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REVUE INTERNATIONALE DE LA CROIX-ROUGE

Débat humanitaire : droit, politiques, action

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. It 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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E

ditorial

Depuis la fin de la guerre froide, on réfléchit beaucoup aux voies et aux moyens de résoudre pacifiquement les conflits qui opposent les États entre eux ou les États et des entités non étatiques. Régler les différends par des voies pacifiques signifie renoncer à une autre option : le recours à la force, avec ses terribles effets sur la vie des individus et la société civile. Bien sûr, la Charte des Nations Unies met les États dans l'obligation de « ... [s'abstenir], dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État... ». Deux publications récentes mettent en évidence cette préoccupation majeure de politique internationale: Agenda pour la paix, de Boutros Boutros-Ghali (1992, et son Supplément de 1995) et le rapport de la Commission Carnegie sur la prévention des conflits meurtriers (1997). En outre, une abondante littérature permet de mieux comprendre les divers aspects du règlement pacifique des conflits et propose des mesures permettant d'atteindre cet objectif.

Ce nouveau numéro de la Revue examine les possibilités et les limites de l'action préventive sous l'angle de la politique et du droit humanitaires. Il faut toutefois préciser dès le départ que notre intention n'est pas de traiter le vaste domaine couvert par la recherche qui est menée aujourd'hui en matière de prévention des conflits et de leur règlement pacifique en général. Empêcher un conflit d'éclater n'est ni le but du droit international humanitaire ni un objectif réaliste pour les « humanitaires ». Et plus particulièrement, mettre fin à des conflits — une entreprise nécessairement de nature politique — ne fait pas partie du mandat des organisations humanitaires, y compris le CICR. La question qui peut donner lieu à discussion est plutôt la suivante: quelle contribution la politique, l'action ou le droit humanitaires

peuvent-ils apporter pour réduire le nombre de victimes parmi les populations qui ne participent pas à l'effort de guerre, en particulier les civils, et pour limiter la destruction des biens civils, surtout l'infrastructure du pays ? En d'autres termes, comment faire pour éviter que des violations graves du droit international humanitaire soient commises dans les conflits armés ? Il convient de relever que cette action humanitaire peut aussi avoir pour effet de contribuer à préserver les conditions de paix ou à faciliter le retour à la normale, possibilité qu'il faudrait étudier plus en détail.

La première partie du présent numéro de la Revue, qui est aussi la plus importante, est composée d'articles sur les contributions que peuvent apporter diverses disciplines dans le but de limiter les dommages infligés dans un conflit armé. Dans la seconde partie, le lecteur trouvera une série de textes portant sur différents sujets, tous liés à la politique, à l'action et au droit humanitaires.

LA REVUE

Since the end of the Cold War much thought has been given to ways and means of peacefully resolving conflicts among States or between States and sub-State entities. Settling differences by peaceful means implies renouncing another option: recourse to force, with its appalling effect on human life and civil society. The United Nations Charter, of course, places States under the obligation to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...". Two recent publications bear special witness to this major concern of international policy: Boutros-Ghali's Agenda for Peace (1992, with its 1995 Supplement) and the Report of the Carnegie Commission on Preventing Deadly Conflict (1997). Moreover, a large body of literature gives much insight into the diverse aspects of peaceful conflict resolution and proposes measures conducive to achieving that goal.

This issue of the Review examines possibilities and limits of preventive action from the perspective of humanitarian policy and law. It must, however, be made clear right from the outset that we do not intend to embrace the vast field covered by today's research into conflict prevention and peaceful settlement of conflict in general. Preventing conflicts from breaking out is neither the purpose of international humanitarian law nor is it a realistic goal for "humanitarians". In particular, settling conflicts — an endeavour which is necessarily of a political nature — is not part of the mandate of humanitarian organizations, including the ICRC. The question which is open for discussion is rather the following one: what contribution can humanitarian policy, action or law make to minimizing casualties among those who are not engaged in the war effort, in particular civilians, and to limiting destruction of civilian property, especially of the country's

infrastructure? In other words, what can be done to prevent serious violations of international humanitarian law from happening in time of armed conflict? That such humanitarian action may also have the effect of helping to preserve peaceful conditions or facilitate a return to normalcy should be noted and further explored.

The main part of this issue of the Review consists of articles examining possible contributions by various disciplines to achieving the goal of limiting the harm inflicted in armed conflict. In the second part, the reader will find a number of texts on a range of different topics, all linked to humanitarian policy, action and law.

THE REVIEW

Conflict prevention and conflict resolution: limits of multilateralism

by
FRED TANNER

Throughout the 1990s both practitioners and scholars have paid extensive attention to conflict prevention. Preventive actions are designed to resolve, manage, or contain disputes before they become violent. Conflict management, in turn, means the limitation, mitigation and containment of conflict. The notion of conflict prevention includes numerous activities such as conflict avoidance and conflict resolution, with techniques such as mediation, peace-keeping, peacemaking, confidence-building measures, and track-two diplomacy.

The concept of conflict prevention rests today on an impressive body of literature. Also, the United Nations, regional organizations, State entities and non-governmental organizations have engaged in recent years in systematic “lessons learned” and “best practices” exercises with regard to failed missions or missed opportunities. Furthermore, numerous high profile and well financed research projects and blue ribbon reports have come up with policy recommendations that are directly feeding into the highest level of decision-making at the UN and other organizations.¹

But despite all these developments, conflict prevention remains an enigma. Conflicts continue to emerge and many of them turn violent. In the 1990s decade alone, approximately 5.5 million peo-

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ple were killed in almost 100 armed conflicts. These deadly conflicts have led to widespread devastation and regional instabilities, as well as large numbers of refugees. The international community remains unable to prevent the outbreak of war and the scope of action of many organizations is confined to limiting the negative effects of violence.

The main source of frustration for the international community is its inability to credibly and accurately predict and rapidly respond to conflicts that threaten to turn violent. This is due both to the complex dynamics of internal, ethnic and communal conflicts and to the reluctance of many States to take steps that involve risks and costs. Nevertheless, the increasing presence of international organizations and State and non-State entities in conflict-prone areas raises the hope that a multilateralization of conflict prevention could reduce the number of missed opportunities in the future.

This paper explores the extent to which the international and regional organizations, States and non-State entities are prepared and able to engage in a coordinated system of multilateral preventive diplomacy. For this purpose, it will first take stock of past and current efforts to enhance conflict prevention. In the second part, it will examine opportunities and pitfalls for the UN, regional organizations and international contact groups. Finally, the paper will explore the tricky balancing act of NGOs and international organizations such as the International Committee of the Red Cross to preserve their impartiality in the course of collective efforts to curb or avert violence and deadly conflicts.

Taking stock of past and current conflict prevention activities

International prevention of internal conflicts has been advocated since the end of the Cold War. In the light of several conflict management tasks successfully accomplished by the UN in the late 1980s and early 1990s (Namibia, Nicaragua, El Salvador), the UN Secretary-General's *Agenda for Peace* of 1992 devoted an entire chapter

¹ See, e.g., *Preventing Deadly Conflict: Final Report, with Executive Summary*, Carnegie Commission on Preventing Deadly Conflict, New York, December 1997.

to conflict prevention. One of the novelties of his report was the creation of a conceptual link between various stages of conflict escalation and those policy actions that could remedy them. These include conflict prevention, dispute escalation prevention and the limitation of the spread of violence if it occurs. The last segment of these policy responses also opened the door to conflict management, an approach that established the conceptual ground for direct outside involvement to check escalating violence by using peaceful or even coercive means, if necessary.

The sobering experiences of the United Nations and the world at large in Somalia, Rwanda and Yugoslavia gave rise from the mid-1990s onward to the realization that there exists a clear need to reassess the role of the UN and other international entities in conflict prevention and conflict management. This realization was based on the recognition that conflict prevention needs a thorough understanding of conflicts and their relationship to failed States and State formation, and an institutional framework that can implement policy responses in a rapid and coherent manner.

The academic community and independent expert commissions consequently launched important research projects and policy recommendations in the latter 1990s on causalities of internal conflicts and the viability and utility of preventive diplomacy.² A series of studies specifically addressed the UN, its reform and its ability to respond to conflict and complex emergencies.³ Finally, the publication in late 1999 of

² Michael Brown (ed.), *The International Dimension of Internal Conflict*, MIT Press, Cambridge, 1997; Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, United States Institute for Peace Press, Washington, DC, 1993; Stephen Van Evera, "Hypotheses on nationalism and war", in Robert J. Art and Robert Jervis, *International Politics: Enduring Concepts and Contemporary Politics*, Harper Collins, New York, 1996, pp. 5-39. *Final Report of the Carnegie Commission on Preventing Deadly*

Conflict, op. cit. (note 1), Chapter 5: The responsibility of States, leaders, and civil society.

³ The main studies are: *Our Global Neighbourhood*, Commission on Global Governance, 1995; Brian Urquhart and Erskine Childers, *A World in Need of Leadership: Tomorrow's United Nations*, 1996; *Words to Deeds: Strengthening the UN's Enforcement Capabilities*, International Task Force on the Enforcement of UN Security Council Resolutions, 1997.

reports on the UN missions in Srebrenica and Rwanda have provided a thorough account of lessons learned from failed opportunities of the UN to prevent the escalation of deadly violence to all-out genocide.⁴

It would go beyond the scope of this paper to summarize the findings of the various studies. But it is important to highlight a few points that are relevant for conflict prevention efforts.

1. There are no simple explanations for causes of conflict and the way they fuel an escalation of violence. To understand the dynamics of internal conflicts a multitude of specific indicators need to be taken into account, such as poverty and high population growth, resource scarcity, discrimination and disempowerment of minorities and other groups in society, military threats and sources of insecurity. A certain mix of these variables can, but must not necessarily, lead to societal stress, violence and war.

2. It is important to distinguish between structural underlying causes of conflict and the proximate causes that trigger conflict escalation. This is the reason why conflict prevention today should differentiate between structural and short-term prevention. The structural causes primarily include factors related to State weakness, poverty, political injustice and economic deprivation. Thus, structural prevention should have a strong economic, human needs and governance bias, and should comprise development aid, local capacity-building, and assistance in election and human rights monitoring.

3. The proximate causes of conflict often result from deliberate decisions by determined leaders or political demagogues to make violent responses to contentious issues. "Bad leadership" can exploit insecurity, the vulnerability of certain groups and socio-economic cleavages to the extent that violence becomes a means to strengthen the hold of demagogues on power. Stephen Stedman argues that "the humanitarian tragedies of today were caused mainly by leaders who were interested in neither reaching non-violent resolutions to conflicts

⁴ Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The fall of Srebrenica, General Assembly Doc. A/54/549, 15 November 1999. Report of the

independent inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda, United Nations, 15 December 1999.

nor making concessions".⁵ In contrast to the structural causes, the understanding of proximate causes or events that trigger violence is not yet at an advanced stage and requires more study.⁶

4. There is no consensus on the utility of early warning in conflict prevention. Some analysts argue today that failed opportunities for conflict prevention have occurred not because of insufficient time to respond, but because of a lack of political will to react to the warning. The Carnegie Commission on Preventing Deadly Conflict made one of the first efforts to link early warning with receptivity of warning and early response. But, as the 1999 Rwanda Report pointed out, early warning makes sense only if the warning signals are correctly analysed and transferred to the relevant decision-making authority. In this context, the capacity to gather and analyse information for the UN has fallen prey to "downsizing efforts". In 1992, the UN did away with the Office for Research and Collection of Information (OCRI) and transferred some of its functions to the Department of Political Affairs and, as a consequence, the 1995 Report of the Commission on Global Governance proposed that the UN develop a new system to collect information on trends and situations that may lead to violent conflict or humanitarian tragedies.⁷

5. The question as to the use of force is essential for assuring effective conflict prevention or the successful implementation of peace settlements. Given the notoriety of bad leaders and deliberate hindrance of conflict prevention and conflict termination, the international community is faced with the critical question whether coercive measures should constitute an integral part of conflict prevention. Examples such as Somalia have, however, painfully shown that the threat of outside intervention by force is no panacea for communal violence and the escalation of conflict.

6. Finally, the fact that the overwhelming majority of conflicts are internal struggles has an important impact on how the

⁵ Stephen Stedman, "Alchemy for a new world order overselling preventive diplomacy", *Foreign Affairs*, Vol. 74, May 1995, p. 18.

Millennium, Conference Report, International Peace Academy, New York, April 2000, p. 2.

⁷ *Our Global Neighbourhood*, op. cit. (note 3).

⁶ *From Reaction to Prevention: Opportunities for the UN System in the New*

international community can address such conflicts. Intra-State conflicts do require methods of early warning and prevention different from those for traditional inter-State confrontations.⁸ Issues such as sovereignty, local rivalries and bad neighbourhoods can make the use of preventive diplomacy towards States prone to civil war very difficult.

It is clear from the above points that conflict prevention today can only be carried out successfully in a multilateral setting with a multidisciplinary approach.

Towards multilateralization of conflict prevention?

The spread and global importance of internal conflicts in the 1990s, together with the increasing diversity of players in international affairs, has led to a certain multilateralization of conflict prevention efforts. This multilateralization presupposes that international and regional organizations, States and non-State entities would combine their efforts to fight the spread of deadly conflicts, in other words that all parties involved should accept a policy scheme that subscribes to a common vision on conflict resolution. But the diversity of mission mandates, the respective organizational turf, the bureaucratic red tape, national interests and conflicting views on conflict prevention and humanitarian actions set limits to effective multilateral action.

Among the various players, the United Nations remains the only institution with global legitimacy for conflict prevention. Yet regional organizations have been gaining importance in security cooperation over the last few years. While this type of cooperation is invaluable, the division of labour between the UN and regional organizations has run into trouble. For example, with regard to the NATO military intervention in Kosovo, UN Secretary-General Kofi Annan warned that “conflict prevention, peace-keeping and peacemaking must not become an area of competition between the United Nations and regional organizations”.⁹

NGOs and humanitarian organizations play an integral and increasingly important role in conflict prevention, owing to their

⁸ Janie Leatherman, William DeMars et al., *Breaking Cycles of Violence*, Kumerian Press, West Hartford, 1999, p. 3.

⁹ Kofi Annan, *Annual Report of the Secretary-General*, 1999 (para. 69).

knowledge of and involvement in potential conflict areas. There is, however, an uneasy relationship between humanitarian organizations and other parties engaged in conflict prevention and peace implementation. In the final analysis, States remain the most important players in today's international system, and if their national interests are at stake, they may tend to short-cut international organizations in favour of international contact groups or unilateral action. The following section will briefly examine each of these entities and their ability and willingness to engage in multilateral preventive action.

The United Nations

Chapter VI of the UN Charter calls on those involved in a dispute to try to settle it peacefully, using a wide variety of diplomatic instruments. Article 99 of the Charter empowers the Secretary-General to bring to the attention of the Security Council "any matter which in his opinion may threaten the maintenance of international peace and security".

But the efficiency of these instruments is limited by the reluctance of the UN member States and particularly by the permanent members of the Security Council to confer more power upon the Secretary-General and his organization. The proposals for a UN Rapid Reaction Force, an important element for conflict prevention, has been thwarted for many years, even though eminent policy-makers and experts, such as Brian Urquhart, have called for it.¹⁰

The defining question with regard to these forces, and to conflict prevention in general, is to what extent the United Nations can use its organization effectively for early warning and succeed in gaining sufficient commitments from member States for robust peace operations to be staged. Recent lessons learned from the developments in Rwanda and Srebrenica provide a very valuable insight into how the UN's approach to unfolding conflicts and deadly violence can be improved. Key issues concern the use of force, command and control, and the training and equipment of UN peace forces. The essential ques-

¹⁰ *Op. cit.* (note 3).

tion remains the manner in which troop-contributing States are linked to the peace operation and how the Security Council is involved.

Both in Rwanda and in Bosnia, the UN failed to prevent genocide from taking place. In each case there was plenty of warning of the forthcoming mass killings, but the UN mishandled both of them. Two reports examining these cases were finally published in late 1999. Given the involvement of Kofi Annan as rapporteur of the Srebrenica mass killings and as one of the key persons to take partial blame at the UN for the handling of the unfortunate mission during the Rwanda genocide, these reports assume a high profile and could have a big impact on future policy-making in conflict prevention and conflict management.

In the case of Rwanda, the inadequate resources and the major countries' absence of political will were the underlying causes of failure. The report sums up that the UN presence in Rwanda was "not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble".¹¹ The mission lacked well-trained troops, functioning matériel and military capacity. The dearth of strong political commitments was made worse by the unilateral withdrawal of the national contingents during crucial moments of the unfolding crisis. In the case of Srebrenica, with the lack of commitments by outside powers to an effective resolution of the war in Bosnia, "a consensus absent in the Council, lacking a strategy, and burdened by an unclear mandate, UNPROFOR was forced to chart its own course".¹²

There was early warning of the coming massacres: the Special UN Representative in Rwanda reported that one group was in clear violation of the peace agreement by stockpiling ammunition, distributing weapons and reinforcing positions in Kigali. Also, the now infamous cable by Force Commander General Dallaire refers unequivocally and urgently to information about planning and practical preparations for mass killings. The problem with early warning was twofold: first, the information was not processed correctly at the UN, owing to

¹¹ Rwanda Report, *op. cit.* (note 4), p. 21.

¹² Srebrenica Report, *op. cit.* (note 4), p. 17.

sloppiness and wrong lines of communication at its New York headquarters, and second, the “lack of capacity for intelligence analysis” contributed to an erroneous interpretation by the UN of the Arusha peace process and the intentions of the parties thereto. The lack of in-depth analysis of the political situation on the ground in Rwanda was clearly evidenced by the oversight of an alarming report by the Special Rapporteur of the Commission on Human Rights that — just two weeks before the UNAMIR mission was launched — pointed to the deteriorating human rights situation and explicitly referred to the dangers of genocide.¹³

Another lesson learned in conflict prevention is that the peace implementers should be able to continually adjust mission mandates, rules of engagement, troop strength and military capacities of peace missions to changing realities on the ground. The Rwanda mandate changed in nature from Chapter VI to Chapter VII of the Charter at a stage of the conflict when it would still have been possible to stop the genocide. But UNAMIR II failed, in the final analysis, because of the unwillingness of UN member States to provide troops for it. Two months after the Security Council agreed to the mission, UNAMIR II still only had 550 troops instead of 5,500. In the case of Srebrenica, after the Security Council had established the safe areas the force commander requested 34,000 troops, but finally had to settle for a “light option” with a minimal troop reinforcement of around 7,600 that was to be defended, if necessary, by NATO air strikes.¹⁴

In its recommendations, the Rwanda Report points prominently to the need to improve the early warning capacity. It argues that it is essential to improve the ability of the UN Secretariat “to analyse and respond to information about possible conflicts, and its operational capability for preventive action”. In this context, the report suggests that “further enhancement of the cooperation between different Secretariat departments, UNSECOORD programmes and agencies and outside actors, including regional and subregional

¹³ Rwanda Report, *op. cit.* (note 4), p. 22.

¹⁴ United Nations Protection Force, UN Department of Public Information, *September 1996*, see <http://www.un.org/Depts/dpko/>.

organizations, NGOs and the academic world, is essential".¹⁵ The new Report on Peacekeeping, to be presented to the Millennium Summit of the General Assembly in September 2000, should internalize the lessons from Rwanda, Srebrenica and other conflicts where the UN has missed opportunities for conflict prevention and management.

Regional organizations

The *Agenda for Peace* makes a claim for more active use of regional organizations under the UN Charter's Chapter VIII, especially since the United Nations has become overstretched and overburdened. The contributions of ASEAN in Cambodia, the Organization of American States and the Contadora Group in Central America, and the European Union, OSCE, NATO and the Western European Union in the former Yugoslavia have indicated a potential that could make a substantial contribution to peace and stability. But this potential is not sufficiently exploited.

The only regional organization which has both normative and operational capabilities in conflict prevention is the Organization for Security and Co-operation in Europe (OSCE). In 1990 the Charter of Paris for a New Europe mandated the OSCE to search for "ways of preventing, through political means, conflict which may emerge". As the incipient pan-European cooperative security structures were challenged and then invalidated by the Yugoslav wars, the OSCE realized that its role in conflict prevention lies more in the normative and soft security dimensions. In 1992, the OSCE created the Conflict Prevention Centre (CPC) to serve as a focal point in European early warning and dispute settlement. But, with minor exceptions, the CPC was bypassed during the explosion of deadly violence in the Balkans. States with vital stakes in the unfolding conflict apparently preferred to pursue their policies through the European Union, the UN and, ultimately, through international ad hoc contact groups.

A more successful initiative was the creation of a mandate for an OSCE High Commissioner on National Minorities, tasked to provide early warning and early prevention in minority conflicts. The

¹⁵ Rwanda Report, *op. cit.* (note 4), p. 41.

role of the High Commissioner has been more successful than the CPC because of his ability to address structural causes of conflict directly with the parties concerned. His sustained engagement with the Baltic States, for instance, helped to defuse tension over the status of Russian minorities.

Lastly, the OSCE agreed to engage in long-term missions in potential trouble spots where latent tensions could erupt into violence and war. It currently has missions posted in 17 countries in the Balkans, the Caucasus, Central and Eastern Europe and Central Asia. These missions have been successful in countries such as Estonia, Latvia, Macedonia, Moldova and the Ukraine. Conversely, their presence failed to have the desired effect in other areas such as Bosnia, Chechnya, Georgia, Tajikistan and Kosovo where, despite their work, violence has prevailed. The experience of the OSCE in conflict prevention shows that long-term missions and discreet work on structural questions such as democracy-building, human and minority rights and the promotion of civil society are more suitable for regional organizations than attempts to find quick-fixes for the direct causes of conflict.

International contact groups

The reality of conflict prevention is that it is neither risk-free nor cheap. Preventive diplomacy is viable only if there are parties willing to pledge assistance and provide guarantees. Local parties in dispute almost always need outside backing to credibly guarantee the implementation of agreements. The States that are prepared to assume such responsibilities are primarily stakeholders in the hot spot areas. Their interests may be geopolitical or affected by the politically costly effects of violence, such as refugee flows, regional destabilization and pressure by exile groups. The cost factors, both politically and financially, will induce such States to give credible commitments. Referring to the unfolding Kosovo crisis in 1998, the *Economist* wisecracked that successful prevention “does not win votes, but failed intervention loses buckets of them”.¹⁶

¹⁶ *The Economist*, 25 June 1998, p. 51.

Consequently, the groupings and alignments of States and other international players depend very much on the interests involved in the potential conflict. States still prefer to act unilaterally or in concert with a few other States in order to maintain their freedom of action and ensure their effectiveness. This has led to the emergence of contact groups similar, in post-modernist form, to the nineteenth-century Concert of Europe. The selective or unilateral nature of such contact group arrangements, especially if they are the result of parochialism, can lead to conflict prevention policies tending to exclude small States and non-State entities.

A number of international contact groups emerged after the collapse of the Federal Republic of Yugoslavia. The States with key interests in the region, such as France, Germany, Russia and the United States, turned to ad hoc crisis management after the European Union and the OSCE proved unable or unwilling to elicit the necessary political commitments for proactive engagement in the region.

At the international conference on the former Yugoslavia, held in London in 1992, the larger European countries and a representative of the European Union met together with Russia and the United States. This ad hoc conference, housed at the UN in Geneva, worked with the specific input of representatives of even smaller contact groups. At a later stage, when the war escalated to include Bosnia, the contact group was made up of four permanent members of the Security Council plus Germany, but without China. Lastly, when the violent conflict spread to Kosovo, a few Western States and Russia pursued a conflict management policy through the Rambouillet structure. After the failure of this process, Russia dropped out of the group and NATO intervened in a cut-and-run intervention in Kosovo without any UN or OSCE mandate. In hindsight, the NATO air strikes were the result of contact group actions that clearly lacked international legitimacy.

Kosovo is a good example of the downside of contact group arrangements. These are based on a trade-off between effectiveness and participation. Contact groups are more effective than international institutions precisely because there are fewer players and there is no red tape along with onerous decision-making. Also they create the

very visible front that is required for dealing with notorious opponents. Nevertheless, they do appear exclusionary to those States and organizations that are not admitted to this inner core. Furthermore, they neither have an institutional memory nor can they fall back on pre-existing contingency planning. Finally, contact groups often lack international legitimacy, an issue that becomes apparent when the group decides to use coercive measures.

In conclusion, contact groups have played essential roles in recent cases of conflict prevention and conflict management. Such groups usually emerge only after initial efforts of conflict prevention have failed and after States have chosen to short-cut international organizations, or alternatively when organizations refuse to take up the management of specific cases, as was the case with Operation Alba in 1997.¹⁷ These groups will always have to grapple with questions related to legitimacy and will in the end rely on regional institutions or the UN for the implementation of any agreement they may have worked out. Thus, instead of bypassing the UN, regional organizations and non-State agencies, they should develop better ways of using existing institutional organizations. This would give multilateral preventive actions a better chance of success.

The role of humanitarian organizations and NGOs

The international community's capacity to prevent conflict is still quite limited. These limitations stem from the "structural legacies of the Cold War restricting multilateral actions, while the growing number of interventions is a reflection of the proliferation of deadly internal conflicts".¹⁸ The increased number of internal armed conflicts reduces the role of States in conflict prevention; the traditional policy instruments of States, such as coercive diplomacy and deterrence, have lost much of their utility for that purpose. These are some of the reasons why non-governmental organizations are assuming an increasingly important role in the field of conflict prevention. While NGOs would

¹⁷ On 28 March 1997, the Security Council authorized the deployment of an Italian-led multinational military and humanitarian mission in Albania.

¹⁸ *Op. cit.* (note 8), p. 4.

be unable to perform the functions of the United Nations or sovereign States, they can usefully complement them.

In 1994 the UN Secretary-General recognized three distinct contributions that non-State entities could make in the broad field of conflict management and peace-building: "1. preventive diplomacy, because NGOs are familiar with the situation on the ground and are well placed to alert governments to nascent crises and emerging conflicts; 2. peacemaking, where NGOs can give humanitarian and social aid under perilous and difficult conditions; and 3. post-conflict peace-building, where NGOs can help fragile governments and destitute populations to find the confidence and the resources to make peace last".¹⁹

NGOs and other humanitarian organizations have the advantage of being in dispute-prone areas for years before conflict or violence actually breaks out. Their knowledge of local society and culture and the local reputation they have built up cannot be acquired instantly by outside entities that choose to get involved in that specific area once conflict has erupted. The essential role of NGOs in conflict prevention was acknowledged by the Commission on Global Governance in its report *Our Global Neighbourhood*. The report conceptualized the practises and challenges of global governance and promoted the recognition that "formal, intergovernmental mechanisms could be only one piece of a larger, evolving, and more dynamic mosaic".²⁰

A project initiated by the Catholic Relief Services and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame (USA) examined the role of NGOs in conflict prevention. It identified the following areas where NGOs can enhance the impact of government and international organizations on early warning and prevention of internal conflict by: "1. increasing access to parties in conflict, and flow of information about them; 2. improving the comprehensiveness of response; 3. amplifying the impact of peace strategies through their own networking; and 4. creating conditions for great power engagement in larger scale preventive and rescue operations".²¹

¹⁹ UN Secretary-General's address at the 47th Annual Conference of NGOs, 1994.

²⁰ Edward C. Luck, "Blue ribbon power: Independent commissions and UN reform",

International Studies Perspectives, Vol. 1, Issue 1, April 2000, p. 99.

²¹ *Op. cit.* (note 8), p. 20.

The ICRC and other humanitarian agencies have played a crucial role in conflict prevention. For example, the ICRC agreed during the 1962 Cuban Missile Crisis to appoint neutral inspectors to check Soviet compliance with the commitment not to ship ballistic missiles to Cuba. This go-between role helped to ease tensions at that critical moment of superpower confrontation, even though the crisis was subsequently defused before the deployment of the inspectors was required.

With regard to internal armed conflicts, the ICRC can base its conflict prevention activities on the mandate entrusted to it by the XXIst International Conference of the Red Cross.²² It suggests that the ICRC can, in conjunction with the National Societies and governments of the countries concerned, “examine what contribution the Red Cross could make to preventing the outbreak of the conflict or achieving a cease-fire or cessation of hostilities”.

Most of the ICRC’s contributions to conflict prevention focus on containing the harmful effects of armed conflicts by keeping them to a minimum. According to René Kosirnik of the ICRC, it conducts a “preventive humanitarian diplomacy”. This includes in-depth analysis of the areas concerned, local networking, sensitizing of governments, authorities and civil society to their responsibilities under international humanitarian law, capacity-building of local partners and the organization of early warning systems.²³

The ICRC has frequently been able to negotiate the establishment of humanitarian safety zones, which were off limits to armed belligerents. Such zones have helped to prevent the escalation of violence and even, in some cases, to resolve the conflict. For example, the ICRC mediated a 24-hour truce during the revolution in the Dominican Republic in 1965. This served as the basis for extending the cessation of hostilities until it eventually became a permanent end to the conflict.²⁴ More recently, the ICRC managed to create

²² XXIst International Conference of the Red Cross (Istanbul, 1969), Resolution XXI: Contacts between National Societies in cases of armed conflicts.

