC proposals based on the SIrUS Project

In May 1999, the ICRC convened a meeting of government experts in international humanitarian law and of military and civilian medical experts to consider the proposals contained in the SIrUS Project. On the basis of discussions in this meeting and bilateral consultations, the ICRC made a set of proposals for consideration by the States, the International Red Cross and Red Crescent Movement and other concerned organizations. The proposals below will be contained in a report

7 Stuart Maslen and Peter Herby, "An international ban on anti-personnel mines: History and negotiation of the 'Ottawa treaty'", *IRRC*, No. 325, December 1998, p. 693.

8 See Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, May-June 1996, p. 272 (with the text of the 1995 Protocol on Blinding Laser Weapons).

on the project to be submitted to the 27th International Conference of the Red Cross and Red Crescent, to be held in Geneva in October-November 1999:

The SIrUS Project

The SIrUS Project has established that the following effects of weapons on humans have NOT been seen commonly as a result of armed conflicts in the last five decades:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated anti-personnel mines — now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality rate;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognized and proven medical treatment which can be applied in a well-equipped field hospital.

Proposal 1

That States, when reviewing the legality of a weapon take the above facts into account by:

- establishing whether the weapon in question would cause any of the above effects as a function of its design, and if so:
- weighing the military utility of the weapon against these effects; and
- determining whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.

Proposal 2

That the States make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons, and b) to promote transparency in the conduct and results of such reviews.

Plan of action

The ICRC presents the SIrUS Project and the above proposals to the States, the medical community and concerned organizations and individuals as a means of promoting, over time, both debate and consensus on a health-based approach to weapons under international humanitarian law. In so doing, the ICRC invites:

the States to analyse the approach proposed in this paper and to take the available data concerning the nature of injury in recent conflicts into account when determining, as called for under Article 36 of Additional Protocol I of 1977, whether a proposed weapon, by its design, causes effects on health which may constitute "superfluous injury or unnecessary suffering";

the States to make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons, and b) to promote transparency in the conduct and results of such reviews;

the States, the National Red Cross and Red Crescent Societies and other interested organizations to support the approach taken by the SIrUS Project in their efforts to strengthen respect for the prohibition of weapons which are inherently abhorrent or of a nature to cause "superfluous injury or unnecessary suffering"; such efforts may include public discussion and fora such as the 27th International Conference of the Red Cross and Red Crescent (1999) and the 2001 Review Conference of the 1980 Convention on Certain Conventional Weapons;

national medical associations to consider the contribution medical professionals can make to promoting effective implementation of international humanitarian law through discussion and endorsement of the SIrUS Project;

medical professionals and other individuals concerned with the effects of weapons and armed conflict to promote a health-based approach, including consideration of the SIrUS Project, in professional and public discourse on these issues.

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Résumé

Déterminer la légalité d'une arme — une nouvelle approche : le Projet SIrUS

par le Dr ROBIN M. COUPLAND, FRCS, et PETER HERBY

Une règle fondamentale du droit international humanitaire dit qu'il est interdit, au cours des hostilités, d'infliger des « maux superflus » aux combattants ennemis. Sur la base de ce concept, l'utilisation d'un certain nombre d'armes ou de munitions a été interdite au cours de ce siècle, comme les armes chimiques ou, plus récemment, les mines antipersonnel. Toutefois, la communauté internationale n'a jamais adopté de critères qui permettent de décider si une arme ou un type de munition est susceptible de causer des « maux superflus ». Le Projet SIrUS, lancé par le CICR, a comme objectif de proposer de tels critères[9]*. En se basant sur les résultats d'enquêtes statistiques, le Dr Coupland élabore, dans la première partie de l'ouvrage, les bases médicales qui doivent permettre l'élaboration de critères pour évaluer les effets d'une arme. Peter Herby, quant à lui, retrace le cadre juridique et présente les propositions que le CICR entend soumettre à la XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge, fin 1999.*

9 Voir Dr Robin M. Coupland FRCS (éd.), *Le Projet SIrUS – Déterminer quelles armes causent des « maux superflus »*, CICR, Genève, 1998.

New rules for the protection of cultural property in armed conflict

The significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

Alles van waarde is weerloos.[1]

by
JEAN-MARIE HENCKAERTS

THE 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereafter: the 1954 Convention) is the paramount international instrument for the protection of cultural property during armed conflicts.[2] Cultural property includes museums, libraries, archives, archaeological sites and monuments of architecture, art or history, whether religious or secular. The 1954 Convention has to date been ratified by 95 States, but the basic principles concerning respect for cultural property enshrined in it have

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1 "All things of value are defenceless." A famous line by the Dutch poet Lucebert (author's translation).

2 Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague, 14 May 1954, reprinted in Dietrich Schindler and Jiri Toman (Eds.), *The laws of armed conflicts: A collection of conventions, resolutions and other documents*, 3rd ed., Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 1988, pp. 745-759.

become part of customary international law. A Protocol dealing mainly with the protection of cultural property in occupied territory was adopted at the same time as the Convention, and 79 States are party thereto.[3] The specific content of the Convention will be explained in brief under each of the substantive sections of this article.

The effectiveness of the 1954 Convention became a subject of general concern in the early nineties, during the second Gulf War and the war in the former Yugoslavia. As this article goes to press, that effectiveness is sadly still being tested in the continued war in the Balkans.

In 1991, the Government of the Netherlands decided to include a review of the 1954 Convention as part of its contribution to the United Nations Decade of International Law. As a result, The Netherlands and the United Nations Educational, Scientific and Cultural Organization (UNESCO) jointly commissioned and funded "a review of the objectives and operation of the Convention and Protocol with a view to identifying measures for improving its application and effectiveness and to see whether some revision of the Convention itself might be needed, perhaps by means of an Additional Protocol".[4] That review was published in 1993 by Professor Patrick Boylan.

In the following years, the Government of the Netherlands continued to be the driving force behind the review process, and three expert meetings were organized which resulted in the "Lauswolt document", named after the Dutch town where it was drafted. The Lauswolt document was a new draft treaty based on the findings of the Boylan review.

In March 1997, twenty government experts met at UNESCO headquarters in Paris to review the Lauswolt document. On the basis of their discussions, the UNESCO Secretariat drew up a revised Lauswolt document which it submitted to all States party to the 1954 Convention at a meeting in Paris on 13 November 1997. It was decided that a final preparatory meeting would be convened to discuss certain legal questions further, and the proposal by the Netherlands to convene a diplomatic conference in 1999 to transform the Lauswolt document into an international treaty was welcomed.

3 Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague, 14 May 1954, *ibid.*, pp. 777-782.

4 Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO, Paris, 1993, p. 19.

The final preparatory meeting was hosted in Vienna in May 1998 by the Austrian Government. The meeting identified five main areas that needed to be addressed in the Second Protocol:

- the exception of military,
- precautionary measures,
- the system of special protection,
- individual criminal responsibility,
- institutional aspects.

After the meeting, a Preliminary Draft Second Protocol to the 1954 Convention was drawn up.[5] States and relevant organizations were invited to submit comments on the draft, in particular with respect to the five areas mentioned above.[6] On the basis of those comments, the UNESCO Secretariat and the Government of the Netherlands together drew up the final draft Second Protocol.[7]

The Diplomatic Conference on the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict took place in The Hague from 15 to 26 March 1999. On 26 March 1999, the Conference adopted the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (hereafter: the Second Protocol) without a vote.[8] It was opened for signature in The Hague on 17 May 1999 in the framework of the Centennial celebrations of the First International Peace Conference and signed by 27 States on that date. It remains open for signature at the Hague until 31 December 1999.

The Second Protocol is additional to the 1954 Convention, which remains the basic text. A State can only become a party to the

5 UNESCO Doc. HC/1999/1, 9 October 1998.

6 See Synoptic report with its Addendum and Corrigendum of comments on the Preliminary Draft Second Protocol to the 1954 Hague Convention received from High Contracting Parties to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, other UNESCO Member States and international organizations, UNESCO Docs. HC/1999/4, 15 January 1999, HC/1999/4/Add.1, March 1999, and HC/1999/4/Add.1/Corr.1, 18 March 1999. Military and legal aspects of the preliminary draft were further discussed in the light of modern humanitarian law at an Expert Meeting on the Improvement of the 1954 Hague Convention, Leiden (Netherlands), 17-18 December 1998.

7 Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. HC/1999/1/rev.1, February 1999.

8 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague, 17 May 1999, UNESCO Doc. HC/1999/7, 26 March 1999.

Second Protocol if it has ratified the 1954 Convention. During the entire review process, four options were kept open regarding the treaty technique to be used for improving the 1954 Convention. The first consisted in amending the 1954 Hague Convention; however, any amendments would have required unanimous adoption by all States party to the Convention.[9] Since this was virtually impossible, this option was discarded even though some States had supported it. The second option consisted in the adoption of a new, separate convention. This would have required substantial negotiations and would have had the disadvantage of creating two separate systems. As a result, this option was never really considered.

The third option consisted in the adoption of a Protocol aimed at revising the 1954 Convention. Several delegations strongly advocated this option, but because unanimity would again have been required, it was rejected by the majority of delegations. In the end, the fourth option prevailed, namely that the new treaty would be an additional protocol which would in no way amend the 1954 Convention but would supplement it and would only apply to the States who ratified it. The 1977 Protocols additional to the 1949 Geneva Conventions served as a useful precedent. As a result, every effort was made to make sure that each provision of the Second Protocol was indeed additional to the 1954 Convention.

The purpose of this article is to highlight the major developments embodied in the Second Protocol and to mention certain points of common understanding that were acknowledged at the Diplomatic Conference but not reflected as such in the text of the Protocol itself nor in the Conference's Final Act.

Peacetime measures

Pursuant to Article 3 of the 1954 Convention, States undertake to prepare in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict "by taking such measures as they consider appropriate". But the Convention does not provide any further details on measures States should take.

The Second Protocol aims to provide more guidance in this respect, as it provides specific examples of concrete measures to be taken in time of peace:[10]

9 1954 Convention, Article 39(5).

10 Second Protocol, Article 5.

- the preparation of inventories,
- the planning of emergency measures for protection against fire or structural collapse,
- the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property,
- the designation of competent authorities responsible for the safeguarding of cultural property.

These measures are of great practical importance for the protection of cultural property in the event of armed conflict.

Clearly, they also require financial resources and know-how. With these requirements in mind, the Second Protocol provides for the setting up of a Fund for the protection of cultural property in the event of armed conflict.[11] The Fund was specifically established to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime. It will be managed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, which is to be set up pursuant to the Second Protocol.[12] The resources of the Fund shall consist inter alia of voluntary contributions made by States party to the Second Protocol.[13] Some States had sought the inclusion of compulsory contributions, but in the end that proposal was rejected.

In addition, the Second Protocol expands on the rather general provision concerning dissemination contained in the 1954 Convention.[14] Again, specific examples of concrete dissemination measures are listed, especially for the military and civilian authorities who assume responsibilities with respect to the application of the Second Protocol. They are to be fully acquainted with the Protocol, and to that end States party shall, as appropriate:[15]

- incorporate guidelines and instructions on the protection of cultural property in their military regulations,
- develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes,

11 *Ibid.*, Article 29.
12 *Ibid.*, Article 24.
13 *Ibid.*, Article 29(4).
14 1954 Convention, Article 25.
15 Second Protocol, Article 30.

- communicate to one another, through the Director-General of UNESCO, information on laws, administrative provisions and measures taken under the preceding paragraphs,
- communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of the Protocol.

The experience of the International Committee of the Red Cross provides ample evidence of the essential role of dissemination when it comes to ensuring respect for international humanitarian law.

Respect for cultural property

A. All cultural property

Article 4 of the 1954 Convention provides that cultural property shall not be subject to any act of hostility nor used for purposes which are likely to expose it to destruction or damage in the event of armed conflict. It immediately adds, however, that both obligations may be waived in case of "imperative military necessity". Professor Boylan's review identified the lack of a clear definition of this exception as a serious weakness with respect to the basic principle of protection contained in the 1954 Convention.[16]

Although the origins of the principle of military necessity can be traced back to the Lieber Code,[17] the restriction of imperative military necessity was first codified in international law in the 1907 Hague Regulations limiting the destruction or seizure of the enemy's property to that which was imperatively demanded by the necessities of war.[18] The

16 Boylan, *op. cit.* (note 4), pp. 54-57.

17 See Burrus M. Carnahan, "Lincoln. Lieber and the laws of war: The origins and limits of the principle of military necessity", *American Journal of International Law,* Vol. 92, 1998, 213, and Horace B. Robertson, Jr., "The principle of military objective in the law of armed conflict", in Michael N. Schmitt (Ed.), *The Law of Military Operations — Liber Amicorum Professor Jack Grunawalt*, International Law Studies, Vol. 72, Naval War College Press, Newport, Rhode Island, 1998, p. 197.

18 Regulations Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, Article 23(g), in Schindler/Toman, *op. cit.* (note 2), p. 83.

1954 Convention borrowed this notion as there were few other established limits applicable to the conduct of hostilities.[19]

As history shows, however, the concept of military necessity has not limited warfare in any significant way. The Second World War, for example, was fought under the restriction that no property could be destroyed unless there was an imperative military necessity to do so. Yet entire cities were destroyed.

It appears that the notion of imperative military necessity is too vague to constitute an effective limitation on warfare. Even military lawyers at the Diplomatic Conference admitted that it was difficult to teach their troops how to interpret and work with the concept. In general, matters left to discretionary clauses based on military necessity are those which could not be regulated; and matters which are not regulated provide a field for the law to develop. In order to do so, the military philosophy behind the maxim "Have confidence in the wisdom of the generals"[20] had to be replaced with objective criteria that were binding on the military. The goal of the Diplomatic Conference was to give a content to the notion of imperative military necessity with a view to enhancing its meaning and effect.

Imperative military necessity to commit acts of hostility

Limiting attacks to military objectives would in large part achieve that goal. One should not forget that the 1954 Convention was adopted well before the 1977 Protocols additional to the 1949 Geneva Conventions. It was drafted against the background of the Second World War, at a time when it was still considered acceptable that entire cities would be attacked. In the midst of such a war, the 1954 Convention sought to protect valuable cultural property.

19 This was in part because some documents which had identified such limits had failed to become binding treaty law. See, e.g., Article 24(1) of the Hague Rules of Air Warfare, drafted by a Commission of Jurists at The Hague, Dec. 1922 - Feb. 1923, in Schindler/Toman, *op. cit.* (note 2), p. 210: "Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent".

20 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Dordrecht/Geneva, 1987, p. 395, quoting Éric David, *La protection des populations civiles pendant les conflits armés*, International Institute for Human Rights, VIIIth Teaching Session, July 1977, Strasbourg, p. 52.

In 1977, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) did away with this approach.[21] Henceforth, only military objectives — more clearly defined and more carefully selected — were to be made the object of attack. Civilians and civilian objects were not to be made the object of a direct attack. This approach is a clear example of how international humanitarian law balances military necessity and humanitarian needs: it allows attacks that are necessary but establishes strict humanitarian limits.

It was therefore obvious that any improvement of the 1954 Convention should reflect this modern approach: cultural property is generally civilian property and as such should not be attacked; it may be atacked only if and when it becomes a military objective. This approach also has the advantage of providing a clearer answer to the question of when cultural property may be attacked.

The definition of military objective in Article 52(2) of Additional Protocol I was one of the major achievements of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), which was convened by the Swiss Government in 1974 and adopted Additional Protocol I on 8 June 1977. States not party to Additional Protocol I, such as the United States, Turkey and India, confirmed the customary law nature of this provision during the 1999 Diplomatic Conference that adopted the Second Protocol. This illustrates how the Diplomatic Conference also sought to reaffirm certain rules of humanitarian law while developing others.

The definition of military objective contains two criteria which have to be fulfilled cumulatively before objects can be destroyed, captured or neutralized. They deal with the nature, location, purpose or use of objects and with the military advantage to be gained by destroying, capturing or neutralizing them. The nature, location, purpose or use of the object has to be such that it makes an "effective contribution to military action". The military advantage has to be "definite, in the circumstances

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), in Schindler/Toman, *op. cit.* (note 2), pp. 621-688.

ruling at the time". These criteria were as clear as it was possible to negotiate during the CDDH and they are fairly strict.

As such, the notion of military objective incorporates the idea of military necessity. Once an object has become a military objective it can be destroyed, captured or neutralized, subject to certain exceptions. This simple rule recognizes the military necessity of attacking certain objects during war. By limiting those objects to those which are military objectives it incorporates the notion that war has limits. As a result, the concept of military objective embodies the balance that humanitarian law establishes between military interests and humanitarian concerns.

The requirement of the 1954 Convention that the military necessity has to be "imperative" is made sufficiently clear in Article 4 of the Second Protocol by the second condition, namely that no other alternative is available. Military necessity could therefore virtually never be invoked to justify an attack on cultural property standing in the way of an advancing army, as there are almost always alternatives to circumvent the property. This means that when there is a choice between several military objectives and one of them is a cultural property, the latter shall not be attacked. In fact, this provision adds cultural property to the military objectives which, under Article 57(3) of Protocol I, should not be attacked.[22]

The protection of cultural property is enhanced in that the concept of military objective — so widely recognized and used that it has become part of customary international law — is used to define the exception of military necessity. The rule that only military objectives can be targeted is now part and parcel of military manuals and military training worldwide. As many delegates stated at the Diplomatic Conference, it is important to have a simple text which is easy to use and to teach. The concept of military objective fulfils these requirements far better than the vague notion of military necessity.

The final text of Article 4 of the Second Protocol is based on proposals submitted by Austria and the ICRC. The Austrian proposal read: "Imperative military necessity under Article 4, paragraph 2 of the

22 *Ibid.*, Article 57(3) which provides that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack of which may be expected to cause the least danger to civilian lives and to civilian objects [and which is not cultural property]." The text in brackets shows how Article 57(3) would read for States having adopted both Additional Protocol I and the Second Protocol.

Convention may only be invoked when there is no other feasible alternative for fulfilling the mission and for as long as the reasons for its invocation prevail". The ICRC proposal read: "Objects constituting cultural property lose their general protection from the moment they become military objectives, i.e. when they are used to make an effective contribution to military action and when their total or partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time".

A Working Group on Chapter 2 was set up under the chairmanship of Austria. Its task was to combine both proposals as the delegates felt both had merit and were in fact complementary. The Austrian proposal sought to define the "imperative" character of military necessity whereas the ICRC proposal sought to use the concept of military objective to give content to the principle of military necessity. A criticism of the ICRC proposal was that it singled out the *use* of cultural property that could make an effective contribution to military action, whereas Article 52(2) of Additional Protocol I specifies that the nature, location, purpose or use of objects can make an effective contribution to military action. Many delegates, mostly from NATO countries, observed that any definition of military objective had to correspond exactly to the definition given in Article 52(2) of Protocol I.

As a result, the Working Group decided to provide a definition of military objective at the beginning of the Protocol, while Article 4 would limit acts of hostility against cultural property to property "which, by its use, has become a military objective". But even in the Working Group several delegations expressed concern about the restriction "by its use", whereby cultural property could become a military objective by its use only and not by its location, for example. When the draft prepared by the Working Group on Chapter 2 came back to the plenary, the issue of use and location was clearly too controversial and the text was not acceptable to a significant number of delegations.

The Egyptian and Greek delegations were the most active in supporting the restriction whereby cultural property could become a military objective by its use only. The argument was that cultural property which was not used in any way for military action should never be the object of attack. If mere location could turn a cultural property into a military objective, the protection of cultural property would be greatly dimin-

ished. Some positive action should be required from the holder of the property before it could become a military objective. The ICRC supported this approach.

Since it was agreed that the nature and purpose of cultural property could never turn it into a military objective, the entire debate centered around the issue of location. The ICRC Commentary to 1977 Protocol I notes that the Working Group of Committee III introduced the location criterion without giving reasons.[23] The same thing could be said of the Second Protocol. No real reasons were given why location had to be included.

One example commonly cited at the Diplomatic Conference was that of historic bridges. This example is misleading, however, because it is really the use of such bridges that can make an effective contribution to military action.

The Canadian delegation offered another specific example: the retreat of troops could be blocked by a historic wall and there might be no way around the wall if it was located in a valley or a mountain pass. To go around the wall would take too much time, and the commander would therefore either have to take casualties or break through the wall. In such case, the historic wall would not be used for military action and would become a military objective merely because of its location. This example does not seem realistic as such walls are not usually built in valleys or mountain passes. The need for the criterion of location was not well explained, yet several delegations, mostly from NATO countries, strongly insisted on it.

The ICRC Commentary on Additional Protocol I gives the following examples of objects which by virtue of their location make an effective contribution to military action: a bridge or other construction or a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.[24]

As mentioned above with respect to historic bridges, it is really the use of a construction or site that turns it into a military objective.

23 ICRC Commentary, *op. cit.* (note 20), p. 636, para. 2021.

24 *Ibid.*, p. 636, para. 2021.

With regard to sites that must be seized because of their location, the question arose at the CDDH what the situation would be if a belligerent in a combat area wished to prevent the enemy army from establishing itself in a particular area or from passing through that area, for example, by means of barrage fire.[25] There can be little doubt, according to the Commentary, that in such a case the area must be considered as a military objective and treated as such.[26] Of course, such a situation could only concern limited areas and not vast stretches of territory. It applies primarily to narrow passages, bridgeheads or strategic points such as hills or mountain passes.[27]

None of these examples constitute convincing evidence of the need to target cultural property because of its location. There is convincing legal evidence, on the other hand, to say that what turns cultural property into a military objective is ultimately its use. In 1907, Article 27 of the Regulations Respecting the Laws and Customs of War on Land already stipulated that "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, *provided they are not being used at the time for military purposes*" (emphasis added). This text confirms that it is their use which makes these objects lose their protection.