²³ René Kosirnik, *Some questions and answers regarding the ICRC and preventive*

actions, Round Table on Preventive Action, Copenhagen, ICRC, Geneva, p. 6.

²⁴ Yves Sandoz, “The Red Cross and peace: Realities and limits”, *Journal for Peace Research*, No. 3, 1987, p. 293.

humanitarian buffer zones in Mexico in 1994 between the Chiapas insurgents and the Mexican Federal Army.

The main dilemma for humanitarian organizations, and in particular for the ICRC, in protracted internal conflicts is the need to preserve absolute impartiality towards the belligerents and non-discrimination towards the victims. This is why it may be risky for humanitarian agencies to get too closely associated with a peace process: if the process stalls, then they are implicated *nolens volens*. It is a constant concern of humanitarian NGOs to be able to continue their work after international conflict prevention efforts fail, and especially then.

Also, there is always the danger that humanitarian support may do more to prolong human suffering, namely when humanitarian assistance is diverted to support warring parties. A study on conflict prevention has shown that “aid has been often co-opted by belligerent groups and thus encouraged conflict”.²⁵ The same study also argues that certain development programmes and financial assistance “have indirectly contributed to the exacerbation of horizontal inequalities, and hence to the probability of violence”.²⁶

A lack of in-depth analysis of the socio-political situation and inadequate coordination among relief agencies and other outside entities may enable warring factions to play one off against another. Thus, early warning and preventive measures make sense only if they are carried out in close coordination with other outside entities. It is for this purpose that the Carnegie Commission recommends annual coordination meetings among the NGOs: “The leadership of the major global humanitarian NGOs should agree to meet regularly — at a minimum on an annual basis — to share information, reduce unnecessary redundancies, and promote shared norms of engagement in crises. This collaboration should lead directly to the wider nongovernmental commitment to network with indigenous NGOs in regions of potential crisis, human rights groups, humanitarian organizations, development

²⁵ “From reaction to prevention: Opportunities for the UN system in the new millennium”, *Conference Report*, International

Peace Academy, New York, 2000, p. 5.

²⁶ *Ibid.*

organizations, and those involved in track-two efforts to help prevent and resolve conflict".²⁷

Conclusions

The whole decade of the 1990s was a decade of missed opportunities for preventive action. This is partly due to the fact that many States are still not prepared to go beyond paying lip service to conflict prevention and conflict management. Conflict prevention is not risk free, nor is it free of political and financial costs. Furthermore, the role of the State has lost some of its importance to other players, owing to the internal nature of today's deadly conflicts. Thus the traditional policy instruments of States, such as coercive diplomacy and deterrence, have lost much of their utility for conflict prevention.

Today, effective prevention requires a comprehensive, multidimensional and coherent strategy. In this context, a multilateral approach to conflict prevention appears useful and even imperative: the comparative advantage of each organization can in aggregate make the difference needed to defeat the scourge of violence. This article has shown that a combined approach of various players is possible and feasible, but joint actions on the premise of joint prescriptions remains unrealistic. For instance, quiet diplomacy, track-two activities, local networking and discreet work among rival groups require low-key conduct which may not be compatible with high-level carrot and stick policies.

It is, however, possible to engage in a useful division of labour by differentiating between structural prevention and preventive action to ward off an imminent escalation of violence. For example, long-term missions and socio-political work on questions such as democracy-building, human and minority rights and the promotion of civil society are more suitable for regional and international organizations and NGOs. In turn, only very few such organizations can rapidly and effectively respond to an unravelling crisis. Such a rapid response needs accurate and credible warning, especially in the light of potential

²⁷ *Preventing Deadly Conflict*, *op. cit.* (note 2), Chapter 5.

large-scale killings and attempts of genocide. The Rwanda Report has shown that warning is essential for the political mobilization of the international community.

Finally, the involvement in conflict prevention and management reveals the dilemma between mitigating a humanitarian crisis and finding a long-term solution. The current literature on conflict is afflicted by the dangerous argument that “war should have a chance” and play itself out rather than being “sustained by humanitarian assistance”.²⁸ The humanitarian organizations cannot escape the debate about conflict-solving versus humanitarian relief, and the agenda of States pursuing geopolitical objectives may not be compatible with humanitarian efforts of international organizations and NGOs. Too close an association with regional powers or contact groups may lead to the loss of credibility of humanitarian organizations, especially if the formal peace process turns sour. The humanitarian organizations are always concerned to ensure that their work can continue, particularly in cases where international conflict prevention efforts fail.

The ICRC is one of the main organizations that have to cope with the effects of prevention failures of the international community. Nevertheless, close cooperation with other entities in connection with an internal conflict should be desirable for the ICRC as long as it does not affect its impartiality. This message comes across loud and clear in the statement by former ICRC President Cornelio Sommaruga, who argued that comprehensive conflict prevention is possible as long as “all parties are taking due account of the respective responsibilities, mandates and spheres of competence of each party”.²⁹

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²⁸ Edward N. Luttwak, “Give war a chance”, *Foreign Affairs*, July/August 1999, pp. 36-44.

²⁹ Keynote address by Dr. Sommaruga, ICRC President, 23 June 1998, Geneva Centre for Security Policy, see <http://www.gcsp.ch>.

Résumé

Prévention et règlement de conflits : les limites du multilatéralisme

par FRED TANNER

Au cours des années 90, l'intérêt de la recherche et de la pratique s'est tourné vers la prévention de conflits, c'est-à-dire toute activité tendant à gérer ou à résoudre des situations conflictuelles avant qu'elles ne dégénèrent en affrontement ouvert et violent. Cet article examine les possibilités et les chances de succès d'actions de prévention entreprises, soit par un État, soit dans un contexte multilatéral. L'expérience des dernières années démontre clairement que les États ne souhaitent pas s'exposer dans un conflit qui ne les concerne pas directement. Les conflits d'aujourd'hui en appellent donc à des stratégies plus complexes, et seule une approche multilatérale a une chance d'aboutir à des résultats satisfaisants. Il existe aujourd'hui un grand nombre d'organisations gouvernementales et non gouvernementales — universelles et régionales, grandes et petites —, chacune avec un mode d'action bien distinct, ce qui permet l'engagement de l'une ou de l'autre, selon les données de la situation.

Women and war

by

CHARLOTTE LINDSEY

Frequently today's conflicts are internal — fought within a country between different ethnic or political groups of the same “nationality” — rather than international, fought between countries and across borders. This has led to the civilian population becoming increasingly “caught up” in the conflict and/or targeted by the parties to the armed conflict as part of a deliberate strategy. War at home rather than abroad has had a major impact on women as members of the civilian population. Furthermore, women are increasingly taking up arms as members of the armed forces.

Much attention has been given in the past few years in academic debate and the media to sexual violence, particularly rape, inflicted upon women and girls during war, as well as the protection afforded to women under international humanitarian law. As conflicts have illustrated — and the media have reported — this attention is fully justified. However, it has tended to be confined to sexual violence and less attention focused on the other issues of the impact of armed conflict on women. This article aims to draw attention to the multi-faceted ways in which women experience armed conflict and, to a limited extent, to some of the activities of the International Committee of the Red Cross to assist and protect women.

Women taking part in hostilities

Women have tended to be classified within a single category “women and children”, and as “vulnerable”. Yet women are not

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necessarily vulnerable and certainly have needs, experiences and roles in war that differ from those of children (although it must be stated that in many conflicts children are coerced into taking on adult roles). Women are actively engaging in many armed conflicts around the world and have played a part in wars throughout history.

It was the Second World War that highlighted their role primarily in reservist or support units (including work in munitions factories) in the German and British forces and, in the case of the Soviet Union, their direct participation in the fighting as members of all services and units “constituting 8% of the total armed forces”.¹

Since then, women have assumed a much greater role and are more frequently joining the armed forces, voluntarily and involuntarily, performing both support and combatant roles. To give a few examples, in the United States military, “overall, 14% of active duty personnel are women”, and of the US forces who served in the 1990-1991 Gulf War, 40,000 were women.² It is estimated that a fifth of the Eritrean armed forces are female³ and up to a third of the fighting forces of the Liberation Tigers of Tamil Eelam (LTTE) involved in the civil war in Sri Lanka are women.⁴ The role of the female “suicide bombers” of the LTTE has also underscored the horrifying extent to which women are prepared to take action in that ongoing conflict. Ironically, much of their “success” in hitting targets can be attributed to the fact that as women they can often get closer to their objective — possibly due to a perception that they are more vulnerable and therefore less likely to carry out such attacks. “For many reasons, women are the preferred choice of secular groups when it comes to infiltration and strike missions. First, women are less suspicious. Second, in the conservative societies of the Middle East and South Asia, there is a

¹ See Françoise Krill, “The protection of women in international humanitarian law”, *IRRC*, No. 249, November-December 1985, pp. 337-363.

² Greg Siegle, “Women critical to success of US all-volunteer force”, *Jane’s Defence Weekly*, Vol. 31, No. 23, 23 June 1999.

³ David Hirst, “Ethiopia: Human waves fall as war aims unfold”, *The Guardian*, 18 May 1999.

⁴ Dexter Filkins, “Sri Lanka women at war”, *Herald Tribune*, 13 March 2000.

hesitation to body search a woman. Third, women can wear a suicide device beneath her clothes and appear pregnant.”⁵ Women are as capable as men of perpetrating extreme violence.

Women are also “actively” supporting their menfolk in military operations — not by taking up arms but by providing them with the moral and physical support needed to wage war. Data collected in the course of the ICRC’s “People on War” survey⁶ exemplify this, as for example an elder and religious leader in Somalia said: “I believe that those civilians and fighters belong to one family group, once the civilians are going with the fighters — doing things like cooking, treating them, and any other necessary thing... Whatever happens to the civilians is up to them. If they collaborate with the fighters, then what happens is up to them.” And it is not just Somalis that responded in this way, as one young man in Abkhazia stated: “Somebody can hold a submachine gun and somebody only a ladle. But it doesn’t mean a cook is less responsible than a soldier.”

Furthermore, there are women endangered because of their presence amongst the armed forces but who are there completely against their will — abducted for sex or to cook and clean in the camp. During the period of their abduction — and often after — these women and girls can be in considerable danger from attack by the opposing forces as well as their abductors. The best known and wide-scale example of such abductions was that of the so-called “comfort women” in the Far East during the Second World War — a term which in no way encompasses the horrific nature of the ordeal to which these women were subjected during their detention by the Japanese military. In recent years, women and girls have also reportedly been abducted by the armed groups in other countries, such as Uganda.

⁵ Dr Rohan Gunaratna, “Suicide terrorism: a global threat”, *Jane’s Intelligence Review*, April 2000.

⁶ *The People on War Report: ICRC world-wide consultation on the rules of war*, ICRC, Geneva, 1999 (available on request from the

ICRC, Geneva, website www.onwar.org). — To mark the 50th anniversary of the 1949 Geneva Conventions the ICRC launched a consultation in 17 countries, 12 of which were or had been at war, giving the general public a chance to express their opinions on war.

Women have furthermore been under suspicion and targeted for the suspected or actual role of their menfolk, in order to get to the absent man by intimidating and attacking the woman.

Despite these examples of voluntary and involuntary participation of women in armed conflict as combatants and in support roles, some countries and cultures refuse the participation of women in combat roles in the armed forces. The majority of women experience the effects of armed conflict as part of the civilian population.

Women as members of the civilian population

As members of the civilian population, women and girls — like men and boys — are subjected to innumerable acts of violence during situations of armed conflict. They often suffer the direct or indirect effects of the fighting, enduring indiscriminate bombing and attacks as well as a lack of food and other essentials needed for a healthy survival. Women invariably have to bear greater responsibility for their children and their elderly relatives — and often the wider community — when the men in the family have left to fight, are interned or detained, missing or dead, internally displaced or in exile. The very fact that many of the menfolk are absent often heightens the insecurity and danger for the women and children left behind, and exacerbates the breakdown of the traditional support mechanisms upon which the community — especially women — have previously relied. Increased insecurity and fear of attack often cause women and children to flee, and it is common knowledge that women and children constitute the majority of the world's refugees. But what of the women who do not flee?

Ironically, many women often do not flee the fighting — or the threat of hostilities — because they and their families believe that the very fact that they are women (often with children) will afford them a greater measure of protection from the warring parties. They believe their gender — their socially constructed role — will protect them. Therefore, women often stay to protect the family's property and livelihood; to care for the elderly, young and sick family members who cannot flee as they are less mobile; to keep their children in school (as education is such an important factor for many families and their future); to visit and support family members in detention; to search for

their missing family members; and even to assess the level of insecurity and danger in order to decide whether it is safe for the displaced family members to return. In fact, this perceived protection — that as a woman you will be safe — is often not the reality. On the contrary, women have been targeted precisely because they are women. The ICRC assisted, for example, large numbers of mostly elderly and frail women left behind in the former United Nations Protected Areas in Croatia (UNPAs, frequently referred to as the “Krajinas”). They had been left by their fleeing family members to protect the property and/or could not or would not leave their homes. Even these elderly — and often bedridden — women were not free from harassment and attack.

Women are often under direct threat from indiscriminate attack due to the proximity of the fighting. They have also been forced to harbour and feed soldiers, thus being exposed to the risk of reprisals by the opposing forces and placed in difficult and inappropriate situations: another mouth to feed on scant resources, and the personal safety of the woman and her children threatened. As one peasant woman in El Salvador eloquently stated in the “People on War” survey, “[it] was terrible, because if you didn’t sell tortillas to the guerrillas, they got mad, and if you didn’t sell to the soldiers, they got mad, so you had to collaborate with both sides.”⁷

Owing to the proximity of the fighting and/or the presence of the armed forces, women invariably have to restrict their movements; this severely limits their access to supplies of water, food, and medical assistance and their ability to tend their animals and crops, to exchange news and information and to seek community or family support.

Limited access to medical assistance can have an enormous impact on women, especially for reproductive and material health. Childbirth complications, arguably more likely in the stressful conditions of war, can lead to increased child and maternal mortality or sicknesses.

Women are all too often harassed, intimidated and attacked in their homes, while moving around their village and its environs and when passing checkpoints. A lack of identity documents — a problem

⁷ *Supra* note 6.

experienced by many women who have lost, were previously never issued with or did not feel the need to have documentation in their own right — severely affects the personal security and freedom of movement of women, increasing their risk of abuse, including sexual violence.

Sexual violence in armed conflict

The conflict in Bosnia and Herzegovina brought world recognition for the issue of the rape of women as a means of warfare. The world was horrified to hear accounts of women held in order to rape and to impregnate them.

Rape, forced prostitution, sexual slavery and forced impregnation are violations of international humanitarian law and are now an undisputed part of the vocabulary of war. Not that they are “new” crimes. Who didn’t learn in their history lessons of marauding armies entering the conquered towns on a rampage of “looting and raping”?⁸ But few of us were probably taught that “rape” was a crime and can never be justified as a means of warfare or show of power, as a reward for the victorious army or as a lesson for the vanquished unable to protect their womenfolk.

In many conflicts women have been systematically targeted for sexual violence — sometimes with the broader political objective of ethnically cleansing an area or destroying a people. From Bangladesh to former Yugoslavia, from Berlin in World War II to Nanking under Japanese occupation, from Vietnam to Mozambique, from Afghanistan to Somalia, women and girls have been the victims of sexual violence in armed conflict (this is also true for men and boys, although even less is known about the extent of this problem).

It is not possible to give anything but estimates as to the number of victims of sexual violence (female or male, adult or child), as not all victims survive, and the majority of victims will never report the violation against them. Reliable statistics are not easy to obtain, and

⁸ On rape in war see in general Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Simon & Schuster, New York, 1975. — Note that “looting and raping”, one a

property crime and the other a direct and violent attack on a person, are often linked together as violations in war.

those available are often based on the numbers of victims seeking medical help for pregnancy, sexually transmitted diseases or termination of pregnancy. The numbers of women seeking such assistance often become the basis upon which statistics are extrapolated. However, many women are generally too afraid to speak of their experiences for the very real fear of ostracism or retaliation by their family or community. Many also believe that no one can help them now that they have been violated. Moreover, the worst atrocities against the civilian and detainee populations (groups which are expressly protected under international humanitarian law) all too often occur when international organizations are not present to witness the violations, as was recently the case in Kosovo (during the period of the NATO air strikes), in Chechnya during the Russian military campaign, in rural areas of Sierra Leone and in numerous other conflicts around the world. Whilst recognizing that statistics on the numbers of victims of a crime like rape are invaluable in order to ensure effective support and assistance (the right help in the right places), statistics should not become the main issue. One person raped is one too many.

Sexual violence is a particularly brutal act against its victim. During the "People on War" survey undertaken by the ICRC in countries which had been or are still at war, one in nine of all respondents reported that they knew somebody who had been raped, and nearly as many reported that they knew somebody who had been sexually assaulted.⁹ This is shocking. States have a duty to ensure the protection of and respect for all civilians and persons no longer taking part in hostilities.

The ICRC has long considered sexual violence as a war crime and a serious violation of international humanitarian law.¹⁰ At

⁹ *Supra* note 6.

¹⁰ See in particular: Statement before the Commission for Rights of Women, European Parliament, Brussels, 18 February 1993: "Le CICR a dénoncé la pratique du viol commis par toutes les parties au conflit, comme les autres exactions commises à l'encontre des civils. Le viol est considéré comme un crime de guerre et

il est grand temps de trouver des solutions permettant de mettre un terme à ces pratiques inacceptables." — Resolution 2 B of the 26th International Red Cross and Red Crescent Conference (Geneva, 1995): "[The Conference] (a) expresses its outrage at practices of sexual violence in armed conflicts, in particular the use of rape as an instrument of terror, forced

the 27th International Conference of the Red Cross and Red Crescent (Geneva, 1999), the ICRC expressed once more its concern at the occurrence of sexual violence in armed conflict and pledged to States and the Red Cross and Red Crescent Movement that it would place specific focus on making known to parties to armed conflicts the protection accorded to women by international humanitarian law, with emphasis on the issue of sexual violence.¹¹ The full implementation of international humanitarian law must become a reality, and the prime responsibility for achieving this rests with the parties to an armed conflict. They must observe the rules and take necessary action so that sexual violence does not occur, and they must bring the perpetrators to justice if such crimes are committed.

It is important to note the significant work of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, both of which have prosecuted and convicted perpetrators of sexual violence against women. In addition, the Rome Statute of the International Criminal Court (ICC) also explicitly mentions sexual violence as a war crime.¹² These are significant developments in the battle against impunity.

Missing persons and widowhood

The conflict in Bosnia and Herzegovina (1993–95) put the plight of women and the survivors of sexual violence onto the world

prostitution and any other form of indecent assault; ... (c) *strongly condemns* sexual violence, in particular rape, in the conduct of armed conflict as a war crime, and under certain circumstances a crime against humanity, and *urges* the establishment and strengthening of mechanisms to investigate, bring to justice and punish all those responsible.” — ICRC Update on the Aide-Memoire on rape committed during the armed conflict in ex-Yugoslavia, of 3 December 1992: “As never before in its history, the ICRC has spoken out forcefully against systematic and serious abuses committed against the civilian population in Bosnia- Herzegovina, such as... rape, internment, deportation,

harassment of minority groups...” The act of rape is an extremely serious violation of international humanitarian law. Article 27, para. 2, of the Fourth Geneva Convention states: “Women shall be especially protected against any attack on their honour, in particular rape, enforced prostitution, or any form of indecent assault.”

¹¹ This pledge was announced by the President of the ICRC at the 27th International Red Cross and Red Crescent Conference (Geneva, 1999). See ICRC web site www.icrc.org

¹² See the ICRC's submission to the Preparatory Commission for the ICC regarding the determination of the elements of crimes. On file with the ICRC.

agenda. Besides sexual violence, this war (like many others before and since) was characterized by the separation of men from women and children — both a voluntary and involuntary separation. Men took up fighting roles, fled to third countries and safe areas, or were rounded up and detained and/or killed in large numbers. Often women stayed to try to find out the fate and whereabouts of their male relatives, or to protect their property, initially believing that the war would not be long and that they would be spared. However, all sides in this conflict failed to protect and spare the lives of civilian men, women and children. Although the majority of the dead or missing were men (and mostly men of military age, even though many were not part of the armed forces), women were also killed or are still unaccounted for. There are still 18,292 persons,¹³ reported by their families to the ICRC, considered missing long after the end of the conflict. Of these, 91.7% are men and 8.1% are women.

The very fact that many women survive conflicts in which their menfolk have died or disappear has enormous implications. The wars in the former Yugoslavia and the genocide in Rwanda have highlighted the plight of widows and women desperately trying to ascertain the fate of their loved ones. The survivors of those wars — and others throughout the world — are now struggling to cope not only with the difficulty of providing an immediate livelihood or means of survival for themselves and their family, but also with the additional trauma and uncertainty of not knowing what will happen to them in the absence of their menfolk. Widows and relatives of missing men — fathers, sons and husbands — may well be left without any entitlement to land, homes and inheritances, social assistance and pensions, or even the right to sign contracts. They and their children can be subjected to violence and ostracism as a result of their status.¹⁴

All over the world, tens of thousands of women are searching for news about the fate of missing relatives, and this search

¹³ In addition to these persons reported missing, the Bosnia-Herzegovina authorities believe that there are a further 10,000 persons unaccounted for.

¹⁴ See ICRC website for report on ICRC workshop on “widowhood and armed conflict” held in November 1999, Geneva.

often goes on years after a conflict has ended. The inability to mourn and bury their loved ones has an enormous impact on the survivors and the coping mechanisms they adopt. Humanitarian law recognizes the need and right of families to obtain such information. The ICRC endeavours to find out about persons missing in relation to armed conflicts through the Red Cross family news network, visits to places of detention, enquiries in response to tracing requests and representations to the warring parties to clarify their fate. But all too frequently, parties to an armed conflict do not do enough in that regard, thereby prolonging the agony of war long after the fighting has ended. As one mother, whose son has been missing since 1991 as a result of the conflict in the former Yugoslavia, so tragically exclaimed: "There used to be a saying around here that the worst thing which can happen to someone is to bury their own child. It seems nowadays that there is something far worse — not knowing what happened to him at all."¹⁵

Women everywhere are showing enormous courage and resilience as survivors and as heads of households — a role many of them had little or no preparation for and which is made more difficult by the social constraints often imposed on women. Many women have taken up this challenge and resolutely set aside their trauma in order to go on living for their children.

Displaced women

As previously stated, women and children make up the majority of the world's refugees and displaced persons. Fleeing and living in displacement creates numerous problems for women around the world, and ironically often exposes women to enormous risks. Women generally flee taking few possessions with them and many become separated from family members. Displacement may well force women to become reliant on support from the local population in the area to which they are displaced, or on assistance from international and non-governmental organizations. They often have to travel long

¹⁵ Quoted from "The issue of missing persons in Bosnia and Herzegovina, Croatia and

the Federal Republic of Yugoslavia", *ICRC Special Report*, 1998.

distances in their search for water, food, firewood, and for traditional foods and herbs for medicines for themselves and their families. During this search women frequently risk attack and injury from fighting, mines and unexploded ordnance, as well as sexual abuse, especially rape.

Women display tremendous strength and resourcefulness in the coping mechanisms they adopt in trying to ensure their own survival and that of their family. However, women in camps for displaced persons are frequently vulnerable, especially when they are the head of the household, widows, pregnant women, mothers with small children and elderly, for they have to shoulder all the daily responsibilities for survival which consume enormous amounts of time and energy. Furthermore, they may be overlooked by camp authorities and organizations providing assistance because in many cultures women are not in the public sphere and often do not have their own identity documents, and because the special needs of women have not been taken into account. For example, pregnant women need greater access to health services and larger food rations. Women with children are also particularly concerned about their children's education and often have to find the means to pay for clothes and books, then must cope with increased workloads if their children are at school.

Women in situations of displacement also invariably lack the privacy needed to maintain their personal hygiene and dignity. As they have to share living quarters, washing and toilet facilities with many people (and which are frequently easily accessible to men), many women are forced to choose between maintaining personal hygiene and maintaining their dignity and security.

For these reasons, women need to be actively included in the planning, implementation and evaluation of activities carried out and assistance distributed.

The ICRC assisted almost five million persons displaced by armed conflict in 1999. In the year 2000, it is working to protect and assist internally displaced persons in 31 countries throughout the world. In many of these countries, women have been specifically consulted by the ICRC as to what assistance should be distributed to whom, for example, to find out what would best meet the needs of households headed by women.

Women in detention

Women are also detained as a result of conflict, often in worse conditions than men. This is primarily due to the fact that the majority of detainees are men, and there are few prisons or places of detention solely for women. In many cases women detainees are consequently housed in the men's prison and, since they are fewer in number, their section is usually the smallest and lacks adequate sanitary and other facilities.

The existence of a separate prison for women can also lead to problems. As women generally constitute only a minority of detainees, few prisons are built specifically for them. This means that the nearest women's prison may be situated far from their home, and that by being sent there they are separated from their family and the support that families provide.

People in detention often rely heavily on their relatives to visit them and bring additional food and other items (medicines, clothes, toiletries, etc.). Women often suffer from a lack of family visits and therefore their family's support. There are many reasons for this: the remoteness of the place of detention, insecurity for visitors, relatives unwilling or unable (because they are displaced, have disappeared or are missing) to come, or lack of money to pay the travel costs.

Furthermore, women detainees often have the added concern of their children's well-being, either because young children are detained with them and are being raised in difficult conditions or because they have been separated from their children and are uncertain as to who is raising them and how. Even where a family member has taken over responsibility for the children, this enforced separation can be very difficult for women to bear.

Women also have specific needs which they find it hard to meet in detention. For instance, women and girls of menstruating age often have problems in obtaining suitable sanitary protection, regular access to sanitary facilities (toilets and washing areas) and appropriate clothing to deal with their menstruation in a manner that preserves their health and dignity.

Both men and women are often subjected to maltreatment, including sexual violence, whilst in detention. For women, there

is a serious risk of pregnancy and gynaecological problems, and fear of the consequences these may have both for their life in detention and after their release, when they return to their families and communities.

In 1999, the ICRC visited more than 225,000 detainees around the world, including some 6,300 women and more than 450 girls under 18 years of age. The majority of these women and girls were detained in relation to an armed conflict or situation of political violence. As a general rule, the ICRC registers persons detained in relation to an armed conflict or other form of political violence, in particular prisoners of war, security detainees or civilian internees. It visits them (speaking to them in private without the presence of guards or authorities) to assess their conditions of detention and treatment. With the consent of the detaining authorities, it provides non-food assistance in the form of sanitary and hygienic requisites, such as sanitary protection for women, clothes, buckets, cooking pots and recreational items, as well as medical supplies (to the medical services).

The protection of women in international humanitarian law¹⁶

Ever since its inception, international humanitarian law has accorded women general protection equal to that of men.¹⁷ At the same time the humanitarian law treaties recognize the need to give women special protection according to their specific needs. This protection is enshrined in the four Geneva Conventions of 12 August 1949 for the Protection of War Victims and their two Additional Protocols of 8 June 1977. The Conventions and Protocols protect women (and men) as members of the civilian population not taking part in an armed conflict. Women (and men) as members of the armed forces are also protected when captured by the enemy. Some of the key provisions of this law are outlined below.

¹⁶ See in general Krill, *op. cit.* (note 1).

¹⁷ International humanitarian law is not the only body of law relevant to situations of armed conflict, human rights law is also

applicable. These two bodies of law should not be seen as mutually exclusive, and their methods of implementation should be seen as complementary.

The law of international armed conflicts

Women who have taken an active part in hostilities as combatants are entitled to the same protection as men when they have fallen into enemy hands. The Third Geneva Convention relative to the Treatment of Prisoners of War stipulates that prisoners of war shall be treated humanely at all times. Besides this general protection, women are also afforded special protection based on the principle outlined in Article 14, paragraph 2, that “women shall be treated with all the regard due to their sex”. This principle is followed through in a number of provisions which expressly refer to the conditions of detention for women in POW camps, e.g. the obligation to provide for separate dormitories for women and men¹⁸ and for separate sanitary conveniences.¹⁹ The principle of differentiated treatment for women also resulted in provisions relating to the separate confinement of women from men and the immediate supervision of women by women.²⁰

Women (and men) who, as members of the civilian population, are taking no active part in hostilities are afforded protection under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and under Additional Protocol I. Women are in general protected against abusive treatment by the parties to the armed conflict and also against the effects of the fighting. They are entitled to humane treatment, respect for their life and physical integrity, and to live free from torture, ill-treatment, exactions and harassment. In addition to this general protection, women are afforded special protection under the said Convention and Protocol I, which stipulate that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault”.²¹

International humanitarian law also lays down special provisions for pregnant women and mothers of small children (generally considered to be children under seven years of age). It stipulates that

¹⁸ (Third) Geneva Convention relative to the Treatment of Prisoners of War, Art. 25(4).

¹⁹ *Ibid.*, Art. 29(2).

²⁰ *Ibid.*, Arts 97 and 108, Additional Protocol I, Art. 75(5).

²¹ (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 27(2). See also Additional Protocol I, Arts 75 and 76.

they shall “benefit by any preferential treatment to the same extent as the nationals of the State concerned”,²² pregnant women and nursing mothers “shall be given additional food, in proportion to their physiological needs”,²³ pregnant women and mothers with dependent infants who are detained or interned should have their cases considered with the utmost priority,²⁴ and maternity cases must be “admitted to any institution where adequate treatment can be given”.²⁵

Women are also protected, as members of the civilian population, against the effects of the hostilities, and there are rules which impose limits on the use of force. In the conduct of hostilities the parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.²⁶

The law on non-international armed conflicts

Women (and men) who take an active part in the hostilities in a non-international armed conflict do not have prisoner-of-war status when they fall into enemy hands. However, in such a case they are entitled to the fundamental guarantees afforded by Article 4 of Additional Protocol II relative to the Protection of Victims of Non-International Armed Conflicts. Basically, they are entitled to the same protection as men, but they also have a right to special treatment.

Persons not taking part in such a conflict are protected by Article 3 common to the four Geneva Conventions. While it contains no special provision on the protection of women, this rule establishes fundamental guarantees for the treatment of all persons not taking part in the hostilities. Furthermore, Additional Protocol II stipulates in general terms that “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” are forbidden.²⁷ Protocol II also provides for special treatment of women who are arrested, detained or interned in relation to the hostilities. In such cases, “except when men and women

²² Fourth Geneva Convention, Art. 38.

²³ *Ibid.*, Art. 89.

²⁴ Additional Protocol I, Art. 76(2).

²⁵ Fourth Geneva Convention, Art. 91.

²⁶ Additional Protocol I, Art. 48.

²⁷ Additional Protocol II, Art. 4(2)(e).

of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women".²⁸

Women as members of the civilian population are also protected against the effects of hostilities in non-international conflicts. Article 13 of Protocol II stipulates that "the civilian population as such, as well as individual civilians, shall not be the object of attack".

Honour in international humanitarian law

Article 27 of the Fourth Convention uses the term "honour" when referring to the special protection conferred by international humanitarian law on women against attacks like "rape, enforced prostitution, or any form of indecent assault". In recent years, some writers have voiced concern about the use of the word "honour" in relation to sexual violence, in that it fails to recognize the brutal nature of rape and uses instead a "value" term to define the interest to be protected rather than the woman herself, and for embodying the notion of women as property.²⁹

The question of honour — a term which is also used in other articles of the Geneva Conventions and not only in those pertaining to women — demands more examination than can be done in such a general article, covering so many aspects of women and war. However, to briefly touch upon this issue, honour is a code by which many men and women are raised, define and lead their lives. Therefore, the concept of honour is much more complex than merely a "value" term. But to a certain extent the concerns outlined above are valid. It is unfortunate that the language used by States fifty years ago, when the Geneva Conventions were written, links violations of a sexual nature with a woman's honour. This could lead to the question whether it is the honour of the woman international humanitarian law

²⁸ *Ibid.*, Art. 5(2)(a).

²⁹ See in particular Catherine N. Niarchos, "Women, war and rape: challenges facing the International Tribunal for the former Yugoslavia", *Human Rights Quarterly*, Vol. 17,

1995, pp. 671-676, and Judith Gardam, "Women, human rights and international humanitarian law", *IRRC*, No. 324, September 1998, pp. 421-432.

wants to protect or whether it is the woman herself? The answer is clearly the latter.

If one looks at Article 27 as a whole it is clear that the law grants “protected persons, in all circumstances, respect for their persons (...) They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof...”. This protection is conferred on both men and women, adult and child, and was intended to be as broad as possible encompassing all acts of violence and threats thereto. The second paragraph of this provision, referring to special protection for women, aims to strengthen this protection by highlighting sexual violence. However, linking sexual violence and honour has made it seem to some that this provision is less about a physical protection for women and more about a value judgement. Since the Geneva Conventions were drafted, law and language have evolved, as Article 76 of Additional Protocol I clearly shows. The 156 States parties to this Protocol³⁰ attest to its universality. Article 76 confers protection to women in the power of a party to the conflict (a broad field of application). It states that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” There is no mention of the term “honour”.

In conclusion, the Geneva Conventions and Additional Protocols stipulate that *women* must be respected and protected against rape, enforced prostitution or any form of indecent assault. In order to strengthen their protection, it is this part of the law which must be emphasized, disseminated and enforced during situations of armed conflict. For its part, the ICRC has pledged that over the next four years it will focus its particular attention on this very issue.³¹

Recent ICRC initiatives

The ICRC initiated a study in 1998 to better identify the ways in which women are affected by armed conflicts, and to

³⁰ As at 15 May 2000.

³¹ The ICRC has committed itself for the next four years to increase its dissemination of knowledge of the protection which should

be accorded to women and girl children, especially with regard to sexual violence, among parties to armed conflicts throughout the world. *Supra* note 11.

determine whether its own response could be improved. The study, which will be concluded this year, aims to: (1) identify the needs of women, including their access to basic goods and services such as food, water, shelter and health care; (2) draw up a realistic and comprehensive picture of ICRC activities in favour of women affected by armed conflict, and assess whether these activities adequately respond to the needs identified; and (3) examine international humanitarian law, in order to assess the extent to which it provides adequate coverage of the needs identified. Information has been provided by ICRC delegations around the world, as well as firsthand information provided by war-affected women themselves through the "People on War" survey, adding an invaluable dimension to the study.³² The ICRC plans to present an initial draft of it to practitioners and experts later this year. On the basis of the study's findings, the ICRC will formulate guidelines to enhance the protection and assistance of women affected by armed conflict. This ICRC initiative was supported at the 27th International Red Cross and Red Crescent Conference, held in Geneva in 1999, by States party to the Geneva Conventions and by the International Red Cross and Red Crescent Movement.³³

Furthermore, the pledge made at the International Conference renewed the ICRC's commitment to the effective protection of women.³⁴ This pledge is intended not only to promote the respect to be accorded to women and girl children affected by armed conflict, but also to make sure that the specific needs of women and girls are appropriately assessed in the ICRC's own operations. ICRC delegations around the world have been instructed to focus increased attention upon the needs of women affected by armed conflict and to adapt where necessary the ICRC's activities and programmes to ensure that they are met.

This study, the planned guidelines and the pledge made by the ICRC are parts of a long-term commitment to better assist and protect women in armed conflict. The ICRC hopes that these

³² *Supra* note 6.

³⁴ *Supra* note 11.

³³ Resolution 1: Plan of Action for the years 2000-2003, 27th International Red Cross and Red Crescent Conference (Geneva, 1999).

initiatives will lead to more effective implementation in future of the protection conferred upon women by humanitarian law. However, the prime responsibility rests with the parties to an armed conflict, namely to observe the rules, and with States, namely to bring the perpetrators of violations of these rules to justice.

Conclusion

War, whether international or non-international, causes extreme suffering for those caught up in it. Women experience war in a multitude of ways — from taking an active part as combatants to being targeted as members of the civilian population specifically because they are women. But war for women is not just rape — fortunately many women do not experience this heinous violation; it is also separation, the loss of family members and the very means of existence, it is injury and deprivation. War forces women into previously unaccustomed roles and necessitates the development of new coping skills.

Today more than ever, States and parties to an armed conflict must do their utmost to uphold respect for the safety and dignity of women in wartime, and women themselves must be more closely involved in all the measures taken on their behalf. Every State bound by the treaties of international humanitarian law has the duty to promote the rules protecting women from any form of violence in war, and should crimes occur, to bring the perpetrators to justice. If women have to bear so many of the tragic effects of armed conflict, it is not primarily because of any shortcomings in the rules protecting them, but because these rules are all too often not observed. The general and specific protection to which women are entitled must become a reality. Constant efforts must be made to promote knowledge of and compliance with the obligations of international humanitarian law by as wide an audience as possible and using all available means. The responsibility for improving the plight of women in times of war must be shared by everyone.

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Résumé

Les femmes et la guerre

par CHARLOTTE LINDSEY

Si la population civile est trop souvent la cible principale des hostilités, notamment lors des conflits armés non internationaux, les femmes, elles, sont régulièrement les victimes les plus durement affectées. Les traités de droit international humanitaire contiennent des dispositions spéciales destinées à protéger les femmes dans la guerre, en particulier contre les actes de violence sexuelle. L'auteur de cet article élargit le débat pour examiner également la situation de la femme en sa qualité de mère ou de chef de famille, car, lorsque les hommes sont au combat, ce sont les femmes qui assurent la survie de la famille et de la communauté. Les dispositions des Conventions de Genève et de leurs Protocoles additionnels sont passées en revue, tant pour les conflits armés internationaux que non internationaux. Pour conclure, l'auteur donne une information intermédiaire sur l'étude y relative, en cours d'élaboration au CICR, à la demande de la XXVII^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge.

International humanitarian law and basic education

by
SOBHI TAWIL

The suffering caused by armed conflict is one of the most tragic shared historical experiences of human society. The twentieth century is believed by many to have seen both a rise in the number of armed conflicts across the world and a significant change in the nature of these conflicts. More particularly, the second half of the twentieth century has witnessed a proliferation of internal conflicts often related to the birth, consolidation or collapse of nation-states. As urban and residential areas increasingly become the theatre of combat in internal conflicts and in civil war, the proportion of civilian victims grows dramatically. Children and young people also appear to be ever more exposed to and affected by the violence of armed conflict, not only as victims but also as aggressors, as evidenced by the enrolment and exploitation of children as combatants in many conflict situations today.

Far from fulfilling the early optimism generated by the end of the Cold War and reflected in the international commitment in favour of education for all made by governments and aid agencies at the 1990 World Conference on Education for All (Jomtien, Thailand),¹ the last decade of the twentieth century has not seen any reallocation of resources away from destruction and toward the satisfaction of human needs such as basic education. Rather than the promise of an international “peace dividend”, the end of the Cold War appears to have brought with it a continuation, if not an accen-

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tuation, of the trend toward greater political instability, violence and armed conflict.

Protecting the right to education in times of armed conflict

It is therefore not surprising that over the past decade armed conflict has proved to be one of the major obstacles to the realization of the Education For All (EFA) goals set by the international community at Jomtien, Thailand, in 1990. Even then, a significant number of the countries in which declining primary school enrolment rates were observed during the 1980s were those afflicted by armed conflict (Berstecher & Carr-Hill, 1990²). While the Jomtien Declaration and Framework of Action made only limited reference to education in emergencies, such education has progressively emerged as a key issue over the past decade. Although conventionally overlooked in favour of basic needs such as shelter, nutrition and health care, the provision of education in emergencies is becoming increasingly viewed as a necessary component of early emergency relief assistance (Pigozzi, 1997; Retamal and Aedo-Richmond, 1998). Recognition of the importance of ensuring continued education in situations of armed conflict is steadily gaining ground. Indeed, the interagency mid-decade review of international achievement toward the goal of education for all (Amman, 1996) devoted one of its round table sessions to Education in Emergencies and identified “escalating violence caused by growing ethnic tensions and other sources of conflict” as an “emerging challenge” for education.³ More recently, the strategic parallel session on Education in Situations of Emergency and Crisis at the recent World Education Forum (Dakar, April 2000) succeeded in introducing the issue into the wording of the Dakar Framework of Action:

Education For All “must take account of the needs of the poor and most disadvantaged, including working children, remote

¹ *World Conference on Education for All: Meeting Basic Learning Needs*, Final report, Interagency Commission, New York, 1990.

² See bibliography in the Annex.

³ The Amman Affirmation, Mid-decade meeting of the International consultative forum on education for all, Amman, Jordan, 16-19 June 1996.

rural dwellers and nomads, ethnic and linguistic minorities, children and adults affected by armed conflict and HIV/Aids, and those with special learning needs”.⁴

It is worth noting, however, that throughout the 1990s humanitarian law was largely absent from the international discourse on basic education, whether in the context of development or that of emergencies and post-conflict reconstruction. A wide range of legal instruments are commonly referred to in support of the right of refugee children and young people and those in emergency situations to continued access to quality basic education. The fact that education is defined first and foremost as an “inalienable human right” is endorsed by reference to instruments of international law such as the Universal Declaration of Human Rights (1948) and the United Nations Convention on the Rights of the Child (1989). In the case of refugee education, more particularly, additional reference is made to the Convention relating to the Status of Refugees (1951). The right to education is thus seen as binding under all circumstances and to be protected in all situations, including crises and emergencies resulting from civil strife and war.

Yet international literature on basic education to date has rarely referred to international humanitarian law as a body of law that further protects the right of children and young people to education in situations of armed conflict. This is most surprising, given that international humanitarian law not only strengthens the legal framework for the protection of education in times of armed conflict, but also makes provision for specific situations. Indeed, a number of articles set out provisions for the protection of the civilian infrastructure and that of the right of civilians and non-combatants to satisfy basic social and cultural needs, including education, in times of armed conflict, under military occupation or in emergency situations. As part of the general protection of civilian populations in the context of armed conflict, international humanitarian law makes the following provisions for the protection at such times of the right to education:

⁴ Dakar Framework of Action, April 2000.

- Education of orphaned or unaccompanied children

“The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.”⁵
- Education under military occupation

“The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. (...) Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.”⁶
- Education of interned children and young people

“All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.”⁷
- Education of children during non-international armed conflicts

“Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.”⁸

⁵ Art. 24, Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

⁶ Art. 50, *ibid.*

⁷ Art. 94, *ibid.*

⁸ Art. 4(3)(a), Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Clearly, international humanitarian law has a contribution to make to the legal framework for the protection of education in emergencies. In this respect it is promising that, for the first time, the assessment thematic study that served as the basis for the strategic session for education in emergencies at the recent World Education Forum (Dakar, 2000) explicitly refers to humanitarian law. One of the major recommendations put forward in the study is “that more systematic efforts be made to link the themes of human rights and humanitarian law to protecting the rights of children and adolescents in emergency situations.”⁹ The study also emphasizes the “need for a clear and integrated statement of the protection which schools should enjoy in times of conflict, under humanitarian law, and the implications for the child’s and adolescent’s right to education of the Convention on the Rights of the Child.”¹⁰

Contributing to the core content of basic education

Besides strengthening the legal provisions for the protection of access to education in situations of armed conflict, international humanitarian law has a role to play in defining the content of basic education. Arguably, humanitarian law has a unique contribution to make to the knowledge, skills and attitudes that constitute the indispensable learning content of basic education. The 1990 World Conference on Education for All defined basic education as encompassing both “essential learning tools (such as literacy, oral expression, numeracy and problem-solving) and the basic learning content (such as knowledge, skills, values and attitudes) required by human beings to be able to survive, to develop their full capacities to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, to continue learning”.¹¹ Beyond both the “essential learning tools” or key com-

⁹ *Education in Situations of Emergency and Crisis*, Education For All Assessment Thematic Study, Emergency Educational Assistance Unit (ED/EFA/AEU), EFA Forum, Paris, October 1999.

¹⁰ *Ibid.*, p. 66.

¹¹ *Op. cit.* (note 1).

petencies such as literacy and numeracy and the situation-specific aspects of basic education, humanitarian law can help to provide the critical elements that form the common core of basic education. Through a series of ethical explorations relating to the common human experience of armed conflict, education in humanitarian law is an important contribution to positive attitudinal change fostered by ideas such as respect for life and human dignity, civic responsibility, and solidarity.

Such education in humanitarian law is based on three observations that may be made with regard to armed conflict, violence and young people. The first is that the tendency of armed conflicts around the world to multiply and change in nature does not seem to be abating. Secondly, it is becoming ever more difficult to distinguish between armed conflict and non-conflict settings, as all societies appear to be increasingly prone to various forms of violence. It may be more appropriate to situate all societies on a continuum of levels of violence ranging from school-based and street violence to social unrest, internal disturbances and armed conflict. Finally, young people are increasingly exposed to greater media coverage of these different forms of violence, and are more and more affected by and involved in both urban violence and armed conflict. These observations lead to an important working assumption for any initiative concerning education in humanitarian law for young people, namely that education in humanitarian law constitutes relevant and meaningful learning for young people in all societies, regardless of the local historical experience of armed conflict and whatever the exact position of a given society on the continuum of violence may be.

It is interesting to note in this respect that one of the main arguments put forward to explain and justify the failure to teach humanitarian law as part of basic education has to do with the perceived lack of relevance of the subject to young people in non-conflict settings. Preliminary evidence, however, suggests the contrary. A recent UNICEF/*Le Monde* survey conducted in France among adults and teenagers in 1999 on the tenth anniversary of the Convention on the Rights of the Child indicated that French youngsters viewed war as a

major preoccupation more frequently than did their parents.¹² Moreover, exploratory focus group discussions conducted by the ICRC with 13-18 year olds in over ten countries around the world clearly show that they are eager to explore the ethical issues related to humanitarian law and armed conflict.¹³ When asked if they thought young people should learn about humanitarian law, the replies varied from needing to be aware of one's rights to "helping us in our small wars in life".

With this in mind, the main desired learning outcome of any initiative towards education in humanitarian law could be seen as a contribution to the formation of informed and responsible young people prepared to abide by, defend and promote humanitarian law and the principle of respect for life and human dignity in their respective spheres of influence. More specifically, this could include positive changes in levels of:

- awareness of limits and of various forms of protection applicable to situations of armed conflict;
- understanding of the multiple aspects of international humanitarian law, of the complexity of its application, and of humanitarian issues;
- interest in international current events and humanitarian action;
- capacity to view conflict situations at home and abroad from a humanitarian perspective;
- active involvement in community service or other forms of mobilization to protect and promote humanitarian attitudes.

Education in humanitarian law therefore proposes to explore war in ways that are not habitually the case when examining history or current events. As such, education in humanitarian law is not explicitly about peace, tolerance, mutual understanding, violence prevention or conflict resolution; it is about the ethical issues related to the shared human experience of armed conflict. Nonetheless, the knowledge, skills, values and attitudes involved in any such exploration

¹² Survey conducted among 1,300 adults and 12-15 year old children. See Pascale Kremer, "Droits fondamentaux des enfants: beaucoup reste à faire", *Le Monde*, 08.11.1999.

¹³ These discussions were conducted as part of the initial phase of research and development of the Exploring Humanitarian Law (EHL) project (see next section).

would necessarily have links with what is broadly referred to as “peace education”, understood as a very vague term that covers a wide array of educational initiatives varying considerably in content and approach and ranging from education for mutual understanding to environmental education and global citizenship. In order to properly situate education in humanitarian law within the context of such initiatives, it is important to define “peace education” more accurately. In the words of UNICEF, it is:

“... the process of promoting knowledge, skills, attitudes and values needed to bring about changes that will enable children, youth and adults to prevent conflicts and violence, both overt and structural; to resolve conflict peacefully; and to create the conditions conducive to peace, whether at an intrapersonal, interpersonal, intergroup, national or international level” (UNICEF, 1999: 1).

According to the above definition, peace education is clearly made up of three more or less distinct components: (i) conflict prevention, (ii) conflict resolution, and (iii) creating conditions conducive to peace. Although education for young people in humanitarian law is not explicitly about conflict prevention, and even less about conflict resolution, it definitely helps to create conditions conducive to peace. In situations of acute social and political tension, as for example in post-conflict and social reconstruction environments, education in humanitarian law may have a potential indirect pacifying effect.

Education in humanitarian law also has clear links to citizenship education programmes. The general area of citizenship education has been found to cover a wide spectrum of terms in different countries, ranging from citizenship and civics to social studies, studies of society and life skills (Kerr, 1999). Citizenship education has also been found to have numerous curricular subject links including history, geography, law, politics, religious studies and so forth. As a result, citizenship education may be defined and approached in numerous ways. From the specific perspective of humanitarian law, it may be argued that the development of international humanitarian norms relative to situations of armed conflict constitutes an emerging “civic

megatrend” (Kennedy, 1997)¹⁴ that has a central place in the preparation of informed adult citizens worldwide. By developing an awareness and an understanding of the ethical underpinnings of those norms, education in humanitarian law may be seen as a potentially unique contribution to citizenship education at the local, national and global levels.

Clear and direct relations furthermore exist between education in humanitarian law and human rights education, despite the fact that international humanitarian law is rarely explicitly mentioned in the definition of human rights education. “Rights education usually includes the component of learning about the provisions of international documents such as the Universal Declaration of Human Rights (1948) and the Convention on the Rights of the Child” (UNICEF, 1999: 7). The absence of any mention of international humanitarian law is striking for several reasons. First, international humanitarian law, together with human rights law, forms a part of public international law. Indeed, such basic rights as the right to life, the prohibition of torture or inhumane treatment, the prohibition of slavery and servitude and the right to fair trial, constitute what is often referred to as the “hard core” of human rights that must be respected under all circumstances, thus also in the extreme case of armed conflict. Seen thus, international humanitarian law and international human rights law are complementary in that they seek to protect the individual, albeit in different ways and in different circumstances. It is therefore logical that human rights education should also cover the provisions formulated in international treaty or customary rules which, in times of armed conflict, seek to protect all persons who are not or are no longer taking part in the hostilities, including the wounded, the sick, medical personnel, prisoners, and the civilian population.

However, the absence of any mention of international humanitarian law in the definition of the content of human rights education is surprising, given that humanitarian law, although not entirely free of controversy, is less contentious than human rights.

¹⁴ Quoted in Kerr, p. 7.

Whereas regimes of an authoritarian nature may perceive “human rights education” as politically sensitive, education in humanitarian law is generally well accepted. Evidence from a number of divided societies indicates that the area of citizenship education in general, and of human rights education in particular, is a controversial one. This is the case in Northern Ireland, for instance, where these programmes are seen by some segments of society as having an unwritten agenda or as being instruments of social engineering (Duffy, 2000). The central use of politically coloured concepts such as human rights within citizenship education may be contentious in that it is perceived as providing support for the current political process, which remains contested by significant segments of society in Northern Ireland. It may be argued that, within such contexts, international humanitarian law has a unique contribution to make to the definition of a shared value base for citizenship education in divided societies, particularly when other normative references such as human rights may be in dispute.

International humanitarian law can thus contribute unique and specific elements to the core content (in terms of knowledge, skills and attitudes) of basic education. The central value of respect for human life and human dignity on which such learning rests is at the intersection of ethics, citizenship and rights education.

The Exploring Humanitarian Law (EHL) project

Background

The Exploring Humanitarian Law (EHL) project was initiated by the ICRC in late 1998 with the aim of designing core learning materials for global use among young people in the 13-18 age range. As of March 2001 these modules may be adapted and progressively integrated either into secondary school curricula in the areas of citizenship or ethics education and/or into non-formal education programmes by implementing partners working through Ministries of Education, national Red Cross/Red Crescent organizations and/or other educational partners. The long-term strategic goal of the EHL project is that education in humanitarian law become fully accepted as

an integral part of basic education both in secondary curricula and in non-formal programmes for young people (aged 13-18) around the world.

EHL project development work was started in 1999 with the establishment of a network of some fifteen sites around the world to identify interest and set up an informal group of contacts.¹⁵ Once established, the groups provided the research and curriculum development process with information from the viewpoint of the local learning environment, conducting some thirty-five focus group discussions with young people and probing perceptions of humanitarian limits, human dignity in war and relevance of education in humanitarian law. The qualitative data collected through this consultation has helped to determine the design of the modules. Associated sites have also been reviewing and/or trying out prototype materials with youth groups and giving critical input to feed into the process of curricular development. This consultation has largely confirmed the working hypothesis underlying the development of the EHL modules, namely that ethical explorations of humanitarian law and the experience of war are perceived as relevant and meaningful learning regardless of the local experience of armed conflict. Moreover, this interest in exploring humanitarian law is expressed in a variety of ways that reflect local educational concerns. Several examples from the current research and development work on the EHL modules may serve to illustrate this observation.

Education and the threat of armed conflict

The Ministry of Education in Djibouti recently drew up a report on the multidimensional crisis afflicting the country's educational system and the general failure of the school system to promote cultural and socio-economic development.¹⁶ This crisis is reflected in the extremely low levels of development of basic education in Djibouti: the already dramatically low net enrolment ratios in grade 1

¹⁵ See list in Annex.

¹⁶ *Réflexions préliminaires à la tenue des États Généraux de l'Éducation: Document*

d'orientation, Ministère de l'Éducation Nationale, République de Djibouti, juin-juillet 1999.

(31.8 per cent), drop to less than 15 per cent at the secondary level.¹⁷ These educational indicators, much like those of neighbouring Ethiopia, Eritrea, Somalia and Yemen, are among the lowest in Africa. Moreover, the economy has suffered from conflicts in the Horn of Africa in the 1980s (refugee influx from Ethiopia and Somalia) and from natural disasters such as drought and famine, as well as from extreme poverty.¹⁸ Finally, internal conflict in the north of the country (1991–1994) has inflated the budget of the Ministry of Defence at the expense of education and other social sectors, and public resources for education have continued to decrease as a result of the introduction of a structural adjustment programme in 1995/96.

Given this generally dismal picture of urgent social and economic needs, interest in an educational initiative such as EHL would appear difficult to justify in the face of pressing priorities in terms of access to literacy, health and proper housing. On the contrary, it is precisely because of this reality of internal conflict (1991–1994), of ongoing armed conflict in neighbouring countries, of current trouble in the north and of regional tensions that EHL is seen as a relevant project by educational authorities in Djibouti.¹⁹ Moreover, the Ministry of Education has stressed the timeliness of an educational project (not only for young people, but also indirectly for their parents and communities at large) that aims to develop a greater sense of responsibility with regard to situations of armed conflict and humanitarian assistance within the conflict-ridden context of the Horn of Africa. EHL is genuinely seen by the authorities in Djibouti as an educational project with a “human dimension and humanitarian implications”.²⁰

¹⁷ The Gross Enrolment Ratio at the secondary level was 15.4 per cent for 1998/99.

¹⁸ Life expectancy at birth, among the lowest in the world, is estimated at 48 (UNICEF, 1998).

¹⁹ This understanding was reaffirmed during an interview with the Director General of the Ministry of Education in Djibouti, September 1999.

²⁰ In his letter to the Minister of Education, the director of CRIPEN described EHL in the following terms: “Ce projet (...) me paraît être, compte tenu de sa dimension humaine et sa portée humanitaire, très instructif et très bénéfique pour le pays à plus d'un titre” (In view of its human dimension and humanitarian scope, this project (...) seems to me to be very instructive and very beneficial for the country).

Global versus parochial socialization in divided societies

The current process of curricular review in Northern Ireland involves a “values education” component that should lead to recommendations for the introduction of what is now being provisionally called “Educating for Democratic Citizenship” in the core curricula for 14–16 year olds in 2001/2002. The 24-month-old review is being conducted under the auspices of the Council for Curriculum Examinations and Assessments (CCEA) in Belfast, whose role is to advise the Department of Education for Northern Ireland on curricular reform.²¹ A steering committee has been set up for this purpose at the CCEA, bringing together representatives of major projects, regional library boards and teacher unions with a view to proposing legislation for citizenship education. The revised proposals being drawn up by the CCEA are intended to reflect the transition from the education for mutual understanding approach to that of citizenship education.

It is within this context of educational innovation that the Exploring Humanitarian Law project was first introduced and links established with the goals of the Educating for Democratic Citizenship programme. The pilot Social, Civic and Political Education project (Arlow, 1999) being funded by the Department of Education is one of the main pilot projects shaping the current review process. Exploring Humanitarian Law was seen as a potential contribution to such efforts. The introduction of humanitarian law as an additional reference for international law, the proposed ethical exploration of the humanitarian perspective that underlies it, and the introduction to a global perspective were all seen as positive contributions that EHL could make to citizenship education in Northern Ireland.