The ICRC Commentary on Article 53 of Additional Protocol I confirms this view. Article 53 prohibits the use of cultural property in support of the military effort.[28] The Commentary notes that "if protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the Protocol, though it would not necessarily justify attacking them. To the extent that it is admitted that the right to do so does exist with regard to objects of exceptional value, such a right would depend on their being a military objective, or not, as defined in Article 52, paragraph 2".[29] For example, "it is not permitted to destroy a cultural object whose *use* does not make any contribution

25 *Ibid.*, p. 621, para. 1955.

26 *Ibid.*

27 *Ibid.*

28 Even though Article 53 deals with the use of very special cultural property only, for example cultural property on the International Register of Cultural Property under Special Protection or the new List of Cultural Property under Enhanced Protection, the author will argue below that there is no need to differentiate between the ways in which special or enhanced protection, on the one hand, and general protection, on the other, is lost..

29 ICRC Commentary, *op. cit.* (note 20), p. 648, para. 2079.

to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer *used as such*".[30]

As a compromise, the sentence "which, by their use, have become military objects" was changed to "which, by their function, have been made into military objects" in the Second Protocol. This represents a twofold change. First, the word "use" was replaced by "function", which does not appear in the definition of a military objective. Secondly, "become" was replaced by the words "been made into".

With regard to the new text, there was a clear understanding that the word "function" referred at the same time to something that was in fact functioning. For example, an old fortification which was not functioning as a fortification could not be considered a military objective. In addition, the new text sought to convey the requirement of an active role on the part of the holder of the cultural property in that the holder made the property into a military objective. This could only happen through use.

It is only by a stretch of imagination that function could cover location: the example of the historic wall blocking retreating soldiers could fall under the new text in that the circumstances make the wall, which functions to block a retreat, into a military objective. But in real life this is not the problem faced by cultural property on the battlefield. In real life the problem is that cultural property is attacked even when it is not used for any military action or is attacked indiscriminately. In real life the rule should be simple: cultural property which is not used to make an effective contribution to military action and whose destruction, seizure or neutralization does not offer a definite military advantage cannot be attacked. It is difficult to imagine how military commanders could teach their soldiers anything else.

It s remarkable that military lawyers who call for texts that are simple to teach and apply argue at such length about a minor difference that will be difficult to apply and teach. The reason why some delegates strongly argued for use only was clear. The mere location of pyramids in Egypt or temples on Greek islands should never serve as a pretext to attack those objects. The insistence on changing use to function is difficult to

30 *Ibid.* (emphasis added). — See also Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague/Boston/London, 1982, p. 334, para. 2.6.

understand if the only example that could be given was that of an ancient wall blocking a pass. This example could easily have been dealt with under the exception of the prohibition on use of cultural property, thus leaving the overall system consistent, clear and simple. It is to be hoped that it will be taught and applied in that way.

Imperative military necessity to use cultural property

The 1954 Convention also allows the use of cultural property for military action if such use is required for reasons of imperative military necessity. The same problem as explained above applies to the exception with respect to use of cultural property: the content of the exception is not very clear and the protection of cultural property would be enhanced by greater precision.

An absolute prohibition of the use of cultural property for military action is difficult to imagine, as there may indeed be situations in which the military need to avail themselves of cultural property for good reason. A classic example is the case of retreating troops who need to take shelter in a cultural property for defence purposes. Because the exception is limited to cases of "imperative" military necessity, such use can only be made when there is no alternative available. Hence, the Second Protocol provides that a waiver on the basis of imperative military necessity may only be invoked to use cultural property for military action "when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage".[31]

Finally, it should be noted that the decision to attack or use cultural property on the basis of the exceptions explained above shall only be taken by an officer commanding a force equivalent to a battalion or a smaller force where circumstances do not permit otherwise.[32]

B. Cultural property under enhanced protection

The 1954 Convention establishes a system of special protection. This system was designed for a limited number of refuges intended to shelter movable cultural property, centres containing monuments and

31 Second Protocol, Article 6(b). It is noteworthy that the Protocol speaks of "a waiver on the basis of imperative military necessity", because that is the language used in Article 4(2) of the 1954 Convention. The Second Protocol is additional to the 1954 Convention.

32 *Ibid.*, Article 6(c).

other immovable cultural property of very great importance.[33] Special protection is granted by entry in the International Register of Cultural Property under Special Protection.[34] The system is intended to safeguard cultural property like the Versailles Palace in France or the Taj Mahal in India.

Unfortunately, the system of special protection has had very limited success. Only one centre containing monuments and eight refuges have been listed in the Register.[35] As three refuges were withdrawn from the list in 1994, only one centre containing monuments and five refuges remain. There are a number of reasons why so few objects have been listed. The first is that entry in the list is conditional on the property being situated at an adequate distance from any large industrial centre or from any important military objective.[36] In many cases it is almost impossible to fulfil this condition as so much valuable cultural property is located in the heart of cities surrounded by potential military objectives. In addition, there is no agreement on what constitutes an adequate distance and, as a result, it is difficult to prepare an application for entry or to judge a request. This is yet another indication that the 1954 Convention was adopted well before the developments in humanitarian law reflected in the 1977 Additional Protocols and well before the technological evolution that has lead to means and methods of warfare that allow for more accurate targeting.

Political motivations have also stood in the way of registration. States can object to the entry in the Register and have done so on grounds such as the fact that the requesting authority was not the legitimate representative of the country in question.[37]

As a result, the Second Protocol has done away with the distance criterion and has strictly limited the possibility of lodging objec-

33 1954 Convention, Article 8(1).

34 *Ibid.*, Article 8(6).

35 These are: Vatican City (18 January 1960), a refuge at Alt-Aussee in Austria (17 November 1967), six refuges in the Netherlands (Zandvoort (2), Heemskerk (2, cancelled on 22 September 1994), Steenwijkerwold (cancelled on 22 September 1994), Maastricht (12 May 1969)) and the central Oberrieder Stollen refuge in Germany (22 April 1978). See International Register of Cultural Property under Special Protection, UNESCO Doc. CLT-97/WS/12, August 1997.

36 1954 Convention, Article 8(1)(a).

37 Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth/Unesco, Aldershot/Paris, 1996, pp. 108-109.

tions. Under the new system, three criteria have to be met in order for an object to be listed in the newly established List of Cultural Property under Enhanced Protection (the List):[38]

- the object must be a cultural heritage of the greatest importance for humanity;
- it must be protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- it must not be used for military purposes or to shield military sites and a declaration must have been made by the Party which has control over the cultural property, confirming that it will not be so used.

A decision to grant or deny enhanced protection may only be made on the basis of those criteria. In addition, objections against such grant shall be specific and related to facts.[39] This is a clear response to the shortcomings of the previous system.

The fact that the World Heritage List established under the 1972 Paris Convention concerning the protection of the world cultural and natural heritage is widely used — 582 sites are listed — constituted an incentive to try and make the International Register of Cultural Property under Special Protection work. But past efforts showed that this could only happen if the conditions and procedures were adjusted to redress previous shortcomings.[40] The usefulness of such a list lies in its world-wide renown: its mere existence should constitute an effective tool of prevention and protection. UNESCO would remind warring parties of the list and point out that any military use of or attack against any property on the list would constitute a serious war crime (see below). The commission of such acts would also have severe negative political implications. When no wartime list was available, as in the case of the attacks on Dubrovnik, UNESCO availed itself of the World Heritage List, which had not necessarily been established for wartime purposes. As a result, Dubrovnik was more or less spared. This example has strengthened the conviction that it would be use-

38 Second Protocol, Article 10.

39 *Ibid.*, Articles 11(5) and 11(7).

40 See Toman, *op. cit.* (note 37), pp. 108-111, for examples of important cultural property that, for one reason or another, has not been included in the International Register of Cultural Property under Special Protection.

ful to have a list of exceptionally valuable cultural property to be protected in time of armed conflict. This conviction was clearly articulated by the States represented at the Preparatory Meeting in Vienna in May 1998.

As the Second Protocol is additional to the 1954 Convention, and does not amend it, the existing system of special protection could not be touched and an entirely new system had to be established. As the existing system has had only very limited success, the intention is clearly to start using the new system. States wanting to register any property should start using the new List of Cultural Property under Enhanced Protection established by the Second Protocol, and States that have registered property in the previous list should request a transfer to the new list.

The fact that a new system had to be set up also explains why a new name had to be used. Continued use of the designation "special protection" would have implied an amendment of the existing special protection system. As the Protocol was clearly supplementary, a new name had to be used and a separate and new system had to be set up.

Under the 1954 Convention special protection consists of the fact that the immunity of such property can only be withdrawn "in exceptional cases of unavoidable military necessity".[41] The wording implied a stricter standard than for other cultural property, where a waiver on the basis of "imperative military necessity" was in place. In practice, however, it was not clear what "exceptional cases of unavoidable military necessity" were.

The Second Protocol has clarified the law by establishing more clearly when cultural property under enhanced protection loses its protection, namely "if, and for as long as, the property has, *by its use*, become a military objective", and an "attack is the only feasible means of terminating the use of the property" that made it a military objective.[42]

Loss of enhanced protection is conditional on use of the cultural property so that it becomes a military objective. "Use" was not replaced by "function" as was the case for the general protection system for all cultural property, on the strength of the argument that the *quid pro quo* of enhanced protection was non-use in exchange for enhanced protection. As indicated above, one of the conditions for registration of cultural

41 1954 Convention, Article 11(2).

42 Second Protocol, Article 13 (emphasis added).

property for enhanced protection is abstention from its use for military purposes and a declaration confirming that it will not be so used. The argument was that since there is a promise not to use, enhanced protection can only be lost through use. It was further argued that limiting loss of protection for cultural property under enhanced protection to instances of use only was an essential part of the "enhanced" level of protection offered by enhanced protection system. This argument is, however, mistaken.

A common misunderstanding is that there is a difference in the levels of protection afforded cultural property under general and enhanced protection — and the names indeed do suggest that such a difference exists. But there is, in fact, no lower or higher level of protection. The basic protection is the same: the object cannot be destroyed, captured or neutralized. Once protection is lost, it is lost for good: "you use, you lose". There are minor differences in the level of command at which an attack has to be ordered, the warning to be given and the requirement that a reasonable time be given to the opposing forces to redress the situation (see below), but these differences do not change the basic loss of protection.

There is no difference in the level of protection and there is no need to differentiate between two different ways in which cultural property can become a military objective. What is the difference then between enhanced protection and general protection? The main difference lies not in the obligations of the attacker but in the obligations of the holder of the cultural property. In the case of general protection, the holder of the property has the right, if need be, to convert the property into a military objective, by using it for military action. In the case of enhanced protection, the holder of the property has absolutely no right ever to convert the property into a military objective by using it for military action. Registration on the List therefore requires the State party seriously to study whether it would ever be in need of that property for military purposes and to answer in the negative.

Using property on the List for military purposes would amount to a serious violation of the Second Protocol, and the offender would be liable to criminal sanction as a war criminal (see below). The term "enhanced protection" is therefore misleading. The essence of the system is that it concerns some form of "registered" or "certified protection". The holder of the property registers or certifies his promise that the

property will never be used for military purposes. As a result, the property can never become the object of an attack. The advantage of putting property on the List is that an adversary will be particularly aware of it and any attack on the property will have serious consequences for the perpetrator (see below).

The registration of an object on the List of Cultural Property under Enhanced Protection can be compared to an internationally recognized declaration establishing a non-defended locality.[43] It is best to make such declaration in peacetime as it guarantees that everything is in place if and when an armed conflict breaks out.

Conditions for attack

A. All cultural property

Once cultural property has, by its function, become a military objective and there is no feasible alternative, it has lost its protection against attack. Yet the Second Protocol adds a further condition for attack, providing for an extra level of protection for cultural property which has thus become a military objective, beyond the protection enjoyed by all civilian objects. In case of attack, an effective advance warning shall be given whenever circumstances permit.[44] This duty did not exist under the 1954 Convention. The duty to issue an effective advance warning also exists for attacks which may affect the civilian population.[45] This demonstrates how the protection of cultural property in some respects approximates the protection of the civilian population as such and goes beyond the protection of other civilian objects.

In addition, an attack can only be ordered by an officer commanding a force equivalent to a battalion or a smaller force where circumstances do not permit otherwise.[46]

B. Cultural property under enhanced protection

Under the 1954 Convention, an attack on cultural property under special protection can only be ordered by "an officer commanding a force the equivalent of a division in size or larger and whenever circum-

43 See Additional Protocol I, Article 59.
44 Second Protocol, Article 6(d).
45 Additional Protocol I, Article 57(2)(c).
46 *Supra*, note 32.

stances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to attack".[47]

The Second Protocol seeks to tighten these conditions, but an effort to change the relative duty of notice into an absolute duty and a concomitant effort, supported by the ICRC, to have the decision to attack taken at the highest level of government failed. It would indeed make sense to have the decision taken at the highest level of government because of the political implications thereof. Several delegates, however, argued against this proposal. While they recognized that in some countries such a decision would probably be taken at the highest level of government, for example if the Head of State is the Commander-in-Chief of the armed forces, they felt that the political structures of countries around the world were too diverse to impose such an obligation. Hence, the Second Protocol requires that an attack be ordered at the highest operational level of command.

In addition, a proposal to make it an absolute obligation to order the attack at such level, to give effective advance warning and to give reasonable time to the opposing forces to redress the situation, was rejected. Several delegates argued that if their troops came under fire from cultural property under enhanced protection they would deem it excessive to have to comply with those conditions without being able to return fire immediately. Hence, the three obligations are waived if circumstances do not permit "due to requirements of immediate self-defence".[48] This still represents progress over the 1954 Convention, as the level at which the attack has to be ordered is much higher and as the vague "whenever circumstances permit" has been narrowed considerably. In addition, the requirement that a reasonable time be given to the opposing forces to redress the situation is new and adds an extra layer of protection.

An earlier ICRC proposal to approximate the protection of cultural property under enhanced protection to that given to medical units was not considered. Under Article 21 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the protection to which medical units are entitled shall not cease "unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after

47 1954 Convention, Article 11(2).

48 Second Protocol, Article 13(2)(c).

a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded". It was felt that hospitals deserved an exceptional level of protection, beyond that enjoyed by other civilian objects.

Precautions in attack

By introducing the notion of military objective, other rules on the conduct of hostilities contained in Additional Protocol I of 1977 could also be included. The Second Protocol therefore incorporates the rules contained in Article 57 of Protocol I and applies them specifically to cultural property. In fact, Article 57 already covers cultural property, as it applies to civilian objects and all cultural property is, in principle, civilian in nature. Nevertheless, it was deemed useful to reaffirm those rules and to spell them out more clearly with respect to cultural property in particular.

Precautions against the effect of hostilities

The same can be said of Article 58 of Additional Protocol I dealing with precautions against the effects of attacks, the so-called passive precautions to be taken by the defender (in parallel with the active precautions to be taken by the attacker). Article 8 of the Second Protocol applies the rules contained in Article 58 of Protocol I in a way appropriate for cultural property.

Individual criminal responsibility

Article 28 of the 1954 Convention requires States "to take, within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the [...] Convention".[49]

This provision has largely remained a dead letter, mainly because it does not list the violations which require a criminal sanction. The experience of the ICRC Advisory Service on International Humanitarian Law proves that such a list is essential if a coherent and complete system of criminal repression of war crimes is to be institued worldwide.

49 1954 Convention, Article 28.

This is one of the main areas in which the Second Protocol clarifies and develops humanitarian law with respect to cultural property. Building on Additional Protocol I and the Rome Statute of the International Criminal Court, Article 15 defines five acts which constitute serious violations requiring a criminal sanction if committed intentionally and in violation of the 1954 Convention or the Second Protocol:

- making cultural property under enhanced protection the object of attack,
- using cultural property under enhanced protection or its immediate surroundings in support of military action,
- extensive destruction or appropriation of cultural property protected under the Convention and [the Second] Protocol,
- making cultural property protected under the Convention and [the Second] Protocol the object of attack,
- theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

But the definition of serious violations is not in itself sufficient to ensure that persons committing such violations are actually punished. To achieve this would still require effective enforcement at the national level. In order to arrive at effective national enforcement, implementing legislation has to be adopted covering two aspects: (a) criminalizing violations, and (b) establishing jurisdiction to try or extradite.

Criminalizing violations

As far as the need to criminalize violations under domestic law is concerned, States have the specific duty, under the Second Protocol, to adopt whatever measures are necessary to establish the abovementioned five serious violations as criminal offences under their domestic law and to make the offences punishable by appropriate penalties. Such legislation would ensure that the prohibition to commit any of the serious violations of the Second Protocol is, in practice, enforced.

With regard to the issues of auxiliary crimes (e.g. aiding and abetting), command responsibility and defences, the original proposal to set out these rules was discarded in favor of an obligation to comply with general principles of law and international law in this respect.[50] These rules

50 Second Protocol, Article 18(2).

have been authoritatively restated in the Rome Statute of the International Criminal Court, and many delegates felt there was no need to repeat them in a "mini criminal code".

Jurisdiction

The list of serious violations is based on proposals submitted by Austria and the ICRC to the Working Group on Chapter 4. This explains why it contains two types of violations.

a) The first three violations correspond to what are called "grave breaches" under the Geneva Conventions and Additional Protocol I, and are based on a proposal by Austria. States have a duty to try or extradite anyone charged with having committed any of these violations on the basis of universal jurisdiction. Specific and detailed provisions regulate the prosecution and extradition of offenders.[51] According to the Chairman of the Working Group, from the point of view of international criminal law, these provisions are a major achievement as all elements to form a coherent system of prosecution and extradition are included.[52]

With respect to the specific violations included in this category, it is interesting to note that the first two violations concern cultural property under enhanced protection, and that both an attack on and the use of such property are established as serious violations. Under Protocol I of 1977, only an attack on such property is defined as a grave breach and only in so far as it causes extensive destruction.[53] The Second Protocol establishes a balance between the criminal responsibility of both the attacker and the defender.

A proposal by the delegate from China to prohibit collateral damage to cultural property under enhanced protection was not acted upon. This would have been a significant improvement of the existing system. Since the Second Protocol requires parties to a conflict to refrain from any use of such property or its immediate surroundings in support of military action, such a rule could have fitted into the Second Protocol.

51 *Ibid.*, Articles 20-23.

52 Horst Fischer, *Presentation of the Results of the Working Group on Chapter 4*, UNESCO Doc. HC/1999/INF.5, 25 March 1999, p. 2.

53 Additional Protocol I, Article 85(4)(d).

The third serious violation concerns the destruction or appropriation of all cultural property, but the extensive nature of such acts make them serious violations on a par with grave breaches.

States have to establish universal jurisdiction over such violations. This means they have to establish jurisdiction not only when the offence is committed in the territory of the State or when the alleged offender is a national of the State, but also when the offence is committed abroad by a non-national.[54] This reflects the principle of mandatory universal jurisdiction for grave breaches, which implies that all States have to establish jurisdiction to try or extradite non-nationals for war crimes committed abroad who are present in their territory.

At the request of the United States, a provision was included that excludes nationals of States not party to the Second Protocol from the regime of mandatory universal jurisdiction.[55] This would mean that States have no obligation to try or extradite such persons. The extent of this exception is greatly diminished, however, by the acknowledgement that States may establish jurisdiction over such persons under applicable national or international law, including customary international law,[56] by the statement of the Chairman of the Working Group on Chapter 4 that nothing in the Second Protocol in any way limits the ability of States to legislate, criminalize or otherwise deal with any offence under the Protocol,[57] and by the fact that the entire jurisdictional regime is without prejudice to Article 28 of the 1954 Convention.[58]

Article 28 of the 1954 Convention was in fact already intended to provide for mandatory universal jurisdiction. According to Toman, "[t]he representative of one government raised the question of whether a Party to the Convention was obliged to prosecute and impose penal sanctions upon persons having committed breaches outside the territory subject to the criminal jurisdiction of the State in question. The answer is yes, because that is the aim of this provision. It may reasonably be assumed that the country has at its disposal general legislation concerning the protection of its own cultural property and that the criminal act directed against that property would, in any event, be covered by those provisions. What remains to be done — according to Article 28 of the

54 Second Protocol, Article 19(2)(a).
55 *Ibid.*, Article 19(2)(b).
56 *Ibid.*, Article 19(2)(a).
57 Fischer, *op. cit.* (note 52), p. 3.
58 Second Protocol, Article 19(2)(chapeau).

Convention — is *to prosecute those who have committed criminal acts outside the territorial jurisdiction of the State*".[59]

b) The last two serious violations were added to the list at the suggestion of the ICRC. The reason for this was that these acts had been recognized as war crimes subject to criminal sanction in the Rome Statute of the International Criminal Court. As such, they could not be included in a general provision on "other violations" which would only require States to suppress such acts without specifying the means of doing so. As indicated above, the experience of the ICRC has shown that the vagueness of the category of "other violations" makes it very difficult to convince States that certain of those other violations are indeed war crimes which have to be penalized with a criminal sanction under domestic law.

These two serious violations amount to war crimes, but States only have the obligation to repress them by criminal sanctions using the most common grounds for jurisdiction, namely when the offence is committed in the territory of the State or when the alleged offender is a national of the State. There is no obligation to establish jurisdiction over cases where the alleged offence was committed abroad by a non-national, although States *may* exercise such jurisdiction.[60] This reflects the principle of permissive universal jurisdiction for war crimes, according to which all States have jurisdiction to try non-nationals for war crimes committed abroad but are under no obligation to do so if the crimes do not amount to grave breaches. This also follows clearly from the acknowledgement that States may establish jurisdiction over such persons under applicable national or international law, including customary international law,[61] and from the statement by the Chairman of the Working Group on Chapter 4, referred to above, that nothing in the Protocol limits in any way the ability of the State to legislate, criminalize or otherwise deal with any of the serious violations of the Protocol.[62]

The scope of application

The Second Protocol applies equally to international and non-international armed conflicts.[63] The extension of the application of

59 Toman, *op. cit.* (note 37), p. 294 (emphasis in original).

60 Second Protocol, Article 19(2)(a).

61 *Ibid.*, Article 19(2)(a).