EHL's global approach was in fact viewed as an interesting means of helping to overcome the adverse effects of a long tradition of

²¹ See, e.g., Developing the Northern Ireland Curriculum to meet the needs of young people, society and the economy in the 21st century, Advice to the Northern Ireland

Minister of Education on the nature and scope of the review of the Northern Ireland Curriculum (Executive summary), CCEA, Belfast, 1999.

parochial socialization and segregated schooling. It was generally understood that EHL was not a peace or reconciliation educational programme, and that exploring international humanitarian law and the underlying humanitarian perspective could not only heighten awareness of current events in the world at large, but would also have an indirect pacifying effect. To lift the small communities of Northern Ireland out of their insular parochialism and open them to the world was seen as a positive contribution. It is this component of global citizenship, perceived as education about the rights and responsibilities of citizens in a broad international context, which appears to respond to specific educational concerns in Northern Ireland.

Curricular reform and postwar social reconstruction

Political change and armed conflict are dialectically linked to processes of educational transformation. Those processes may be part of a (proactive) educational reform process undertaken in times of relative stability to update curricula by incorporating new knowledge, skills and attitudes resulting from global developments. As a result of the perceived need to adapt to the accelerated pace and scale of global change at the turn of the twentieth century, or to what some have termed “the millennium effect”, many countries around the world “are undertaking reforms of schools and curricula, which will be in place by 2004” (Kerr, 1999: 2). Processes of educational transformation may also be part of wider and more radical political attempts to redefine educational systems following political upheavals and post-conflict social reconstruction. Post-conflict educational reconstruction is another major process of educational transformation. Recognizing the potential role of education as a catalyst for civil strife (Tawil, 1997) paves the way for new thinking on education, not only in post-conflict situations but also in emergency situations. This is clearly reflected in recent arguments for education to be included as a component of early humanitarian response to emergencies (Retamal and Aedo-Richmond, 1998). More than a simple stopgap measure until normalcy is restored, educational intervention in emergencies may be viewed as an “opportunity for educational transformation”. The fact that the education system “must be rebuilt rather than merely re-instituted”, that “it must

change in profound ways” (Pigozzi 1998), implies much broader scope and possibilities for such educational transformation.

Curricular reform, particularly in the area of civic or citizenship education, is an important opportunity for educational transformation in post-conflict societies such as Lebanon. The reform of civic education in Lebanon currently being undertaken by the Educational Centre for Research and Development is such an opportunity: after its complete absence from the school curricula since the outbreak of the civil war in 1975, civic education is now being redefined and reintroduced in the official curricula at all grade levels.²² Prior to 1975, civic education was not only a weak area of study in the official Lebanese curriculum, but had also been poorly imposed on an educational system that was, and still is, predominantly managed through the private/community sector.²³ The new civic education programme, with its four interwoven strands of social, civic, national and humanitarian education, aims to shape a new generation of informed and responsible citizenry capable of contributing to postwar social reconstruction.

Political violence, education and the culture of violence

Another significant example of political upheaval and educational transformation is that of South Africa. The recent history of educational development in South Africa has been marked by extreme political violence in a context defined first and foremost by the institutional violence resulting from over 300 laws of physical separation that constituted the legal framework of the *apartheid* regime. The refusal to accept the translation of this policy in terms of education sparked off the Soweto student uprisings of 1976, marking the beginning of a process of large-scale “militarization of youth” (Marks, 1995).

²² The rewriting of history textbooks for schools is, however, controversial, given the difficulty in reaching any consensus among the various components of Lebanese society as to what has actually taken place over the

last quarter of a century since the outbreak of the civil war.

²³ An estimated 70 per cent of all in-school children and young people are enrolled in the private sector.

“... [F]or many of the children that have grown up in the last 20 years there has been a protracted exposure to police violence and violence on the part of the security force, especially during the states of emergency. This has gone together with social upheavals over this period, as youth moved to the forefront of resistance and long-standing adult authority structures unravelled. Over this period larger numbers of young people were not only victims of state violence but perpetrators of violence themselves in the name of resistance. Revolutionary and political violence has been a significant influence in the lives of huge numbers of children, and in many areas this has involved ongoing violence between groups with different affiliations.” (Downall, 1994: 77-78).

Young people had thus been at the forefront of direct daily confrontation with the repressive forces of the *apartheid* regime since the 1976 Soweto student uprisings. “In fact, a great deal of the ‘people’s revolution’ that took place between 1976 and 1990 was led by or involved children under 18 years [who acted as] proxy soldiers” in the national liberation struggle. Indeed, “South Africa’s war happened in many battlefields, which included the streets of many urban and rural communities, where the involvement of children, fundamentally students, was crucial to destabilize the regime.” (Nina, 1999).

Exposure to such high levels of violence has distorted “normal” processes of socialization for many young people and has resulted in a “lost generation”, as large numbers of them were killed or maimed, traumatized and deprived of normal schooling. *Post-apartheid* young people in the townships are often characterized by attitudes of disrespect for authority inherited from that period of struggle. The widespread culture of violence in the townships in South Africa is seen as part of the *apartheid* legacy, in which authority was equated with repression and the denial of rights. Indiscipline and antisocial behaviour have deep-seated roots in the mindset of the 1980s that was based on the refusal of the legitimacy of authority; a mindset largely moulded by the United Democratic Front’s (UDF) strategy of making the townships “ungovernable”. One of the main educational challenges today is to restore the authority of the local educational structures and of the broader *post-apartheid* social order, and the legal

authority on which that order is founded. Students' confidence in authority is now said to be at a record low. This is exacerbated by the culture of failure and by the development of a large uneducated underclass that feeds into the culture of violence. According to certain scholars, there is a reluctance of some to acknowledge that "there is a war out there in the township schools".²⁴ It is in this context that the EHL project is seen by the Department of Education at national level as a "peg to deal with violence" within the framework of the urgent need to "demilitarize" South African youth.²⁵

Concluding remarks

These examples show that the content of educational initiatives such as Exploring Humanitarian Law appears to respond to diverse educational concerns in very different social and political settings, concerns that range from the need for humanitarian preparedness in the event of armed conflict to less risky and more appropriate means of addressing issues of social and political violence. In post-conflict and transitional divided societies, education based on the exploration of humanitarian issues highlights the common human concerns that arise in times of armed conflict and are often obscured by politically and ideologically driven analyses. By developing a sense of global citizenship, the ethical explorations proposed by programmes such as Exploring Humanitarian Law contribute to the common core of basic education. In addition to this link between humanitarian law and the substance of basic education, international humanitarian law also enhances the legal protection of the right to education in times of armed conflict. As a result of these links at the pedagogical and legal levels, it may easily be argued that humanitarian law has a central role to play in international policy-making with regard to basic education.

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²⁴ Professor Manganyi, University of Pretoria.

²⁵ Interview with Professor Kader Asmal, Minister of Education, Republic of South Africa.

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Résumé

Droit international humanitaire et éducation de base

par SOBHI TAWIL

Cet article examine l'éducation au droit humanitaire et le situe en regard d'autres initiatives éducatives, largement groupées sous les termes «Éducation à la paix», en général, ou «Éducation aux droits de l'homme» et «Éducation civique», en particulier. On y relève que le droit international humanitaire a un rôle central à jouer dans la définition d'une politique relative à l'éducation de base. L'auteur présente également le projet du CICR «Explorer le droit humanitaire» qui développe du matériel éducatif relatif à cette matière et est destiné à des jeunes âgés de 13 à 18 ans. L'un des buts de ce projet est de renforcer les dispositions du droit international humanitaire sur le droit à l'éducation en période de conflit armé.

Preventing and limiting suffering should conflict break out: the role of the medical profession

by

VIVIENNE NATHANSON

The role of the medical profession is to prevent and limit suffering; the specialization of practitioners, by offering different roles for individuals, delineates their part in that overall task. Identifying conflict as a cause of such suffering allows us to examine the role of individual doctors and of groups of doctors in undertaking the tasks specific to conflict.

Throughout history individuals have expressed the hope, and sometimes the expectation, that man is outgrowing — socially and politically — the need or will to engage in conflicts. Sadly these hopes and expectations far exceed reality. Most observers feel that the number of conflicts is escalating. This may be, at least in part, a man-made phenomenon resulting from the accessibility of all parts of the globe to television and other news crews. It also demonstrates the need not only for action to reduce the suffering of those directly and indirectly affected, but also for scrutiny of the effectiveness of action taken by the various players involved.

The nature of conflicts is also changing. Wars are no longer fought on remote foreign fields but on home ground, through-

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out towns, cities and the local countryside. Armies are often irregular groups of ill-trained individuals. There are few clear distinctions between combatants and non-combatants. The laws of war — or international humanitarian law — built up over generations are too often flouted, through ignorance as much as through malice. In all too many conflicts the role of doctors and other health care workers, which that body of international law is intended to protect, is threatened and their neutral status is questioned. Even the symbols of the red cross and the red crescent, indicating those places which should remain inviolate, are increasingly targeted. In this time of international and intra-national tension and waning regard for high legal standards, the role of the medical profession in reducing and alleviating suffering is under considerable strain.

Why is this a role for the medical profession?

In considering the role that the medical profession could and should play in preventing and limiting suffering if conflict breaks out, it is important to take into account what the medical profession is, what access its members have to decision-makers and what special knowledge or expertise they bring with them. At the same time the nature of conflicts should be explored and related to the expertise of doctors and the opportunities they might have to intervene. It should be realized that doctors may feel disenfranchised in terms of their potential role in conflict. They may be blinded by the — usually very substantial — political component. They are almost always ignorant of international humanitarian law and of the institutions that could help them to take action under that body of law, and they may have only little access to the types of data that would make them more effective in their role of reducing and preventing suffering.

It is also essential to understand that many doctors will shy away from lobbying in these difficult areas or advising on them. They may feel that they lack the relevant expertise and that it is up to others with specific knowledge and specialized skills to take action. If a more general role is to be assumed by all doctors, they must be empowered or enabled to use their knowledge, and their fear of venturing into unknown territory must be removed. Those who wish doctors to

participate more fully and exert their power and influence must deal first with these fears.

In setting out my ideas about the role of the medical profession I shall attempt to explore these areas, to identify opportunities and indeed responsibilities. I shall also attempt to identify those areas in which initiatives have been taken, and those where conditions seem right for new initiatives.

I shall talk predominantly about doctors. But doctors are just one category of health care professionals, all of whom will have similar and related duties and opportunities. So while some of what I say will relate in particular to the specific knowledge of doctors and their place in society, far more will apply to all health care professionals.

The first role that the medical profession must play is to point out the health consequences of conflicts. These consequences may extend over several generations. Doctors should encourage conflict resolution and support those who try to avert wars. In doing so it is entirely appropriate for them to be explicit about the nature of the suffering conflicts cause. They must be prepared to challenge concepts such as “surgical strike” and point out the death, disease and disability which will follow the use of arms, whether “high tech” or not.

Doctors and politics

The action that doctors take depends upon whether they see that they have a political role as a group, or whether they regard their role as confined to directly advising on health care issues. In practice, doctors should also consider how they should advise and attempt to intervene in conflict resolution. As individuals they may feel that they have nothing to offer, but collectively they are able to add their voices to a pan-professional approach. This necessarily has implications for the groups that doctors join — their national associations and the specialist societies. These organizations should respond to the wishes of their members; on occasion they should also prompt them to address new issues. Those working within such organizations, as staff or as elected representatives, should be looking for opportunities to present professional “evidence” and collaborating with their sister

organizations to ensure that the advice or evidence provided is coherent, comprehensive and compelling.

It is simply not acceptable for doctors' organizations to pass on to others the responsibility for finding opportunities to speak out, to lobby, campaign or otherwise influence the decision-makers. Doctors have in many fields demonstrated their ability to sway public opinion. As individuals they are, in most countries, respected by the general population. They are among the best educated and best paid members of society. Their education and knowledge is a common bond between them, and they are thus readily able to organize themselves as a group, especially for the exploration of science and medicine. These factors should be used for the benefit of "public health", which must include lobbying and other interventions to ensure that politicians and the populace understand the nature of suffering caused by conflict. Doctors should also seek opportunities to predict the potential suffering and to reduce that as well.

Sometimes doctors state that they cannot become involved in campaigning against conflict, or against certain weapons, or indeed even for certain standards in humanitarian aid, because they say they are not "qualified" or expert. But this does not stop doctors from discussing smoking, or HIV disease and public policy. They simply need to see conflict and weapons placed in a clear public health perspective.

Doctors reluctant to engage in this debate must realize that their reluctance will be welcomed by those who wish to keep the humanitarian arguments in the background or to foster the fear, prejudice and anger which are the prerequisites of public support for conflict. In the early days of both the Falklands War and the Gulf War, the voices of those in the UK who warned that British troops would inevitably be injured or die were not welcome. An explicit understanding of the cruelties and suffering of conflict is not conducive to public support for those who wish to engage in conflict, and in that phase humanitarian appeals and calls for caution do not suit their purpose.

The use of medical knowledge in conflicts

Whether doctors and other health care professionals want the role or not, it is inevitable that their skills and knowledge will play

some part in conflicts. By easing the direct suffering of combatants on the battlefield, by reducing the body count, they may make war more acceptable. It was said during the Vietnam War that public support for the anti-war message was directly related to the number of body bags shipped back home. If the medical care had been less well organized, less efficient and less successful, more combatants would have died and the war might have been more widely rejected by the public at an earlier date. It is agreed by many medical organizations that in situations where doctors see individuals who have been subjected to fundamentalist punishments, they should not collaborate in order to ease the suffering, for example by performing the ritual amputations. No one has suggested that doctors should take the equivalent approach to war by denying medical care; but the corollary is that they must be very explicit to the public about the suffering they are seeing and treating.

Doctors are uniquely positioned to monitor the effects of a conflict on the whole population, as well as identifying those most seriously affected. It is health care workers, and especially doctors, who sign death certificates, who treat the injured and record both the cause and effect of the injury. They also track and treat epidemics and diseases due to deprivation, whether from poverty or for social reasons, and do so with regard to combatants and non-combatants alike. Doctors are used to dealing with statistics, particularly epidemiological data. These statistics need careful interpretation. There is much in common between the interpretation of general epidemiological data and the interpretation of trends in weapons injuries.

Medical neutrality

When doctors treat the wounded they are ethically obliged to do so without consideration of the sex, race, nationality, religion or political opinions of the wounded person, or of any other criteria. Because of the obligation to offer their services to whoever needs their help, the concepts of medical impartiality and of medical neutrality were born. This, in terms of international humanitarian law, effectively rules out health care workers and institutions as legitimate targets. But one of the changes observed over the last decade has been

a decline in respect for their role, and a deliberate targeting of doctors and of hospitals, in recent conflicts. When health care and its providers are put in jeopardy in this way, those agencies that provide aid workers and facilities may be forced to reconsider doing so. In Rwanda, Bosnia-Herzegovina and Kosovo there was clear evidence of the targeting of doctors and medical facilities. Similar problems have also been seen in Sierra Leone, East Timor and Chechnya, where health professions were attacked alongside other civilians. Authorities targeted doctors who were fulfilling their ethical obligation to practise their skills without discrimination.

The Kosovo conflict provides a comprehensive case study of how health workers continue to carry out their work in accordance with their ethical obligations, how they are attacked for doing so and how eventually they become sought-after targets. At the same time, conflicts in the former Yugoslavia show how the neutrality and safety of health care institutions have been systematically violated. In part this reflects the problems of international humanitarian law, which in turn reflects the nature of historical conflicts between States. There is an evident need for the difficulties that arise when wars are within States to be covered more clearly by humanitarian law. Even where the conflicts fall outside the scope of the 1949 Geneva Conventions, the duties of doctors continue to be governed by international codes of ethics. Thus doctors are equally bound to help all patients regardless of nationality, politics, race, religion, etc., and indeed regardless of their own personal safety, but the protection that they are offered by customary law and international treaties may be limited.

Members of armed forces of States and rebel groups have recently flouted the neutrality of health care institutions, which are entitled to protection under the Geneva Conventions and customary international law. In the conflict in Sierra Leone UN peacekeeping forces (from Nigeria) were reported to have stormed a hospital and executed about 28 patients, including two children, who were suspected of being rebels. The fact that rebel forces had apparently committed similar atrocities is no defence; if UN troops ignore international humanitarian law there can be no hope that others will respect it.

Medical neutrality has a purpose. It honours the Hippocratic ethical tradition in medicine. In doing so it acknowledges that by protecting medical personnel and the facilities in which they can work, the suffering engendered by war can be alleviated. Doctors must therefore take part in a systematic campaign to persuade States to recognize explicitly the importance of medical neutrality, regardless of the political circumstances in which they find themselves.

Because of their concern about the increasing number of breaches of medical neutrality, a number of health care professional and human rights organizations have been working for some time to lobby for a Special Rapporteur on Breaches of Medical Neutrality under the UN system. The idea behind this would be to gather data on breaches and to investigate how and when they happen. There should also be the possibility to take action against States which allow violations to happen. Such a rapporteur would base his/her work on the existing codes of medical ethics. The level of support for this concept is growing — perhaps directly reflecting the increasing recognition of the occurrence of breaches. The very fact of explicitly recognizing medical neutrality in this way should increase its status and respect for it.

It is obvious that the collection of data by a rapporteur requires action by all health professionals. First, they should continue to honour their ethical obligations, and secondly they should systematically report any violations and record the role of the State, the army or others in giving rise to such violations.

Quite apart from violations of neutrality and even the treatment of individuals, doctors see a wide variety of diseases around areas of conflict. Much of the morbidity and mortality in conflict — the suffering — stems from the “classical” public health effects of hostilities. Simply put, destruction of the infrastructure leads to illness and death. In times of conflict, even where the civilian population is not displaced, there is often a disruption of water supplies and sewage systems, as well as power supplies and thus heating, lighting, refrigeration and air-conditioning. Food supplies, too, are disrupted and in many countries this also means incomes disappear for farmers. All this raises the likelihood of epidemic disease and especially of diarrhoeal diseases

alongside the other killer diseases of vulnerable young and old people. Doctors are inevitably involved in planning for the containment of these diseases in the non-combatant population, and in many cases in the displaced population.

The medical lessons of conflict

Even where doctors deny themselves a role in local, national or international politics, the medical profession has always been involved in conflicts. Throughout history, healers and later trained health care workers of various types have offered help to those injured in battle. Since Solferino health care workers have increasingly played a major role in assisting those displaced by war. The development of services has mirrored the development of training for different categories of health care workers.

In some cases conflicts have sparked intensive developments with regard to the quality of training, service provision or pure medical research. Florence Nightingale's observation of the poor organization and delivery of nursing services to injured soldiers in the Crimean War has had a lasting impact on the training of nurses, at least in the United Kingdom. The need to aid injured servicemen with extensive burns during the Second World War was a major factor in developing the management of burns, and of reconstructive plastic surgery.

Despite these examples of dealing with crises, too little time has been spent considering what could be done more systematically by those health care workers, and especially the medical profession, to reduce and alleviate the suffering inherent in conflict.

It is a truism that war causes deaths, but equally war causes suffering. That suffering has a number of causes, which are directly or indirectly related to the nature of the war, the weapons used, its duration and the steps taken by governments and other authorities to moderate its effects. Unless we first identify and consider those factors we can do little to ease or limit suffering. The risk is greatest for those on and near the actual combat zone; however, the nature of modern wars means that the persons at risk include those who do not leave their homes. It cannot be overstressed that today's wars are fought not on

distant battlefields, but around the towns and villages in which the general population live.

Much of the suffering and many of the deaths are a direct effect of weapons. The traditional role of the doctor in response to this has been to consider the effects of the weapon in terms of the injury it causes and to prepare responses to deal with that injury. Thus medicine in conflict has studied the effects of burns and developed protocols to deal with them and to reconstruct damaged tissues afterwards. In the same way surgeons in conflicts have made enormous progress in the management of burns, bullet wounds, anti-personnel mine injuries and so on. In the United Kingdom it is acknowledged that some of the most important advances in the management of trauma came from Northern Ireland, where the trauma often resulted from incidents including bombings and “punishment shootings” which were part of the so-called “troubles”.

In some countries the conflict can include the organized targeting of some individuals and their subjection to ritual punishments. The conflict may be between those who pursue fundamentalist beliefs and those who have espoused a less absolutist regimen. Medical activities on either side can be seen as support for their cause, rather than as a manifestation of medical impartiality. In these circumstances doctors have to decide whether to collude with those effecting the punishment, or whether they should oppose them. This has been a significant problem for doctors working for various agencies in Afghanistan. Should they help the Taliban to carry out punishment amputations under Shari’a law, should they help to treat the prisoners afterwards, or should they take a purist view of refusing to help in any way, acknowledging that this could increase the morbidity and mortality levels. In seeking solutions agencies are effectively considering not only the individual who is being punished but also the impact their refusal could have on future punishments.

Furthermore, doctors offering medical aid in conflict zones may become aware of human rights abuses. The existence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and in future of the International Criminal Court, means that these doctors may have to be prepared to give evidence. Certainly

their epidemiological data is likely to be of use in preparing evidence to show whether certain forms of mistreatment were planned and may indeed amount to war crimes. While gathering data may be possible, agencies face a further dilemma in considering when to speak out about the abuses they have observed. Speaking out early might alert other agencies, and indeed the UN, to the need to intervene, but it might also lead to ejection of the agency and increase the global level of suffering.

In addition, doctors have to consider how to persuade agencies providing emergency relief and other humanitarian assistance to gear their aid and services to actual needs.

Damage to the civilian infrastructure, displacement of parts of the population and disruption of supply lines, agriculture and other industries lead at least to poverty and often to extremes of deprivation. These social conditions are not only an immediate danger but also have long-term effects, especially on young children. The ill effects of the conflict will thus go on for many years beyond its apparent limits.

Rape as a weapon of war

Other “weapons of war” must today be considered to include rape. Throughout history it has been a part of warfare, but is increasingly occurring on an organized basis in modern conflicts. Rape is used in a variety of ways, for instance as a genocidal agent often accompanied by the deliberate transmission of HIV; as a weapon to cause continuing shame, especially for Muslim women in recent conflicts; and in the form of enforced prostitution, including the use of comfort women by the Japanese in World War II. The International Criminal Tribunals for the former Yugoslavia and for Rwanda have recognized rape as a war crime and in some cases as a form of attempted genocide. Doctors dealing with rape victims have to be sensitive to cultural issues, to the women’s psychological and physical condition and to the need to present evidence to criminal tribunals. Too often the services provided for these women do not take their needs and cultural requirements into sufficient account. In providing such services doctors and the agencies for whom they work

must discuss service needs and cultural settings with the women themselves.

There are many theories about the reasons behind rape — ranging from natural expressions of rage and sexuality to organized campaigns to destroy the morale of the enemy, and even to genocide. In a certain sense they are largely irrelevant — with the exception of genocidal acts, which have particular legal significance. What matters is that they leave behind victims who will need the support of doctors and other health care workers. It is easy for doctors to think of the immediate physical consequences of rape and to ignore the longer-term psychological and social consequences. When considering their role in service provision these workers will, in order to provide the right services, have to understand the context in which the rapes took place, the respective society's attitude towards the raped woman, and the availability of other services such as genito-urinary medicine, abortion and psychological support.

Sensitivity to societal and cultural factors is important for all aspects of medical and health care. The need for it is most acute in relation to sexual activity. Services to help women who have been raped must recognize the cultural context in which the women live. This must include sensitivity to religious and other factors, as well as appropriate “independent” translation services.

War and public health

Much of the other suffering can be said to have a direct “public health” cause. It arises from the disruption of social and societal infrastructures. This can be of direct or indirect origin, i.e. physical disruption of main water supplies, sewage pipes and communications networks including roads, or movement of populations away from settled towns and villages to refugee camps that have no infrastructure.

Historically, conflicts often included the “sacking” of cities, sometimes after a prolonged period of siege. The defeated city would be razed to the ground, not least to stop its inhabitants from retaining any power or ability to resist their conquerors. In the 20th century cities were devastated by the “blitzkrieg”. Both had the

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same effect. They destroyed housing, water-supply systems and sewerage and brought down power supplies. The effect upon the civilian population was much the same. Those who were not injured or killed by the original destructive force lost their shelter and supplies of safe water. The medical conditions seen are also similar: diarrhoeal diseases, malnutrition and hypothermia/exposure, as well as the direct physical sequelae of collapsing buildings, etc.

Conflicts also create wasteland, especially by the contamination of land by anti-personnel landmines. The presence of these devices renders land unusable, and often causes widespread malnutrition. While the injuries caused by exploding landmines are well catalogued, the still commoner diseases of deprivation are less comprehensively described.

In these circumstances the population suffer both physically and psychologically. Trauma of the latter kind are particularly common in displaced persons. In our attempts to help them survive we often forget or ignore the consequences of displacement. These include disruption of the familial and societal support networks, plus a potentially permanent sense of insecurity, of excessive concern for one's physical safety.

Using specialized medical knowledge

Doctors who are part of the political process in their countries act like any other politician, in that they renounce their clinical credentials. It is unreasonable to expect them to use their clinical knowledge or to exert all their diagnostic and therapeutic "arts" in conflict resolution and prevention. But if they are lobbied by other health care workers and presented with clinical and public health information, they should be better able than other political colleagues to assess this information and apply it to clinical circumstances. Moreover, their ability to defend themselves against charges of inhumanity may be reduced if it is clear that they had the specialized knowledge to understand the data presented to them in terms of the effects upon the population. There are various ways in which doctors could take action:

- Doctors could encourage radio and television services to depict war and conflicts as they really are, showing the devastating effects that weapons have on individuals. They should vehemently oppose the sanitization of war by news media, as this makes conflicts more acceptable to the general public.
- Doctors should use their specialized medical knowledge to comment on conflicts. They should point out what the actual effects will be. They should be explicit about human suffering, making it clear that limits are impossible to enforce and that suffering will extend far beyond the combat zone and the combatants themselves.
- Doctors should discuss the epidemiology of conflict, and especially the public health issues, such as the diseases and deaths that will follow disruptions of water supplies and sewerage or the displacement of populations. If doctors feel that they lack the necessary specialized knowledge, they should be helped to understand that much of what they can do in reducing suffering has to do with public health and epidemiology. A minimal understanding of the epidemiology of warfare gives them the tools for significant and effective interventions.

The SIrUS Project

These are of course not the only ways in which doctors can bring their expertise and influence to bear. The ICRC's SIrUS Project has clearly identified the role that doctors and others play in the legitimization — or not — of new weapons.¹ Using medical knowledge, gained in conflicts, of the effects of weapons to identify the types of injury they can be predicted to produce puts health workers in a new position. It enables them to give objective answers to some of the questions raised by new weapons. While it is still unclear how much this project will affect the licensing procedure for new weapons, it is inevitable that it will have some impact.

But the development of this project also demonstrates that there are many individuals who do not want medical involvement in

¹ Robin M. Coupland, FRCS, and Peter Herby, "Review of the legality of weapons, a

new approach: The SIrUS Project", IRRC; No. 835, September 1999, p. 583.

the assessment of weapons. The antagonism that some have shown raises questions about the reasons for this reluctance. Do they really believe the issue is too complex? Or that the epidemiological data is too insubstantial? Or are they afraid that a cool scientific assessment with a humanitarian core will limit the freedom of States, weapons designers and manufacturers to produce “new” weapons. The technological advantage that some States have over others could diminish if medicine were to ally itself with international humanitarian law and control the development of some types of weapons.

The SIrUS Project brings me back to the beginning of this article, namely the role of doctors not only as individuals but within organizations. Within countries doctors can act together and attempt to exert political influence. By grouping together internationally, doctors can have even more influence, not least because such groupings can avoid apparent party-political stigmata. The efficacy of such groups is seen in the work of International Physicians for the Prevention of Nuclear War, Physicians for Human Rights and many other organizations in which doctors form a significant part. The World Medical Association, as an organization of the national medical associations of many countries, could be one of the most powerful of such groups. But it also brings to light one of the problems: many of its member associations are unused to undertaking high-profile actions, especially where to do so might bring them into conflict with their governments or others. Those members who do take such actions must help those who have not yet done so; the alternative is for the World Medical Association to become a group which lobbies only for the good of its members and not for “public health”. Associations such as the Turkish Medical Association have acted in exemplary fashion to highlight human rights abuses domestically. Their willingness to embrace the broader humanitarian role of doctors should help others to explore the actions they could take.

Conclusion

In summary, doctors have three main roles. The first is to attempt to minimize the suffering caused by conflict by applying their specialist knowledge and skills to those who are affected. The second is

to use epidemiological principles and collected data to attempt to reduce the potential for such suffering. The third is to avoid the medical sanitization of war and instead to show the true face of the suffering it inflicts and work to ensure that this will change public and eventually political opinion. The role of doctors is not unique, many others can do some or all of these tasks. Doctors are, however, at least unusual and perhaps even unique in the potential depth and breadth of the knowledge, authority and respect that they can bring to accomplishing them. If they fail to engage in this endeavour, then they will continue to be occupied by the treatment of reducible and possible preventable morbidity.

The reluctance that many doctors feel about engaging in such difficult debate and decision-making can best be overcome by organization: grouping together both nationally and internationally gives depth of knowledge and skills, depoliticizes key decisions and encourages international debate. Doctors *can* prevent suffering or reduce it to a minimum. By joining forces they can make this happen. ●

Résumé

Prévenir et limiter la souffrance en cas de conflit : le rôle de la profession médicale

par VIVIENNE NATHANSON

Prévenir et limiter la souffrance, tel est le rôle principal de la profession médicale. Dans cet article, l'auteur décrit les tâches spécifiques qui incombent au personnel médical, en particulier aux médecins, en situation de conflit ou de guerre. Après avoir examiné, notamment, la position du médecin face à la politique, la neutralité du personnel médical et les possibilités qu'il a d'influencer le choix des méthodes et moyens de guerre que feront les belligérants, l'auteur définit les trois rôles que le médecin peut et doit assumer :

- *mettre à disposition ses connaissances professionnelles et son expérience afin de limiter la souffrance des victimes de conflits armés ;*
- *sur la base de l'expérience acquise lors de conflits, tenter de réduire tout ce qui peut provoquer la souffrance ;*
- *tenter d'influencer l'opinion publique en luttant contre le risque de tomber dans le piège de la guerre « propre », par des témoignages sur le vrai visage de la souffrance qu'elle engendre.*

Avec son expérience professionnelle unique et l'autorité que lui confère sa tâche, le médecin peut, mieux que quiconque, tenter de rendre la guerre moins cruelle.

Journalists' reports cannot prevent conflict

by
CHRISTOPH PLATE

Declining interest in historical background and conflict analysis

During the genocide in Rwanda, in April 1994, a German radio presenter asked me, the new foreign correspondent who had just arrived and suddenly and unexpectedly found himself caught up in a war, how things really stood with the Hutus and the Tutsis down in Rwanda. The presenter obviously had not prepared well for this live broadcast or perhaps it wasn't his best day. I managed to cover up for the embarrassing mistake: what he'd meant, of course, was Hutus and Tutsis. This slip raised the question of how difficult it must be for the reader, listener or viewer if the editor himself can't get even the most important facts right about the greatest genocide in Africa in modern times. At that time, from April to June 1994, victims of the massacres could be seen each day on television screens in Europe and the United States. Yet very few people had a clear idea of who was bashing whose brains out in Rwanda. Not to mention the more probing question of why it was happening or whether it could have been prevented.

And what seems far away to the media consumer is generally also remote for politicians. In the editorial offices, reports on skirmishes, forthcoming acts of war and impending massacres might catch

CHRISTOPH PLATE is a correspondent for Swiss and German media in Africa: He lives in Nairobi, Kenya. Translated from German by the ICRC.

the special editor's eye but are otherwise of little interest to anyone. It would be nice — but naïve — to think that journalists, reporters and correspondents in Africa would be able to prevent man-made disasters by writing critical reports. For foreign correspondents are reporting for their clients in Europe or the United States. And even if they are writing for an English-language or French-language medium, the warlords on the African continent couldn't care less what is being said about them in *Newsweek* or *Le Monde*.

It is not until war breaks out or famine is rife or there is a massacre that people begin to wonder what caused it. The period prior to the disaster then becomes a news item or a background story. Reports in the media can indeed influence conflicts, but they can hardly ever prevent them. Television pictures create the atmosphere. An empathetic report on a famine or, better still, pictures of emaciated mothers and wailing children may prompt the competent minister or committed parliamentarians in Europe or the US to take action — after all, they want to be re-elected. But politicians don't win votes for the cautious prevention of conflict. And advance warning and prevention of conflicts are incompatible with the way politics and the media seem to work today.

Of course there are dozens of exceptions — the serious daily which disregards current fashions in publishing and does not feel it must hype up every topic simply because others do, or the politician who acts without the ulterior motive of winning elections. But these exceptions are becoming increasingly rare. In politics and journalism the pace is constantly being stepped up by competition, the plethora of information and the speed of its transmission. Time to reflect is becoming a rarity. A good deed done by a politician today is already forgotten tomorrow. How many readers of a French or Belgian daily can remember what their governments did early this year to help the inhabitants of Mozambique who were trapped by floods?

Yet many observers still believe that journalism can change the world. The role played by correspondents during the Viet Nam war is cited as an encouraging example. It was not until graphic reports and pictures from the forests of Indochina outraged public opinion in the United States of America that the government found itself compelled,

after much protest, to make peace with the Vietcong. No war since then with massive US involvement has ever been reported on so freely, for military strategists resolved that journalists should never again be allowed to bring so much influence to bear on the outcome of hostilities. Since Viet Nam, the press has never, to my knowledge, managed to end or prevent a war.

As a journalist in Rwanda

Let us return to Rwanda and the question of whether journalism can achieve anything at all in situations of crisis. In March and April 1994, BBC correspondents reported from the capital Kigali that trouble was brewing. The Rwandan government, led by President Habyarimana, and the rebels of the Rwanda Patriotic Front (RPF) had agreed in the Arusha peace treaty to end the civil war. The Tutsi minority was henceforth to be allowed to participate more fully in public life and in the government. Tension rose in the capital shortly before a joint government was formed, since rumour had it that those close to the President would never agree to share power with the rebels. The Canadian commander of the UN troops, General Romeo Dallaire, cabled New York to warn of a genocide, reporting that warnings he had received from the Rwandan army and the ruling party led him to expect a disaster of unprecedented dimensions and that the militias were being heavily armed. But Dallaire's warnings went unheard, as did those of the journalists. Kofi Annan was responsible for the deployment of UN troops at that time and was thus General Dallaire's chief. He ignored the alert from Kigali. Admittedly, few could have imagined the extent of the killings and atrocities that began on 6 April. The genocide which claimed up to one million victims within the next three months, many of whom were hacked to pieces with knives, defied the imagination of journalists and the staff of relief organizations.

Within hours after the bloodbath began it was clear that disaster was imminent in that small country, yet only the occasional correspondent travelled to Rwanda in the first few days and weeks. Was it fear of the dangers or lack of travel facilities that prevented so many colleagues from going to Rwanda, or were they speechless at the horrors taking place? What is more, only a few relief organizations stayed

on there; one was the ICRC, which was running a hospital in the centre of Kigali. Meanwhile the killing continued. Corpses with bloated bellies floated down the rivers, and massacre victims were dumped in latrines. The organizers went about their task meticulously, Broadcasting on mobile radio transmitters their calls to murder and reading out lists... And still nobody heard the appeals by General Dallaire, relief organizations and journalists, calling on their governments and the Security Council to send more UN troops to Rwanda to stop the slaughter. The reaction by the governments in Bonn, London and Paris, and by the Security Council in New York, left most of the admonishers at a loss for words, for instead of being increased, the number of UN troops in Rwanda was drastically reduced. Then after the assassination of ten Belgian soldiers by militiamen most of the remaining troops from Belgium, Senegal, Ghana, India and Zimbabwe were withdrawn in order to avoid exposing them to further risk. And that was precisely what the organizers of the genocide had counted on.

Those who stayed were a handful of journalists and representatives of relief organizations, some of whom remained in the war zone contrary to instructions from their headquarters. The Polish journalist Ryszard Kapuscinski, who is accused at times of neglecting the facts and creating a literary truth, voiced the criticism that modern war reporting devoted little attention to the political context and none whatsoever to the historical causes of events. But since SOME reporters themselves do not have the answers to their own questions they cannot answer the media consumers' questions or make pertinent assessments.

Two types of reporting

In reporting from and about Africa there are two groups of journalists which differ from each other through their familiarity or unfamiliarity with the subject. The first group comprises foreign correspondents who are posted in Abidjan, Johannesburg or Nairobi and who have generally made a close study of the region on which they are reporting. Although it no longer seems to be a matter of course, the majority of these correspondents are very widely read in the history of the continent, the causes of its conflicts, its literature and the various customs practised from Abuja to Zanzibar. The editors who are in

charge of the Africa desk in the editorial offices back home and are in regular contact with the correspondents also belong to this group, although they do not live in Africa. The second group consists of all those who fly in only when there is a disaster. Many of the reporters who converge from all over the world are sometimes not sure where they are. In many cases they don't even speak the colonial language of the country in question, nor have they any idea of either when or why the country became independent or from whom it won its independence. This group of generally very young, very avid "semi-professionals", as the German relief worker Rupert Neudeck once called them, are under tremendous pressure from the editorial offices back home to deliver as highly sensational stories as they can. After all, the travel expenses have to be justified.

When the genocide in Rwanda was over, in July 1994, a great number of such reporters flew into the town of Goma in eastern Congo, just over the border from Rwanda. Hundreds of thousands of Rwandan refugees had gathered there, fleeing for fear of reprisals to the neighbouring country at the end of the civil war and genocide.

The reports of the overwhelming number of reporters gave rise to a wave of offers of help. In Germany the sympathy for the fate of the refugees went so far that the German Chancellor arranged for a series of short-term missions by volunteer doctors and nurses — which ended in a fiasco, however, since the volunteers had not been properly prepared. The question of why the refugees had come to Goma, and the realization that amongst the Rwandans, who were plagued with cholera and malnutrition, there were also numerous killers, interested very few of the journalists and government representatives who had arrived from Europe. Criticisms to the effect that the repressive structures which had made the genocide possible in Rwanda were being maintained through the refugee camps were dismissed.

The hordes of reporters and the flood of aid which descended upon the Rwandan refugees, may have seemed a mockery to many a survivor of the genocide. But this lack of historical understanding and political interest was like a continuation of the international community's silence during the genocide. The inertia of governments and relief organizations during the genocide itself was

compensated with generous assistance for the refugees, amongst whom there were many murderers.

It is not always easy either for correspondents posted in Africa to issue warnings and admonitions. A looming conflict in Kosovo has more immediacy for editors than an impending massacre in Burundi or Liberia. It is part of human nature for people to be more preoccupied with wars at their front door than with those further afield. The Viet Nam war was no exception, for since 30,000 Americans were killed it was a war that took place in every American living room.

The power of the visual image

Moreover, warning of disasters is not thought to be the concern of the electronic media; it supposedly takes place in the newspapers. Television exists by transforming news into pictures, and you can't get any footage of massacres about to happen in Burundi or the flaring of renewed hostilities in Sierra Leone. But for many newspapers events become newsworthy only when people have already seen them on television. The massacres in Burundi and the mutilations in Sierra Leone did not become news, and sensational news at that, until the victims had been shown on TV.

The relief organizations have realized that television is their most important medium. It is for similar reasons that rebels first occupy the television station and then the seat of government. Whoever controls television broadcasting controls the people, their views and their feelings. Televised pictures make the work of the organization known and donations pour in. Rupert Neudeck, the head of the Kap Anamur relief organization, appeared on German television several times during the war in Kosovo, and after these appearances his small organization received so many donations that he had no choice but to pass on several of the millions to other relief organizations.

To maintain interest in emergencies and disasters, there must be constant reminders of them. The rivalry between relief organizations is the equivalent of media competition over an interesting story. Many of the relief organizations born of social commitment in the course of the last three decades vie for sponsors' donations and contri-

butions from national budgets or that of the European Union. At stake are jobs in the relief organizations and amongst their suppliers.

Efforts to attract the attention of journalists by means of information leaflets, statistics and dire warnings of imminent famine, floods or droughts have taken on inflationary dimensions. Correspondents have developed a flair for knowing which relief organizations only issue warnings when the emergency really is imminent and which groups make a mountain out of a mole hill.

One example was the warnings of the impending famine in Ethiopia in the spring of 2000. The World Food Programme of the United Nations had been sounding the alarm for months about bottlenecks in food supplies and had been calling for a forward-looking supplies policy. It was more by chance that the media became aware of the drought in Ethiopia: the Ethiopian Foreign Minister delivered a speech in which he attacked the West and urged that the authorities must not wait again until skeletons were to be seen on television. There was no world-shattering news apart from that. So journalists streamed into Ethiopia, where they were received by the relief organizations, busied themselves around the few hungry people, and wrote heart-rending reports. But the appeals for aid were out of all proportion to the real extent of the disaster. Some relief organizations actually conjure up disasters. Several of them said that things might get as bad as they were back in the 1980s, without having any surveys to back them up. The European Union and the United States immediately pledged hundreds of thousands of tons of food aid. It was only then that the head of the World Food Programme, Ms Bertini, brought more objectivity into the debate, stating that this was not a famine but a drought. Those relief organizations which had tried — with impunity — to collect funds by exaggerating the situation in fact did the cause of the needy a disservice, and the hotfoot journalists damaged the credibility of their profession.

Under the growing pressure of competition most media reporting has replaced analysis with cheap propaganda. What is more, since the end of the Cold War Africa has lost much of its strategic importance and is going through a period of economic marginalization which is steadily reducing interest in the continent. To give an account of the conflicts there, for instance in the Democratic Republic of

Congo, or an explanation of the various influences exerted by the neighbouring States of Rwanda and Uganda requires interest in the editorial office and space in the media. These requirements are met by only a handful of media, such as certain critical daily newspapers in Switzerland and Germany.

These newspapers are also read by decision-makers. The officials in the Swiss Ministry of Foreign Affairs are presumably more inclined to seek information in the *Neue Zürcher Zeitung*, the *Frankfurter Allgemeine* or the *Financial Times* than in the widely available tabloids with their scant and piecemeal news coverage.

Media and prevention?

But the media are unlikely to have a preventive effect. Critical reporting on Liberian President Charles Taylor presumably forced him to introduce a relatively civilized form of rule and deterred him from behaving like a bush fighter once he was the elected President. But in the 1990s that reporting did not stop him from waging a brutal war on his own people. Taking preventive action is the task of relief organizations such as the ICRC: talking to officers, prison guards and warlords in order to prevent the situation from deteriorating even further.

The former UN special envoy to Somalia, Mohamed Sahnoun, did a lot of thinking on the possibility of preventing conflicts from breaking out. He concluded that an article in the *New York Times* has much more effect than ten of his reports to the United Nations in New York. But even Sahnoun overestimates the powers of the press. Experience has shown that conflict prevention is much cheaper than subsequent reconstruction. Yet neither the relief organizations nor the press seem able to break this vicious cycle of destruction, reconstruction and renewed destruction. The task of the foreign correspondents should be to report on the reasons for this vicious cycle.

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Résumé

Les articles de journalistes ne peuvent empêcher les guerres — Moins d'intérêt pour le contexte historique et l'analyse des conflits

par CHRISTOPH PLATE

Est-il vrai, comme le pensent beaucoup d'observateurs, que les médias peuvent changer le monde? — Mettant à profit ses expériences, vécues notamment en Afrique, l'auteur examine les difficultés du métier de journaliste dans des situations de crise, et les limites qui lui sont imposées. Après avoir examiné la couverture par les médias des récents drames humanitaires survenus en Afrique, il conclut que leur pouvoir afin de prévenir un conflit ou une catastrophe est en réalité très faible, voire nul.

Peace and the laws of war: the role of international humanitarian law in the post-conflict environment

by

COLM CAMPBELL

While international humanitarian law has long generated a rich body of scholarship on substantive legal issues, particularly in relation to combat situations and military occupation, considerably less attention has, until relatively recently, been devoted to its role in post-conflict scenarios. What consideration there was tended to focus on the Nuremberg¹ and Tokyo² precedents emphasizing justice-as-accountability, with occasional events, such as the Eichmann trial, serving as a catalyst for broader discussion.³

The reasons are obvious: there was little discussion of the role of international humanitarian law in such situations because there seemed little to discuss (though this begs the question as to whether the law might have played a larger role if a broader debate on its possible contribution had emerged earlier). With the closing of the Tokyo and

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Nuremberg Trials and those under Control Council Order No. 10, an internationally validated infrastructure came to an end. The absence of any similar ad hoc bodies, the unwillingness of the international community to establish a standing tribunal with criminal competence in the area, and the limited use of humanitarian law by national criminal tribunals in post-conflict situations despite the creation of universal jurisdiction over grave breaches of the four Geneva Conventions of 12 August 1949 on the protection of war victims all contributed to a situation in which international humanitarian law seemed to be playing quite a limited role in the post-conflict arena, generating only sporadic academic interest.⁴ Compounding matters was a tendency by some lawyers towards compartmentalization, resulting in a perception of humanitarian law as somewhat removed from the mainstream of legal debate.

The picture has now changed almost beyond recognition. Not only has the role of international humanitarian law in post-conflict situations become an area of increasing scholarly focus, there has also been a noticeable whittling away at the perceived isolation of this area of law, with the result that the links between humanitarian law and other areas of public international law have been become more clearly visible.

¹ The Nuremberg trials have generated a vast body of literature. For some early writing see H. Ehard, "The Nuremberg Trial against the major war criminals and international law", *AJIL*, Vol. 43, 1949, p. 223; R.W. Cooper, *The Nuremberg Trial*, Penguin Books, 1947; V. H. Bernstein, *Final Judgment: The Story of Nuremberg*, Latimer House, 1947; R. K. Woetzel, *The Nuremberg Trials in International Law*, Praeger, 1962.

² See A. C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, Collins, 1989; R. H. Minear, *Victors' Justice: the Tokyo War Crimes Trial*, Princeton University Press, 1971; P. R. Piccigallo, *The Japanese on Trial: Allied War*

Crimes Operations in the East, 1945-1951, University of Texas Press, 1979.

³ See H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Faber and Faber, 1963; B. Sharpe, *Modesty and Arrogance in Judgment: Hannah Arendt's Eichmann in Jerusalem*, Praeger, 1999; G. Hausner, *Justice in Jerusalem*, Nelson, 1967.

⁴ See T. J. Murphy, "Sanctions and enforcement of the humanitarian law of the four Geneva Conventions of 1949 and Geneva Protocol I of 1977", *Military Law Review*, Vol. 103, 1984, p. 3, and R. Bierzanek, "The responsibility of States in armed conflicts", *Polish Yearbook of International Law*, Vol. XI, 1981-1982, p. 93.

Three factors have contributed largely to these developments: the first has been the growing convergence of international humanitarian law and international human rights law, most obviously in the adoption, virtually verbatim, of the fair trial provisions of the 1966 International Covenant on Civil and Political Rights in the two 1977 Protocols additional to the Geneva Conventions.⁵ This convergence is also evident in the elaboration of a number of codes of conduct and declarations which have attempted to bridge the gaps between human rights law and international humanitarian law in relation to crisis situations of various sorts.⁶

The second factor involves two interrelated developments. One is the emergence in recent years of a trend towards structured (some would say choreographed) peace processes in relation to intractable or stalemated violent conflicts (examples include El Salvador, the former Yugoslavia, Palestine/Israel, South Africa, and Northern Ireland). Since the balance of forces or the circumstances in these conflicts were such that no side was able to achieve a military victory and thus to impose its will on the other(s), the negotiating processes have had to attempt to reconcile the interests and concerns of all sides. This has frequently required that questions of past violations of human rights law and international humanitarian law be addressed. The other, related development has been the process of structured transition from military to civilian rule in recent decades, most obviously in Latin America (examples include Chile and Brazil). These processes have generated a discourse on “transitional justice”,⁷ into which the

5 See generally, R. E. Vinuesa, “Interface, correspondence and convergence of human rights and international humanitarian law”, *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 69; Y. Dinstein, “Human rights in armed conflict: International humanitarian law”, in T. Meron (ed.), *Human Rights in International Law*, Oxford University Press, 1984, p. 345; T. Meron, “The humanization of humanitarian law”, *AJIL*, Vol. 94, 2000, p. 239.

6 These developments are examined further below.

7 See N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols., US Institute for Peace Press, 1995; I. P. Stotzky (ed.), *Transition to Democracy in Latin America: the Role of the Judiciary*, Westview Press, 1993; A. James McAdams (ed.), *Transitional Justice and the Rule of Law*, 1997; A. Brysk, *The Politics of Human Rights in Argentina: Protest, Change and Democratization*, Stanford University Press, 1994.

post-communist transitions in Eastern Europe have fed.⁸ Central to this inquiry has been the question of how democratic successor governments should deal with serious violations of previous regimes, with particular reference to the institutional vehicles for engaging with past violations.⁹ Its themes therefore mesh neatly with those which have emerged in recent peace processes; indeed, it is possible to subsume many legal issues relating to the latter under the general “transitional justice” umbrella.

The third factor, which is directly related to the peace process issue, is the resurrection of the international criminal tribunal model, firstly through the creative use of Chapter VII of the UN Charter in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁰ then by following this precedent with the International Criminal Tribunal for Rwanda (ICTR),¹¹ and finally by the adoption of the treaty-based Rome Statute of the International Criminal Court (ICC).¹² The creation and operation of the ICTY and ICTR have contributed to the overall picture not only through their impact on the development of the substantive law, but also by rekindling a heated debate on “peace versus accountability”. This theme

⁸ See L. Huyse, “Justice after transition: On the choices successor elites make in dealing with the past”, *Law and Social Inquiry*, Vol. 20, 1995, p. 51; E. Blankenberg, “The purge of lawyers after the breakdown of the East German communist regime”, *ibid.*, p. 223; M. Los, “Lustration and truth claims: Unfinished revolutions in Central Europe”, *ibid.*, p. 117.

⁹ For a particularly insightful piece see S. Cohen, “State crimes of previous regimes: Knowledge, accountability and the policing of the past”, *Law and Social Inquiry*, Vol. 20, 1995, p. 7.

¹⁰ The literature on the ICTY is fast becoming unmanageable. For some recent writing (other than the sources listed elsewhere in the footnotes) see S. D. Murphy, “Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia”, *AJIL*, Vol. 93, 1999, p. 57; K. D. Askin, “Sexual violence in decisions and indictments of the

Yugoslav and Rwandan Tribunals: Current status”, *ibid.*, p. 97; J. R. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed., Transnational Publishers, 2000.

¹¹ See V. Morris, V. and M. P. Scharf, *The International Criminal Tribunal for Rwanda* (2 Vols.), Transnational Publishers, 1998.

¹² M. H. Arsanjani, “The Rome Statute of the International Criminal Court”, *AJIL*, Vol. 93, 1999, p. 22; P. Kirsch and J. T. Holmes, “The Rome Conference on an international criminal court: The negotiating process”, *ibid.*, p. 2; M. McAuliffe de Guzman, “The road from Rome: The developing law of crimes against humanity”, *Human Rights Quarterly*, Vol. 22, 2000, p. 335; D. McGoldrick, “The permanent International Criminal Court: An end to the culture of impunity?”, *Criminal Law Review*, 1999, p. 627.

most pointedly aired in a 1996-97 exchange between an anonymous contributor¹³ and Felice Gaer¹⁴ in the pages of *Human Rights Quarterly* — connects many of the developments outlined above: do the requirements of peace-making (Realpolitik) trump demands for accountability for past gross violations of humanitarian law, or can these apparently conflicting demands be accommodated?

The purpose of this paper is not to make yet another attempt at seeking a definitive answer to this question — many forests of paper have already been sacrificed in the exercise — rather it is the narrower task of examining and critiquing the roles which the debates have suggested for international humanitarian law (in terms both of substantive law and of legal process). Particular attention will be given to the law's contribution to the stabilization of the post-conflict environment through its contribution to the reconciliation process. The focus therefore is on legal *impact*, something that can perhaps best be assessed in terms of the institutional vehicles most frequently employed in putting the law into effect: the criminal trial and the truth commission.

It is possible to think of at least three other instances in which international humanitarian law could play an important role in the post-conflict environment. The first is as a reference point in “lustration” processes: the screening out of “bad apples” from security forces by successor governments.¹⁵ The second is in relation to reparation of victims of past abuses. The third is the more generalized contribution which dissemination of the standards and principles of humanitarian law can make to building a culture of rights and responsibilities in the post-conflict environment. And while these concerns are beyond the present inquiry, they will be considered insofar as they help to amplify issues which form the paper's central focus.

¹³ Anonymous, “Human rights in peace negotiations”, *Human Rights Quarterly*, Vol. 18, 1996, p. 249.

¹⁴ F. Gaer, “UN-Anonymous: Reflections on human rights in peace negotiations”, *Human Rights Quarterly*, Vol. 19, 1997, p. 1.

¹⁵ A. K. Stinchcombe, “Lustration as a problem of the social basis of constitutionalism”, *Law and Social Inquiry*, Vol. 20, 1995, p. 245, and Los, *op. cit.* (note 8).

Trial, peace and international humanitarian law

First a warning: the terms of reference of the “peace versus accountability” debate are clearly problematic in international humanitarian law. The suggestion that blanket non-prosecution is a legitimate policy option (“peace trumping accountability”) runs counter to the direct imperative in the Geneva Conventions to repress grave breaches. A formal amnesty for grave breaches would therefore be unlawful, however attractively presented as a necessary part of an overall peace package. Parallel arguments apply in relation to the most serious violations of international human rights law.¹⁶

While humanitarian law does provide for amnesties in relation to high intensity non-international armed conflict — the 1977 Protocol II additional to the Geneva Conventions stipulates that at the end of hostilities the authorities “shall endeavour to grant the broadest possible amnesty”¹⁷ — the provision in question has generally been taken to refer only to offences for which amnesty was possible, and thus not to the most serious breaches of the Protocol.¹⁸ The category of those benefiting could be expected therefore to correspond closely to those who would have “combat immunity” in international armed conflicts, and who would as such therefore be entitled to release at the conflicts’ end.

But between the black-and-white choices of formal amnesty for all crimes versus explicit commitment to prosecute, there are myriad shades of grey, tinged with greater or lesser degrees of unlawfulness. Rather than an explicit amnesty there may simply be a failure to act. This may be the result of an unwritten agreement that

¹⁶ See R. O. Weiner, “Trying to make ends meet: Reconciling the law and practice of human rights amnesties”, *St. Mary’s Law Journal*, Vol. 26, 1995, 857; N. Roht-Arriaza and L. Gibson, “The developing jurisprudence of amnesty”, *Human Rights Quarterly*, Vol. 20, 1998, p. 843; D. Cassel, “Lessons from the Americas: Guidelines for international responses to amnesties for atrocities”, *Law*

and Contemporary Problems, Vol. 59, 1996, p. 196.

¹⁷ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 6(5). Emphasis added.

¹⁸ Roht-Arriaza/Gibson, *op. cit.* (note 16), pp. 864-866.

nothing will be done to advance prosecution at the national or international levels, or a more obscure “understanding” to that effect. A further possibility is that the failure may be due to a unilateral policy decision, or it may reflect a lack of hard evidence, which may in turn be due either to a genuine difficulty in assembling the material, or to a lack of willingness to investigate. In relation to non-international armed conflicts, while it is now recognized that serious breaches of applicable humanitarian law are international crimes,¹⁹ neither Article 3 common to the 1949 Geneva Conventions nor Additional Protocol II contain provisions equivalent to those in the said Conventions creating universal jurisdiction over grave breaches.

For those who wish to secure the greatest possible respect for humanitarian law, it is important that the arguments currently in the public domain on the utility or otherwise of trials involving use of humanitarian law be taken up, if only to make sure that in the grey areas the likelihood of ensuring respect for international humanitarian law is enhanced. This requires a critical scrutiny of the arguments in favour of resort to the law in order to verify that claims for the utility of the law in such circumstances are based not on overblown assertions but on sustainable reasoning.

The utility of trial

Arguments for the utility of trial in the post-conflict environment fall under three main headings: trial as deterrence; trial as justice; and a relative newcomer: trial as a route to truths. In some instances the structure of argumentation proceeds by a direct extrapolation from standard domestic criminological and criminal justice debate — the reference to deterrence theories providing an obvious example. Such a read-across may be doubly problematic: firstly because the international legal order is quite different from the national, a factor which can impinge significantly on the operation of international

¹⁹ T. Meron, “International criminalization of internal atrocities”, *AJIL*, Vol. 89, 1995, p. 554. See also *The Prosecutor v. Tadic*,

Decision in the Appeals Chamber, ICTY, 2 October 1995, case No. IT-94-1-AR72, and *Morris/Scharf*, *supra* (note. 11).

tribunals;²⁰ and secondly because, as Cohen has pointed out, Western-dominated criminology takes as its starting point the existence of a stable democracy — an unwarranted assumption in post-conflict situations.²¹ This is not meant to imply that such arguments are invalid, but merely that they need to be approached with considerable caution. It also suggests the need for a more precise identification of the delimitation between the domestic and international spheres in relation to trial, since it is arguable that the waters in this area have become muddied, at least partly because of a failure adequately to do so.