62 Fischer, *op. cit.* (note 52), p. 3.

63 Second Protocol, Articles 3 and 22.

the Second Protocol to non-international armed conflicts is essential. Most modern armed conflicts are non-international, and history has shown that the protection of cultural property in such conflicts can be problematic.

Furthermore, developments since the adoption of the Hague Convention in 1954 should not be forgotten. Additional Protocol I establishes a coherent system of criminal repression but only as far as international armed conflicts are concerned. It is of particular importance, as a result, that the entire Second Protocol, including the section on criminal repression, apply to non-international armed conflicts. This reflects the modern tendency of legislation, for example, no longer to distinguish between international and non-international armed conflict when it comes to repression of violations of international humanitarian law. In addition, under its Statute, the International Criminal Court has jurisdiction over war crimes committed against cultural property in both international and non-international armed conflict.

At the request of China and India, a phrase was added to the effect that nothing in the Protocol shall prejudice "the primary jurisdiction" of a State in whose territory a non-international armed conflict occurs over the serious violations of the Protocol. This means, in reality, that the territorial State has the primary responsibility to exercise jurisdiction over such violations: to investigate, prosecute and punish the offenders. It clearly implies, however, that if such jurisdiction is not exercised, jurisdiction may be exercised by other States or by international criminal tribunals with the competence to do so.

Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose because Article 1 of the Protocol defines the word "Party" as a State Party to the Second Protocol. However, the understanding was that throughout the text the word "Party" in the phrase "Party to the conflict" includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol.[64] The reasoning was that non-governmental forces involved in a non-international armed

64 Third States which have not ratified the Second Protocol are generally referred to as "party" (in lower case).

conflict within a State party to the Protocol are bound by the Protocol through the ratification of the State concerned.[65]

Conclusion

The adoption of the Second Protocol is an important step forward in the legal protection of cultural property in armed conflict. The Protocol addresses the weaknesses of the 1954 Convention and offers adequate solutions. Its main achievements are that it:

- clarifies the obligations to take precautionary measures and disseminate the Convention and the Second Protocol;
- updates the 1954 Convention by introducing concepts contained in Additional Protocol I of 1977;
- offers the opportunity to make the regime of "special protection" effective by replacing it with a new and improved system of "enhanced protection";
- improves the enforcement mechanism by defining serious violations which have to be punished with a criminal sanction and by imposing a duty upon States to establish jurisdiction over those violations;
- develops humanitarian law by defining those serious violations and by extending the scope of application to non-international armed conflicts.

Another beneficial effect of the Second Protocol is that more attention has been given to the 1954 Convention itself. As a result, a considerable number of States have ratified the 1954 Convention since the review process started and more are in the process of ratification. Much remains to be done, especially as far as marking of cultural property and dissemination are concerned, but at least awareness of the problems has been heightened.

While human life is still more important than objects, it is nevertheless essential to have rules protecting cultural property, as such

65 It is unfortunate that recognition of the potential confusion of the definition of "Party" and the use of the term "Party to the conflict" came only in the last hours of the Diplomatic Conference. As a result, there was no discussion on whether the general understanding that the Second Protocol applies to governmental forces and rebel groups in a non-international armed conflict is also valid for Article 11(9). It is difficult to say whether this was indeed the intention of States, as the Working Group on Chapter 3 (Enhanced Protection) did not discuss the issue.

objects constitute the collective memory of humanity, examples of its greatest achievements, and symbolize human life itself. If cultural property is destroyed, civilian life suffers greatly as well.

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Résumé

Nouvelles règles pour la protection des biens culturels en cas de conflit armé. La portée du Deuxième Protocole relatif à la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé.

par JEAN-MARIE HENCKAERTS

Le Deuxième Protocole à la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé a été adopté le 26 mars 1999, à l'issue de deux semaines de négociations, par une Conférence diplomatique qui s'est tenue à La Haye. L'auteur a suivi, pour le CICR (qui avait le statut d'observateur à la Conférence diplomatique) les débats relatifs à ce Deuxième Protocole ainsi que son adoption. Le présent article a pour but de mettre en évidence les principaux développements juridiques contenus dans le Deuxième Protocole. Il fait mention, en outre, de certains points d'accord qui ont été reconnus à la Conférence diplomatique mais qui ne sont pas apparus en tant que tels dans le texte même du Protocole, ni dans l'Acte final de la Conférence.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity

The review of the 1954 Convention and the adoption of the Second Protocol thereto (26 March 1999)

by
JAN HLADÍK

ONE of the most widely discussed and controversial issues during the review of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (of 14 May 1954 – hereafter "the Convention")[1] was the meaning of the notion of "military necessity".[2] The Convention refers to the concept twice; first, with regard to cultural property enjoying general protection it uses the term "imperative military necessity" (Arti-

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1 249 UNTS 240.
Text available from UNESCO and on Internet (www.unesco.org/general/eng/legal/convent.html).

2 On the review process in general, see Jan Hladík, "The Review Process of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its impact on international humanitarian law", *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, 1998, pp. 313-322.

cle 4, paragraph 2), and, second, with respect to cultural property under special protection, it speaks of "unavoidable military necessity" (Article 11, paragraph 2).

The reference to "imperative military necessity" in Article 4, para. 2 of the Convention enables the States party to use cultural property and its immediate surroundings or appliances for military purposes and to conduct hostilities against such property "where military necessity imperatively requires such a waiver". In view of these not very strict conditions, the scope for invoking the waiver is quite large. UNESCO has no information, however, about the practice of States.

The notion of "unavoidable military necessity" in Article 11, para. 2 has stricter conditions for its application to cultural property placed under special protection. In particular, immunity may be withdrawn "only in exceptional cases of unavoidable military necessity" and "only for such time as that necessity continues"; it is further provided that such necessity can only be established at a higher command level. At the moment, six cultural sites are granted special protection under the 1954 Convention. They are all registered in the International Register of Cultural Property under Special Protection (Article 8, para. 6 of the Convention).

The inclusion of the notion of military necessity in the Convention was the result of fierce negotiations at the Diplomatic Conference that drew up the 1954 Convention. As many questions discussed in 1954 surfaced again during the review procedure, the main points made during those debates must be briefly examined.

The results of the 1954 Diplomatic Conference

The Secretariat's draft for the Conference, circulated in 1953, contained two references to "imperative military necessity"[3] and one ref-

3 Article 4 - UNESCO Draft — *Obligations in respect of cultural property situated within the territory of another Contracting Party*

1. Each High Contracting Party undertakes to respect cultural property situated within the territory of another High Contracting Party, except in cases of imperative military necessity.

2. In particular, each Party undertakes not to use movable cultural property for purposes which might expose it to destruction or damage. It further undertakes not to remove or requisition movable cultural property or the material for its protection and to take the necessary measures to prevent or put a stop to any form of theft and any act of damage or destruction not justified by imperative military necessity.

Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954, published by the Government of the Netherlands, The Hague, 1961, p. 374.

erence to "unavoidable military necessity".[4] The Secretariat's commentary on draft Article 4 ("imperative military necessity") stated that "[t]he obligation to respect cultural property is liable to conflict with the requirements of military operations. It is, however, often possible to find a compromise between military necessities and the task of protecting cultural property".[5] It went on to say that "[i]n order that there should be no abuse of so-called military necessities, it has been provided in paragraph 1 of *Article 4* of the Convention, that the obligation to respect cultural property situated within the territory of another Contracting Party shall lapse only in cases of 'imperative' military necessity".[6]

When commenting on the possibility of withdrawing special protection ("unavoidable military necessity"), the Secretariat pointed out that "[i]t should here be emphasized that, in using the term 'unavoidable' in connection with special protection, it was intended to give it a connotation even stronger than that implied by the expression 'imperative military necessity' used in Article 4, paragraphs 1 and 2, in connexion with the general provisions governing the protection of cultural property and the Contracting Parties' obligation to respect such property. This distinction should therefore be understood as reflecting the greater degree of protection provided for in Chapter II. Moreover, it was considered desirable to avoid a situation in which any officer or holder of rank whatever might, on the field of operations, constitute himself the judge of the 'unavoidable' character of a given military necessity, and decide as to it without due thought. It has therefore been specified that it should be the Staff of a large formation, i. e., at least a Divisional Staff, which should take the responsibility for so serious a decision".[7]

Two opposite tendencies arose during the Conference discussions. Some States wished to exclude this option from the Convention, claiming that it would diminish the scope of protection and open the door

4 Article 11 - UNESCO Draft — *Withdrawal of immunity*

4. Subject to paragraph 1 of the present article, immunity shall be withdrawn from cultural property under special protection only in cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the staff of the large formation in charge of the operation concerned. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity. *Ibid.*, p. 381.

5 *Ibid.*, p. 309.

6 *Ibid.*

7 *Ibid.*, p. 310

to abuses; others insisted on its inclusion, giving various reasons such as recognition of the concept of military necessity by Article 50 of the First Geneva Convention[8] or the fact that "to close the door to those things which were militarily unavoidable in the face of a mission assigned by competent governmental authorities, might have a disastrous effect upon the basic aims of the Convention".[9]

The biggest practical problem, however, is that the Convention does not define the notion of military necessity. It is therefore up to each State party to interpret the concept in a concrete case. To give an example, Croatia stated in its latest report on the implementation of the Convention that "as for Article 4, paragraph 2, of the Convention, cases should be mentioned where relentless enemy attacks necessitated some deviations from the Convention. An example of it is the defence of Vukovar, which, besieged for many months, had to organize defence against incessant air and artillery attacks intended to take the town".[10]

It is obvious that in the event of armed hostilities the interpretation of such a provision may vary and may even lead to abuse. For this reason, the question came up again in the course of the review of the Convention, which began in the early 1990s, mainly as a reaction to the destruction of cultural heritage during the conflict in the former Yugoslavia.

The review of the 1954 Convention

The Netherlands, one of the most active countries in the review procedure of the Convention, submitted to the 140th session of UNESCO's Executive Board an explanatory note which, among other things, questioned the adequacy of the exceptions regarding "military necessity" in the sense of Article 4, para. 2 and their conformity with the present state of international humanitarian law.[11]

As a result of the interest of a number of Member States in the review of the Convention, the Director-General of UNESCO

8 Cuba, *ibid.*, p. 151

9 United States of America, *ibid.*, p. 141.

10 *Information on the implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954)*, 1995 Reports, UNESCO doc. CLT-95/WS/13, Paris, December 1995, p. 23.

11 *Review of the application of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954)*, UNESCO doc. 140 EX/26, Paris, 11 September 1992, p. 6.

decided to commission a study on the possible improvement of the Convention. The study was undertaken by a UNESCO consultant, Professor Patrick Boylan, Vice-President of the International Council of Museums. Published in 1993, the study examines the implementation of the Convention since 1954 and makes a number of recommendations for its improvement in order to enhance its relevance for the present day.[12] Chapter 4, entitled "The 1954 Convention's concepts of protection, safeguarding and respect for Cultural Property", discusses the evolution of the concept of military necessity and recommends strongly "that in any revision of the 1954 Convention or in any new Additional Protocol to it, High Contracting Parties should renounce the provisions of Article 3(2)[13] allowing the waiving of the provisions of the Convention in the case of military necessity. Indeed, this should be seen as one of the highest priorities of the review process".[14]

In February 1994 a group of experts, invited in their personal capacities, put together the so-called Lauswolt document containing draft provisions aimed at improving the Convention. The Lauswolt document did not, however, deal with the problems raised by the notion of military necessity.

The second meeting of the High Contracting Parties to the 1954 Convention (Paris, 13 November 1995) invited all the States to submit to the Secretariat written comments on the substantive proposals for improving the Convention. Several replies commented on the military necessity issue. Some wished to remove completely the exception of military necessity (Croatia, the Czech Republic and Slovenia), others proposed modifications (Belgium, and an alternative proposal from the Czech Republic), still others suggested reconsidering the issue (Kuwait and Poland).[15]

The March 1997 meeting of governmental experts on the review of the Convention resulted in a redrafting of the Lauswolt document. The issue of military necessity was again barely mentioned in the

12 P. J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO doc. CLT-93/WS/12, Paris, 1993.

13 In fact, the author of the report means "Article 4, para. 2". *J.H.*

14 *Op. cit.* (note 12), p. 57.

15 *Summary of comments received from States Parties to the Hague Convention and from the International Council on Archives*, UNESCO doc. CLT-96/CONF.603/INF.4, Paris, December 1996, pp. 2-4.

revised text. It was, however, pointed out that "certain military legal advisers favoured including such a phrase in the new instrument because, according to their views, such a concept has been a part of international customary and treaty law of armed conflicts and the exclusion of this concept would not be accepted by their military. Those observers pointed out that there were close links between the 'military necessity' and the corresponding obligation not to use cultural property for military purposes".[16] In particular, the Israeli observer suggested that the following provision be inserted in the new draft: "The provisions of this instrument shall not prejudice or derogate from accepted customary principles of the Laws of War, including, *inter alia*, the principles of proportionality, distinction and military necessity".[17]

During the third meeting of the States party to the Convention (Paris, 13 November 1997), representatives of several countries (e.g. Argentina, Austria, France and Israel) defended the value of this notion, asserting that it expressed one of the basic rules of international humanitarian law. They agreed, however, to define it more precisely and narrowly.

Finally, during the May 1998 (Vienna) meeting of governmental experts on the revision of the Convention the majority of participants speaking on this point favoured retaining the notion in the proposed new instrument. However, in accordance with the views expressed, its definition should include elements which would indicate the circumstances in which this exception to the obligation to protect cultural property may be invoked.

New definitions of "military necessity"

Following the May 1998 meeting, the Secretariat of UNESCO prepared a definition of the notion of "military necessity" for both situations mentioned in the 1954 Convention.[18] The definitions have the following characteristics.

16 Meeting of governmental experts on *the review of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*, UNESCO doc. CLT-96/CONF.603/5, Paris, 30 April 1997, p. 2.

17 *Draft provisions for the revision of the 1954 Hague Convention and commentary from the UNESCO Secretariat*, UNESCO doc. CLT-97/CONF.208/2, Paris, October 1997, p. 3.

18 See text in Annex 1.

a) Military necessity in respect of cultural property under *general protection*

1. Measures undertaken by a military commander to obtain, as quickly as possible, the complete surrender of the enemy must be lawful and in conformity with the generally recognized principles of international humanitarian law, both of treaty and customary nature, such as the distinction between combatants and non-combatants, proportionality and the prohibition of reprisals against protected categories of persons and objects.
2. Those actions must be limited as to the time, purpose and object of military operations.
3. No other feasible alternative was available at the moment of the operation.
4. The assessment of the situation by a commander was made from all sources reasonably available to him/her at the moment of the operation.
5. Imperative military necessity may be established only by the officer commanding a force the equivalent to a battalion unless the circumstances of the military engagement do not allow this.
6. If possible, a warning shall be communicated to the opposing party a reasonable time in advance.

b) Military necessity in respect of cultural property under *special protection*

In addition to the six conditions listed under a), the following two conditions must also be respected.

1. Unavoidable military necessity may be established only by the officer commanding a force equivalent to a division.
2. A warning shall be communicated to the opposing party in a reasonable time in advance.

The definition of "imperative military necessity" (applicable to cultural property under general protection) differs from that of "unavoidable military necessity" (in cases of special protection) in two respects: the rank of the military officer who may invoke the exception (battalion commander or division commander, respectively) and the obligation to give a warning prior to a military operation (recommended or obligatory, respectively) .

The new definitions were drawn up on the basis of the text and of the commentaries on the 1949 Geneva Conventions, their Additional Protocols of 1977 and other instruments of international

humanitarian law. They were based on comments made at various stages of the review process by a number of delegations (e.g. Argentina, Austria, France, Germany, Israel and the Netherlands) and the ICRC.

Preparation of drafts for the Hague Diplomatic Conference of March 1999

The Preliminary Draft Second Protocol to the 1954 Hague Convention prepared by the Netherlands in cooperation with the UNESCO Secretariat, made use of the Secretariat's definition of "military necessity".[19] The Netherlands draft is stricter because it provided for obligatory warning in both cases and vested the responsibility for attacking cultural property under special protection in the national command level.

Following the submission of the Preliminary Draft for consideration to the States party to the 1954 Convention, States not party to that Convention and the international organizations concerned, the Secretariat received a number of substantial comments on the definition of "military necessity" applicable both to generally and to specially protected cultural property. Those comments were taken into account when the Secretariat prepared the Final Draft Second Protocol to the Convention for the Diplomatic Conference.[20]

The Final Draft contained a more precise definition than the Preliminary Draft of "military necessity" applicable to generally protected cultural property because it incorporated the clause of proportionality (Article 6 f). However, prior warning is no longer obligatory. As to the definition of "military necessity" applicable to cultural property under enhanced protection (a new category of protection combining the aspects of special protection under the Convention with criteria for the inclusion in the World Heritage List under the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972), the new definition vests the responsibility to attack cultural property having lost

19 *Preliminary Draft Second Protocol to the 1954 Hague Convention*, HC/1999/1, October 1998, distributed by the Netherlands in preparation for the Diplomatic Conference to be held in the Netherlands in March 1999. See texts in Annexes 2 and 3.

20 *Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, HC71999/1/rev.1, February 1999, distributed by the Netherlands. See Annexes 4 and 5.

enhanced protection in the highest level of government (Article 15 a) and incorporates the clause of proportionality (Article 15 f).

Discussions on this issue at the Hague Diplomatic Conference and its outcome

As during the 1954 Intergovernmental Conference, the notion of military necessity was one of the most hotly debated issues during the recent Diplomatic Conference which resulted in the adoption of the Second Protocol to the 1954 Convention (The Hague, 15-26 March 1999). Two opposing tendencies appeared, both during the plenary debates and in the working group on this matter: the attempt of military participants (both lawyers and operational staff) to broaden the scope of the definition of military necessity, and the attempt of cultural heritage protection experts to narrow the scope of this definition so as to limit potential abuses and loose interpretation.

The final text includes two provisions dealing with this issue: Article 6 (Respect for cultural property) related to generally protected cultural property, and Article 13 (Loss of enhanced protection) regarding cultural property under enhanced protection.[21]

How do these two provisions help develop the definition of "military necessity"? In the author's opinion, Article 6 includes two new elements: first, the waiver of imperative military necessity in the case of transformation of cultural property into a military objective (Article 6 a (i)), and second, such waiver in case of use of cultural property for purposes likely to expose it to destruction or damage (Article 6 b) when such use is necessary for obtaining military advantage. The first provision concerns the attacker, while the second provision addresses the needs of the defending side. In addition, Article 6 a (i), which is based on Article 52, para. 2 of Additional Protocol I of 1977 to the Geneva Conventions, thus makes an important link between the new instrument and the definition of military objective under the 1977 Protocol.

Article 13, which *de facto* develops the definition of "unavoidable military necessity" under Article 11, para. 2 of the Convention, brings in the two new elements: the decision to attack that must be ordered at

21 See texts in Annexes 6 and 7.

the highest operational level of command, and the obligation to give advance warning.

Before concluding this note on the meaning of "military necessity" in the 1954 Convention, it should be recalled that the notion appears in a number of other treaties on different aspects of the law of armed conflicts, such as the four 1949 Geneva Conventions (e.g. Art. 8, 34 and 50 of the First Convention; Art. 126 of the Third Geneva Convention; Art. 49, 55, 108 and 143 of the Fourth Convention) and Additional Protocol I of 1977 (Art. 54, para 5, 62, 67 and 71).

Let us conclude with the words of an acknowledged expert of the law of war: today, "military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established".[22]

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Annex 1

22 B. M. Carnahan, "Lincoln, Lieber and the laws of war: The origins and limits of the principle of military necessity", *American Journal of International Law*, Vol. 92, No. 2, April 1998, p. 231.

Article XX — *Military necessity – general definition*

1. For the purpose of this instrument, military necessity represents an urgent situation obliging a military commander to take measures indispensable for forcing as quickly as possible the complete surrender of the enemy by means:
(a) indispensable for obtaining the military objectives which are lawful in accordance with the generally recognized principles of international humanitarian law, both of treaty and customary nature, such as the distinction between combatants and non-combatants, proportionality and the prohibition of reprisals against protected categories of persons and objects, and
(b) which are limited as to the time, purpose and object of military operations.

2. The application of the concept of military necessity shall be judged on the base of two conditions:
(a) no other feasible alternative was available at the moment of the conduct of hostilities, and
(b) the assessment of the situation by a commander was made from all sources reasonably available to him/her at the moment of the conduct of hostilities.

Article XX— *Military necessity in respect of cultural property under general protection*

1. For the purpose of the present instrument, imperative military necessity as referred to in Article 4, paragraph 2 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict means a situation referred to in Article ...

2. Imperative military necessity may be established only by the officer commanding a force the equivalent of a battalion unless the circumstances of a military engagement do not allow it and, if possible, a warning shall be communicated to the opposing Party in a reasonable time in advance.

Article XX — *Military necessity in respect of cultural property under special protection*

1. For the purpose of the present instrument, unavoidable military necessity as referred to in Article 11, paragraph 2 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict means a situation referred to in Article ...

2. Unavoidable military necessity may be established only by the officer commanding a force the equivalent of a division and a warning shall be communicated to the opposing Party in a reasonable time in advance.

Annex 2

[Article 3 — *Respect for cultural property*

6. The obligations in para. 1 and 2 may only be waived in the case of imperative military necessity under the following conditions:
a. only that degree of force may be applied that is not otherwise prohibited by the law of armed conflict and that is required for partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources;
b. warning is given to the opposing forces;
c. a minimum time to redress the situation is given to the opposing forces;
d. the decision to attack is taken on battalion level;
e. no alternative means are reasonably available;
f. means and methods are limited to those which are strictly necessary to counter the threat posed.]

Annex 3

Article 8 — *Immunity of cultural property under special protection*

3. In using force against cultural property under special protection in one of the exceptional cases mentioned in para. 2 the attacking forces shall only attack the property concerned if no alternative means are reasonably available and under the following conditions:
a. warning is given to the opposing forces;
b. a minimum time to redress the situation is given to the opposing forces;
c. the decision to attack is taken on national command level;
d. means and methods are limited to those which are strictly necessary to counter the threat posed.

Annex 4

Article 6 — *Conditions for military operations*

An attack against cultural property which has lost its general protection according to Article 5 may only be undertaken on the following conditions:
a. the attack is ordered by an officer commanding a force equivalent to a battalion;
b. where circumstances permit, a minimum time is given to the opposing forces to redress the situation;
c. where circumstances permit an effective prior warning shall be communicated to the opposing forces;
d. no other feasible alternative is available;
e. the means and methods chosen are limited to those which are strictly neces-

sary to counter the threat posed; and
f. the damage caused is not excessive in relation to the concrete and direct military advantage anticipated from the attack.

Annex 5

Article 15 — *Conditions for military operations*

An attack against cultural property which has lost its enhanced special protection according to Article 14 may only be undertaken on the following conditions:
a. the attack is ordered by the highest level of government;
b. a minimum time is given to the opposing forces to redress the situation;
c. an effective prior warning is communicated to the opposing forces;
d. no other feasible alternative is available;
e. the means and methods chosen are limited to those which are strictly necessary to counter the threat posed; and
f. the damage caused is not excessive in relation to the concrete and direct military advantage anticipated.

Annex 6

Article 6 — *Respect for cultural property*

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:
(a) a waiver on the basis of imperative military necessity pursuant to Article 4, paragraph 2, of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
(i) that cultural property has, by its function, been made into a military objective; and
(ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
(b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
(c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

(d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

Annex 7

Article 13 — *Loss of enhanced protection*

1. Cultural property under enhanced protection shall only lose such protection:

(a) if such protection is suspended or cancelled in accordance with Article 14; or

(b) if, and for as long as, the property has, by its use, become a military objective.

2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:

(a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);

(b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;

(c) unless circumstances do not permit, due to requirements of immediate self-defence:

(i) the attack is ordered at the highest operational level of com-mand;

(ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and

(iii) reasonable time is given to the opposing forces to redress the situation.

Résumé

La Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé et la notion de nécessité militaire. Réexamen de la Convention de 1954 et adoption de son Deuxième Protocole additionnel (26 mars 1999)

par JAN HLADÍK

La Convention de La Haye 1954 permet une dérogation à l'obligation de respecter un bien culturel si une nécessité militaire l'exige. Si l'objet est sous protection spéciale, les conditions permettant une dérogation sont plus strictes. La notion de « nécessité militaire » et la signification à y donner ont toujours suscité la controverse des experts en la matière. Dans son article, l'auteur retrace l'histoire de cette disposition, à partir des premiers projets jusqu'à l'adoption de la Convention de 1954. Il examine ensuite différentes propositions qui tentent de définir la notion de « nécessité militaire » d'une manière plus précise. Le Deuxième Protocole additionnel à la Convention de 1954, adopté le 26 mars 1999 par une conférence diplomatique à La Haye, inclut de nouveaux textes qui représentent un pas en avant dans la protection des biens culturels en cas de conflit armé.

Police and security forces

A new interest for human rights and humanitarian law

by
CEES DE ROVER

THE dissemination of international humanitarian law among armed forces has always been an important part of the ICRC's work. Only recently, however, has the organization decided to expand its dissemination activities to police and security forces. This article examines the motives behind the ICRC's decision and the current and anticipated results. It also provides an overview of the strategies and methods being used to reach a critical new audience.

Changing nature of conflict

It is an oft-repeated truth that the nature of conflict is changing. In recent years there have been fewer and fewer armed conflicts between States and the very threat of such conflicts has significantly diminished. At the same time, there has been a dramatic increase in the number of armed conflicts within States. It is important to acknowledge that such conflicts are not simply the consequence of the threat or use of force. Their causes are complex: contributing factors include poverty, illiteracy, unemployment, discrimination, ethnic tensions, religious intolerance, exploitation and the progressive depletion

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of natural resources. As each of these factors has some connection with human rights issues, it is only logical to conclude that violations of human rights are as much a cause as they are a consequence of armed conflict. Furthermore, progressive globalization, the increased mobility of people and the disappearance of inner borders (as has recently been witnessed in Europe) combined with economic deprivation, social injustice and political oppression pose complex security challenges both for individual States and for regional and global security alliances. The conflicts which ensue are not easily settled, and it is not enough to avert the threat or use of armed force to prevent them from breaking out.

Moreover, today's battles are no longer fought by soldiers alone: irregular armed groups, isolated individuals and members of police and security forces often take part in them as well. An important consequence of the latter's involvement is the blurring of previously absolute task distinctions between police and security forces, on the one hand, and armed forces, on the other, with one readily taking on the apparent responsibilities of the other. Thus we see examples of police and security forces involved in the conduct of hostilities, as well as of armed forces involved in the maintenance of public order. As for the battlefield, it is increasingly shifting to urban areas and civilian populations are no longer spared. Attacks upon civilians and civilian targets are common, as evidenced by the high number of civilian casualties which these conflicts produce.

It is in these complex and extreme circumstances that the ICRC is striving to carry out its mandate to provide protection and assistance to the victims of armed conflict. One of the approaches taken is to promote active respect for international humanitarian law by ensuring that its rules are better known, understood, and applied. Traditionally, the ICRC has focused its dissemination efforts on members of the armed forces throughout the world. However, in view of the changing nature of armed conflict, it has come to realize that members of police and security forces are an important part of the equation and can no longer be ignored. In 1996 it therefore decided to develop an institutional policy and suitable methods for the dissemination of human rights law and humanitarian law among such forces.

Police and security forces

The term "police and security forces" often gives rise to confusion. What is its exact meaning and which forces are involved? Does it make a difference whether a target audience comprises members of a civilian police force, a *gendarmerie* or the armed forces? And how do national intelligence agencies and security services fit into the picture? Although the role they play in conflict situations may not be visible, it obviously exists.

In the author's view, this problem of definition can be avoided by adopting a functional approach, that is to say by focusing on *what* a particular action entails rather than on *who* is performing it. The law enforcement function can typically be defined as follows:

Basic responsibilities:

maintenance of public order and security;
prevention and detection of crime; and
provision of help and assistance to those in need of it.

Basic powers:

arrest;
detention;
search and seizure; and
use of force and firearms.

If members of armed forces engage in the maintenance of public order, they are performing a law enforcement function. Consequently, they must themselves observe the existing domestic legal framework, as well as relevant and applicable international obligations. From the standpoint of their legal obligations, it does not really matter that they are members of armed forces: when performing a law enforcement function, they have the same obligations as do members of a civilian police force. The UN Code of Conduct for Law Enforcement Officials[1] confirms this view. According to the Code, the term "law enforcement officials" "includes all officers of the law, whether appointed or elected, who exercise police powers, especially

1 Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979. The Code consists of eight articles covering all aspects of law enforcement behaviour and responsibility. It is generally referred to as a "soft-law" instrument as its provisions do not constitute legally binding obligations. However, it is based upon basic human rights principles which are protected under treaty law. It provides national law enforcement officials with guidance on the proper way to perform their tasks and duties.

the powers of arrest or detention".[2] The Code further provides that "in countries where police powers are exercised by military authorities, whether in uniform or civilian, or by the security forces of the State, the definition of law enforcement officials will be understood to include the agents of these services"[3]. It follows that civilian police services, *gendarmeries*, armed forces and/or State security services may be entrusted with law enforcement responsibilities and resort to the use of law enforcement powers. The legal and practical consequences of this statement must now be explored.

Applicable international legal standards

To focus on the type of action performed rather than on the status of the actor is not merely of semantic value since the applicable international conventions focus on the former as well. Everyone knows, for example, that international humanitarian law is applicable in situations of armed conflict. What happens, however, when armed forces, civilian police or security units conduct operations in a context where international humanitarian law is not applicable? What rules of behaviour, if any, are relevant in such a situation? It is to international human rights treaties[4] and to so-called "soft law" texts[5] that we turn for answers. These instruments contain rules of behaviour which have been established on the international level for law enforcement officials and which cover a wide range of subjects related to adequate and correct performance of law enforcement functions.

Rather than emphasising the differences between international human rights law and humanitarian law, the ICRC, in its deal-

2 *Ibid*, Art. 1 (commentary, para. a).

3 *Ibid*, Art. 1 (commentary, para. b).

4 Human rights treaties of greatest significance to the duties and responsibilities of law enforcement officials include the International Covenant on Civil and Political Rights, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Status of Refugees (1951) and the UN Protocol Relating to the Status of Refugees (1967).

5 See, *inter alia*, Basic Principles on the Use of Force and Firearms (adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 1990), the Code of Conduct for Law Enforcement Officials (supra note 1), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA Res. 43/173 of 9 December 1988), the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res. 40/34 of 29 November 1985) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (GA Res 40/33 of 29 November 1985).

ings with police and security forces, has given preference to identifying what both branches of international law have in common. Thus, it can be observed that the right to life, liberty and security of person, or the right to physical integrity and to the respect for human dignity are protected by both bodies of law. Any restriction to the enjoyment of these rights will have to be justified by legal and ethical arguments and by referring to the principles of justice, proportionality and necessity. Depending upon the circumstances prevailing in the country or region concerned, the ICRC's message to members of police and security forces will be based on human rights law and/or humanitarian law, and on domestic provisions. The content of the message, however, does not change.

Theory and practice

The principal task of law enforcement officials is to protect all persons against illegal acts and to serve their community. The effective discharge of these responsibilities requires a law enforcement organisation to be representative of that community and to be responsive and accountable to it. Generally, the performance of law enforcement agencies is dictated by the national legal framework, including rules for independent judicial control over law enforcement activities. In particular, recourse to law enforcement powers is subject to strict rules, including the duty of reporting. Each law enforcement official must know, apply and respect the law and principles of justice. A law enforcement body that violates the law or principles of justice in the performance of its duties can no longer be distinguished from the criminals it is pursuing. Even isolated violations are extremely destructive. Invariably, responsibility for such acts is attributed to the organization as a whole. This, in turn, serves to erode public trust in the police and to widen the gap between police and community.

Violations of the law — including violations of international human rights law and humanitarian law — are rarely if ever the result of sheer ignorance. Rather, they are symptomatic of an incapacity or unwillingness on the part of law enforcement organisations to transform hard legal obligations into adequate, correct and equitable law enforcement conduct. Lack of practical skills, lack of adequate

supervision, shortcomings in individual attitudes and behaviour, lack of judicial control and accountability and lack of organisational transparency can all be identified as potential causes.

From this understanding comes the general objective of ICRC dissemination activities for police and security forces, which is to integrate relevant principles of law into operational behaviour and education and training. In other words, members of police and security forces must understand the implications of the law for the performance of their tasks and be able to put this theoretical knowledge into practice. The emphasis in dissemination is on "know how" rather than on "know what". It would therefore be unrealistic to expect too much from the conducting of seminars aimed at imparting knowledge of legal rules.

The ICRC's concern for the activities of police and security forces

The reality of limited resources, on the one hand, and the dictates of its mandate, on the other, mean that the ICRC cannot focus its dissemination efforts on each and every domestic police or security force. Priority is therefore given to those countries where the ICRC maintains an operational delegation and where it carries out its protection mandate. Even though the ICRC's relations with police and security forces may concentrate on dissemination activities, they also hold potential value for negotiating access to security detainees and for ensuring the safety of its delegates.

As stated above, the objective of the ICRC's dissemination work among police and security forces is to integrate relevant legal norms and standards into operational behaviour and training. A two-pronged approach has been adopted to this end. First, the operational hierarchy of the target force is engaged in a dialogue on the implications of these norms and standards for task performance. The aim of this dialogue is to secure a commitment. From management officials within the target force to incorporate the relevant legal requirements into standing orders and procedures and to ensure that these new rules and procedures are implemented and respected. Secondly, the ICRC enters into a dialogue with the academies and institutions responsible for the education and training of members of the target force. One

objective of this dialogue is to determine the extent to which relevant international obligations must still be integrated into the existing training curricula. Ultimately, this process should lead to a review of such curricula or to the development of new ones. Emphasis is placed on ensuring that aspects of knowledge, skill, attitude and behaviour are equally addressed throughout the training process.

In both cases the ICRC organizes training courses. A typical training course for the operational hierarchy lasts five days, and training courses for instructors last a minimum of five days and a maximum of 10. In both types of courses the number of participants is limited to 24.

The content of these courses is based upon the ICRC's own training manual, *To Serve and to Protect,*[6] which contains the rules of human rights law and humanitarian law that are relevant for professional law enforcement practice in every type of situation ranging from peace to international armed conflict. The manual consists of 16 different chapters addressing, *inter alia,* issues of international law, law enforcement responsibility and law enforcement power. It also focuses on the implications of the special position of women, juveniles, victims, refugees and internally displaced persons for law enforcement practice. Courses follow a standard programme which may be adapted to reflect local and/or regional realities and needs. The ICRC has established a pool of experts to conduct these training courses. Pool members are all active or recently retired law enforcement officials who have received extensive training from the ICRC in human rights law and humanitarian law and been taught effective training techniques.

The ICRC does not view the implementation of a training course as the culmination of its efforts. Instead, participation in such a course is seen as the beginning of a lasting relationship with the target force. Continued involvement is considered as necessary to help forces address practical problems in implementing legal principles. In addition, the ICRC places great value on being able to identify minor

6 C. de Rover, *To Serve and to Protect. Human Rights and Humanitarian Law for Police and Security Forces*, ICRC, Geneva, 1998.

deficiencies or shortcomings in the training process which require remedy. In this respect, the ICRC enjoys the advantage of being permanently based in the field. Since most other international organisations lack a substantive field presence themselves, they cannot easily provide the continuity and post-training service which is so often required.

The ICRC is seeking to strengthen its regular field-based support by hiring delegates with a police or security forces background. Such delegates are able to offer expert assistance and support. Moreover, their knowledge and practical experience could be used as the basis for dissemination programmes designed to assist the target force in its efforts to integrate relevant provisions of the law into both operations and training. In February 1999 the ICRC had already posted Delegates to Police and Security Forces in its delegations in Brazil, Peru and Hungary. Such delegates, who also cover others countries in their region, will be posted in Kiev and Pretoria as well.

The example of Brazil

Knowledge of the law and a capacity and willingness to transform that knowledge into action are basic prerequisites for the achievement of the ICRC's dissemination objective *vis-à-vis* police and security forces. As noted above, mere seminars, irrespective of their content, quality or duration, will not do the trick. However, the ICRC has neither the mandate nor the competence to assist police and security forces in training their members in police techniques and tactics. It has therefore had to identify potential partners who could fill the gap.

In Brazil this has led to the implementation of a multi-year project aimed at integrating relevant norms into operations and training. A detailed assessment of needs and capacities revealed that the Brazilian Military Police lacked the skills required to bring about that integration. The assessment identified serious deficiencies in personal and collective capacities in a range of fields, particularly with regard to the arrest of suspects and the use of force and firearms. It should be pointed out that the force has been widely and severely criticised for its frequent recourse to excessive use of force and firearms and its practice of arbitrary arrest and detention. Accusations

of extrajudicial killings and summary executions have also been reliably reported.[7]

In close cooperation with the Brazilian Ministry of Justice and the Military Police, the ICRC has designed a strategy to remedy the detected deficiencies and build the force's capacities to alter negative behaviour patterns. The chosen strategy is to use a training-of-trainers approach. When the project is completed, 800 core police instructors drawn from the various states of Brazil will have been trained.

The training for these instructors is conducted under the auspices of the ICRC and the Ministry of Justice. It comprises both a theoretical and a practical component. The theoretical component is based on the contents of *To Serve and to Protect,*[8] which for this purpose has been translated into Portuguese, and the relevant instruction is given by ICRC experts. The practical component seeks to transform the acquired legal knowledge into behaviour. It focuses particularly on the tactics to be adopted in approaching and arresting dangerous suspects and on the use of force and firearms. It also seeks to shape personal attitudes.

The learning goals and objectives for the practical component are derived from the theoretical instruction and are formulated by the ICRC. However, the ICRC does not provide or supervise any practical instruction. This task has been assigned to Equity International (EI).[9] an independent non-profit foundation which seeks to improve police performance by promoting international norms for professional and equitable law enforcement. It offers assistance and training to police and security forces at the request of the relevant authorities.

In 1998 six professional police instructors recruited by and under the supervision of EI were stationed in Brazil for a period of four months in order to give the practical instruction described above. In 1999 instructors will again be active in Brazil. Their task will be to

7 See, for example, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68 (1997), par. 41 and 42.

8 *Supra,* note 6.

9 *See* Equity International, *Integrating Human Rights into the Functioning of the Military Police of the State of Sao Paulo,* Report of Project BRA/98/01, December 1998. Report on file with the author.

consolidate the levels of knowledge and skill attained in 1998 and to assist the Military Police in developing teaching materials.

The ICRC will undertake a detailed and thorough evaluation of this project at its completion. The evaluation will cover both process and outcomes and thus enable the ICRC to make the necessary adjustments. However, preliminary results indicate that the ICRC is well on track. The Brazil project, including its essential practical component, has been received with enthusiasm both by the government and by the Military Police. On the basis of the experience it has gained, the ICRC is currently studying the possibility of extending this service, once again in cooperation with EI, to police and security forces in other countries.

Concluding remarks

The ICRC seeks, wherever possible, to decentralise and deconcentrate its dissemination activities. For the time being, however, most of its dissemination activities for police and security forces are still being coordinated at ICRC headquarters in Geneva.

For the third year in a row, the demand for ICRC assistance has increased exponentially. However, the success of this programme should not be measured in terms of demand, but in terms of the effect which the programme has on the operational task performance of the target force. Ultimately, ICRC efforts in this regard aim to offer protection to victims and potential victims of violence, human rights violations and other abuses of power and authority. The way in which an individual perceives and experiences his or her rights is often decided on the basis of personal encounters with police and security forces. All too often, these experiences are negative. Every effort should therefore be made to ensure that those with law enforcement responsibility uphold that law and respect rights and freedoms — without any adverse distinction and irrespective of circumstances.

After two years of activity, the ICRC now has a strategy, a structure, the methods and necessary support materials to meet the special needs of police and security forces in the field. However, this is only the beginning. The ICRC must now seek to refine its tools and approaches. Relationships with established contacts must be consolidated. New contacts must be made in countries where they do not yet

exist but are deemed necessary. In addition, the programme must be constantly reviewed on the basis of ongoing evaluations in order to ensure its continued relevance.

To sum up, the changing nature of conflict poses challenges that can only be met by developing tools and approaches different from those which have found favour in the past. The expansion of ICRC activities to police and security forces is one example of a response which is both reactive and proactive. Peace in tomorrow's world will depend, to a great extent, on the capacities, commitment and functioning of those in charge of maintaining law and order. All efforts to sensitize this important group to their potential both for violating and for protecting the rights of individuals deserve encouragement and support.

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Résumé

Les forces de police et de sécurité — Un intérêt accru pour les droits de l'homme et le droit humanitaire

par CEES DE ROVER

Promouvoir l'enseignement du droit international humanitaire auprès des membres des forces armées a toujours été l'une des tâches prioritaires du CICR. Aujourd'hui cependant, les forces de police ou d'autres unités chargées de tâches similaires sont de plus en plus souvent engagées directement dans des opérations de maintien de l'ordre et de la sécurité, notamment dans des situations de troubles intérieurs, voire de conflit interne. Il est devenu important de s'assurer que les membres de ces unités connaissent quelques règles fondamentales en matière de protection de l'individu dans ces circonstances, et que leur comportement respecte la dignité humaine. Le CICR a mis en route un programme pour assister les autorités nationales compétentes dans l'organisation d'un tel enseignement.

The relevance of the 50th anniversary of the Geneva Conventions to National Red Cross and Red Crescent Societies: reviewing the past to address the future

BY MICHAEL. A. MEYER

The 1949 Geneva Conventions for the protection of war victims, perhaps the cornerstone of contemporary international humanitarian law, are still very much alive and relevant in this, the 50th anniversary year of their adoption. What is the special significance of the 50th anniversary of the signing of these treaties to the 175 recognized National Red Cross and National Red Crescent Societies, the approximately 12 National Societies in formation, and those yet to be established? Some thoughts on the matter are submitted below.

The Geneva Conventions themselves: National Society recognition, but no monopoly

National Societies, although expressly recognized in three of the four Geneva Conventions, have very few, if any, exclusive rights or roles under those Geneva Conventions.

A number of articles make express reference to National Societies as performing, or potentially performing, a specific function. However, such references do not normally give National Societies an exclusive right, or

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monopoly. Rather, National Societies are cited to illustrate the particular type of organization that may carry out a specified function. The drafters of the 1949 Conventions specifically named National Societies in recognition of the great services they had rendered during armed conflicts in different parts of the world, perhaps particularly during the Second World War. They also, however, worded the articles to enable other organizations with similar characteristics, notably other voluntary aid societies or relief societies, to provide the same assistance.

For example, Article 26 of the First Geneva Convention begins : "The staff of National Red Cross Societies and that of other Voluntary Aid Societies..."; Article 63 of the Fourth Convention provides: "Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power: (a) recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions...".[1]

Article 44, para. 2, of the First Geneva Convention reserves use of the red cross (and red crescent) emblem to National Societies as an indicatory sign, i.e. marking their connection to the Red Cross and Red Crescent Movement: no other recognized relief societies may use the emblem as an indicative device.[2] However, as an exceptional measure, and subject to national legislation, National Societies may authorize third party ambulances and first-aid posts used exclusively to give free treatment to display the emblem in peacetime (Article 44, para. 4). This may be said to be a type of indicative use of the emblem, given that the National Society must authorize it, and that treatment is free and in line with the concept of voluntary service.

In practice, the right to use the words "Red Cross" ("Red Crescent") is reserved exclusively to Red Cross/Crescent bodies. Even this is not absolute, however, since the actual treaty text, Article 44, para. 1, permits the medical services of armed forces to use the words "Red Cross" or

1 The same terminology is used in the two 1977 Protocols additional to the 1949 Geneva Conventions, namely Article 8(c)(ii) of Additional Protocol I and Article 18(1) of Additional Protocol II.