In fact, four possible trial scenarios need to be taken into account: trial by an international criminal tribunal (which can proceed only on the basis of a breach of international criminal law); trial in the domestic tribunals of a third country, on the basis of a charge framed as a breach either of international criminal law or of a domestic law transposing an international legal obligation (an option which the *Pinochet* case has forced into the public consciousness²²); trial in a domestic tribunal of the State in question for a breach of international criminal law framed as such; and trial in a domestic tribunal of the State on the basis of a charge framed in terms of domestic law which might also have been framed as a crime against international law (for instance a killing might be charged as murder rather than as a crime against humanity). It is in relation to these various possibilities that the validity of the arguments and counter-arguments surrounding the relationship between deterrence, justice, and truth must be judged, rather than in terms of a simplistic “trial-in-the-abstract” standard.

Trial and deterrence

The best that can be said about the viability of deterrence theory in the context of major violations of international humanitarian law is that it is, as yet, unproven. Standard criminological literature

²⁰ For a critical examination of this view see T. J. Farer, “Restraining the barbarians: Can international criminal law help?”, *Human Rights Quarterly*, Vol. 22, p. 90.

²¹ *Op. cit.* (note 9), p. 10.

²² *R. v. Bow Street Metropolitan Magistrates and Others, ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97. See R. J. Wilson, “Prosecuting Pinochet: International crimes in Spanish domestic law”, *Human Rights Quarterly*, Vol. 21, 1999, p. 927.

describes two kinds: specific (deterrence by trials of those who have already engaged in criminal behaviour), and general (deterrence of potential criminal behaviour in society at large). After the combined experiences first of Bosnia and Herzegovina, and then of Kosovo, there can only be said to be a severe doubt as to the specific deterrent value of international trials in such situations, a conclusion which Cohen had reached well beforehand when he branded the theory as “dubiously relevant”.²³

While the possibility of trial for breaches of humanitarian law before an international tribunal might, because of the gravity which international trial signifies, be taken to have greater deterrent value than trial before a domestic court, this does not appear to be the case. At least part of the problem may be that referred to by Farer: “relative certainty trumps relative severity” in the deterrent stakes.²⁴ Thus since the numbers tried in international tribunals must, on the basis of logistical considerations alone, be relatively small, individual violators will know that the chances of their being so punished are remote, and the deterrent value will be correspondingly low. The picture might be different if widespread, systematic and impartial domestic trial for such breaches were instituted at the domestic level — indeed it is arguable that it could be different *only* if that were to occur — but until such evidence becomes available, theories of specific deterrence will remain of unproven value in the contexts under examination.

Admitting that the ICTY may have achieved little under the “specific” heading even before Kosovo, Payam Akhavan, who has acted as Legal Adviser to the Tribunal, sees it as contributing significantly to general deterrence in that its operation serves to produce “the gradual internalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles”.²⁵ From this perspective, trial becomes something akin to a social engineering tool: “the prevention of future crimes is necessarily a

23 Cohn, *op. cit.* (note 9), p. 42.

24 *Op. cit.* (note 20), p. 92.

25 P. Akhavan, “Justice in The Hague, peace in the former Yugoslavia? A commen-

tary on the United Nations war crime tribunal”, *Human Rights Quarterly*, Vol. 20, 1998, p. 751.

long-term process of social and political transformation, entailing internalization of ideals in a particular context or “reality”, or the gradual penetration of principles into given “power realities”.²⁶ This focus on inculturation meshes with a broader discussion, mentioned above, on the possible culture-building role of international humanitarian law generally, while the emphasis on internalization resonates with Akhevan’s views on trial as a route to truth and will be further explored below.

Justice, accountability and the rule of law

Explicit justice-claims, quite separate from deterrence theories, surface in the trial debate under two main headings: justice-as-fairness (mainly discussed below in the context of the relationship between truth and legal procedure); and a cluster of arguments around the “justice-as-accountability” theme, focusing on the moral obligations of a State faced with massive violations, and on the need to uphold the rule of law as a value in itself. As both Huyse and Cohen note, regimes which have been responsible for serious and systematic human rights violations are taken to have fractured the moral order, producing in the process countless victims of torture, murder and general abuse.²⁷ The suffering of these victims, it is claimed, renders it morally unacceptable that perpetrators should escape punishment, and since morality also demands that those accused of violations be treated justly, the appropriate route to punishment is through trials which respect due process of law. Where no action or insufficient action is taken at national level (as in the case of the former Yugoslavia and Rwanda), the obligation falls upon the international community. Such arguments dovetail neatly with free-standing claims in relation to the rule of law. Since maintaining the rule of law is a good in itself, the quasi-moral obligation to uphold this good falls upon the State, in the first instance, and then upon the international community.

Sometimes a morality-based demand for justice is presented in terms of a retributionist rationale familiar from national criminal justice debates: the need for some kind of relationship

²⁶ *Ibid.* p. 731.

²⁷ Huyse, *op. cit.* (note 8) , p. 51, and Cohen, *op. cit.* (note 9), pp. 22-24.

between the suffering of the victim and that to be imposed upon the perpetrators. Few if any commentators burrow further in national debates to argue that punishment may lead to the rehabilitation of violators (although some parallel issues crop up in the debate touched upon below on “reintegrative shaming” in relation to truth commissions).

For the reasons already mentioned, the question of the legitimacy of read-across from domestic criminal justice debates to the post-conflict environment is an open one. The key feature of the transitional aspect of this environment is the move from a situation in which the rule of law was either absent or highly degraded — how else could systematic gross human rights violations have taken place — to one in which the rule of law is established. Thus there is no possibility of *maintaining* the rule of law (at least at the domestic level); at best it can be *recreated*.

As regards morality-based arguments, it is clear that for very many people it is highly repugnant that those who have inflicted so much suffering on victims not be made to account for their actions. And the individual criminal trial offers the paradigm of accountability. As international humanitarian law gives a much more explicit recognition to the principle of individual criminal responsibility than human rights law, outlaws all the gross abuses typically committed in conflict situations and, particularly since the adoption of the two 1977 Additional Protocols, also provides extensive due process guarantees, it is tailor-made to serve this purpose. To categorize a particular infraction as a breach of the laws of war, whether this categorization is made by an international or a domestic court, underlines the seriousness of the crime in a way that a trial employing ordinary domestic charges cannot, even if the domestically framed charge has the same elements as that framed in terms of international humanitarian law. Use of international humanitarian law therefore has an important symbolic function, which can make a significant contribution to satisfying victims’ thirst for accountability.

The contrary argument gets to the root of the “peace versus accountability” debate: as Cohen points out, “the paradox is that some measure of impunity might be the best way to create the political

conditions under which the rule of law is eventually attainable”.²⁸ Less prosaically, in the exchange referred to above, “anonymous” asserted accusingly that demands for punishment made during the Bosnian peace negotiations meant that “thousands of people are dead who should have been alive — because moralists were in quest of the perfect peace”.²⁹ Variants of the argument ultimately point in the same direction: an insistence on prosecution of past human rights violators in the post-conflict transitional phase may be profoundly counter-productive because it may either hamper the negotiation of a settlement — “turkeys don’t vote for Christmas” — or it may undermine a newly emerging post-conflict democracy, for instance by provoking a military coup. Instead of satisfying the quest for justice, the end result may be more human rights violations, and rather than restoring the rule of law, prosecution may result in its subversion.

While there is no denying the pragmatic force of these arguments, it is not clear that they apply with equal vigour to each of the four possibilities of trials identified above. It might also be claimed that some turn as much on the timing of trials as on their initiation *per se*, and that to some extent the concerns may, in time, be overtaken by events. Whereas trial at the domestic level, whether employing charges framed in terms of domestic or international law, is conditional upon a favourable balance of forces within the State in question, trial in a post-conflict situation before an international tribunal, or before a domestic tribunal in a third country, is largely free of such considerations — though availability of defendants and witnesses and evidence generally will remain prime considerations.³⁰ This is not to say that such trials might not conceivably undermine a peace settlement, but it does suggest that such a possibility may be less likely — what would the point be of a military coup which could neither halt the instant trial nor prevent trials in the future? Similarly, the argument put forward by “anonymous” postulates a policy choice with regard to an ad hoc international tribunal in the course of peace negotiations.

²⁸ *Ibid.* p. 34.

²⁹ Anonymous, *op. cit.* (note 13), p. 258.

³⁰ J. Katz Cogan, “The problem of obtaining evidence for international criminal trials”, *Human Rights Quarterly*, Vol. 22, 2000, p. 404.

Whatever view is taken of its merits (it has been heavily criticized), its applicability largely evaporates in situations in which a standing international tribunal with jurisdiction exists, created by a statute to which the State is a party. This is not to suggest that the initiation of the ICC, if and when it occurs, will provide a panacea and therefore bring the “peace versus accountability” debate to an end. Even if there is a high degree of ratification, there will inevitably be much manoeuvring in relation to the bringing of charges (whether before the ICC or before domestic tribunals), and there are logistical limits in any case on the volume of possible work which one body could be expected to handle. Furthermore, domestic tribunals offer advantages in terms of immediacy of the message they send, and accessibility by witnesses, which international tribunals cannot match. But it does point to the applicability of the debate becoming narrowed: the establishment of the ICC will create some relatively fixed reference points, defining at least some new parameters in the accountability debate.

This possible reconfiguration of the legal matrix still leaves unanswered the question of the precise relationship between accountability and reconciliation, which is a slightly different issue from the calculus of the possible counter-productive effects of prosecution. Tackling this broader question in turn requires engagement with theories of the relationship between accountability and truth, both in the context of criminal trials and in the operation of truth commissions.

Trial and truths: the importance of legal procedure

Whereas much of the established literature on transitional justice envisages two sequential phases, i.e., the truth phase and the justice phase (fact-discovery followed by trial), more recent contributors such as Akhavan have championed the truth-eliciting role of the trial process itself, a view that has not gone unsupported.³¹ The essence of this argument is that the ICTY will tell “the truth about the underlying causes and consequences of the Yugoslavian tragedy” through the

³¹ J. Pejic, “Creating a permanent international criminal court: The obstacles to independence and effectiveness”, *Columbia*

Human Rights Law Review, Vol. 29, 1998, p. 291.

exercise of prosecutorial discretion. This will create an “optimal” truth that “demonstrates that individuals — primarily leaders — bear liability for crimes, and that there is no justification for the collective attribution of guilt to entire ethnic groups”. The truth in question is to be “shared” between the various ethnic groups — just as the values imparted through general deterrence were to be “internalized”, as noted above — as providing “a moral or interpretive account ... that appeals to a common bond of humanity transcending ethnic division”.³² Reconciliation is the envisaged end result, as each ethnic group comes to realize that it was not an opposing group that was responsible for the violence, but rather the leaders on both sides. International humanitarian law, with its developed insistence on individual criminal responsibility, seems well equipped to prove precisely this point, but before this new role can be endorsed, a number of possible weaknesses in this “trial-as-truth” argument must be explored.

The most obvious potential weakness is that it stands or falls on the validity of a particular theory, or set of theories, about ethnic conflict, which Akhavan labels “instrumentalism”. This holds that ethnic conflict comes about largely as a result of manipulation by self-interested power-elites, a truth that is to be proved by the prosecution of leaders — the “big fish”. Other theories, by contrast, focus on possible structural causes and historical roots of ethnic conflict, and look to addressing these causes as a route to reconciliation or at least to coexistence. Another possible related weakness is that of the compatibility of Akhavan’s suggested strategy with perceptions of due process. While focusing on ringleaders is clearly a good use of resources, the danger exists that what is itself a morally laudable enterprise may be seen as tainted, if it creates a perception that prosecution strategies are being manipulated in order to prove a particular (contested) theory of ethnic conflict.

There may also be problems with the notion of truth, or perhaps with the notion of *the* truth, in the face of what Cohen has referred to as the “postmodernist black hole”.³³ This of course raises

³² *Ibid.*, p. 741/2.

³³ Cohen, *op. cit.* (note 9), p. 12. See also J. A. Lindgren Alves, “The Declaration of

Human Rights in postmodernity”, *Human Rights Quarterly*, Vol. 22, 2000, p. 478.

issues which impact not simply on Akhavan's views, but on any attempt to extract truth from the trial process, and even more forcefully on the project of truth commissions. And assuming that the search for particular truths is a legitimate enterprise, does the criminal trial offer the best or even a good vehicle for determining it?

Akhavan's solution is twofold, relying on legal procedure to provide the pieces of a factual mosaic and upon overarching theoretical insights to provide the principle for assembling them. Thus, in the words of Michael Ignatieff, the formal evidentiary procedures of tribunals such as the ICTY are to be seen as "conferring legitimacy on otherwise contestable facts".³⁴ From this proven collection of particular facts, the "optimum" truth — responsibility of the big fish — is then to be inferred, extrapolated or constructed.

Not everyone has been as sanguine about the utility of the trial process as a vehicle for discovering truths, even amongst those who see the exercise as potentially worthwhile. Lawyers are not historians, and are concerned not with facts in the abstract, but with the fact-law nexus, with such facts as the rules of the legal world are geared to engage with. Thus Cohen questions whether the "conventional rituals of evidence"³⁵ of criminal law offer an effective way of obtaining knowledge and, with reference to the *Klaus Barbie* prosecution, raises the possibility (no more than that) that a trial strategy may obliterate or distort rather than serve the cause of truth-telling.

Clearly there is no easy answer to this question, and it may be that paradoxically, the weakness of the trial process in this regard is also its principal strength. At best, trial can conclusively determine a limited truth, since the truth to be decided is circumscribed both by substantive law and by legal procedure, e.g., by rules of evidence which exclude consideration of certain facts — and the only facts that are relevant are those which relate to a particular criminal offence, thus risking a double distortion. But this offers two advantages: the very rigour of procedural rules can produce findings of fact that "stick" because the

³⁴ M. Ignatieff, "Articles of faith", *Index on Censorship*, September/October 1996, quoted in Akhavan, *op. cit.* (note 25), p.770.

³⁵ Cohen, *op. cit.* (note 9), p. 21.

trial experience resonates with historically validated collective notions of justice — “justice-as-fairness”. And the legal categorization of such facts as constituting a specific crime, particularly a heavily stigmatized crime (such as a war crime), may go a long way towards addressing the victims’ sense of hurt, combating strategies of denial and, to that extent at least, establishing a truth. Such denial strategies can take many forms, from crude dismissal of facts by Holocaust-deniers to more subtle conceptual failings.

A key to unlocking the truth-trial-law-reconciliation matrix may lie in the notion of “acknowledgement”, attributed to the New York philosopher Thomas Nagel. If the concept is unpacked, it can be seen to have elements of both acceptance and evaluation. At its core is an appreciation that the behaviour in question was wrong. There is a subjective recognition/acceptance of particular facts by the wrongdoers, by those associated with them, or by society generally, and an evaluation of these facts by reference to an objective standard, thus defining the wrongness — for instance recognition not only that a particular army unit carried out a specific killing, but that the killing was murder. The truth that is being acknowledged is constructed not in terms of fact-in-the-abstract but rather in terms of “fact *as*”, with the “*as*” capturing the legal, and by extension the moral, culpability.

In this general context, international humanitarian law can provide important reference points for the construction of the “*as*”, whether through a straightforward application of the established law, or more pointedly, through its creative interpretation — though some would question whether any legal formulation can adequately encapsulate the full horror of mass atrocities, and others query whether such creative law-making is compatible with principles of Western legality.³⁶

But to suggest, as Akhavan seems to do, that the trial process will produce the establishment or acknowledgement of a truth, which of itself will produce reconciliation, is perhaps to overstate the case. A more plausible argument may lie in regarding engagement with

³⁶ M. J. Osiel, “Why prosecute: Critics of punishment for mass atrocity”, *Human Rights Quarterly*, Vol. 22, 2000, p. 118.

the concerns of victims as a prerequisite, or at least as a likely precursor to reconciliation — and thereby as contributing significantly to the stabilization of the post-conflict environment — and seeing trial as a route to such engagement. It could perform this function through punishing wrongdoers (thereby meeting a demand for accountability), and/or by a less ambitious truth-eliciting function which can yet help to acknowledge the enormity of the suffering which the atrocities in question have inflicted upon victims. To suggest, though, that criminal legal processes employing international humanitarian law or any other body of law have the capacity to contribute more directly to reconciliation, particularly by generating reconciliation themselves, is to assign responsibilities to such processes that they are never likely to fulfil.

Commissioning truths

Even firm advocates of the prosecution option as a route to truth recognize that trial is not without its limitations in that regard. Thus for Pakhavan “... the relative remoteness of the ICTY from the region means that it cannot be a substitute for local initiatives (including a commission of truth based on popular participation or public gestures of atonement by leaders)”.³⁷ In many respects the literature on truth commissions parallels that in relation to prosecution.³⁸ Popkin and Roht-Arriaza analyse the goals to be served by the commissions in terms of “creating an authoritative record of what happened; providing a platform for victims; recommending changes calculated to avoid future abuses; and establishing who was responsible and providing a measure of accountability for the perpetrators”.³⁹ Typically established, as Hayner points out, in periods of political transition, the motivation for their initiation lies in a desire to mark “a break with a past record of

³⁷ Akhavan, *op. cit.* (note 25), p. 742.

³⁸ See P. Hayner, “Fifteen truth commissions – 1974 to 1994: A comparative survey”, *Human Rights Quarterly*, Vol. 16, 1994, p. 597; *Truth Commissions: A Comparative Assessment*, Harvard Law School Human Rights Program, 1997; M. Enselaco, “Truth commissions for Chile and El Salvador: A report and

assessment”, *Human Rights Quarterly*, Vol. 16, 1994, p. 657; M. Popkin and N. Roht-Arriaza, “Truth as justice: Investigatory commissions in Latin America”, *Law and Social Inquiry*, Vol. 20, 1995, p. 79.

³⁹ Popkin/Roht-Arriaza, *op. cit.* (note 38), p. 80.

human rights abuses; to promote national reconciliation, and/or to promote or sustain political legitimacy".⁴⁰

What truth(s)?

The "authoritative record" referred to by Popkin and Roht-Arriaza is invariably conceived in terms of the general sweep of violations. Thus for Hayner the aim is to "paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time",⁴¹ an approach which requires that strategic choices be made with regard to the focus of the investigation. But unlike Akhevan's insistence on the use of prosecutorial discretion in the trial process to discover the "optimal" truth, the concerns of truth commissions are generally conceived not in terms of the correctness of particular (instrumentalist) theories of ethnic conflict, but relate rather to the somewhat more technical (almost statistical) exercise of selecting a representative sample for examination.

Inevitably, any selection risks distortion, but in the case of truth commissions the danger of distortion of the truth which Cohen suggests may be inherent in the trial process should be less apparent, since the strategic choice of subject matter for investigation is not restricted to those cases in which a specific perpetrator can be identified, and in which the suspect is physically available for trial. By the same token the information to be accessed is not limited by the evidential requirements of the criminal process.

International humanitarian law provides a particularly important reference point in this context for two reasons. The first is that it sets a standard by which the behaviour not only of a State's security forces, but also that of non-State players can be assessed; the second is that this evaluation is tailored to the precise context most frequently advanced in justification or exoneration by those responsible for violations, namely the existence of some kind of war or armed conflict.

State and non-State actors

While in recent years international human rights law has been paying more attention to the legal consequences of the behaviour

⁴⁰ *Ibid.*, p. 604.

⁴¹ *Ibid.*

of non-State players,⁴² it remains the case that international humanitarian law articulates a much more deeply rooted doctrine of individual responsibility. Returning to Hayner's analyses of the role of truth commissions, it is likely that the legitimating function that she envisages can be achieved only where the commission itself achieves a kind of popular legitimacy. Achieving this legitimacy requires that truth commissions in post-conflict situations avoid any taint of political partisanship and be insulated against any suggestion that their operation amounts to the truth-eliciting equivalent of victor's justice. At least part of the answer may lie in a willingness to examine violations from across the spectrum. Thus for instance, the Rettig Commission in Chile,⁴³ the Salvadorean Truth Commission⁴⁴ and the South African Truth and Reconciliation Commission⁴⁵ all investigated abuses not only by the State's security forces, but also by armed opposition groups, with the Salvadorean and South African Commissions in particular drawing explicitly on international humanitarian law to assess the behaviour of non-State entities.

Such use of international humanitarian law challenges head on the self-justification most frequently advanced (or tacitly accepted) by both State and non-State players: "We did what we did because we were fighting a war against terrorism/a civil war/ a war of liberation." Since humanitarian law, strictly applied, takes as its starting point the existence of an armed conflict of some sort, whether non-international or international (including wars of national liberation⁴⁶), it

⁴² This has occurred through the development of the doctrine often referred to (perhaps misleadingly) as *Drittwirkung* or third party effect. See D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London, 1995, pp. 19-22, and A. Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1963, pp. 178-244. For a discussion of the parallel jurisprudence of the Inter-American Commission on Human Rights, see Weiner, *op. cit.* (note 16).

⁴³ Popkin/Roht-Arriaza, *op. cit.* (note 38), p. 85 and pp. 98 f.

⁴⁴ *Ibid.*, pp. 86-89, and pp. 98 f.

⁴⁵ J. Sarkin, "The trials and tribulations of the South African Truth and Reconciliation Commission", *South African Journal of Human Rights*, 1996, p. 617; J. Sarkin, "The Truth and Reconciliation Commission in South Africa", *Commonwealth Law Bulletin*, Vol. 23, 1997, p. 528; K. Asmal, L. Asmal and R. Suresh, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, 2nd ed., David Philip, Cape Town, 1997.

⁴⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1(4).

facilitates coming to grips with the rhetoric of those taking part in the conflict and in a sense turning it back upon them. Thus an apparent escape route — the war as justification — can become a channel to some kind of accountability.

Even where the existence of an armed conflict in a technical sense may have been in doubt — it will almost invariably be contested — there is a growing body of opinion that the standards and principles articulated and expressed most sharply in international humanitarian law retain a validity in all conflict situations, irrespective of whether the legal threshold (armed conflict) has been reached. In this respect they may help to fill a gap left by international human rights law, which attempts to deal with conflict situations by means of the heavily criticized derogation mechanism.⁴⁷

The clearest example of this trend is the formulation in recent years of a number of codes of conduct and sets of principles which are based upon humanitarian standards but which also draw upon human rights law. Two somewhat different strategies can be identified: the first aims to devise a code specifically designed to apply in a sub-armed conflict environment: situations of “internal disturbances and tensions”;⁴⁸ the second aims to codify a set of standards to be applied irrespective of the categorization of the conflict. Progress on this later line can be traced from the adoption of the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence (1987)⁴⁹ to the adoption of the Declaration of Minimum Humanitarian Standards⁵⁰ at Turku/Abo (1990), sometimes referred to

⁴⁷ For some criticisms see J. Fitzpatrick, *The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994; F. Ní Aoláin, “The emergency of diversity: Differences in human rights jurisprudence”, *Fordham International Law Journal*, Vol. 19, 1995, p. 101; O. Gross, “‘Once more into the breach’: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies”, *Yale Journal of International Law*, Vol. 23, 1998, p. 437.

⁴⁸ See H. P. Gasser, “A measure of humanity in internal disturbances and tensions: Proposal for a code of conduct”, *IRRC*, No. 262, January-February 1988, p. 38.

⁴⁹ The text of the Oslo Statement is included in the pamphlet *Declaration of Minimum Humanitarian Standards*, Abo Akademi University Institute for Human Rights, 1991, pp. 13-16.

⁵⁰ The text of the Declaration is appended to T. Meron and A. Rosas, “A Declaration of Minimum Humanitarian Standards”, *AJIL*, Vol. 85, 1991, p. 375.

as the Turku/Abo Declaration. In 1994, an amended version of the text was adopted⁵¹ which received a degree of validation from both the United Nations⁵² and the OSCE.⁵³

While punitive trials must, by definition, apply hard law, truth commissions may have a considerably greater degree of flexibility in the standards they employ, precisely because their primary purpose is not a punitive one. Thus truth commissions may offer a route, which the trial process cannot follow, to the application of codified humanitarian principles, thereby increasing the reach of such principles in post-conflict situations.

While there is much to be gained by the application of international humanitarian law and standards to the activities of both State and non-State entities, the area is not without its pitfalls. Enhancing the legitimacy of truth commissions by casting the net widely is one thing, but a juxtaposition suggesting a facile equivalence is quite another. As Cohen writing on the parallel issues presented by mutual amnesties notes, treating State and non-State actions in the same way provides “a convenient symmetry to disguise very different social realities”.⁵⁴ In the same vein Popkin and Roht-Arriaza warn of the dangers of treating State and non-State violence as “functionally equivalent”, thereby producing a “distortion of the historical record”.⁵⁵ Specifically, they caution that the educational effects on the population as a whole could be lost in the notion that “terrible things happen in all war and are committed by all sides”.⁵⁶

Clearly there is no easy answer to the questions which these issues raise. Perhaps the best that can be said is that while the use

51 The text is appended to A. Eide, A. Rosas and T. Meron, “Combating lawlessness in gray zone conflicts through minimum humanitarian standards”, *AJIL*, Vol. 89, 1995, p. 215.

52 In 1994 the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities decided to transmit the Declaration to the Commission on Human Rights with a view to its adoption (Res. 1994/26).

53 The States participating in the Budapest review meeting of the OSCE (1994)

decided to “emphasize the potential significance of a declaration on minimum humanitarian standards applicable in all situations and declare[d] their willingness to actively participate in its preparation in the framework of the United Nations”. Budapest Decision VIII on the Human Dimension, quoted in *op. cit.* (note 51), p. 215.

54 Cohen, *op. cit.* (note 9), p. 35.

55 *Ibid.*, p. 98.

56 *Ibid.*

of international humanitarian law to assess the behaviour of armed opposition groups can advance the authoritativeness and therefore the legitimacy of truth commissions, this should not be done in a way which detracts from the focus on the responsibility of the State as the entity with primary responsibility for upholding international law. Of pivotal importance in this regard is the set of strategic choices to be made at the outset as to the legal and factual scope of the truth commission's inquiry. The fact-situations investigated should be those calculated to reach the educational objectives signalled by Popkin and Roht-Arriaza. And it needs to be made clear that while armed opposition groups can be held to have committed breaches of international humanitarian law, heed should be taken of Mera's criticism that by characterizing actions of non-State players as human rights violations, the Rettig Commission undermined the educational role of its report.⁵⁷

Truths and reconciliation

Whether the behaviour of State or non-State players is in question, more is at stake than simply the discovery of the truth. Thus Hayner, in a passage which again parallels the punishment literature, argues that "...the importance of truth commissions might be described more accurately as acknowledging the truth rather than finding the truth... Official acknowledgement of the facts outlined in a truth commission report by government or opposition forces can play an important psychological role in recognizing a 'truth' which has long been denied".⁵⁸

As with the case of prosecution, international humanitarian law can play an important role in defining the "as" in the process of acknowledgement. The finding that the behaviour of particular actors in a conflict should be thought of as a breach of international humanitarian law or standards (and therefore acknowledged as such) highlights the seriousness of the violation, and may help to address the victims' sense of hurt.

⁵⁷ J. Mera, "Truth and justice in the democratic government", quoted in Roht-Arriaza, *op. cit.* (note 38), p. 99.

⁵⁸ Hayner, *op. cit.* (note 38), pp. 607-8.

This once again raises the question of possible routes to reconciliation. It was suggested above that to see prosecution as itself producing reconciliation may be to assign a responsibility to the prosecution function that it is unlikely to fulfil, and that it might be more realistic to see engagement with the concerns of victims (through prosecution) as paving the way for, rather than itself generating, reconciliation, though this inevitably leads on to the old calculation about the possible counter-productive effects of prosecution. Employment of international humanitarian law in the findings of truth commissions seems to offer a means of signalling the seriousness of what has taken place while at the same time sidestepping the potential counter-productive effects of prosecution, and therefore offering an alternative route towards reconciliation.

This still leaves open the question of the relationship between the findings of a truth commission and possible subsequent proceedings, whether criminal or otherwise. One possibility may lie in tying the process in with, or reformulating it as, a lustration mechanism, designed to bar violators from the old order from public service in the new, and perhaps involving some engagement with the issue of reparation. A variant may lie in adapting Braithwaite's criminological model of "reintegrative shaming" which, Cohen speculates, might lead to "public shaming and denunciation that would answer the demand for "acknowledgment".⁵⁹

Another option is the South African model whereby full disclosure by a perpetrator before a truth commission may lead to amnesty, but this in turn raises the problem, addressed at the start of this paper, of the formal legality of amnesties. Yet another is to leave the issue of prosecution fully open, but this would probably make the truth-eliciting function of a truth commission much more difficult to discharge since there would be no incentive to perpetrators to participate in the process. But whichever route is taken, it is clear that international humanitarian law and standards have a role to play in defining yardsticks to be employed by either criminal tribunals or truth commissions. Thus even if there is a perception that a pragmatic decision

59 Cohen, *op. cit.* (note 9), p. 36.

whether to proceed by the trial or the truth commission route has to be made, this need not be equivalent to a decision as to whether international humanitarian law is employed or not, but rather as to the mode by which this body of law is drawn upon.