2 The international Red Cross and Red Crescent organizations are permitted to use the emblem at all times: First Geneva Convention, Article 44, para. 3.

"Geneva Cross" as well (and, no doubt, by analogy, this would include the designation "Red Crescent").[3]

In short, the 1949 Geneva Convetions recognize the National Societies and give them the potential to carry out a range of important humanitarian tasks, both medical and non-medical, during armed conflicts. However, other organizations meeting the same conditions may carry out these functions as well. Even use of the emblem and of the words "Red Cross" or "Red Crescent" are less the preserve of the Movement than one might think.

The Movement's Statutes: a strong link to the Geneva Conventions

Although the Geneva Conventions themselves may be said to give National Societies a degree of latitude in respect of their commitments thereunder, this is not so for the Statutes of the International Red Cross and Red Crescent Movement (1986), where the importance of the Conventions to National Societies is very clear.

First, five of the conditions for recognition of National Societies contained in Article 4 of the Statutes refer, either expressly or by implication, to the Geneva Conventions: a recognized Society must be constituted on the territory of an independent State where the First Geneva Convention is in force (Article 4, para. 1); the Society must be duly recognized by the legal government of its country on the basis of the Geneva Conventions as a voluntary aid society, auxiliary to the public authorities in the humanitarian field (para. 3); it must use the name and emblem of the Red Cross or Red Crescent in conformity with the Geneva Conventions (para. 5); the Society must be so organized as to be able to fulfil the tasks defined in its own statutes, including the preparation in peacetime for its statutory tasks in case of armed conflict (para. 6); and the Society must be guided in its work by the principles of international humanitarian law (para. 10).

These conditions for recognition — which are, in a sense, operational guidelines — need to be satisfied before official recognition can be

3 The ICRC commentary says that this is "a drafting error, and is completely illogical". Jean S. Pictet (ed.), *Commentary to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 329. However, there may be organizations that used the name "Red Cross" or something similar before the adoption of the relevant Geneva Convention, and they may have a right under national law to continue to use their long-established name; but such organizations are rare.

given to a National Society as a component of the International Red Cross and Red Crescent Movement. They must continue to be fulfilled after recognition, and together with the five other conditions for recognition, provide a fixed standard and unifying base for all National Societies.

The conditions cited show the importance of the Geneva Conventions to a National Society: the Conventions help to give the Society a special status with its government and a place in international humanitarian law; the tasks of a Society as a voluntary aid society, as prescribed in the Geneva Conventions, are emphasized, and the Society is required to be guided by the principles of humanitarian law, many of which are contained in the Geneva Conventions.

Article 3 of the Statutes defines the role and statutory position of National Societies, and again there are a number of significant references to the Geneva Conventions or to international humanitarian law. National Societies organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts as provided in the Geneva Conventions. They disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect. They also cooperate with their governments to ensure respect for the law and to protect the red cross and red crescent emblems (para. 2). Internationally, National Societies, each within the limits of its resources, give assistance to the victims of armed conflicts, as provided in the Geneva Conventions (para. 3).

This provision also covers National Society activities in other areas, notably, aid to victims of natural disaster and work promoting health and social well-being. However, it is clear that assistance to victims of armed conflict — the traditional role of National Societies as voluntary aid societies, under the Geneva Conventions — remains one of their main duties. Also, training in non-emergency activities provides much of the experience National Societies need to undertake effectively the duties of a voluntary aid society during armed conflict. And as will be mentioned later, National Societies should do more to capitalize on their specially recognized roles in dissemination and implementation of international humanitarian law.[4]

4 These roles have also been recognized in Resolutions of the United Nations General Assembly, of the Diplomatic Conferences of 1949 and 1974-1977 and of various International Conferences of the Red Cross and Red Crescent.

The importance of the Geneva Conventions to National Societies is not only plain in those articles of the Movement's Statutes specifically addressing their recognition and functions. It is also clear from those articles concerning the relationship of the States party to the Movement's components, and concerning the International Conference of the Red Cross and Red Crescent ("International Conference").

Articles 1, para. 3, and 2, para. 1, illustrate that it is through adherence to the Geneva Conventions that the States have institutional links with the Movement, both with respect to the International Conference and to their cooperation with the Movement's components (including, of course, National Societies). Article 2, para. 1, also shows that the cooperation between the States and the Movement's components is based, in part, on the Geneva Conventions, where the ICRC and National Societies have a role to play together with and in addition to the States, and on the Movement's Statutes, in particular Article 2 itself and Articles 8 to 11 on the International Conference. Article 2 commits States party to the Geneva Conventions to establish and to encourage the development of National Societies. Article 2, para. 3, provides for mutual support between the States and the Movement's components, the latter only supporting the humanitarian activities of States. Thus, a special relationship is created between a State and the Movement — in particular, between a State and its National Society — as a result of the State's adherence to the Geneva Conventions.

Article 8 provides that the States party to the Geneva Conventions meet at the International Conference in the exercise of their responsibilities under those Conventions. In other words, the States are members of the International Conference, the Movement's supreme deliberative body, because of their adherence to the Geneva Conventions. Article 10, para. 2, states that the International Conference contributes to the respect for and development of international humanitarian law, and in this function the States' participation at the Conference is especially important.

Thus, it may be said to be from the Movement's Statutes that the significance of the Geneva Conventions to the National Societies is made most clear. The International Conference is a unique humanitarian forum, bringing together both representatives of the States party to the Geneva Conventions and representatives of the Movement's components.[5] The Movement's Statutes

5 Indeed, it may be their participation at the International Conference, that most distinguishes National Societies from other voluntary aid societies, rather than use of the emblem, association with the Geneva Conventions, or other characteristics.

— adopted by both the States party to the Geneva Conventions and the Movement's components at the International Conference — illustrate that the Geneva Conventions are a main source of the Movement's special character; in particular, perhaps, in relation to National Societies. The latter was reaffirmed when the International Federation of Red Cross and Red Crescent Societies was granted observer status at the UN General Assembly in 1994.[6]

Taking advantage of the role based on international humanitarian law

Although the Geneva Conventions themselves do not generally give the National Societies an exclusive role, the Movement's Statutes have the effect of recognizing a special role for the National Societies in relation to the Geneva Conventions and to international humanitarian law. It is suggested that the National Societies should once again re-examine their publicly recognized role in relation to humanitarian law to reaffirm and, if possible, extend their activities in this field. Unlike many organizations struggling to establish a specific role or niche for themselves, the National Societies already have one, and rather than seek to create a new role, or to emulate the behaviour of other organizations, the Societies should focus on their important roles as defined by international humanitarian law and act in ways which will help to ensure their effective performance.

This is not a new suggestion. Nearly 25 years ago, the Tansley Report, *Reappraisal of the Role of the Red Cross*, noted that the National Societies' basic commitment to assist the victims of armed conflict and to make the necessary preparations beforehand in peacetime, is not, or is not sufficiently, implemented by many Societies.[7] In 1982, Richard Perruchoud wrote that: "The most crucial problem for National Societies is ... the loss of awareness of their original goal of assistance to the victims of armed conflict". He also observed that "[t]he most serious [shortcoming of National Societies] is without doubt no longer realizing the original goal as the Red Cross principles are really put to the test in humanitarian action in times of armed conflict".[8]

6 UN General Assembly Resolution 49/2 of 19 October 1994.

7 Joint Committee for the Re-appraisal of the Role of the Red Cross, *Red Cross at National Level: A Profile*, p. 37, and *Final Report: An Agenda for Red Cross*, p. 97, Geneva, 1975.

8 R. Perruchoud, *International Responsibilities of National Red Cross and Red Crescent Societies*, Henry Dunant Institute, Geneva, 1982, pp. 67 and 91 respectively.

In recent years, there has been greater public interest in, and awareness of, international humanitarian law and the Geneva Conventions, even if understanding of their content has not greatly increased. This represents both an opportunity and a challenge for National Societies. It is an opportunity because Societies can promote humanitarian law, enhancing understanding both of the subject and of their own special connection with it.[9] It is also a challenge because many Societies seem unprepared to disseminate international humanitarian law or to assist with its implementation, and because other organizations have taken a greater interest in this subject.

Some additional challenges

Recent developments in international humanitarian law and its practice also pose challenges for National Societies, and may merit consideration in the 50th anniversary year. Some examples follow.

There has been general approval of the adoption of the Statute of the International Criminal Court, and there has been growing recognition of the importance of prosecuting war crimes (including grave breaches of the Geneva Conventions) at the national level. But the approach of all the Movement's components to enforcement of international humanitarian law through criminal prosecutions must, by necessity, appear to be somewhat contradictory. On the one hand, they strongly support efforts to encourage greater respect for the provisions of the law. On the other, given the need for the Movement's components to have access to the victims of armed conflicts, we must keep a distance from actual court proceedings and investigations. National Society personnel working with the ICRC, or undertaking tasks requiring neutrality and confidentiality, should not be compelled to testify in war crimes prosecutions. However, National Society personnel working as part of the medical services of their country's armed forces may be required to do so, in common with other staff of the military medical services.

9 The ICRC's People on War project, which welcomes the support of National Societies, is another opportunity to promote international humanitarian law. More generally, the 27th International Conference of the Red Cross and Red Crescent (Geneva, 1999) offers an opportunity to reinforce the National Societies' role. For the experience of one National Society, see M. A. Meyer, "The role of a National Society in the implementation of international humanitarian law: Taking up the challenge!", *IRRC*, No. 317, March-April 1997, pp. 203-207.

The Geneva Conventions have few rules pertaining to criminal law and procedure, and this matter of testimony, which affects every component of the Movement, needs urgent consideration.

Also, the use of multi-national forces has become more frequent, and it is suggested that an inter-governmental organization, such as the European Union, which has its own common foreign and defence policy, may soon have its own armed forces. The role of National Societies as auxiliaries to the medical services of their county's armed forces may need to be adapted to take account of these developments. For example, should there be a European Union Red Cross Society which fulfils the role of auxiliary to the medical services of the possible EU armed forces? As seen recently in the humanitarian operations related to the Balkans crisis, it remains important that a clear distinction be made between Movement operations and those of parties to a conflict, even if the latter are of a humanitarian nature.

There is a growing number of actors in current armed conflicts: private armies; multi-national companies which have their own armed forces, relief and development NGOs, the media. Existing international humanitarian law seems sufficiently adaptable to cover them all. Will National Societies be prepared to disseminate knowledge of humanitarian law to these new actors, as well as to the established ones? Will they also be ready to use (where appropriate) the new information technologies?

There may be a growing role for National Societies to cooperate with their governments to implement existing obligations of a humanitarian character, and to promote adherence to other treaties of international humanitarian law. Are National Societies ready to do this, and where possible, could they provide technical assistance to sister National Societies which currently lack trained personnel? Could States cooperate with the Movement's components to do more in this area?

And even if much work is done to increase dissemination and implementation, how do we know it works, what standards might be developed to evaluate our effectiveness?

The next 50 years

The preceding section noted some of the trends for the future affecting the Geneva Conventions. Although it is always risky to make predictions, the following might have been achieved by the time the 75th anniversary of the Geneva Conventions is reached, if not the 100th.

The growing convergence between international humanitarian law and human rights law will continue, providing greater protection for individuals in emergency situations of all types, from internal violence to international armed conflicts. This may broaden the National Societies' dissemination role and strengthen their position in providing assistance to victims in a wider range of circumstances.

The standard of implementation of humanitarian law treaties at the national level might have improved to the stage where a State reporting system has been established.[10] This might include reporting on violations of international humanitarian law. Such a mechanism could be designed to be constructive in nature, rather than condemnatory, and involve the provision of technical assistance — perhaps offered by the ICRC Advisory Service on International Humanitarian Law and National Societies — to help improve a State's record in this field.

National Societies could begin to take a role in wider aspects of international humanitarian law, such as in helping to protect cultural property during armed conflicts, and do more to promote the 1954 Cultural Property Convention and its two Protocols.

Non-lethal weapons and other developments in weaponry may, in due course, be an area meriting specific regulation. National Societies would need to be ready to understand such developments, to cooperate with governments in seeking controls, and to help the victims of such weapons, whose injuries may require different and long-term treatment.

The role of National Societies, and the value of the emblem and of the distinctive signs, in remote-controlled armed conflicts involving combat between technologically advanced vehicles and aircraft rather than between armed human beings, may also need to be addressed. Even in such a world of long-range power projection, space-based lasers, etc., there will remain the threat of attacks by small groups, or even individuals, for example with nerve gas which can kill many thousands of people. There would certainly be a role for National Societies in such terrifying circumstances.

10 In 1998 the International Law Committee of the Danish Red Cross published the outlines of such a proposal: "Voluntary Review Procedure on National Implementation of International Humanitarian Law". This proposal was noted by the 1997 Council of Delegates, a statutory body of the International Red Cross and Red Crescent Movement, and National Societies were invited to examine the proposal with their respective governments (Resolution 4, paras. 7 and 8).

It is hoped that, at least in the next fifty years (if not sooner), the long-standing and vexing problem of the multiplicity of emblems will be resolved.

During the period to 2049, one or more new additional protocols, or even a revised text of one or more of the four Conventions, may have to be adopted; it will have to be possible to achieve this without putting at risk the humanitarian standards contained in the original 1949 treaties. Should this occur, and if appropriate to the subject matter, it is hoped that the States — and any non-State parties to such agreements — will remain willing to give express recognition to the roles to be played by National Societies under these new international humanitarian law instruments, based on their historic role and continued proven relevance.

It is also hoped that the Geneva Conventions and their Additional Protocols will continue to be interpreted in such a way so that they are applied in accordance with their basic spirit of humanitarianism whilst, at the same time, their terms are adapted (where necessary) to fit contemporary circumstances.[11]

National Societies, through their humanitarian activities in peacetime as well as during emergency situations, may be able to help address some of the possible sources of future conflicts, such as economic imbalances within and between States, environmental degradation and resource constraints, and migratory pressures. The International Red Cross and Red Crescent Movement generally should be able to contribute towards fostering a more stable "global village" by encouraging justice and cooperation through its neutral humanitarian services. The 1949 Geneva Conventions, although intended, like the earlier Geneva Conventions, to deal with armed conflicts, promote such values, which are relevant in all circumstances.

Whatever happens, the role of National Societies, as neutral humanitarian conduits of impartial assistance, is still likely to be needed.

Final thoughts

National Societies are *not* NGOs: largely by virtue of the Geneva Conventions, they have a special status as private institutions performing cer-

11 The adaptability of the Geneva Conventions was shown during the South Atlantic conflict (1982). During that conflict, a "Red Cross Box" was established in the spirit of the Conventions to provide a protected zone for hospital ships, and Argentine prisoners of war were accommodated on vessels, rather than in camps on land, to provide them with better living conditions.

tain public functions. Our auxiliary role to government in the humanitarian field, and the way this role enables us to assist people in need, especially during armed conflict, requires re-examination.

The Geneva Conventions seem to have stood the test of time. Their basic principles of impartial aid and voluntary service remain relevant to current armed conflict, and to the philosophy and role of the Movement. National Societies need to renew their acquaintance with the Geneva Conventions as they prepare to strengthen their role, and to meet the needs of the new millennium.

Résumé

L'importance du 50e anniversaire des Conventions de Genève pour les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge : un regard vers le passé pour mieux aborder l'avenir

par MICHAEL A. MEYER

Le 50e anniversaire des Conventions de Genève de 1949 invite à jeter un regard sur les rapports entre ces Conventions et les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge. Différentes dispositions des Conventions attribuent en effet des droits ou des devoirs aux Sociétés nationales. Mais elles n'ont pas toujours le monopole des activités humanitaires dans les situations de conflit armé. Par ailleurs, les statuts du Mouvement international attribuent aux Sociétés nationales des tâches en rapport avec la mise en œuvre du droit international humanitaire, comme l'assistance aux victimes de conflits armés et la diffusion du droit humanitaire. Parallèlement, ils établissent un lien privilégié entre celles-ci et les États parties aux Conventions. Après avoir examiné la situation actuelle et ses enjeux, l'auteur enjoint les Sociétés nationales d'assumer avec vigueur les divers rôles qui leur sont dévolus par les Conventions de 1949 et les statuts du Mouvement.

Study on customary rules of international humanitarian law: Purpose, coverage and methodology

In December 1995 the 26th International Conference of the Red Cross and Red Crescent endorsed the recommendations drawn up by the Intergovernmental Group of Experts for the Protection for War Victims which had met, at the invitation of the Swiss government, on 23-27 January 1995 in Geneva. Recommendation II of this Group proposed that:

> "the ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies."[1]

At the time of writing, most of the research for this report had been carried out and consultations had been held with academic and governmental experts. The ICRC is in the process of drawing up the final report to be ready in spring of the year 2000.

The purpose of this article is to explain the purpose of the study, the areas of international humanitarian law covered and the methodology. An examination of the substantive content of the report as such is beyond the scope of this article given that the report is not yet finalised. However, a few observations concerning substantive issues will be made at the end of this comment.

Purpose of the study

Treaty law and customary international law are the main sources of international law. In the area of international humanitarian law, treaty law is well developed in general (see, for instance, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977). However, there are few treaty rules regulating non-international conflicts. In fact, in situations not

1 Meeting of the Intergovernmental Group of Experts for the Protection for War Victims (Geneva, 23-27 January 1995), Recommendation II, *IRRC*, No. 310, January-February 1996, p. 84, and International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims, Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995), *ibid.*, p. 58.

covered by Additional Protocol II, there is only one general article covering non-international armed conflict, namely Article 3 common to the four Geneva Conventions of 1949. While Article 3 is extremely useful, it is far from complete. For example, it is virtually silent on questions relating to the conduct of hostilities. Additional treaty law could not easily fill this gap because it would be extremely difficult and time-consuming to have States adopt a new treaty on non-international conflicts which would still need States' ratification to enter into force. The idea therefore arose to look into the other source of international law, namely customary international law, which has the additional advantage that as such it binds all States. While many States had wished the ICRC to concentrate its efforts on research into rules of customary international law concerning non-international armed conflict, in the end it was mandated to study these rules with respect to both international and non-international armed conflict.

The study may be useful for many purposes. Below are a few examples of its possible uses:

1. Rules of customary international law apply to all States. As a result, the rules that have been identified as customary international law have to be respected by every State. This will be particularly useful in cases where States have not ratified the 1977 Additional Protocols or in the event of non-international armed conflict, an area where few treaty rules exist, as explained above.

2. The study can also be used to convince governments to ratify certain treaties. If it is shown that certain rules are already customary international law, States should be less hesitant to ratify treaties containing those rules.

3. The study can serve as a dissemination tool. Customary international law takes into account the practice and legal opinion of States around the world and is therefore culturally neutral, so to speak.

4. The study could serve as a basis for the drafting of other documents, such as a revised document on the essential rules of international humanitarian law.

5. The study can be useful for the military. Military manuals should not fall below the standards set by customary international law. Military training should be based at least on these same standards.

6. International (criminal) tribunals which have to apply customary international law could use the study. National courts could also use

it because customary international law is a source of law in many domestic legal systems. Counsel appearing before these courts could also rely on the study.

7. The study will also serve to indicate areas of international humanitarian where there is no agreement and areas where the situation is unclear. These areas may be identified as deserving particular attention from the international community in the coming years.

Areas of international humanitarian law covered by the study

For research purposes the study was divided into six parts:

- principle of distinction
- methods of warfare
- use of weapons
- specific protection regimes
- treatment of persons and human rights law applicable in armed conflict
- accountability and implementation.

The part on the principle of distinction deals not only with the distinction between combatants and civilians and between military objectives and civilian objects but also with the notions of proportionality in attack, precautions in attack, precautions against the effects of attacks, and the protection of undefended areas and works and installations containing dangerous forces. The second part, on methods of warfare, deals with issues such as the duty to give quarter, prohibition of pillage, perfidy, improper use of emblems and uniforms, protection of medical and religious personnel and belligerent reprisals. The third part, on the use of weapons, looks at the general concepts of the prohibition of weapons of a nature to cause unnecessary suffering or superfluous injury and of weapons that are by nature indiscriminate as well as at specific prohibitions of and restrictions on the use of certain weapons. The fourth part, on certain specific protection regimes, deals with the protection of the civilian population against starvation and the corollary protection of relief personnel and objects. In addition, it examines the protection of cultural and religious objects and the environment. The fifth part covers the treatment of wounded, sick and dead persons, missing persons, persons in detention and displaced persons. It also contains a section on human rights law practice relating to the treatment of persons in armed conflict.

Finally, the sixth part, on accountability and implementation, covers aspects of both State and individual responsibility for violations of international humanitarian law. It also includes a section on education for armed forces and civilians on humanitarian law.

This structure was selected solely for research purposes, in order to achieve a reasonable and even distribution of work, rather than for reasons of strict logic. The final report will not necessarily follow the same order.

(a) International and non-international armed conflict

In the report, each issue will be analysed in order to establish which specific rules are customary law applicable in international armed conflict and whether they are also recognised in non-international armed conflict. At this moment it appears that some rules will only relate to non-international armed conflict.

The rules of the 1949 Geneva Conventions on international armed conflict were not researched because they can be assumed to represent customary international law. In any event, with 188 States Parties such a study would be both difficult and less important. In addition, the 1907 Hague Conventions were not researched with respect to international armed conflict either, as the Nuremberg Tribunal specifically stated that they are customary international law.

(b) Naval warfare

Naval warfare was not included in the study because this area of law was recently the subject of a major restatement, namely the San Remo Manual on International Law Applicable to Armed Conflicts at Sea.[2] A reference to the Manual and its commentary were deemed sufficient by the Steering Committee.