Conclusions

What this brief survey has hopefully shown is that international humanitarian law can make a much broader contribution in the post-conflict environment than traditional approaches might have suggested, concerned as they tended to be with the question of individual accountability almost as an end in itself. And this paper has been confined to an examination of the employment of humanitarian law in the trial process and by truth commissions, thus putting to one side possible contributions in lustration processes, and in relation to reparation.

Not all the arguments currently in the public domain for the utility of international humanitarian law in the trial process are equally compelling. While its rules provide a highly appropriate route to individual accountability, the deterrent value of trials employing international humanitarian law is at best unproven, and is likely to remain so, unless and until potential violators face a much greater probability of trial, whether at the domestic or the international level. Ultimately this ties in with a broader project calculated to lead to the generalized inculturation of humanitarian standards — a goal which should be central to strategy for the dissemination of humanitarian law.

As regards the question of trial as a route to truth, it is inevitably the case that the rigorous procedures of the criminal trial limit the kind of truth that can be determined, while also, potentially at least, underlining the validity of the truth that emerges. Here international humanitarian law can make a particularly useful contribution with regard to acknowledgement of the seriousness of violations. A finding that a particular act was a breach of the laws of war signifies the gravity of a crime much more effectively than a finding that domestic law has been breached.

Invariably, arguments for the utility of humanitarian law in the trial process come up against the “peace versus accountability” calculus. But while this has frequently been presented in terms of a stark

“either/or” choice — trial or peace — a closer examination suggests that the question may be as much about timing and mode of trial as about trial in the abstract. There is a difference, in this regard, between domestic trial which is heavily conditional on a favourable balance of forces in the conflict situation, and trial in third countries and before an established international mechanism (such as the International Criminal Court will hopefully become). With the passage of time, if expectations of accountability for serious violations become stronger, it is likely that this calculus will lose some of its force, though it is always likely to remain lurking in the background.

Even in situations in which international humanitarian law is not employed in criminal trials in the post-conflict environment, it can still play an important role in the acknowledgement of truths about the conflict when drawn upon by truth commissions. Humanitarian law offers a specific advantage in this regard in that its reach extends much more clearly to non-State entities than does international human rights law. And because truth commissions need not be tied to well established law, there exists the possibility that the codified standards being developed in the interface between human rights law and humanitarian law can be drawn upon by truth commissions in a way which might not be possible in criminal trials. Overall, the picture that emerges is one in which international humanitarian law can play a much more significant role in the post-conflict environment than some of the more simplistic “peace versus accountability” formulations might suggest.



Résumé

Paix et lois de la guerre : le rôle du droit international humanitaire dans un environnement postconflictuel

par COLM CABELL

Si la littérature sur les règles du droit international humanitaire qui s'appliquent en temps de conflit armé a toujours été riche, l'intérêt pour les effets que peut avoir ce droit au-delà d'un conflit ne s'est développé que récemment. À la fin de la Seconde Guerre mondiale, par exemple, la justice s'est manifestée à travers les sentences des Tribunaux de Nuremberg et de Tokyo punissant les criminels d'une guerre révolue. Ce n'est qu'aujourd'hui que la communauté internationale a songé à établir une juridiction internationale permanente chargée de juger également des crimes commis en dehors d'un conflit armé. L'auteur examine les différentes fonctions de la justice : juger pour dissuader, juger pour rétablir le droit, ou juger pour favoriser l'établissement de la paix (notamment, à travers les commissions de la paix — «Truth Commissions»). Le droit international humanitaire peut jouer un rôle important pour que cette dernière tâche puisse être accomplie par la justice.

Training in international humanitarian law

by

DIETMAR KLENNER

Through that branch of international law known as international humanitarian law, or the law of armed conflict, the international community seeks to mitigate the horrors of war. Humanitarian law protects combatants no longer able to take part in the fighting (for example, the wounded, sick and shipwrecked and prisoners of war), persons not taking part in the conflict, such as civilians, and also civilian objects such as cultural and private property. It prohibits or restricts the use of certain weapons and obliges military commanders to observe certain rules relating to the methods of warfare. It also lays down rules governing the relationship between States engaged in armed conflict.

The core treaties of international humanitarian law are the four Geneva Conventions for the Protection of War Victims, of 12 August 1949. The year 1999 marked the 50th anniversary of those Conventions, which today bind 188 States. It might be thought that this was an event to celebrate, yet a sober look at what has happened on the world's battlefields since the Second World War is more likely to be cause for dismay. True, the rules of international humanitarian law were by and large observed in "traditional" or "conventional" wars such as those fought in Korea, Viet Nam, the Middle East, on the

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Falklands/Malvinas and in the Gulf region. In spite of a number of horrendous exceptions, international humanitarian law did protect thousands of victims of those conflicts. But the face of the modern battlefield has undergone a fundamental change.

Somewhere, soldiers belonging to an international force continue to discover new mass graves, the results of barely imaginable ethnic cleansing operations. In another conflict, guerrilla fighters routinely mutilate civilians, sometimes even children. Another report shows children hacking with knives at enemy corpses. One of them triumphantly holds up the intestines of a fallen soldier, in full view of the camera. Barbarity without end at the turn of the 20th to the 21st century?

One especially disturbing trend emerging from today's predominantly internal armed conflicts is that according to expert estimates, between 80 and 90 per cent of the victims of modern wars are civilians. On 12 February 1999 the President of the International Committee of the Red Cross, Cornelio Sommaruga, speaking before the United Nations Security Council in New York, appealed to States, reminding them that in many conflicts around the world "civilians are the first and principal target. Women, children, the elderly, the sick, refugees and internally displaced persons have been attacked in large numbers and methodically driven from their homes. (...) Genocide, ethnic cleansing, attacks on humanitarian personnel and the repudiation of the principles of humanity, impartiality, independence and neutrality have become increasingly prevalent. (...) The unimaginable pain ... can leave none of us indifferent. Not only that, it compels us to take action on their behalf."

The obvious solution is to try and influence the parties to armed conflicts, but here, too, we are faced with new and different conditions and challenges. In addition to the "regular" combatants, a growing number of "arms bearers" — security forces, special police troops, border troops, paramilitary units, armed groups belonging to liberation movements, guerrilla fighters and armed clans — are today all convinced that they have to fight for a better future or even just for their own interests. How are we to reach and speak to them, to influence their conduct?

The behaviour of individual combatants appears to be determined primarily by the actions of their leaders, by instruction and training in the appropriate cultural, social and military environment, and by acceptance of a minimum of discipline and hence a willingness to comply with certain rules. It follows that if combatants are to act in accordance with the rules of international humanitarian law, raising awareness thereof among their leaders and providing effective instruction and training play a decisive role.

The international community has asked the ICRC to support States in translating the principles of international humanitarian law into instruction and training activities. In his address to the Security Council, President Sommaruga recalled that “through its programme of dissemination to the armed forces, the ICRC has for many years been training and raising awareness among those who bear arms all over the world”.

Experience worldwide shows that in several countries instruction in humanitarian law places too heavy an emphasis on theory and that it is difficult to incorporate into practical training exercises. Military commanders have never been particularly inclined to deal with the finer points of international law, and have preferred to leave that to “specialists”. There are thirty major international treaties comprising over 660 articles — who could provide instruction in them and, more importantly, who could absorb all that information? Do the provisions of these treaties not overly restrict military leaders' freedom of action? Another question of current interest: what ways and means are available to reach the many armed groups worldwide and urge them to observe certain rules?

Specific aspects of training in international humanitarian law

“Leadership” could tentatively and generally be defined as the “targeted influencing of people”. Instruction and training form an integral part of this. If something is not practised in times of peace it cannot be expected to work in times of war. In the military field this statement is of timeless validity.

Anyone wanting his troops to display tactically efficient, correct and disciplined behaviour in combat must continuously invest in instruction and training, which must include international humanitarian law. Instruction and training should be seen as an ongoing process. Commanders should not underestimate the importance of continuous dialogue with their subordinates.

In particular when it comes to international humanitarian law, training should consist of more than the transmission of information, of presentations, seminars and courses which result in statements such as “yes, I have heard of it and we usually implement it”.

The key is integration. International humanitarian law is not a specialized field for the legal profession, it is an obligation and challenge for leaders at all levels. Long-term success can be achieved only if we are able to adapt instruction and training in the principles of international humanitarian law to the function of different units, and to integrate them in a very practical way into all training programmes for military commanders. A squadron leader, for example, should have both theoretical knowledge of and practical training in how to treat a lightly-wounded enemy soldier (disarm him, give him first aid, search him, move him from the danger area, evacuate him) but need not necessarily know all aspects of a demilitarized zone.

The general conditions for training in international humanitarian law differ widely from one country to the next and are so complex that it would be impossible to come up with any kind of recipe for perfect training in international humanitarian law. The following examples from contexts around the world and specific principles of international humanitarian law training might help readers to understand the situation in their own country and possibly allow them to draw some conclusions.

What is the objective of training in international humanitarian law?

The aim is for all soldiers in regular armed and security forces and all members of armed groups to be familiar with the principles of international humanitarian law and to have a grasp of the rules which are important for carrying out the combat tasks falling to them by virtue of their rank and function.

At the tactical level, training aims in particular at making correct and disciplined behaviour the reflex action in a particular situation. At the operational level, the emphasis is on the automatic incorporation of the principles of international humanitarian law into decision-making, planning, command and control processes. The objective is for leaders of all ranks to intervene immediately if the rules of international humanitarian law are violated.

A number of additional training principles are summarized below:

1. At meetings and planning conferences, when issuing orders and holding discussions, senior military leaders should remind officers that it is a national responsibility to make international humanitarian law training an integral part of instruction and training activities.
2. The principles of international humanitarian law should be introduced into appropriate training material in a form which is comprehensible to military leaders. A model manual prepared by the ICRC and focusing on correct conduct on the battlefield may serve as an example.
3. The obligation to provide training in international humanitarian law should be mentioned in annual training guidelines and directives.
4. Training in international humanitarian law is not the domain of specialists. At the tactical level it is the responsibility of the direct superior, who should do the training himself to make it more convincing. Legal advisers are sources of essential expertise and work side by side with operational commanders.
5. Close cooperation among the legal, operational and training divisions in ministries and general staff is vital. Such cooperation ensures that topics related to international humanitarian law are systematically incorporated in accordance with clear objectives into all leadership training curricula.
6. All large-scale exercises should as a matter of principle include items related to the implementation of international humanitarian law and humanitarian challenges. Provision for this should be made already at the level of preparatory planning conferences.

7. Training can be said to have been successful when subjects related to international humanitarian law have been skilfully incorporated into tactical and combat exercises. Training in international humanitarian law always includes a practical component. The aim is to achieve a balance between information, basic knowledge and practical application, for example through demonstrations, stationary training and short exercises, allowing for effective individual and group training in small-scale scenarios.
8. Commanders should receive continued training in how to incorporate humanitarian law and how to use the training material.
9. Preparations for peace-keeping and peace support operations should include a refresher course in international humanitarian law.
10. At the lower levels of the command structure and for all leaders of armed groups in a “non-peace” situation, personal commitment and interest are of decisive importance. Leaders must demonstrate by example that even wars have limits, that we are helping to protect the victims of war and violence by following certain rules.

Rules of conduct for international and internal armed conflicts

There exist several internationally recognized principles and codes of conduct for the tactical level. They are part of the four 1949 Geneva Conventions and their 1977 Additional Protocols, or are derived from other international humanitarian law treaties and from customary law. All these rules serve as a basis for international humanitarian law training for combatants engaged in armed conflicts.

To mark the 50th anniversary of the Geneva Conventions, the ICRC undertook to inform the leaders of all armed groups of the following basic principles and call on them to enter into dialogue with their subordinates to discuss both the principles and the possibilities for their implementation and consequences for training:

You, as a responsible, experienced military commander, are willing to acknowledge certain internationally recognized rules of

conduct in warfare, to integrate them into training in your area of responsibility and to observe and enforce these rules in combat. In your daily discussions and preparations and in the orders you issue you will persuade your subordinate officers that compliance with these rules, which require you and all those under your command to act humanely even in the most difficult conflict situations, strengthens their solidarity, fighting spirit and discipline. All of these rules contribute to a life in freedom and dignity after the conflict has ended. The following rules must be observed:

1. Concentrate on locating and fighting the enemy. Under no circumstances fight the civilian population. Women, children and the elderly are the first to suffer from the consequences of battle. Respect and protect women's dignity. Do not rape them. If you fight well and help the weak you show true courage.
2. Never kill or torture a person who has fallen into your hands during combat. Protect prisoners of war and internees. Respect their life and dignity. Administer first aid even to a wounded enemy. Intervene if your comrades overstep the limits of the law. Set a positive example — you could end up in a similar situation.
3. No matter how tense the situation, be disciplined and refrain from acts of revenge, as otherwise you start a spiral of uncontrolled violence. Have a moderating influence on your comrades. Look to your leader, wait for instructions and follow his example.
4. Never attack persons or objects bearing the red cross or red crescent emblem. They are there to help the victims of war. Allow them to carry out their humanitarian activities, support them and, above all, give them protection. The enemy will usually follow your good example.
5. Respect the property of others. Do not loot.
6. Respect the white flag as a sign that the enemy wants to negotiate or surrender. Hold your fire, inform those next to you, wait for instructions and respect the other protective emblems.
7. Never take hostages.
8. Never attack civilian persons or objects. Destroy only to the extent absolutely essential to your mission.
9. Children are especially threatened and vulnerable. Never

recruit a person under 15 years of age. Endeavour to recruit only persons over the age of 18. Protect children from abuse by others. Prevent children from taking part in combat. Talk to them. Give them the feeling that someone is looking after them. Inform your leader, who will establish contact with an international organization.

10. Be especially careful when using mines or booby traps. Irresponsible use of such mines will cost innocent people their lives for a long time to come.

11. Treat all those in your power humanely. War will never be humane, but you know the rules and restrictions and can prevent unnecessary suffering. Set a positive example for everyone: *I obey the rules. Follow my example.*

12. Support all measures to maintain discipline in your operational unit. Take immediate action if you notice violations of these rules. Inform your leader. Deliberate misconduct will be punished. Above all you are responsible for your own behaviour in combat. There will be situations in which you will find it difficult to obey these rules. In the long term, your positive behaviour is an important contribution to a better future, a life in freedom, dignity and humanity.

Looking to the future

In the long term, proper conduct in compliance with the rules of international humanitarian law on the battlefields of tomorrow will be achieved only if the necessary investment is made in instruction and training, if military commanders of all ranks make a personal commitment, if the principles of international humanitarian law are made a part of practice-oriented training material, and implementation moves from theory to more practical training which takes closer account of the realities of combat. Instruction and training in international humanitarian law should be viewed as an ongoing process.

The fact that the armed forces of the future will face increased challenges of a humanitarian nature should be reflected in their training and military exercises. As was stressed above, integration is the key: what is needed is not to create a specialized field for experts

but to make international humanitarian law an integral part of all training programmes and incorporate it appropriately into all other leadership, tactical, logistics and combat training.

Better protection of the civilian population in armed conflicts, especially internal armed conflicts, and the prevention of humanitarian disasters occurring during or as a result of wars, for example because of a growing number of refugees, will be some of the challenges of the decades ahead.

Convincing all armed groups to comply with at least a minimum of internationally recognized rules and to incorporate them into training will be the biggest challenge of all. There is no magic formula for this. At present, patience, persuasion and direct discussions with the leaders in charge on the spot seem to hold the most promise. In this regard, the ICRC with its specialized experience has much to offer.

The international community is urged to maintain its efforts to incorporate the principles of international humanitarian law into instruction and training. Both the regular armed and security forces and troops serving in peace support operations can and must set an example which will have a positive influence on all parties to conflict. Although the International Criminal Court, once established, is likely to have a deterrent effect, persuasion is to be preferred over the threat of punishment.

We can do better than to start the next millennium with more barbarity. Making international humanitarian law a part of instruction and training will continue to be the real challenge for all leaders of armed groups.



Résumé

Le droit international humanitaire a-t-il encore une chance ?

par DIETMAR KLENNER

Même si ses traités sont bien développés et si son corps de règles s'est adapté à la guerre moderne, le droit international humanitaire n'a de raison d'être que s'il est effectivement respecté au cours des conflits armés. Pour être efficace, le droit doit d'abord être connu des acteurs de la violence. Le problème se pose aujourd'hui avec acuité de savoir comment atteindre les combattants irréguliers, ceux qui se battent sans faire partie de forces armées structurées. L'auteur suggère quelques démarches pratiques pour atteindre ce public. Il propose, par ailleurs, un résumé des règles essentielles et principales du droit international humanitaire à l'attention de ceux qui sont appelés à les enseigner sur le terrain.

Des pages méconnues de l'histoire de la Seconde Guerre mondiale : les prisonniers de guerre soviétiques en Finlande (1941-1944)

par

TIGRAN S. DRAMBYAN

*Ceux qui ne se souviennent pas du passé
sont condamnés à le revivre.*

G. Santayana

Au cours des décennies écoulées, un grand nombre d'ouvrages, d'articles, de mémoires et d'autres publications russes ont été consacrés au problème des prisonniers de guerre pendant la Seconde Guerre mondiale. Pourtant, toutes ces publications – dont l'intérêt scientifique et le contenu informatif pour le lecteur sont indubitables – ont en commun une particularité flagrante : leurs auteurs évitent systématiquement d'évoquer la situation des prisonniers de guerre soviétiques en Finlande, leur utilisation comme main-d'œuvre dans l'économie finlandaise et, surtout, l'activité humanitaire du Comité international de la Croix-Rouge à Genève et de la Croix-Rouge finlandaise. Grâce à cette action, plus de 40 000 prisonniers soviétiques détenus dans les camps finlandais ont pu, de juin 1942 à octobre 1944, recevoir régulièrement de l'assistance sous forme de colis Croix-Rouge.

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Nous nous sommes fixé pour tâche de combler cette lacune de l'historiographie russe et, grâce à une abondante documentation, de décrire de manière sereine et objective, l'histoire et les particularités du séjour des prisonniers de guerre soviétiques en Finlande entre 1941 et 1944.

Les documents utilisés pour ces recherches proviennent des archives des ministères finlandais de la défense et de la santé, et des archives de la Croix-Rouge finlandaise. Nous avons aussi utilisé les informations contenues dans les travaux des historiens finlandais Eino Pietola et Aare Sallinen, ainsi que dans le livre de Nikolai Dyakov, écrivain moscovite qui fut détenu dans un camp de prisonniers de guerre en Finlande. Ce livre, paru en 1990, est intitulé *Pod tchoujim nebom* (Sous un ciel étranger). Nous avons également consulté l'ouvrage de André Durand, *Histoire du Comité international de la Croix-Rouge. De Sarajevo à Hiroshima* (Genève, 1978).

L'Union soviétique et les Conventions de Genève

Rappelons d'abord qu'au début de la Seconde Guerre mondiale, l'Union soviétique n'était pas liée par la Convention de 1929 relative au traitement des prisonniers de guerre. Le gouvernement soviétique n'avait ratifié que la Convention de 1929 pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, ce qui fut notifié au depositaire par une déclaration spéciale du commissaire du peuple de l'URSS chargé des affaires étrangères, M. Litvinov, le 25 août 1931. Le CICR s'est efforcé à plus d'une reprise de persuader l'Union soviétique d'apposer sa signature au bas de la Convention de 1929 relative au traitement des prisonniers de guerre. L'une de ces tentatives a été entreprise par le CICR au début des hostilités entre l'URSS et la Finlande, le 4 décembre 1939. Le CICR proposa alors ses services aux belligérants et envoya son représentant en Finlande. Les autorités finlandaises l'autorisèrent même, à titre exceptionnel, à visiter un camp de transit pour prisonniers de guerre soviétiques en Finlande, tandis que la Croix-Rouge finlandaise soumettait à Genève une liste de soldats et de commandants de l'armée rouge faits prisonniers au cours des opérations militaires.

Après la fin des hostilités, en hiver 1939/1940, tous les prisonniers de guerre (environ 5000) ont été rapatriés par la Finlande en mars 1940. Il ressort de certains documents d'archives du Commissariat du peuple aux affaires intérieures (NKVD) de l'URSS – longtemps tenus secrets, mais désormais accessibles – que les prisonniers libérés furent immédiatement internés dans le camp de prisonniers du NKVD à Youja (région de Ivanovo), puis fusillés en août 1940. Par ailleurs, au 24 juin 1940, le camp du NKVD à Sestorretsk hébergeait 18 prisonniers de guerre finlandais qui avaient refusé de retourner en Finlande¹.

Les prisonniers de guerre soviétique de 1941 aux mains des Finlandais

Selon les données officielles de la Direction des affaires des prisonniers de guerre auprès de l'état-major du commandant en chef des forces armées finlandaises, 64 188 soldats et officiers de l'armée rouge furent faits prisonniers entre juin et septembre 1941². Nombre d'entre eux étaient blessés. Les prisonniers de guerre soviétiques étaient répartis dans 23 camps à travers la Finlande.

En septembre 1941, l'armée rouge stoppait l'attaque des forces germano-finlandaises dans l'Isthme de Carélie, après avoir déjoué leur tentative de prendre le port de Soroka et d'avancer jusqu'à Mourmansk, où parvenaient les livraisons de matériel et d'équipement envoyées en crédit-bail par les alliés de la coalition anti-hitlérienne. D'octobre 1941 jusqu'au 9 juin 1944, il n'y eut pas sur ce front d'hostilités actives ; la situation s'était stabilisée, et de part et d'autre on passa à une guerre de positions. Or, c'est précisément au cours des quatre premiers mois d'affrontements militaires dans l'Isthme de Carélie que furent pris la grande majorité des prisonniers de guerre. Ainsi, dès août

¹ *Voenna-istoritcheskyy Journal*, n° 6, 1990, p. 53. Voir aussi V.B. Konassov, V.M. Podolsky et A.V. Terechtchouk, *Neizvestnye stranitsy istorii*, Moscou, 1992, p. 6.

² Toutes les données concernant le nombre de prisonniers de guerre soviétiques en

Finlande entre 1941 et 1944 sont tirées de l'article de Eino Pietola, « Voennoplennyye v Finlyandii. 1941-1944 gg. », publié dans la revue *Sever* (Petrozavodsk), n° 12, 1990, pp. 91-132.

1941, on comptait 17 215 soldats et commandants soviétiques aux mains des Finlandais, tandis que, le 9 septembre 1941, lorsque l'offensive des forces finlandaises et allemandes fut arrêtée, les camps de Finlande comptaient déjà plus de 60 000 militaires de l'armée rouge.

Ces premiers mois de guerre se caractérisent par une mortalité très élevée parmi les captifs : entre le 10 juin 1941 et février 1942, on compte 14 282 décès dans les camps finlandais, tandis que, pour toute la période de la guerre, entre 1941 et 1944, le nombre des morts atteint 18 700. L'Institut d'études militaires et la Croix-Rouge finlandaise expliquent cette mortalité très élevée parmi les prisonniers de guerre soviétiques par une alimentation insuffisante, par le caractère épuisant du travail et par les maladies. Autant de phénomènes, dont l'action conjuguée a sans aucun doute accru la vulnérabilité des prisonniers.

L'administration des camps pour prisonniers de guerre soviétiques en Finlande, suivant les instructions de la Croix-Rouge finlandaise, exemptait les captifs malades du travail. Ceux-ci étaient placés dans des lazarets où ils recevaient les soins médicaux indispensables, dispensés par le personnel médical finlandais, mais aussi par des médecins, eux-mêmes prisonniers de guerre. Parmi eux, on comptait un certain nombre de médecins hautement qualifiés de Leningrad et de Moscou. Pour le personnel médical finlandais et soviétique des lazarets des camps de prisonniers, le serment d'Hippocrate était sacré.

La mortalité demeura élevée parmi les captifs soviétiques jusqu'au printemps 1942. C'est alors que le maréchal Carl Gustaf Emil Mannerheim, commandant en chef des forces armées finlandaises, après avoir pris connaissance du rapport de la commission de la Croix-Rouge finlandaise sur la situation déplorable des prisonniers dans les camps, retira la responsabilité de la direction et de la protection des camps à l'état-major des unités de l'arrière. Il la confia alors à une instance nouvellement créée, la « Direction des questions relatives aux prisonniers de guerre », qui dépendait de l'état-major du commandant en chef des forces armées finlandaises. Il fixa à cette structure la tâche d'améliorer radicalement la situation des prisonniers dans les camps et de veiller à ce qu'ils soient traités de manière plus humaine.

À la même époque, le 1^{er} mars 1942, le maréchal Mannerheim, en sa qualité de président de la Croix-Rouge finlandaise, signalait au CICR que la Croix-Rouge finlandaise était disposée à accepter une aide alimentaire et autre pour les prisonniers de guerre soviétiques en Finlande. Voici un extrait de la lettre du maréchal Mannerheim³:

« Nous sommes désireux de respecter les exigences édictées par les traités internationaux et les lois humanitaires dans le traitement de nos prisonniers de guerre, mais nous nous trouvons devant une crise, dont il nous est impossible de venir à bout par nos propres moyens. La situation critique de notre pays pour ce qui est dû au ravitaillement ne nous permet pas d'améliorer ni la quantité ni la qualité de la nourriture des prisonniers. Nous ne sommes même pas en mesure de garantir que le niveau d'aujourd'hui pourra à la longue être maintenu. Toute augmentation des rations des prisonniers devrait s'effectuer au détriment de notre population civile.

» En portant une telle situation à la connaissance du Comité international de la Croix-Rouge, nous espérons qu'il voudra bien s'intéresser au sort de nos prisonniers et qu'il trouvera le moyen de leur venir en aide. Le besoin le plus urgent que nous éprouvons pour le moment consiste en vivres et médicaments. Pour notre part, nous serions très heureux de recevoir un délégué du Comité à la disposition duquel nous donnerions toutes les facilités de contrôler que les envois destinés aux prisonniers de guerre sont entièrement et exclusivement mis à l'usage des prisonniers de guerre soviétiques en Finlande. »

La réponse à cette lettre ne se fit guère attendre : le CICR s'adressa à de nombreuses Sociétés de la Croix-Rouge, en leur demandant d'apporter une aide humanitaire à la Croix-Rouge finlandaise, afin de lui permettre d'apporter une assistance concrète aux prisonniers de guerre soviétiques sur son sol. Cet appel suscita une réponse des Croix-Rouges américaine, argentine, canadienne, suédoise et suisse.

3 A. Durand, *Histoire du Comité international de la Croix-Rouge — De Sarajevo à*

Hiroshima, Institut Henry-Dunant, Genève, 1978, p. 443 et suiv.

Grâce aux mesures prises par le CICR, 500 tonnes de vivres ont été distribuées dans les camps de prisonniers de guerre soviétiques en Finlande entre juin 1942 et octobre 1944. Chaque colis contenait du lait en poudre, des conserves de viande, du sucre, d'autres produits alimentaires et des cigarettes. En outre, les captifs reçurent 500 000 cachets de vitamines et des médicaments.

Une comparaison de la situation des prisonniers de guerre soviétiques dans les camps finlandais avec celle de leurs homologues dans les camps allemands témoigne sans ambiguïté, du sort relativement enviable des premiers. Qu'on en juge : dans les camps finlandais, les prisonniers de guerre n'étaient pas contraints par la force de travailler. L'administration des camps définissait deux normes différentes pour les rations quotidiennes, selon que le prisonnier travaillait ou non. Relevons, par ailleurs, que la ration quotidienne des prisonniers de guerre qui travaillaient ne se distinguait pas beaucoup de celle du soldat finlandais.

En outre, le travail des prisonniers de guerre employés dans l'économie était rémunéré selon des tarifs fixés par les autorités. Les prisonniers employés dans l'agriculture étaient payés 50 marks finlandais par jour par le fermier qui les employait. Dans l'industrie, la rémunération journalière versée par l'employeur atteignait 60 marks. Les archives de l'ancien état-major général des unités de l'arrière, qui administrait les camps de prisonniers pendant la première année de guerre, permettent de constater que les prisonniers de guerre effectuaient essentiellement des travaux tels que l'assèchement de marais, l'exploitation de la tourbe, la pose de rails de chemin de fer, les travaux des champs et les opérations de chargement dans le port de Vaasa.

L'armistice entre la Finlande et l'URSS a été ratifié par le Parlement le 19 septembre 1944. Trois semaines plus tard, le rapatriement des prisonniers de guerre soviétiques en Finlande commençait : le premier groupe comptait 1078 personnes. Relevons, cependant, que l'on ignore toujours quel a été le sort de 44 453 prisonniers de guerre soviétiques, dont la liste avait été remise par la Croix-Rouge finlandaise à la partie soviétique avant leur rapatriement.