(c) International human rights law

Although the mandate given to the ICRC mentioned only international humanitarian law, behaviour in armed conflict is often analysed in human rights fora which sometimes refer directly to "international humanitarian law", while others do not. Such practice was included in the research as it can provide supporting evidence when the customary status of humanitarian law rules is uncertain or the rules are ill-defined. For example, human rights practice can help to clarify concepts which are only vaguely defined under international humanitarian law, such as the concept of torture. The

2 *Ibid.*

objective in this case is not to establish independent principles of customary international law but to identify norms of human rights law and evidence of human rights practice which support, strengthen and clarify analogous humanitarian law principles.

In addition, it was decided by the Steering Committee, and widely supported by the governmental experts, that it would be appropriate to include in the report a separate section on human rights practice because, in situations of armed conflict, human rights law may apply independently of humanitarian law,. Although human rights treaties recognise that States may be faced with situations in which they will be unable to fulfil all their obligations and therefore permit derogation from certain rights, human rights law does not cease to apply during armed conflict. Moreover, there are certain rights which are so fundamental that they may never be restricted or derogated from. The study will seek to identify these so-called "non-derogable" rights in customary international law.

Methodology

To determine the best way of fulfilling the task entrusted to it, the ICRC consulted a group of academic experts in international humanitarian law who formed the Steering Committee of the study.[3]

Unlike treaty law, customary international law is not written. To prove that a certain rule is customary one has to show that it is reflected in State practice and that there exists a conviction in the international community that such practice is required as a matter of law. In this context, "practice" relates to official State practice and therefore includes formal statements by States. A contrary practice by some States is possible as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial the original rule is actually confirmed. State practice in this context does not mean age-old practice. In gen-

3 The members of the Steering Committee are Georges Abi-Saab, Graduate Institute of International Studies, Geneva; Salah El-Din Amer, Faculty of Law, Cairo University; Ove Bring, Faculty of Law, University of Stockholm; Éric David, Centre de droit international, Université Libre de Bruxelles; John Dugard, Faculty of Law, University of Leiden; Florentino Feliciano, Appelate Body, World Trade Organization, Geneva; Horst Fischer, Institute for International Peacekeeping Law and Humanitarian Law, Ruhr-University, Bochum; Françoise Hampson, Department of Law, University of Essex, Colchester (U.K.); Theodor Meron, School of Law, New York University; Djamchid Momtaz, Faculty of Law, Tehran University; Milan Sahovic, Center for Human Rights, Belgrade; Raúl Emilio Vinuesa, Faculty of Law, University of Buenos Aires.

eral, research for the study has focused on State practice during the last twenty years. Customary international law can emerge in an even shorter period of time.

Opinio juris and State practice were examined in relation to certain themes rather than taking treaty rules one by one to establish whether they represent customary law. This is likely to lead to a report which will indicate not only general principles of customary law but also detailed rules that can be shown to be customary. A more detailed explanation will be provided in the introduction to the study of the exact method and criteria used to determine whether a rule is part of customary international law or not. In general, it can be said that the Steering Committee and the ICRC opted for a classic approach as set out, in large part, by the International Court of Justice in the North Sea Continental Shelf Cases.[4]

The research was conducted using both national and international sources reflecting State practice (*usus*) and/or legal opinion (*opinio juris*). The measure of access to these various sources largely explains the research method adopted.

(a) Research into national sources

Since national sources are more easily accessible within a country, it was decided to seek the cooperation of national researchers who would prepare national practice reports. The national reports cover all areas of humanitarian law included in the study and are drawn up according to a structure that was established for research purposes.

The sources of State practice and legal opinion collected by the national researchers include diplomatic correspondence, policy statements (both to national and to international bodies), opinions of official legal advisers, police manuals, military manuals, orders to armed and security forces, military communiqués during war, executive decisions and practices, legislation, judicial decisions, government responses and comments when making reservations to treaties or when refusing to adopt, sign, or ratify a treaty, official government responses to NGO allegations and to international organisations, and, if necessary, press releases. Indeed, press releases were only used as a barometer of public opinion (see the Martens Clause) in relation

4 North Sea Continental Shelf Cases (Fed. Rep. Germany v. Denmark, Fed. Rep. Germany v. Netherlands), I.C.J. Reports 1969, p. 3.

to certain serious and important events, not as a source for the determination of customary rules of international law.

It is practically impossible to carry out research into the national sources of each and every country in the world. A selection was therefore made of some 50 countries whose national source material was researched thoroughly by one or more national researchers at the invitation of the ICRC. These 50 countries were selected by the Steering Committee on the basis of geographic representation as well as on the basis of recent experience with armed conflict. In the end, national reports were prepared concerning nine countries in Africa, eleven in the Americas, nine in Asia, twelve in Europe, and nine in the Middle East. Significant practice of other countries was identified through research into international sources and ICRC archives.

(b) Research into international sources

International practice is reflected in a variety of sources: resolutions adopted in the framework of the United Nations (in particular the Security Council, the General Assembly, and the Commission on Human Rights), United Nations ad hoc investigations, the work of the International Law Commission and comments it elicited from governments, the work of the Sixth Committee of the UN General Assembly, reports of the Secretary-General, thematic and country-specific procedures of the UN Commission on Human Rights, reporting procedures before the Human Rights Committee under the International Covenant on Civil and Political Rights, *travaux préparatoires* of treaties, the practice of international organisations, the findings of specialised institutes, State submissions to international and regional courts, international court decisions, and press releases and NGO statements if needed.

A special effort was made to record the practice of regional organisations, including regional international courts. These organisations include the Organization of American States, the Organization of African Unity, the League of Arab States, the Organization of the Islamic Conference, the Gulf Cooperation Council, the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe, and the Commonwealth of Independent States. The practice of the Non-Aligned Movement was also taken into account. Research into these international sources was conducted by six teams, each of which concentrated on one of the six parts of the study.

(c) Research into ICRC archives

To complement the investigation of national and international sources, two ICRC researchers collected material from the ICRC archives relating to nearly forty recent armed conflicts, some twenty of which occurred in Africa, six in Asia, eight in Europe, two in Latin America and two in the Middle East. In general, these conflicts were selected to complement national research so that other countries and conflicts could also be covered.

(d) Consolidation of the research

Upon the completion of their research, the six teams consolidated the results. This means, for example, that with respect to the chapter on the principle of distinction all national, international and ICRC archive material was summarised and consolidated in one document. So far, this has resulted in six consolidated reports containing a structured summary of State practice, together with six executive summaries giving a preliminary assessment by the Steering Committee as to what appears to be customary law, followed by brief explanations. The executive summaries are based on the consolidated reports and follow the same structure. The Steering Committee discussed these six draft reports and executive summaries during three meetings which took place in 1998.

(e) Consultation with government experts

In 1999 two meetings of some 50 governmental and academic experts were held to discuss the preliminary assessment of the Steering Committee contained in the executive summaries. Both meetings were fruitful and constructive, and in general the study was well received. The methodology was largely approved and the Steering Committee's evaluation was generally confirmed. The tendency was to extend the application of the customary rules to non-international conflict rather than to limit their applicability to international conflicts.

Publication

The ICRC will now draft the final report and inform the 27th International Conference of the Red Cross and Red Crescent (31 October - 6 November 1999) of the progress made. The report, together with a summary of the collected State practice, will be published in early 2000.

The report itself will contain three elements: (1) a description of the methodology including an explanation of how the customary law status of rules was established; (2) the rules of international humanitarian law

which were found to be customary together with a commentary, including an explanation as to why this conclusion was reached; and (3), as recommended by the experts consulted, an indication of trends in the development of customary international law where uncertainty exists whether a certain rule has already crystallised into customary international law.

It was also decided that the compilation of State practice, as contained in the consolidated reports, should be published, as an annex to the report. The reason for this is twofold. First, anyone consulting the study should be able to see on what grounds it was decided that a certain rule is of a customary character. For each rule, reference will be made to the practice on which the decision is based. Secondly, for practical reasons it was considered useful to publish the wealth of information that has been compiled rather than just to file it. Many researchers, for example, will thus be able to use the practice gathered for their own purposes. As a result, the report should be published in one large volume together with the consolidated reports of State practice. An off-print should also be made available containing only the study as such, without the consolidated reports of State practice.

Some initial results

Although it goes beyond the scope of this short comment, some mention should be made of the content of the final report. The first conclusion is that there are more rules of customary international law relating to non-international armed conflict than originally expected. Given the particular characteristics of non-international armed conflicts, there are even such rules which apply specifically thereto. Secondly, there are some areas where practice is unclear or too varied to find a rule of customary international law. This was especially the case for some detailed rules which interpret the principle of distinction. Finally, a further remarkable fact is the increasing influence of other areas of international law on humanitarian law, such as international human rights law and international environmental law. Governmental experts, in particular, urged the ICRC not too loose sight of these other branches of international law.

JEAN-MARIE HENCKAERTS
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Arms availability and the situation of civilians in armed conflict

Summary of an ICRC study for the 27th International Conference of the Red Cross and Red Crescent

BY PETER HERBY

As international arms transfers, particularly of small arms, have become easier, the promotion of respect for international humanitarian law has become vastly more difficult. The proliferation of weapons in the hands of new and often undisciplined individuals or groups has outpaced efforts to ensure compliance with basic rules of warfare. The result is appalling levels of wanton violence and a stream of horrific images which threaten to immunize the public and decision-makers to ongoing violations of international humanitarian law. In the absence of vigorous action to restrain the availability of military style arms and ammunition, those responsible for training combatants in the laws of armed conflict have little hope of reaching all those capable of waging war. The price to be paid is high, in terms of human suffering, social and economic disruption and the burdens of intervention when the international community decides to act.

In recognition of these trends, the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 1995) and the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995) called upon the ICRC "to examine, on the basis of first-hand information available to it, the extent to which the availability of weapons is contributing to the proliferation and aggravation of violations of IHL [international humanitarian law] in armed conflicts and the deterioration of the situation of civilians".[1]

The Council of Delegates has also, on two recent occasions, requested that the Movement's role and attitude with regard to the question of arms transfers be studied and clarified. This request was made in Geneva

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1 Recommendations, para. VIII (c), *IRRC*, No. 310, January-February 1996, p. 88, and endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, *ibid.*, p. 58.

in 1995[2] and repeated in Seville in 1997 (Resolution 4.3). The Seville resolution further expressed concern about the "easy access of combatants and civilian populations unfamiliar with the requirements of international humanitarian law to a wide variety of weapons, particularly small arms, and their frequent use against civilians in violation of basic humanitarian principles".[3] The role and position of the Movement on this issue is to be clarified at the Council of Delegates in October 1999, just prior to the 27th International Conference.

Pursuant to the mandate entrusted to it by the 26th International Conference the ICRC has, since 1996, attempted through a variety of methods to distil its experience on the effects of arms availability on civilian populations. The organization has carried out two case studies analysing information drawn from its large medical database on patients treated in its hospitals and by its medical teams. These provide unique insights into the nature of arms-related casualties in two contexts in which the ICRC has worked. To our knowledge, these are among the few systematic studies which have been published on the nature of arms-related casualties among the civilian population in war-torn societies.

In addition, a survey was carried out among senior ICRC delegates with a collective experience of 41 assignments in conflict and post-conflict settings on four continents since 1989. The objective was to gather the perceptions of ICRC staff on the degree of availability of weapons within various segments of given populations, the nature of arms-related incidents involving civilians and the direct impact of arms availability on ICRC field operations. The perceptions and conclusions of the ICRC have been published in a study entitled *Arms Availability and the Situation of Civilians in Armed Conflict*,[4] which will serve as a basis for discussion at the 27th International Conference of the Red Cross and Red Crescent (Geneva, 31 October-6 November 1999).

The ICRC study highlights the high price civilian populations have paid in recent conflicts. Civilian casualties outnumber those of combatants in many internal and ethnic conflicts and have increased throughout the century in parallel with the development of new military technolo-

2 Resolution 2, Council of Delegates (Geneva, 1995), *ibid.*, p. 140.

3 Resolution 8, Council of Delegates (Seville, 1997), para. 4, *IRRC*, No. 322, March 1998, p. 152.

4 *Arms Availability and the Situation of Civilians in Armed Conflict: A study by the International Committee of the Red Cross*, Geneva, 1999, 80 pages (also available in French and Spanish).

gies. Disease, starvation and abuse increase when humanitarian agencies, including the ICRC, are directly attacked and must suspend operations or leave a country. Suffering can continue, often for years after the end of conflicts, as the availability of arms engenders a "culture of violence", undermining the rule of law and threatening efforts at reconciliation among former warring parties. This was vividly illustrated in an ICRC case study which showed that arms-related casualties decreased by only 33% during the 18 months following the end of hostilities in a given region where arms were allowed to remain in circulation.

Although the ICRC study does not suggest that arms availability alone is the cause of violations of international humanitarian law or a deterioration of the situation of civilians, it indicates that the unregulated transfer of weapons and ammunition can increase tensions, heighten civilian casualties and prolong the duration of conflicts. Among the central conclusions is that the current pattern of transfers of small arms, light weapons and related ammunition, because it is largely outside of international control, should be a matter of urgent humanitarian concern. While the primary responsibility for compliance with international humanitarian law falls upon users of weapons, States and enterprises engaged in production and export bear a degree of political, moral and, in some cases, legal responsibility to the international community for the use made of their weapons and ammunition. At the same time efforts to teach and promote humanitarian law must be redoubled so that arms bearers understand its basic norms and are expected by their own communities to respect it.

The international community has in recent decades enacted important prohibitions and limitations on the transfer of chemical, biological and nuclear weapons, missile systems and components of these technologies. Certain geographical regions have established controls on the transfer of major conventional weapons systems. However, until recently little attention has been given to the transfer of small arms and light weapons, which have inflicted most of the death and injury in recent conflicts. The ICRC study encourages governments, regional organizations and non-governmental organizations involved in the development of arms transfer limitations to recognize that international humanitarian law is often the body of law most relevant to the stated purpose for which military-style arms and ammunition are transferred. The proposal that criteria based on humanitarian law considerations should become an important component of any new limi-

tations on arms availability developed in the coming years will be an important point of discussion at the 27th International Conference.

The Red Cross and Red Crescent Movement can play a major role in raising public awareness of the human costs of unregulated arms availability and encouraging governments to include humanitarian law considerations in their decision-making processes relating to arms transfers. On the other hand, it is clear that involvement by any component of the Movement in public debates about specific transfers of arms to specific recipients could create serious security problems and call into question the Movement's neutrality. Such involvement should be discouraged. As with many other aspects of the Movement's vocation, the challenge will be to focus attention on the human face and consequences of the problem and to call for responsible action by governments based on existing principles without getting drawn into a politicized debate.

In insisting on respect for international humanitarian law by those who would arm themselves, States will make a major contribution to the protection of civilian populations from the type of unspeakable suffering which has been inflicted in conflicts throughout this century. In so doing, they will significantly strengthen the basis for both lasting peace and the rule of law in the increasingly global society in which we live.

Arms availability and violations of international humanitarian law

BY JAN EGELAND

The massive influx of weapons into already unstable regions, where they are sometimes sold for a pittance, justifies grave doubts about respect for humanitarian standards. Such proliferation sets in motion a vicious circle in which people arm themselves out of fear for their safety, thus further destabilizing the situation, which is soon governed by the law of the jungle. At that point, any and all standards are ignored. The result: tension, unrest, violence, even armed conflict, all of which is extremely detrimental to any effort to foster respect for international humanitarian law. The International Committee of the Red Cross (ICRC), which monitors compliance with that law, cannot stand idly by. Its President therefore voiced the organization's concern to the 26th International Conference of the Red Cross and Red Crescent, held in 1995, and reminded governments of their responsibilities.[1]

That Conference called on the ICRC to take a closer look at the effect, in terms of violations of humanitarian law and the deterioration of the situation of civilians, of the arms proliferation of weapons in conflict areas, and the International Red Cross and Red Crescent Movement as a whole decided to consider what role it could play and what stand it should take on the issue.

One element in this process of reflection was an international meeting organized jointly by the ICRC and the Norwegian Red Cross in Oslo in May 1998, which brought together researchers as well as governmental, military and non-governmental experts from 14 countries in Africa, the Americas, Asia and Europe to consider the problems caused by unlimited arms availability. The participants included government offi-

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1 Keynote address by the President of the International Committee of the Red Cross, *IRRC*, No. 310, January-February 1996, pp. 20 - 35.

cials involved in licensing, limiting and policing arms transfers, military and academic experts, representatives of the United Nations and specialists from a number of international humanitarian organizations.

The main aim of the meeting was to gain a better understanding of the intricacies of the issue. It was also an opportunity to take stock of the relevant studies and of projects under way. One hopeful sign that immediately became evident was the growing awareness of the problem. A number of governments are beginning to take action and are thinking about both developing existing international norms on the manufacture and sale of arms and how to combat illicit arms trafficking. The forming of dynamic coalitions of non-governmental groups concerned with the grave effects of arms proliferation is another favourable development.

International action to study, control and limit arms transfers that result in violations of international humanitarian law and in human rights abuses has become an increasingly important concern for the Norwegian Red Cross. Together with its partners in the Movement and like-minded organizations belonging to the Norwegian Initiative on Small Arms Transfers, the Norwegian Red Cross will seek to form the strongest possible coalitions in order to curb the proliferation of small arms and thus protect humanitarian law and human rights.

The Norwegian Initiative on Small Arms Transfers is a joint effort to study and encourage measures to control and limit small arms transfers that may endanger peace and human rights. Our partners in this endeavour are Norwegian Church Aid, the International Peace Research Institute and the Norwegian Institute for International Affairs.

Conclusions of the Oslo Group of Experts

After considering a number of case studies from all continents, the 36 Red Cross/Red Crescent and other international experts summarized their findings in a report prepared and published by the Norwegian Red Cross and the ICRC:[2]

"In the absence of vigorous efforts to address the problem of arms availability, the suffering of civilians both during and after armed conflicts may be expected to increase in the years ahead as new sources of weapons become

2 *Arms Availability and Violations of International Humanitarian Law and the Deterioration of the Situation of Civilians in Armed Conflict*, Report, ICRC and Norwegian Red Cross, Geneva/Oslo, 1998.

available owing to reductions in the size of armed forces, privatization of arms industries, the "upgrading" of existing arsenals when accompanied by the transfer of surplus weapons to other regions, and other factors. Under such conditions, providing development aid or relief to people in need and promoting respect for international humanitarian law will grow ever more difficult, dangerous and costly".[3]

The conclusions of the meeting were, however, not entirely bleak. The participants were encouraged by the many efforts currently being made to place stricter limits on the availability of small arms, light weapons and ammunition. These include:

- the three-year moratorium on the production, import and export of small arms and light weapons formally adopted by the Heads of State of the Economic Community of West African States in October 1998, and the implementation mechanism set up with UN support;
- the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, adopted by the Organization of American States in 1997;
- the European Union's programme to prevent and combat illicit arms transfers;
- specific proposals made in the framework of the United Nations for the control of small arms and light weapons on the basis of humanitarian, security and crime-control considerations;
- national legislation in a number of arms-producing and -exporting countries to regulate their arms transfers; and
- a growing number of dynamic non-governmental and local community initiatives addressing arms availability, small arms transfers and gun control.

The participants considered such efforts to be key initial steps dealing with the humanitarian problems caused by unrestrained arms availability. However, as a matter of urgency, these ad hoc responses to the proliferation of weapons in conflict areas must become part of a coherent international strategy for the control of both lawful and unlawful transfers of small arms, light weapons and ammunition. Such a strategy would not only alleviate the plight of civilians caught up in armed conflict but would also bring major benefits in terms of economic development, promoting national and regional stability and ensuring respect for human rights.

3 *Ibid.*, p. 73.

The participants stressed that regional action – if supported by civil society, implemented by the governments concerned and backed up by governments from outside the region – will form the cornerstone of effective strategies to develop norms for the transfer of arms and ammunition and to put an end to illicit transfers. Without a coordinated regional approach, the efforts of any one country to control the presence of arms on its territory could easily be undermined. At the same time, however, regional efforts to limit arms availability are also needed and deserve the support of the entire international community. The Participants proposed a wide range of measures to be taken at the national, regional and international levels.

Future action

The fact that governments are waking up to the problem and that some of them are starting to take action is in itself a very promising development. The meeting of West African States and arms-exporting States members of the Wassenaar Arrangement, held in Geneva on 5 May 1999 to consider the implementation of the West African moratorium on the import, export and manufacture of small arms in that region, is a recent example of this. The Henry Dunant Centre for Humanitarian Dialogue in Geneva brought together representatives of some 40 governments who pledged to support the implementation of this unique regional moratorium on small arms in war-torn West Africa.

The pioneering efforts of the Mali government which led to the West African moratorium, along with the drafting of a European Union code of conduct for arms exports and meetings held on the subject by a number of governments and international organizations – all these are sure signs that the message sent to governments, in particular at the 26th International Conference of the Red Cross and Red Crescent, is getting through.

A growing number of non-governmental organizations are also becoming involved; by explaining the problem to the public and to governments, seeking and proposing solutions and mobilizing media pressure.

What must be decided is whether existing standards on arms transfers are adequate and how illicit transfers can be halted. In the author's view, it is quite clear that when a State fails to fully shoulder its responsibility for ensuring security, or does so in an arbitrary manner, private groups or

even individuals will feel that they must arm themselves for their own safety. Yet the proliferation of weapons does nothing but increase insecurity and erode moral values. So the volume of available weaponry is a serious problem in itself. It is a striking fact that even in the midst of armed conflict, many injuries result not from the hostilities as such but rather from the violence that permeates all human interaction once State authority breaks down and arms flood in. It is also extraordinary to see how arms spread from one region to another, following lines of tension, and how they are sold on the black market for a pittance.

The question then arises as to the responsibility of those who manufacture, sell or possess arms, and particularly their responsibility to destroy surplus arms so that over time the total number of weapons goes down instead of up.

Let us not forget the great complexity of this issue. We are not talking about arms which are prohibited, but about ordinary weapons which everyone agrees are needed by the public authorities to defend themselves and maintain order. It is thus not a question of mobilizing against an indiscriminate, particularly cruel weapon of limited military value, as was the case with anti-personnel landmines. We are getting into a much more sensitive area when it comes to the issue of small arms because of the way it relates to State security and national sovereignty. Nor are the economic stakes inconsiderable.

Thus we could find a million and one reasons not to become involved in this question. But we cannot hide behind the argument that we should do nothing because the matter is just too complicated, not when we see what we all agree is a matter of enormous humanitarian concern. However, it is unlikely that we are looking at an initiative as forceful or well-coordinated as the campaign to ban anti-personnel mines. There are too many different points of view and concerns among the potential campaigners. What we need to do is to find a common understanding for everyone who is aware of the importance of this issue and wants to take action. To this end, we should start by organizing an ongoing exchange of information and analysis, and hold meetings such as this from time to time to engage in useful dialogue. This is the way to build and consolidate a platform allowing the different organizations involved to take action that is in keeping with their specific nature and does not neglect their priorities.

Centenaire de la Conférence internationale de la Paix (La Haye, 1899)

La communauté internationale a célébré cette année le centenaire de la Conférence internationale de la Paix qui s'était tenue à La Haye en 1899. Deux événements ont eu lieu dans cette ville en mai 1999 : une réunion des États et une conférence organisée par des organisations non gouvernementales. Une autre réunion gouvernementale s'est tenue à Saint-Pétersbourg en juin 1999.

Réunie en 1899 à l'initiative du tsar Nicolas II, la première Conférence de La Haye a fait considérablement avancer la cause du droit humanitaire. En effet, même si les promoteurs de la Conférence avaient mis l'accent sur le désarmement et la prévention de la guerre, c'est surtout en raison des énormes progrès en matière de droit international humanitaire que l'on se souvient aujourd'hui de cette réunion. Parmi les différents traités adoptés par la Conférence, la Convention concernant les lois et coutumes de la guerre sur terre, avec la célèbre « clause de Martens », est sans doute le plus important. Révisées en 1907 lors de la Deuxième Conférence internationale de la Paix, les différentes Conventions de La Haye de 1899 et 1907 représentent aujourd'hui des règles de droit coutumier de première importance, même si la matière a entre-temps connu des développements normatifs conséquents, en particulier à travers les Conventions de Genève de 1949 et leurs Protocoles additionnels de 1977.

Des délégués du CICR avaient participé à la Conférence de 1899[1].

Conférences gouvernementales à La Haye et Saint-Pétersbourg

Les conférences de La Haye (18-19 mai 1999) et Saint-Pétersbourg (22-25 juin 1999) relèvent d'une initiative conjointe des Pays-Bas et de la Fédération de Russie. Ces deux États ont lancé l'idée d'une commémoration de la Conférence de 1899 en 1996 déjà, lors d'un débat aux

1 Voir André Durand, *Le Comité international de la Croix-Rouge à l'époque de la première Conférence de La Haye (1899)*, *RICR*, n° 834, juin 1999, pp. 353-363, ainsi que Catherine Rey, *Le CICR et la Conférence de La Haye de 1899*, à paraître prochainement dans le rapport officiel ayant trait aux conférences de La Haye et de Saint-Pétersbourg.

Nations Unies[2]. Les deux conférences s'inscrivent d'ailleurs dans le cadre de la Décennie des Nations Unies pour le droit international et, en fait, en marquent la fin.

Trois rapports ont été commandés par les organisateurs, portant sur les mêmes sujets que ceux qui avaient été traités en 1899 :

- *International Humanitarian Law (Laws of War)*, par Christopher Greenwood ;
- *Development of International Law Relating to Disarmament and Arms Control since the First Hague Peace Conference in 1899 — Especially the Rules and Practices Regarding Verification and Compliance*, par Hans Blix ;
- *The Peaceful Settlement of Disputes : Prospects for the Twenty-First Century*, par Francisco Orrego Vicuna et Christopher Pinto.

C'est bien entendu le rapport sur le droit international humanitaire du Professeur Greenwood qui interpelle tout spécialement le CICR. Ce rapport de près de 100 pages, qui est d'une très grande qualité, dresse un tableau de l'évolution du droit humanitaire de 1899 à nos jours.

Après avoir présenté les travaux de la Conférence de la Paix de 1899, le rapport aborde le champ d'application du droit humanitaire. Il souligne l'importance de toujours faire une distinction entre le droit humanitaire (le *jus in bello*) et le droit qui porte sur l'usage de la force (le *jus ad bellum*). L'auteur propose néanmoins d'examiner plus en détail les rapports entre ces deux branches du droit international. Dans une partie consacrée à la conduite des hostilités, des questions relatives au statut des combattants, à l'usage des armes, à la détermination des cibles, au régime d'occupation et à la guerre sur mer sont discutées. Le chapitre suivant traite d'un sujet d'une importance particulière en droit humanitaire, à savoir les conflits internes. L'auteur y propose que le seuil d'application du Protocole additionnel II de 1977 soit remplacé par celui — plus bas — de l'article 3 commun aux Conventions de Genève de 1949. En outre, il conviendrait, d'une manière générale, d'améliorer les règles de protection dans les conflits internes.

Un dernier chapitre a trait aux mesures visant à améliorer le respect du droit international humanitaire. L'auteur aborde ainsi la clé de voûte du droit humanitaire, car un droit qui n'est pas mis en œuvre n'a aucune valeur. Il passe en revue les différents mécanismes de mise en œuvre : les

2 Voir à ce sujet les documents suivants de l'Assemblée générale : A/RES/51/159 du 16 décembre 1996, A/C.6/52/3* du 15 octobre 1997 (contenant un descriptif détaillé des conférences), A/RES/52/154 du 26 janvier 1998, A/C.6/53/10 et A/C.6/53/11 du 12 novembre 1998 et A/RES/53/99 du 26 janvier 1999.

mesures devant être prises déjà en temps de paix (comme les mesures législatives au plan national et l'enseignement du droit humanitaire), le rôle des Puissances protectrices et du CICR, le mandat de la Commission internationale d'établissement des faits, le rôle des États et des Nations Unies et la répression des crimes de guerre. Il propose en particulier que le rôle du CICR soit renforcé.

Le professeur Greenwood conclut que la qualité des règles du droit international humanitaire mériterait certes, bien souvent, d'être améliorée — en particulier le droit applicable dans les conflits internes — mais que l'aspect le plus important et urgent, de nos jours, est la mise en œuvre effective des obligations établies par ce droit.

Le CICR partage la plupart des conclusions du rapport Greenwood. Il est en particulier de l'avis qu'il serait prématuré de vouloir procéder aujourd'hui à une révision globale du droit international humanitaire. Il s'agirait probablement d'un exercice difficile, à l'issue quelque peu incertaine. En revanche, le CICR est ouvert à des développements normatifs dans des secteurs bien définis, comme ce fut le cas ces dernières années en ce qui concerne certaines armes et la répression pénale des crimes internationaux. Il est aujourd'hui urgent de consolider l'acquis et que les États acceptent sans plus tarder les principaux traités de droit humanitaire[3].

Enfin, il convient de relever que le rapport Blix sur le désarmement contient de nombreuses références au droit humanitaire ayant trait aux armes.

La *Conférence de La Haye* s'est tenue les 18 et 19 mai 1999 dans le cadre historique du Palais de la Paix. Y ont participé au premier chef les conseillers juridiques des ministères des Affaires étrangères du monde entier. Le CICR était représenté par son président, Cornelio Sommaruga, le directeur du droit international et de la communication, et par l'auteur de ces lignes. Bon nombre de représentants d'ONG étaient également présents.

Présidée par le ministre van Mierlo, la réunion était structurée en deux parties : une séance d'ouverture solennelle et des travaux en groupe. Durant la séance d'ouverture — à laquelle la reine des Pays-Bas a pris part — plusieurs personnalités se sont exprimées, dont le secrétaire général des

3 Tels les deux Protocoles additionnels de 1977, la Convention de 1980 sur certaines armes classiques avec ses quatre Protocoles, le traité d'Ottawa sur les mines antipersonnel, le Deuxième Protocole additionnel à la Convention de La Haye sur la protection des biens culturels de 1954 — mais aussi le Statut de Rome sur la Cour pénale internationale de 1998.

Nations Unies, le conseiller juridique des Nations Unies, le président du CICR, Cornelio Sommaruga, et la présidente de la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge, le Dr Astrid N. Heiberg. Dans son bilan d'un siècle de droit humanitaire, le président du CICR a évoqué la richesse et le dynamisme de ce droit qui, ces dernières années, a connu d'importants développements, comme l'interdiction des armes à laser aveuglantes, l'interdiction des mines antipersonnel, l'adoption du Statut de Rome sur la Cour pénale internationale et l'amélioration de la protection des biens culturels en temps de conflit armé. Il a souligné le fait que, même si le droit humanitaire est trop souvent bafoué, il garde toute sa pertinence de nos jours. Encore faut-il qu'il soit enseigné, afin que soit créé chez les porteurs d'armes un « réflexe humanitaire ». Il est nécessaire également de poursuivre les responsables de crimes de guerre[4].

Après la séance d'ouverture, trois groupes de travail ont débattu en parallèle des trois rapports susmentionnés. Les représentants du CICR ont contribué notamment aux discussions sur le droit international humanitaire et sur le désarmement. Lors de la cérémonie de clôture, les rapporteurs ont présenté un résumé des travaux. Le statut de ces rapports n'était pas très clair, certains participants voulant les faire adopter formellement, contrairement à d'autres. Finalement, les textes en question seront des « documents du Président » et ne feront que refléter les avis exprimés en séance.

La *Conférence de Saint-Pétersbourg* (22-25 juin 1999) avait pour titre « Centennial of the Russian initiative: From the First Peace Conference, 1899, to the Third, 1999 ». Les participants à cette conférence, qui avait pour cadre une superbe salle dans laquelle on pouvait sentir le souffle de l'histoire, étaient souvent les mêmes qu'à La Haye, avec en plus une importante participation russe. La délégation du CICR était conduite par Pierre Keller, vice-président, qui était accompagné d'un conseiller juridique de la délégation du CICR à Moscou et de l'auteur de ces remarques.

Lors de la séance d'ouverture, présidée par le professeur Kolodkin, plusieurs personnalités ont pris la parole, dont le secrétaire général des Nations Unies, le vice-ministre russe des Affaires étrangères et le maire de Saint-Pétersbourg. Le vice-président du CICR a fait une déclaration sur le thème « La mise en œuvre du droit international humanitaire : le

4 Ce discours est reproduit sur le site internet du CICR : www.cicr.org (www.icrc.org pour la version anglaise).

grand défi ». Après avoir rappelé l'importance de la Déclaration de Saint-Pétersbourg de 1868 pour l'ensemble du droit humanitaire, il a évoqué les mesures de mise en œuvre les plus importantes : les mesures à prendre sur le plan national, dont l'enseignement du droit humanitaire, l'obligation des États de contribuer à faire respecter le droit, conformément à l'article premier commun aux quatre Conventions de Genève (à cet égard le vice-président a invité les États à faire preuve d'un peu plus d'imagination), et la répression des crimes de guerre. Le représentant du CICR a aussi présenté les premiers résultats de la campagne du CICR « Les Voix de la guerre »[5].

Mme Potravnova, présidente de la Croix-Rouge russe et vice-présidente de la Fédération internationale, a également pris la parole.

Trois demi-journées ont été consacrées à un débat sur les trois rapports. Si, à La Haye, l'accent avait été mis sur les aspects normatifs du droit, les discussions à Saint-Pétersbourg ont porté avant tout sur sa mise en œuvre. Durant une brève séance de clôture, les présidents des trois séances ont résumé très succinctement les débats, sans qu'aucun document ne soit adopté. Dans ses conclusions, l'Ambassadeur Longva (Norvège) a insisté sur le respect du droit humanitaire, certains développements normatifs étant toutefois désirables. Il a repris plusieurs des points déjà évoqués à La Haye, comme la nécessité de renforcer le mandat du CICR dans les conflits internes.

Le professeur Frits Kalshoven (Pays-Bas) a été chargé de préparer le rapport officiel des deux conférences gouvernementales[6]. Ce rapport sera soumis cet automne à l'Assemblée générale des Nations Unies, qui consacrera une séance pléniaire à la fin de la Décennie des Nations Unies pour le droit international. Le rapport officiel de la conférence sera aussi transmis à la XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge[7].

L'Appel de La Haye pour la Paix

Du 11 au 15 mai 1999 (immédiatement avant la conférence gouvernementale) s'est tenue à La Haye la *Conférence de l'Appel de La Haye pour la Paix*. Convoquée par un grand nombre d'ONG, cette réunion de la « société civile », qui a attiré plus de 8000 personnes, a servi de cadre à un

5 Ce discours est disponible sur le site internet du CICR, cf. note 4 *supra*.

6 Ce rapport n'était pas encore disponible lors de la rédaction de cet article.

7 Cela est stipulé expressément dans le document de l'Assemblée générale A/C.6/53/10 du 12 novembre 1998.

débat informel sur de nombreuses questions d'intérêt général touchant non seulement à la paix, mais encore aux problèmes actuels posés par la mise en œuvre du droit international humanitaire. Le CICR a participé activement à plusieurs ateliers sur le droit humanitaire et l'action humanitaire.

La conférence a adopté l'*Agenda de La Haye pour la Paix et la Justice au XXIe siècle*. À la demande de la délégation du Bangladesh, l'Agenda de La Haye a été distribué comme document de l'Assemblée générale[8].

Dans son préambule, l'Agenda de La Haye mentionne l'objectif de l'Appel de La Haye pour la Paix : créer les conditions nécessaires pour que le principal objectif des Nations Unies — préserver les générations futures du fléau de la guerre — puisse se réaliser. Après avoir évoqué les grands thèmes sous-jacents de la conférence, l'Agenda de La Haye présente les principes d'action à mettre en œuvre, dont la plupart interpellent aussi le CICR[9]. Les quelque 50 recommandations ont trait à une multitude d'aspects qui vont de l'éducation à la paix et du renforcement des « capacités locales » à la protection des femmes en situation de conflit armé, l'usage des sanctions économiques et l'élimination des armes nucléaires. De nombreuses propositions concernent directement le droit humanitaire.

Quel bilan peut-on tirer de ces trois conférences ? Qu'en est-il ressorti de concret ?

Le grand mérite des conférences de La Haye et de Saint-Pétersbourg aura certainement été de réaffirmer haut et fort l'importance du droit international — et en particulier du droit international humanitaire. On peut en revanche regretter que peu de nouvelles pistes de réflexion aient été explorées. Pour ce qui concerne le CICR, ses représentants ont été heureux de pouvoir participer aux dernières grandes conférences de ce siècle qui, de surcroît, relevaient directement de son mandat de promoteur et de gardien du droit international humanitaire.

JEAN-PHILIPPE LAVOYER
Chef adjoint
Division juridique du CICR

8 Document A/54/98 du 20 mai 1999.

9 Dont la lutte contre la prolifération des armes légères, la ratification du Statut de Rome sur la Cour pénale internationale, l'interdiction des mines antipersonnel ou l'utilisation d'enfants-soldats.

Nouveaux membres du Comité international de la Croix-Rouge

Lors de sa réunion du 22 juin 1999, l'Assemblée du Comité international de la Croix-Rouge a élu deux nouveaux membres du Comité :

Docteur Jacqueline Avril et

Professeur Jean-Philippe Assal.

Avec cette nomination le Comité compte désormais 23 membres.

Le docteur **Jacqueline Avril**, née en 1948, citoyenne suisse, est docteur en médecine de l'Université de Genève. Elle est installée comme médecin généraliste à Genève, et elle est membre du Bureau et secrétaire du Conseil de l'Association des médecins du Canton de Genève. De 1981 à 1994, elle a réalisé de nombreuses missions pour le CICR.

Le mandat de membre du CICR du docteur Avril commence le 1er septembre 1999.

Le professeur **Jean-Philippe Assal**, né en 1938, citoyen suisse, est docteur en médecine et professeur à la faculté de médecine de l'Université de Genève, responsable de la Division d'enseignement thérapeutique pour maladies chroniques. Il est membre du Comité d'experts pour le diabète de l'Organisation mondiale de la santé (OMS). Il a été membre de la Commission d'éthique de l'Académie suisse des sciences médicales.

Le mandat de membre du CICR du Professeur Assal commence le 15 août 1999.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

New members of the International Committee of the Red Cross

At its meeting of 22 June 1999, the Assembly of the International Committee of the Red Cross elected two new members:

Dr Jacqueline Avril, and

Professor Jean-Philippe Assal.

This brings the membership of the Committee to 23 members.

Dr **Jacqueline Avril**, Swiss citizen, was born in 1948. She is a doctor of medicine from the University of Geneva and has a general practice in Geneva. She is also a member of the Board and Secretary of the Council of the Physicians' Association of the Canton of Geneva. Between 1981 and 1994 Dr Avril carried out a number of missions for the ICRC.

Dr Avril's term of office as a member of the ICRC begins on 1 September 1999.

Professor **Jean-Philippe Assal**, Swiss citizen, was born in 1938. A medical doctor and professor of medicine, he runs the Division for Instruction in the Treatment of Chronic Diseases at the Geneva University Faculty of Medicine. He is also a member of the World Health Organization Committee of Experts on Diabetes, and was formerly a member of the Ethics Commission of the Swiss Academy of Medical Sciences.

Professor Assal's term of office as a member of the ICRC begins on 15 August 1999.

INTERNATIONAL COMMITTEE OF THE RED CROSS

Mise en œuvre du droit international humanitaire

Chronique semestrielle de législation et de jurisprudence nationales
janvier-juin 1999

A) Législation

Allemagne

Adoptée le 6 juillet 1998, la loi allemande de mise en œuvre du traité d'Ottawa sur les mines antipersonnel[1] contient deux volets principaux. Un premier ensemble de dispositions donne un cadre légal aux missions d'inspection prévues dans le traité d'Ottawa. Sont notamment réglementées: la constitution de groupes nationaux d'accompagnement, la coopération avec les missions d'inspection, l'obligation de notification et la transmission des données obtenues. Une seconde série de dispositions vient modifier la loi sur le contrôle des armes de guerre. Les interdictions prévues à l'article premier du traité d'Ottawa sont introduites dans cette dernière, accompagnées de précisions sur les diverses peines applicables. Des références aux mines antipersonnel sont également insérées dans quelques autres dispositions et une compétence juridictionnelle extra-territoriale à l'égard des nationaux est ajoutée.

Australie

Le Parlement australien a adopté, le 21 décembre 1998, une loi de mise en œuvre du traité d'Ottawa sur les mines antipersonnel (*Anti-Personnel Mines Convention Act 1998*, No. 126, 1998). Cette loi prévoit la poursuite de quiconque dispose, possède, développe, produit, acquiert, stocke ou transfère des mines antipersonnel. Elle fixe la peine et l'amende de base et prévoit une série d'exceptions liées à la détection, au déminage, à la destruction, à la désactivation des mines et à la conduite d'une procédure pénale. Elle ajoute une exception pour les cas de simple participation

1 *Ausführungsgesetz zum Übereinkommen über das Verbot des Einsatzes, der Lagerung, der Herstellung und der Weitergabe von Antipersonenminen und über deren Vernichtung*, vom 3. Dezember 1997, Bundesgesetzblatt, 1998, Teil I, Nr. 43, 9 Juli 1998.

à des activités militaires menées en collaboration avec des forces armées qui appartiennent à un État non partie au traité d'Ottawa et qui agissent de façon non conforme aux dispositions de celui-ci, que ces activités soient ou non menées sous les auspices des Nations Unies. Des règles sur la coopération avec les missions d'inspection, la nomination d'inspecteurs nationaux et la fourniture d'informations en vue du respect des obligations conventionnelles figurent également dans la loi.

Belgique

Par une loi du 10 février 1999 (*loi relative à la répression des violations graves du droit international humanitaire*, Moniteur belge du 23 mars 1999, pp. 9286-9288), le Parlement belge a apporté une série de modifications à la loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions de Genève et à leurs Protocoles additionnels. La première modification touche l'intitulé de la loi qui, désormais, ne se limite plus à ces seules infractions graves. Deux paragraphes sont en effet insérés à l'article premier afin de couvrir les crimes contre l'humanité et le génocide. Le contenu de ces deux paragraphes est repris de certaines dispositions du Statut de Rome de la Cour pénale internationale (1998) et de la Convention de 1948 pour la prévention et la répression du crime de génocide. L'attribution des peines est réorganisée et une clause est ajoutée, qui rend inopérante l'immunité attachée à la qualité officielle d'une personne.

Congo

La *loi n° 8-98 du 31 octobre 1998 portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité,* adoptée par le Conseil national de transition, est divisée en quatre chapitres. Le premier s'inspire de certaines dispositions de la Convention sur le génocide de 1948. Le suivant, relatif aux crimes de guerre, énumère les quatre catégories figurant à l'article 8 du Statut de Rome de la Cour pénale internationale, sans détailler le contenu de chacune de celles-ci[2]. Le troisième

2 Il s'agit de : 1°) les infractions graves aux Conventions de Genève du 12 août 1949 ; 2°) les autres violations graves des lois et coutumes applicables aux conflits armés internationaux dans le cadre établi du droit international ; 3°) les violations graves de l'article 3 commun aux quatre Conventions de Genève du 12 août 1949 ; et 4°) d'autres violations graves reconnues comme applicables aux conflits armés ne présentant pas un caractère international, dans le cadre établi du droit international.

chapitre reprend sans changement majeur[3] la liste des crimes contre l'humanité que l'on trouve à l'article 7 de ce même Statut, et le quatrième chapitre rassemble les dispositions communes et finales. Outre la réclusion à perpétuité et d'autres peines accessoires énumérées dans la loi, la peine de mort peut également être prononcée pour les trois catégories de crimes. L'auteur d'un acte accompli sur ordre d'un supérieur ou conformément à des dispositions législatives ou réglementaires ne peut se voir exonéré de sa responsabilité. L'action publique et les peines sont imprescriptibles. Une application rétroactive de la loi est aussi prévue.

Lituanie

Entré en vigueur le 1er juillet 1998, le nouveau *Code pénal de la République de Lituanie* inclut une douzaine d'articles consacrés à la répression des crimes de guerre (articles 333 à 344). La plupart des infractions graves aux Conventions de Genève, ainsi qu'au Protocole I, s'y trouvent reflétées. Il n'est pas clairement déterminé dans quelle mesure ces dispositions couvrent également les conflits non internationaux. Comme pour le génocide, également couvert par ce nouveau Code, la prescription n'est pas admise pour certains des crimes de guerre. De façon générale, les étrangers non résidants ne peuvent être poursuivis pour des actes commis à l'étranger que si ces actes constituent également des crimes en vertu du droit de l'État sur le territoire duquel ils ont été commis.

Nouvelle-Zélande

Le 8 décembre 1998, la Nouvelle-Zélande s'est dotée d'une loi (*Anti-Personnel Mines Prohibition Act 1998*, No. 111, 1998) visant à mettre en œuvre les obligations découlant du traité d'Ottawa sur les mines antipersonnel. Cette loi reprend les interdictions de l'article premier du traité, fixe la peine et l'amende maximales, précise les exceptions relatives à la détection, au déminage, à la désactivation et à la destruction, réglemente la fourniture d'informations, la coopération avec les missions d'inspection et l'accompagnement de celles-ci par un représentant de l'État. La loi prévoit également une exception pour les membres des forces armées qui partici-

3 L'*apartheid* a cependant été remplacé par les « crimes de discrimination : tribale, ethnique ou religieux » (art. 6, lettre j).

pent à des activités militaires impliquant des forces armées d'un État non partie au traité et qui commettent des actes que cette loi interdirait, pour autant qu'il ne s'agisse pas de fournir une assistance active à la commission des tels actes. En outre, elle modifie quelques dispositions de la loi sur les armes de 1983 (*Arms Act 1983*).

B) Jurisprudence nationale

Allemagne

Le jugement rendu le 26 septembre 1997 par le Tribunal régional supérieur de Düsseldorf a, pour l'essentiel des conclusions, été confirmé en appel par la Cour fédérale de justice le 30 avril 1999[4]. Le tribunal régional avait condamné un Serbe de Bosnie à l'emprisonnement à vie pour complicité dans onze cas de génocide et, conjointement, plusieurs cas d'atteintes dangereuses à l'intégrité physique, de privation de liberté et/ou de meurtre. La Cour fédérale réunit l'ensemble des infractions sous le chapeau unique de génocide, tout en confirmant la gravité particulière de la faute, ce qui influe sur la peine. L'application du principe de compétence universelle effectuée par la juridiction précédente, dont la contestation constituait le motif principal de l'appel, a été estimée parfaitement conforme au droit national et international.

Congo

La Cour suprême du Congo a été saisie pour un avis de conformité à l'Acte fondamental du projet de loi sur les crimes contre l'humanité (qui inclut les crimes de guerre). Elle rappelle l'article 8 de l'Acte fondamental[5], l'article 3 commun aux Conventions de Genève de 1949 et le fait que la République du Congo est liée à la fois par celles-ci et par la Convention sur le génocide de 1948. La Cour conclut que ce projet de loi n'est entaché d'aucune inconstitutionnalité[6].

4 Bundesgerichtshof, jugement du 30 avril 1999, 3StR 215/98 — Oberlandesgericht Düsseldorf.

5 Cet article prévoit notamment l'imprescriptibilité des crimes de guerre, des crimes contre l'humanité et des crimes de génocide, et renvoie au pouvoir judiciaire et aux autorités publiques compétentes pour assurer le respect de ce principe.

6 *Cour Suprême*, avis du 24 mars 1998, n° 007/CS/98. Voir la section « législation » pour ce qui est de la loi adoptée en octobre 1998.

France

Dans sa décision du 22 janvier 1999[7], le Conseil constitutionnel a examiné la question de la conformité du Statut de Rome de la Cour pénale internationale avec le texte de la Constitution française. Il en conclut que la ratification de ce Statut exige une révision préalable de la Constitution française. Trois motifs sont invoqués. En premier lieu, les dispositions du Statut de Rome sont jugées contraires au régime particulier de la responsabilité pénale du chef de l'État tel que prévu dans la Constitution. Elles s'opposent aussi à l'adoption souveraine de lois d'amnistie et à l'application des règles nationales de prescription, ce qui affecte, selon le Conseil, les «conditions essentielles d'exercice de la souveraineté nationale». Il en va de même pour l'éventualité d'investigations sur le territoire national hors de toute présence des autorités judiciaires françaises.

Suisse

Dans un arrêt du 30 avril 1999, le Tribunal militaire de Division 2 a reconnu l'ancien maire d'une commune rwandaise coupable «d'assassinat, d'instigation à assassinat, de délit manqué de ce crime et d'infractions graves aux prescriptions des conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens». Les faits incriminés ont été commis au Rwanda en 1994. Une peine de réclusion à vie a été prononcée. Dans ses motifs, le Tribunal indique notamment qu'une interprétation trop limitative quant aux destinataires des normes du droit international humanitaire mènerait à un nonsens. La vision restrictive adoptée par la chambre de première instance du Tribunal pénal international pour le Rwanda dans l'affaire Akayesu est expressément rejetée. En début de procès, le Tribunal a décidé d'écarter les qualifications juridiques de génocide et de crime contre l'humanité en raison d'un ancrage insuffisant de ces notions dans le droit suisse.

C) Autres (Commissions nationales, Commissions interministérielles, etc.)

Côte d'Ivoire

Le *décret n° 98 609 du 11 novembre 1998 portant organisation du ministère de la Défense* (Journal officiel du 10 décembre 1998,

7 *Conseil constitutionnel*, décision 98-408 DC du 22 janvier 1999.

pp.1273-1275) stipule que le «Service de la Justice militaire et du Droit humanitaire» est rattaché à ce ministère. Ce service est chargé de l'organisation et de la mise en œuvre de la justice militaire, des établissement pénitentiaires militaires, du contentieux et de la diffusion du droit humanitaire. Un arrêté subséquent du ministère de la Défense (arrêté n° 0057/MD/CAB du 15 avril 1999) précise que ce service comprend, entre autres, un bureau pour la diffusion du droit international humanitaire.

République dominicaine

La Commission interministérielle pour l'application du droit international humanitaire *(Comisión interministerial de Aplicación del Derecho Internacional Humanitario)*, qui avait été créée *de facto* en novembre 1995, a été remplacée par la Commission nationale permanente dominicaine pour l'application du droit international humanitaire *(Comisión Nacional Permanente para la Aplicación del Derecho Internacional Humanitario de República Dominicana)*. Elle est établie par le décret gouvernemental n° 4688 du 30 mars 1999 et a été officiellement instaurée le 2 juin 1999.

Japon

Se substituant à un groupe d'échange d'informations, qui s'était réuni cinq fois depuis mars 1998, le Comité national sur le droit international humanitaire a tenu sa première réunion en avril 1999. Constitué de représentants de divers ministères, de la Croix-Rouge japonaise et des milieux universitaires, cet organe a prévu de se réunir quatre fois l'an. Il est notamment chargé de favoriser l'échange d'informations sur le droit international humanitaire, d'étudier les questions liées à la diffusion de ce droit et d'en examiner les problèmes de mise en œuvre. S'il l'estime nécessaire, ce Comité peut également se pencher sur toute question touchant le droit international humanitaire.

Kirghizistan

La Commission interministérielle de mise en œuvre du droit international humanitaire du Kirghizistan a été créée par l'ordonnance gouvernementale n° 51 du 28 janvier 1999. Selon ses statuts, entérinés par la même ordonnance, elle a notamment pour charge d'examiner l'état de la législation nationale, de préparer des propositions pour la mise en œuvre nationale, d'émettre des avis consultatifs sur les projets de traités internatio-

naux, de coordonner les activités des organes intéressés dans la mise en œuvre, de promouvoir la diffusion du droit humanitaire, de contrôler l'exécution de ses décisions et d'assurer l'échange d'informations avec le CICR. Elle est placée sous la présidence du ministère de la Justice.

République de Moldova

Le règlement du Comité national de consultation et de coordination de la mise en œuvre du droit humanitaire (organe créé en 1996) a été approuvé par l'arrêté gouvernemental n° 259 du 1er avril 1999. Cet instrument donne compétence à la Commission pour diffuser le droit humanitaire, coordonner les activités des organes impliqués dans la mise en œuvre nationale, évaluer la législation nationale à la lumière du droit international humanitaire, présenter des avis, recommandations et propositions au gouvernement et en contrôler l'application éventuelle. Le règlement aborde également certains aspects de procédure.

Nicaragua

Sanctionnant les efforts déployés par le ministère des Affaires étrangères, le décret gouvernemental n° 54-99 du 4 mai 1999 porte création de la Commission nationale nicaraguayenne pour l'application du droit humanitaire *(Comisión Nacional para la Aplicación del Derecho Internacional Humanitario de Nicaragua)*.

Slovénie

Par un décret du 2 avril 1999 (no 762-01/99-I (B)) le gouvernement slovène a établi la «Commission interdépartementale pour le droit international humanitaire». Cette Commission doit promouvoir l'exécution et le développement de ce droit. Le décret désigne nominalement certains membres de la Commission, dont le président, issu de l'Inspectorat de la République Slovène pour le Patrimoine Culturel, et énumère certains ministères ou départements qui doivent procéder à la nomination de leurs représentants. L'organisation du travail doit être gérée par le ministère des Affaires étrangères. Il est prévu que la Commisison travaillera en collaboration avec la Croix-Rouge slovène et, si nécessaire, avec d'autres institutions ou organisations.

SERVICES CONSULTATIFS EN DROIT INTERNATIONAL HUMANITAIRE, CICR

Adhésion de Cuba au Protocole II additionnel aux Conventions de Genève du 12 août 1949

Cuba a adhéré sans faire de déclaration ni de réserve, le 23 juin 1999, au Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), adoptés à Genève le 8 juin 1977. Le Protocole entrera en vigueur pour Cuba le 23 décembre 1999.

Cuba est le 147e État partie au Protocole II.

Accession to Protocol II Additional to the Geneva Conventions of 12 August 1949 by Cuba

Cuba acceded on 23 June 1999, without making any declaration or reservation, to the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977. The Protocol will come into force for Cuba on 23 December 1999.

This accession brings to 147 the number of States party to Protocol II.

Livres et revues

Books and reviews

Roberta Cohen and Francis M. Deng

Masses in Flight: The Global Crisis of Internal Displacement

Brookings Institution Press, Washington D.C., 1998, 414 pages

Masses in Flight provides a comprehensive and detailed analysis of the causes and consequences of internal displacement, the current political, normative and institutional frameworks for addressing the problem, and numerous recommendations to improve the current response. It draws on a number of other studies and contributions, notably in the context of work within the United Nations environment and in relation to the companion volume *The Forsaken People: Case Studies of the Internally Displaced*,[1] which examines the situation in ten countries affected by internal displacement. The two co-authors have been very closely involved in guiding research in this area, and are particularly well placed to handle the complex and politically sensitive humanitarian problem it represents. Besides being a scholar, Dr Francis M. Deng has a background as a former diplomat and Minister of State of the Sudan, and has been the Representative of the United Nations Secretary-General on internally displaced persons since the mandate was established in 1992. Roberta Cohen has held senior human rights positions in NGOs and in the US Government, and for a number of years has advocated an increased awareness of and improved response to internal displacement. The book thus combines a balanced and policy-oriented approach with, at times, more proactive proposals.

The first chapter starts by briefly highlighting some of the features of internal displacement. It explains the dramatic increase in the

1 Brookings Institution Press, Washington D.C., 1998

phenomenon as being largely due to the end of the Cold War, which has resulted in a proliferation of internal conflicts. At the same time, improved international relations have led to greater assertiveness in addressing a problem which in the past would have been considered as falling within the scope of national sovereignty. The chapter outlines some of the serious dangers and deprivations faced by the victims and the negative impact on affected societies. Recognizing that the international response has been largely inadequate, the authors advocate the need for far more decisive international action. The stated purpose of the study is to guide actions by governments and operational agencies, through a broadly recognized framework of normative standards and institutional arrangements.

The second chapter contains a very good and thorough discussion on who internally displaced persons are, underlying causes of tension in affected countries, and external factors that come into play in the event of internal displacement. Without seeking to give the internally displaced a privileged status, the purpose in framing a definition is to identify all those in a similar situation, so as to ensure that their particular needs are not left unanswered. It is worth noting that the definition is neither exhaustive nor intended to be a legal one. The chapter further provides worldwide estimates of numbers of internally displaced persons over the past few years, and discusses some of the problems in obtaining reliable data. A comprehensive regional overview analyses primary causes of displacement on different continents, resulting patterns of displacement, as well as regional capacities and domestic willingness to address the issue. As is the case throughout the book, the section is very well researched and documented. The points made are almost systematically substantiated by practical examples, both in the main text and in some 84 pages of end notes.

The third chapter, entitled "Legal Framework", highlights the need to clarify the legal status of internally displaced persons. Although they are entitled to the protection provided by international human rights and humanitarian law, it is often difficult for governments, organizations and the displaced themselves to identify the guarantees that apply in specific situations. The chapter presents the international normative protection against forced displacement, points out the multiple problems faced by the internally displaced, and analyses corresponding provisions of human rights and humanitarian law. Refugee law is covered as well for

purposes of analogy. A review of the law relevant to the provision of international assistance and practice of the Security Council in this respect is also included. Noting that the law is complicated and incomplete, and that the rights of internally displaced persons are often disregarded simply for lack of awareness, the authors argue that it would be useful to restate general principles of protection in more specific detail, and to address grey areas and gaps in the law by establishing a body of principles. A set of *Guiding Principles on Internal Displacement*, which are intended to give authoritative guidance to all those confronted with internal displacement, is appended to the study.[2] The Guiding Principles, which largely reflect legally binding standards, were presented to the 1998 session of the UN Commission on Human Rights.

Chapter IV, "Institutional Arrangements", reviews the mandates and capacities of seven humanitarian and development agencies playing a role with regard to internally displaced persons. It examines their institutional strengths, weaknesses and constraints, emphasizing inadequate attention, expertise or capacity to address protection concerns. It also stresses the insufficient coordination between the actors concerned, and reviews options for improvements in this respect. As regards the country level, the authors present some of the challenges facing UNDP officials. These include an inherent tension between their role as resident representatives of that organization and their task as resident coordinators of the United Nations, which may lead them to neglect protection issues relating to the internally displaced. A very good entry into the question of coordination at headquarters level is made through a presentation and analysis of the problems encountered by the former Department of Humanitarian Affairs, — the review still being considered relevant since it is deemed that the Office for the Coordination of Humanitarian Affairs could face similar problems. The main problems are very well presented and comprehensively analyzed, but "steps to improve the current system" are vaguely formulated. This matters less, since both the problems identified and the recommendations put forward stimulate the reader to draw his own conclusions and shape his own views.

Chapter five starts by underlining the fundamental role that non-governmental organizations have come to play in contemporary crisis

2 Text also reprinted in *IRRC*, No. 324, September 1998, p. 545.

situations. On the basis of a survey carried out among 13 major organizations involved with internal displacement, the authors identify the challenges facing these organizations and offer recommendations for strengthening their role, particularly with regard to protection. The analysis reviews a number of issues that are of general interest to all those concerned with internally displaced persons. An important observation is that needs of internally displaced persons which fall outside the traditional activities of organizations often fail to be identified, and are therefore not addressed by anyone.

In chapter six, "Regional Responses", the authors note that in a number of crisis situations, the United Nations response has been minimal, and regional organizations are increasingly expected to assume some responsibility in addressing emergencies in their geographic areas. However, regional initiatives remain at a rudimentary stage of development, with many organizations lacking experience, expertise and often the political will and resources to deal with humanitarian emergencies. In particular, regional and sub-regional bodies in Africa, the Middle East and Asia have been constrained by a strong tradition of non-interference in domestic affairs. The authors emphasize the need for close monitoring of operations such as that undertaken by the Economic Community of West African States in Liberia, to ensure that relief operations are not held hostage to political or strategic objectives. They acknowledge the role played by European institutions to protect democracy and to address conflicts as an important means of averting mass displacement, but advocate more systematic attention to situations of internal displacement. The work of the Organization of American States to protect democracy is also recognized, but it is noted that too little has been done in practice to deal with internal displacement, in spite of the acknowledgment that it requires special attention. It is observed that while the Inter-American Commission on Human Rights has appointed a special rapporteur on internally displaced persons, his task, as that of the Commission in general, is constrained by insufficient resources.

In the last chapter, entitled "Strategies and Recommendations", the authors recapitulate the findings of the study and underline the necessity for a comprehensive approach. Beyond improving the response to emergency needs, the importance of preventing the conditions which lead to displacement and of finding durable solutions is also stressed.

Among the measures to prevent displacement, the authors suggest various steps to strengthen the early warning capacity of the United Nations system, including the development of closer links with regional bodies. They emphasize the usefulness of establishing a reliable information system on internal displacement, and consider the initiatives taken to this end by the Norwegian Refugee Council to be particularly promising. Other measures include good governance, such as effective national institutions to regulate relations among sections of the population, for the protection of human rights and minorities. In order to promote a well-functioning civil society, the authors advocate the need to strengthen local NGOs. They also propose articulating a right not to be arbitrarily displaced and stepping up regional and international capacities to prevent conflict.

A second category of recommendations is aimed at improving protection and at integrating it more effectively with humanitarian assistance, with emphasis on protection strategies for women and children. In particular, the authors propose that gender-specific information be collected as a routine part of assessments and that additional female staff be deployed in camps and settlements to better provide counseling, collect evidence and identify preventive measures in consultation with the women concerned. The authors state the need to strike a more equitable balance between, on the one hand, the principle of non-interference in internal affairs and, on the other, the obligation to provide humanitarian assistance and to promote the observance of human rights. They recognize that primary responsibility for the security, welfare and liberty of populations must remain with the State and also underline its duties in this respect, both towards its own population and towards the international community. Where a State fails to meet its obligations and refuses to accept outside assistance, the international community should assert its concern and step in, using diplomatic negotiations, public exposure or economic and political sanctions as strategies for gaining access. In the most serious cases, outside intervention is required.

In situations where displacement has been caused by conflict, a durable return can be secured only through the restoration of peace accompanied by rehabilitation and development programmes. The authors recommend that humanitarian organizations more forcefully advocate the need for political solutions, both vis-à-vis the international community and vis-à-vis affected governments. They stress the importance of provid-

ing visible signs of progress at an early stage. They further emphasize the need to go beyond rebuilding physical infrastructure and to address also the loss of human skills and disintegration of the fabric of society that long-standing conflicts typically entail. Particular emphasis is placed on the integration of women in this respect.

Masses in Flight is a unique, well-written and very well researched study on the phenomenon of internal displacement. With the comprehensive approach taken by the authors, it may at times be difficult to distinguish between recommendations to meet the specific needs of internally displaced persons and general problems relating to humanitarian action. However, the approach adopted places internal displacement in its proper perspective, without which the issue cannot be effectively addressed, and it permits a thorough review of all the major questions that arise when internal displacement occurs. The book is a must for anyone wanting to acquire a full understanding of internal displacement, and constitutes a solid basis for those who are to formulate appropriate policies and strategies for handling specific situations. Consequently, it deserves a prominent place in any collection dealing with humanitarian assistance in complex emergencies.

For those interested in an overview of the issues dealt with in the study, it should be noted that a shorter (147 pages) and simplified version is available. Based on *Masses in Flight* and issued by the same publisher, David A. Korn has written *Exodus within Borders: An Introduction to the Crisis of Internal Displacement*,[3] which is illustrated by a number of photographs and also reproduces the Guiding Principles on Internal Displacement.

DANIEL HELLE
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3 Brookings Institution Press, Washington D.C., 1999

Publications récentes — Recent publications

International Committee of the Red Cross, *Annual Report 1998*, Geneva, 1999, 412 pages

Comité international de la Croix-Rouge, *Rapport annuel 1998*, Genève, 1999, 416 pages

Comité international de la Croix-Rouge (éd.), *La disponibilité des armes et la situation des civils dans les conflits armés*, Genève, 1999, 92 pages

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Comité international de la Croix-Rouge, *Mise en œuvre nationale du droit international humanitaire*, Rapport annuel 1998 des Services consultatifs en droit international humanitaire, Genève, 1999, 110 pages

International Committee of the Red Cross, *National implementation of international humanitarian law*, Annual Report 1998 of the Advisory Service on International Humanitarian Law, Geneva, 1999, 110 pages

International Federation of Red Cross and Red Crescent Societies, *Annual Report 1998*, Geneva, 1999, 63 pages

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Marc-André Charguérod, *L'étoile jaune et la croix-rouge, le Comité international de la Croix-Rouge et l'Holocauste, 1939-1945*, Labor et Fides/Le Cerf, 1999, 144 pages

Judith Gardam (ed.), *Humanitarian Law,* Ashgate/Dartmouth, Aldershot/Brookfield/Singapore/Sydney, 1999, 570 pages

Collection of essays

Roy Gutman and David Rieff (eds.), *Crimes of War, What the public should know*, W. W. Norton & Company, New York/London, 1999, 399 pages

Jonathan Moore (éd.), *Des choix difficiles, Les dilemmes moraux de l'humanitaire,* Gallimard, Paris, 1999, 459 pages

Édition française de Moore (ed.), *Hard Choices, Moral dilemmas in humanitarian intervention* (voir *RICR,* n° 833, mars 1999, p. 182)

Pierre de Senarclens, *L'humanitaire en catastrophe,* La Bibliothèque du citoyen, Presses de sciences Po, Paris, 1999, 146 pages

Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Collection de droit international, Éditions Bruylant/Éditions de l'Université de Bruxelles, Bruxelles 1999, 485 pages

Revue des questions humanitaires, Journal trimestriel de débat international, n° 6, Été 1999, 64 pages

Humanitarian Affairs Review, A Quarterly Journal of Global Policy Issues, No. 6, Summer 1999, 64 pages

La Revue
The Review

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