Comme il a été possible de l'établir grâce aux documents de la Commission soviétique de contrôle qui surveillait le respect, par

la partie finlandaise, des conditions de l'armistice et le rapatriement en URSS des prisonniers de guerre soviétiques qu'elle détenait, le désir de retrouver la patrie n'habitait pas tous ces prisonniers, et de loin. Dès les premiers jours du rapatriement, plus de 100 prisonniers de guerre choisirent de rester en Finlande ou de gagner la Suède. Mais on ignore toujours quel fut leur sort. Parmi ceux qui ne regagnèrent pas l'URSS, il faut aussi compter les enrôlés volontaires dans l'armée finlandaise. On comptait parmi eux plus de 2000 allemands de la Volga et des personnes originaires des républiques du Caucase.

Dans ce contexte, il n'est pas sans intérêt de rappeler que 2475 prisonniers de guerre finlandais ont été détenus par l'Union soviétique pendant les années de guerre (entre 1941 et 1945). Sur ce nombre, 404 moururent en détention. Ils furent 1931 à retourner par groupes en Finlande. Enfin, 20 prisonniers de guerre finlandais refusèrent de regagner leur pays, choisissant de demeurer en Union soviétique et acquérant la citoyenneté de ce pays⁴.

Témoignages de prisonniers de guerre

Outre les archives de l'état-major général des unités de l'arrière, dont le chef transmettait régulièrement à la Croix-Rouge finlandaise des informations sur la situation dans les camps de prisonniers de guerre, on trouve des pièces importantes dans les travaux de chercheurs finlandais. Eino Pietola⁵ et Aare Sallinen⁶, par exemple, ont étudié le problème des prisonniers de guerre en Finlande. L'ancien prisonnier de guerre soviétique en Finlande, Nikolai Dyakov⁷, a écrit ses mémoires à ce sujet.

Dyakov se rappelle : « Dès les premiers jours de ma captivité, je constatai l'existence de deux Finlandes : d'une part, celle de

⁴ V.P. Galitsky, *Finskije voennoplennye v lageryakh NKVD (1939-1953 gg.)*, monographie, Moscou, 1997, pp. 67, 140 et 141.

⁵ *Supra* note 2.

⁶ A. Sallinen/P. Leontev, « Ouzniki finskogo lagerya n° 11 », *Sever*, 1990, pp. 110-117.

⁷ N.F. Dyakov, « Pod tchoujim nebom. Zapiski o finskom plene. 1941-1944 gg. », *Sever*, 1991, n° 3, pp. 95-123, n° 4, pp. 103-140, n° 5, pp. 106-127.

Risto Ryti, de Väinö Tanner et du mouvement de Lapua, qui faisait cause commune avec Hitler, et, d'autre part, une grande Finlande, celle que l'on ne peut désigner que par le nom authentiquement finnois de «Suomi», ce mot tendre et musical, celle qui vénère et adore son dieu : le travail, la Finlande des ouvriers et des paysans. Les habitants de cette Finlande laborieuse surent toujours rester et restent toujours des hommes dignes, au sens le plus noble du terme.»⁸

On trouve quelques témoignages de prisonniers de guerre après leur retour en URSS dans un article passionnant et très complet du chercheur finlandais Aare Saallinen, « Les prisonniers du camp finlandais n° 11 »⁹. Toutefois, sur ce camp n° 11, situé à Valkeakoski, aucun document ni aucun témoignage n'existe concernant le sort de ses pensionnaires, qui travaillaient dans une usine de papier pour remplir des commandes de guerre de l'Allemagne. Le camp n° 11 semble avoir gardé son secret. Or, Aare Sallinen est parvenu, au terme de longues recherches dans les archives du ministère de la Santé et de la Croix-Rouge finlandaise, à trouver des témoignages de prisonniers de guerre soviétiques détenus à Valkeakoski. Il a ainsi publié les noms de 105 prisonniers du camp n° 11, ainsi que ceux de quinze autres prisonniers qui furent remis par les autorités finlandaises aux Allemands. L'auteur a poursuivi ses recherches, afin de déterminer quel avait été le sort des prisonniers du camp n° 11 après leur retour dans leur patrie.

Voici ce qu'il écrit : « En 1980, P. F. Nikoutev, l'un des anciens prisonniers de guerre que les Finlandais avaient restitué à la partie soviétique après la fin de la guerre, raconta qu'après avoir été remis aux Soviétiques et avoir subi une rapide vérification, les prisonniers libérés ont été embarqués à Belomorsk sur deux vieux bateaux à vapeur. Le premier explosa après avoir parcouru tout juste un kilomètre. Aucune tentative de sauvetage ne fut entreprise. Le deuxième bateau parvint à bon port. Nikoutev fut jugé et condamné à dix ans de réclusion ; on l'envoya travailler à Komi. Ayant appris ces faits, je me suis alors demandé : tous les rapatriés sont-ils rentrés chez eux ? (...) »

8 *Ibid.*

9 *Op. cit.* (note 6).

» Le jour de l'inauguration du monument à la mémoire des 27 prisonniers de guerre soviétiques du camp n° 11 à Valkeakoski, aucun des proches de ces disparus ne vint se recueillir sur leurs tombes. Le monument fut inauguré en présence de l'attaché militaire de l'ambassade soviétique en Finlande, le général Konstantinov, et son adjoint, le colonel Moudrik, venus de Helsinki. Je leur transmis les informations concernant les prisonniers de guerre enterrés dans le cimetière. Ils me remercièrent, mais je ne reçus jamais aucune réponse de leur part. Je m'adressai par la suite à la société Finlande-URSS, sans que mes démarches suscitent davantage d'intérêt. (...)

» Certes, je comprends que l'on n'a pas fait le meilleur accueil aux prisonniers de guerre à leur retour, et je sais que cet opprobre est retombé sur leurs familles, qui furent privées de toute assistance sociale. Pourtant, les prisonniers ne sont pas coupables; la faute en revient à des événements dont ils n'étaient pas les instigateurs (...)

» Pour moi, ce sont des personnes, certes éloignées, mais dont j'ai appris à connaître, pour beaucoup d'entre eux, les personnalités et les noms. J'aimerais recevoir des informations de leur part ou à leur sujet. Je voudrais être utile à l'un ou l'autre d'entre eux.»¹⁰

Ce sont là les paroles d'un simple travailleur finlandais, ancien combattant, mû exclusivement par le désir généreux d'éclaircir le sort des anciens prisonniers du camp n° 11 de Valkeakoski, d'établir un contact avec eux et d'essayer, dans la mesure du possible, de leur apporter une aide.



¹⁰ *Ibid.*, p. 115 et suiv.

*Abstract***Unknown pages of the history of the Second World War: Soviet prisoners of war in Finland (1941-1944)**

by TIGRAN S. DRAMBYAN

Despite abundant literature on the Second World War, not much has been written about the situation of those members of the Soviet armed forces who were held in captivity by Finland between 1941 and 1944. Yet between June and September 1941 close to 65,000 officers and men of the Red Army were taken prisoner, many of whom were wounded. Although the Soviet Union was not a party to the 1929 Prisoner-of-War Convention, Finland treated its prisoners according to the Law of Geneva. Thus ICRC delegates visited the POW camps, and prisoners received food and medical assistance from various Red Cross Societies. In the autumn of 1944 they were repatriated to the Soviet Union. Not much is known about how they fared after their return to their home country. Firsthand accounts by former Soviet POWs close this review of a chapter of recent history unknown to most.

Humanitarian issues and agencies as triggers for international military action

by

ADAM ROBERTS

In crises and conflicts since the end of the Cold War considerations specifically identified as “humanitarian” have been repeatedly designated by States and international bodies as grounds for threatening, and embarking on, international military action. Such considerations have been given greater prominence in international decision-making than in previous eras. Since 1990, in one episode after another in which international bodies have sought to stop terrible excesses in crisis-torn regions, three main types of humanitarian issue have been cited, for example in UN Security Council resolutions, as grounds for international concern:

- murder and deliberate infliction of suffering on civilians, prisoners and others;
- refusal of parties to a conflict to allow or assist humanitarian relief activities;
- violence and threats of violence against humanitarian workers.

In a few cases these types of humanitarian issue have been raised, not in the context of an armed conflict, but as a result of tyrannical government or else a state of uncontrolled violence. However, in

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most cases these issues have arisen during armed conflicts (whether international or internal, or with elements of both). Thus they necessarily relate directly to the law of war. Security Council resolutions have in fact repeatedly condemned such actions by parties to conflicts as violations of international humanitarian law. Then in many cases the Security Council, or certain of its leading members, have gone on to authorize or initiate the use of force in order to end a pattern of violations. In short, the law of war is acquiring a role as a trigger for military action.

The terms “law of war” and “international humanitarian law” are used more or less interchangeably in this paper. They and the various near synonyms also used currently (such as “international law of armed conflict”) all refer to what is substantially the same body of law. The term “law (or laws) of war” is sometimes seen as old-fashioned, but it has the merit of being succinct; and it also encompasses aspects that are not exclusively humanitarian in purpose, such as the law relating to neutrality. At the same time, the term “international humanitarian law” has come to be widely used in diplomatic circles and non-governmental organizations; and it can be particularly useful in referring to those parts of the law of war that deal with substantially humanitarian matters such as protection of vulnerable populations and of aid activities.

Military action based on these three types of humanitarian issue is one important response to the questions of how to prevent violations of international humanitarian law, and how to protect civilians and other victims of war. Much discussion of the protection of civilians in war has failed to take account of this developing practice of military action. One reason may be that the whole subject is controversial. Any exploration of military action as a response to violations of the law of war challenges the long-standing and important principle that the law relating to resort to war (*jus ad bellum*) is a separate and distinct subject from the law relating to conduct in war (*jus in bello*). Likewise, any suggestion that humanitarian workers and organizations may play some part in triggering military action challenges their deep (and in some cases legally-based) commitment to impartiality and neutrality.

“Military action” is a broad term. As used here, it encompasses the use of military force, or the explicit threat of such use, with

the aim of ending persistent violations of international humanitarian norms. The particular purposes of such action can include altering the policies of certain factions or governments; weakening or defeating certain armed forces and the infrastructure that supports them; arresting suspected violators of the law of war; providing humanitarian relief; and providing physical protection for vulnerable people, activities and institutions. Its forms can include the use of air, naval and land forces, whether in direct combat operations, in protection, in intervention in a State, or in making threats against a particular State or group.

The legal framework for such action includes three main types:

- (a) UN command and control, as with enforcement operations which are approved by the Security Council and remain directly under UN;
- (b) action following a UN authorization under which powers are delegated to national or alliance command and control;
- (c) action without explicit UN backing, for example under the auspices of a regional alliance or organization.

In some cases, as noted below, military action has the additional legal basis that it has the full consent of the government of the State where the action takes place.

The broad subject of military action as considered here overlaps with, but is not quite the same as, humanitarian intervention. "Humanitarian intervention" in its classical sense means military intervention in a State, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants. Shorn of the epithet "humanitarian", the term "intervention" still carries an implication of forcible action against the wishes of the government of the State concerned. Many military actions rooted in considerations of international humanitarian law fit these definitions of intervention, but by no means all do. Some, indeed, may have the explicit consent of the government of the territory in which the action takes place (for example, when such action is taken against insurgents or separatists in a civil war) and therefore do not count as interventions in the classical sense, whether humanitarian or otherwise. Equally, some actions, even if grounded in considerations of international humanitar-

ian law, may have other purposes (for example, concern with international peace and security) that are not strictly speaking humanitarian, and are therefore doubtful candidates for inclusion in the category of “humanitarian intervention”.

Considerations of international humanitarian law and international human rights law often converge. The same acts may constitute violations of both of these bodies of law, and may be cited in a particular instance as justifications for military action or the threat thereof. Sometimes the international humanitarian law element is underplayed, such as when public figures advocate or defend military action, or discuss the general issue of humanitarian intervention, exclusively on grounds of violations of human rights, when the violations concerned might equally properly be viewed as violations of international humanitarian law. However, considerations of international humanitarian law, which are the main focus of attention here, have come to be emphasized much more since about 1991 than in any previous period, especially in the practice of the UN Security Council.

Military action as a response to violations of human rights and humanitarian norms has a long history, well predating the modern codifications of international law on the subject. In the 1820s, it was largely as a consequence of reported Turkish atrocities that French and British governments decided to give a degree of naval support to the cause of Greek independence from Ottoman rule. The history of European colonialism is replete with cases in which one part of the public justification for intervention was the violation of basic humanitarian norms in one or another part of the non-European world. Similarly, in the period of the Cold War (roughly 1945–89) numerous interventions were justified at least partly in humanitarian terms.

The purpose here is, first, to illustrate the extent to which humanitarian issues have become entwined with the initiation of international military action, especially in the practice of the Security Council, in response to a wide variety of situations by no means limited to war. This is followed by an examination of some of the other purposes that may contribute to the initiation of international military action in particular cases, and an examination of the apparent absence

of specific authorization of such military action in international law, including the law of war. The chapter then turns to the difficult role of humanitarian organizations in situations where force is threatened or used, and a specific examination of some of the problems that the entwining of humanitarian and military issues has created for the International Committee of the Red Cross (ICRC). This is followed by a brief discussion of the protection of civilians in UN debates, focusing on three key UN documents issued in 1999. Finally, on the basis that “humanitarian” issues will continue to have a bearing on decisions about military force, some possible conclusions for humanitarian organizations, States, and inter-State organizations are suggested. Of these, perhaps the most challenging is the question of how peacekeeping forces may need to undergo a complex metamorphosis in order to be effective in carrying out tasks such as protection of civilians in violent situations.

Security Council practice since 1990

Since early 1991 there have been at least nine crises in which humanitarian issues were referred to prominently in UN Security Council resolutions, after which military action was authorized either by the Security Council itself and/or (in the case of northern Iraq and Kosovo) by major Western States, and such action took place. In all but the first of these cases, relevant Security Council resolutions explicitly referred to Chapter VII of the United Nations Charter, indicating that the Council’s powers to take action, including sanctions and enforcement, were being invoked. These nine cases are briefly outlined below, with a few examples of the reference to humanitarian issues in the relevant resolutions. (In almost all cases other issues were also mentioned, including, for example, the maintenance of international peace and security.)

Northern Iraq (1991)

Following a failed uprising within Iraq and a huge exodus of Kurds and others to neighbouring countries, a Security Council resolution in April 1991 required that “Iraq allow immediate access by international humanitarian organizations to all those in need of assis-

tance in all parts of Iraq”.¹ This was not adopted under Chapter VII of the UN Charter, but it did state that Iraqi actions causing refugee flows “threaten international peace and security in the region”. The resolution, while less than a formal authorization of intervention, was of considerable help to the United States and its coalition partners when the US-led military operation within northern Iraq began on April 17, 1991. Iraq subsequently consented to the presence of the UN Guards Contingent in Iraq (UNGCI).

Bosnia and Herzegovina (1992-1995)

During this long and atrocious war, from as early as June 1992 onwards several Security Council resolutions suggested that if the UN Protection Force (UNPROFOR) and its humanitarian activities were obstructed, further measures not based on the consent of the parties might be taken to ensure delivery of humanitarian assistance.²

Also in 1992, the resolution establishing the NATO-enforced “no-fly zone” in Bosnia specified that one of the purposes of the ban on military flights was “for the safety of delivery of humanitarian assistance”.³

The resolutions on the “safe areas” in Bosnia approved by the Security Council in April-June 1993 all condemned violations of international humanitarian law, and referred also to other humanitarian considerations, including the Security Council’s duty to prevent the crime of genocide.⁴ Certain subsequent uses of force by NATO in Bosnia from 1993-1995 were based on these resolutions.

Somalia (1992/1993)

The US-led invasion of 9 December 1992, by the Unified Task Force (UNITAF) was authorized by a Security Council resolution passed six days earlier that referred to “the urgent calls from Somalia for

¹ SC Res. 688 (5. April 1991).

² See e.g. SC Res. 758 (8 June 1992); SC Res. 761 (29 June 1992), and SC Res. 770 (13 August 1992), this last adopted explicitly under Chapter VII.

³ SC Res. 781 (9 October 1992).

⁴ SC Res. 819 (16 April 1993); SC Res. 824 (6 May 1993), and SC Res. 836 (4 June 1993), the last two adopted explicitly under Chapter VII.

the international community to take measures to ensure the delivery of humanitarian assistance in Somalia”, expressed alarm at “continuing reports of widespread violations of international humanitarian law occurring in Somalia”, and made numerous other references to humanitarian issues.⁵

In 1993, the expanded UN peacekeeping force, UN Operation in Somalia (UNOSOM II), was established on the basis of a resolution that deplored “the acts of violence against persons engaging in humanitarian efforts” and noted with regret “the continuing reports of widespread violations of international humanitarian law”.⁶ This resolution accorded UNOSOM II specific powers of enforcement, confirming that it was intended to be more than a normal peacekeeping force. It left Somalia in March 1995 following a number of disastrous incidents, mainly in Mogadishu in 1993 and 1994, that raised questions about the command structure and purposes of the international forces in Somalia, and about their failures to observe fundamental humanitarian norms.

Rwanda (1994)

The UN response to the genocide in Rwanda in April-July 1994 was marked by weakness and indecision, despite the presence in the country of a small peacekeeping force, the UN Assistance Mission for Rwanda (UNAMIR). When the Security Council did begin to call for forceful action in response to the crisis, it stressed the importance of humanitarian issues as a basis for such action. For example, an early resolution on these lines passed in April 1994 expressed concern over “a humanitarian crisis of enormous proportions” and decided on an expansion of UNAMIR’s mandate:

“(a) To contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas;

⁵ SC Res. 794 (3 December 1992), adopted under Chapter VII.

⁶ SC Res. 814 (26 March 1993), adopted under Chapter VII.

(b) To provide security and support for the distribution of relief supplies and humanitarian relief operations".⁷

This mandate was repeated and reaffirmed in a resolution in early June, which referred to "reports indicating that acts of genocide have occurred in Rwanda", and underscored that "the internal displacement of some 1.5 million Rwandans facing starvation and disease and the massive exodus of refugees to neighbouring countries constitute a humanitarian crisis of enormous proportions".⁸ Great difficulties arose in obtaining forces to go to Rwanda to carry out the mandate.

On 22 June, in a further decision on Rwanda, the Security Council accepted an offer from France and other member States to establish a temporary operation there under French command and control. The Council authorized France to use "all necessary means to achieve the humanitarian objectives" that had been set out in the resolutions cited above.⁹ This was the prelude to the controversial French-led *Opération Turquoise* in western Rwanda in summer 1994.

Haiti (1994)

Following the coup d'Etat in Haiti in September 1991, the Security Council eventually passed a resolution in July 1994 stating *inter alia* that it was "gravely concerned by the significant further deterioration of the humanitarian situation in Haiti", and authorizing the use of "all necessary means to facilitate the departure from Haiti of the military leadership ... and to establish and maintain a secure and stable environment".¹⁰ This resolution is remarkable for its unequivocal call for action to topple an existing regime. The US-led invasion followed in September 1994, with the last-minute consent of the military regime to the presence of the Multinational Force in Haiti (MNF). In 1995, the UN Mission in Haiti (UNMIH), a peacekeeping force, took over

⁷ SC Res. 918 (17 May 1994), only part of which was adopted under Chapter VII.

⁸ SC Res. 925 (8 June 1994).

⁹ SC Res. 929 (22 June 1994), adopted under Chapter VII. The humanitarian objec-

tives to which it referred were those set out previously in SC Res. 925 (1994), and also in SC Res. 918 (1994).

¹⁰ SC Res. 940 (31 July 1994), adopted under Chapter VII.

from the MNF, inheriting the powers, including those under Chapter VII of the UN Charter, that had earlier been accorded to the MNF.¹¹

Albania (1997)

In March 1997, during a period of widespread disorder in Albania and a large refugee exodus, the Security Council adopted a resolution approving the establishment of an Italian-led multinational protection force (MPF) “to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance.”¹² This operation had the consent of the Albanian government. The MPF was deployed in Albania shortly after the resolution was passed, and by the time that the force was withdrawn in June it had contributed significantly to the restoration of order.

Kosovo (1998/1999)

Following the outbreak of hostilities and atrocities in Kosovo from February 1998 onwards, and a worsening of the situation over the summer, the UN Security Council passed a resolution in September 1998 demanding that the parties take certain concrete steps including a cease-fire and acceptance of an effective international monitoring force in the province. In the course of repeated references to humanitarian issues, this resolution stated that a main purpose was “to avert the impending humanitarian catastrophe”, and also demanded that the Federal Republic of Yugoslavia “facilitate, in agreement with the UNHCR and the ICRC, the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo”.¹³ The subsequent major resolution on Kosovo, endorsing agreements concluded in

¹¹ SC Res. 975 (30 January 1995), provided for UNMIH to take over certain specific powers that had been accorded to the MNF in Haiti by SC Res. 940 (31 July 1994).

¹² SC Res. 1101 (28 March 1997), adopted under Chapter VII. See also SC Res. 1114

(19 June 1997), deciding that the operation in Albania was to be limited to a period of 45 days from 28 June 1997.

¹³ SC Res. 1199 (23 September 1998), adopted under Chapter VII.

Belgrade on 15 and 16 October 1998 and adopted just over a week later, made similar references to humanitarian issues as a basis for action.¹⁴

Over Kosovo in 1998/1999, as in the case of northern Iraq in 1991, the Security Council did not explicitly authorize the use of force, but did spell out demands relating *inter alia* to humanitarian issues. These resolutions were then cited by representatives of NATO member States as evidence that the military action they were taking, even though not endorsed by the Security Council, was in pursuit of goals (including humanitarian ones) that the Council had proclaimed.

Following the war between NATO States and Yugoslavia in March–June 1999, the Security Council passed a further resolution deciding to deploy an international civil and security presence in Kosovo, the latter with substantial NATO participation and with extensive powers. Its assigned tasks included establishing “a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered”.¹⁵

East Timor (1999)

When pro-Indonesian elements in East Timor refused to accept the outcome of the referendum of 30 August 1999, which had favoured independence for the territory, and embarked on large-scale killings and expulsions, the Security Council passed a resolution in mid-September authorizing an Australian-led multinational force to restore peace and security in East Timor, and “to facilitate humanitarian assistance operations”.¹⁶ This resolution was only passed after Indonesian consent to the multinational force had been obtained: this followed the exertion of considerable pressure on the Indonesian government.

A resolution adopted in the following month made provision to replace the Australian-led force with the UN Transitional Administration in East Timor (UNTAET), which was authorized “to

¹⁴ SC Res. 1203 (24 October 1998), adopted under Chapter VII.

¹⁶ SC Res. 1264 (15 September 1999), adopted under Chapter VII.

¹⁵ SC Res. 1244 (10 June 1999), adopted under Chapter VII.

take all necessary measures to fulfil its mandate". Again, humanitarian considerations and organizations were mentioned.¹⁷

Sierra Leone (1999/2000)

Faced with the difficult task of ensuring implementation of the Lomé Peace Agreement of 7 July 1999 that was intended to end the long civil war in Sierra Leone, in October 1999 the Security Council adopted a resolution establishing a new UN force there with certain limited enforcement powers. The UN Mission in Sierra Leone (UNAMSIL), which replaced a UN observer mission with fewer powers, was authorized "to take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence". The resolution also called on all parties "to ensure safe and unhindered access of humanitarian assistance to those in need in Sierra Leone, to guarantee the safety and security of humanitarian personnel and to respect strictly the relevant provisions of international humanitarian and human rights law."¹⁸

A subsequent resolution adopted in February 2000 strengthened UNAMSIL's mandate, giving it authority to "take the necessary action" regarding an enlarged range of tasks that included, *inter alia*, "to facilitate the free flow of people, goods and humanitarian assistance along specified thoroughfares".¹⁹

Other purposes in these military actions

The fact that humanitarian issues were cited authoritatively in so many Security Council resolutions, the great majority of which also referred to Chapter VII of the UN Charter, and all of which led to military action of some kind, does not mean that States and international bodies had experienced a sudden conversion to humanitarianism. In some crises they adopted a response in the name of humanitarianism because they were unable to formulate, or to agree, substantive

¹⁷ SC Res. 1272 (25 October 1999), adopted under Chapter VII.

¹⁸ SC Res. 1270 (22 October, 1999), adopted under Chapter VII.

¹⁹ SC Res. 1289 (7 February 2000), adopted under Chapter VII.

policies dealing with the fundamental issues involved. Nor does the emphasis on humanitarian aspects mean that there were no other purposes, interests or motives at stake. In each case there were. They included:

Securing return of refugees. While enabling refugees to return home may appear to be a humanitarian cause, it also reflects a strong interest of States faced with a sudden refugee influx or a threat thereof. In many cases States taking a significant role in military action in a crisis, or urging others to do so, were also those that faced major refugee problems. In many cases since 1990, massive refugee flows have been seen as constituting a threat to international peace and security, and hence as justifying involvement and action by the Security Council and by others.

International peace and security. In all the above crises, considerations of international peace and security were mentioned alongside humanitarian issues as a basis for international action. For the UN Security Council, reference to this matter is procedurally important in order to justify the Council concerning itself with a crisis. In general, the crises demonstrate that humanitarian issues are not easily separable from more explicitly political ones, including those relating to peace and security.

Credibility of commitments and/or demonstration of power. If States, or the UN Security Council, have called for certain action to be taken by a party to a conflict, and their calls have been ignored, they may have an interest in taking military action in order to maintain the international credibility of their words and of their military capacity. In addition, some States may embark on military action, including in support of humanitarian causes, partly out of a concern to demonstrate a capacity for exercising power, including in cases where their material interests are not directly involved. Some such motivations may have been involved in the willingness of various countries to support the Sarajevo airlift for three years following the visit by President François Mitterrand of France to Sarajevo on 28 June 1992.

In many cases there may have been other interests at stake, encompassing the protection of fellow nationals, the protection of UN

personnel from attack, the security of present or future investments, and the spreading of democracy. Yet the main problem in connection with many of these crises has been the *lack* of solid interests on the part of actual and potential intervening States, and a resulting lack of willingness to take any seriously committing action. In some cases (as in Bosnia) they have acted too late; in other cases (as in Rwanda) most States failed to act at all; in still other cases (as in Somalia) those intervening were not willing to stay for the length of time, nor to accept the level of casualties, that completion of the tasks assigned to the mission might have required.

Lack of legitimation of military action in the law of war

There is no treaty that explicitly recognizes a general right of States or international bodies to take military action in response to gross violations of humanitarian norms, including those in the law of war. The nearest to a legal basis for such action is the UN Charter. The wording of Article 2(4) and 2(7), while basically non-interventionist, appears to leave some scope for the Security Council to take enforcement action within a State; and Chapter VII recognizes the Security Council's right to take a wide range of actions, some of which can be military, in cases where there is a threat to international peace and security. Chapter IX, on international economic and social cooperation, contains a pledge by members to "take joint and separate action" to achieve, *inter alia*, universal observance of human rights, but it has never been suggested that this phrase in Chapter IX legitimizes specifically military action.

Some international agreements concluded since 1945 contain provisions pointing towards a possible right of military action in response to violations. The clearest example (which belongs equally to both the human rights and armed conflict branches of international law) is the 1948 Genocide Convention, Article VIII of which specifies that any contracting State "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide". Another possible example (which is not in

the strict sense a laws of war treaty) is the 1994 Convention on the Safety of United Nations and Associated Personnel, Article 7 of which contains a provision that States will cooperate in its implementation, “particularly in any case where the host State is unable itself to take the required measures”. Both of these agreements have been cited frequently in the course of UN Security Council resolutions authorizing the use of force.

As to humanitarian interventions (in the classical sense of military interventions on humanitarian grounds) not authorized by the UN Security Council, there is a dearth of any binding legal text that supports such action. Treaties in the fields of human rights and international humanitarian law do require States to observe well-defined standards, and to prevent and punish certain violations of those standards. Further, common Article 1 of each of the four Geneva Conventions of 1949 famously calls on States “to ensure respect for the present Convention in all circumstances”. This phrase, while open to considerable interpretation, does not go so far as to imply that forcible military action is among the means of implementation.

A number of treaties in the field of the law of war appear to exclude the idea that a State’s violations of their terms could provide a basis for military intervention. The 1977 Protocol additional to the Geneva Conventions, which relates to international armed conflicts (Protocol I), contains the following caveat in the Preamble:

“*Expressing* their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations ...”

Additional Protocol II, on non-international armed conflicts, states in Article 3, entitled “Non-intervention”:

“1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

“2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the

armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.”

The 1998 Rome Statute of the International Criminal Court (not yet in force) contains a similar provision in the Preamble, emphasizing that “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” Finally, the 1999 Second Hague Protocol on Cultural Property, in its chapter on non-international armed conflicts, reaffirms State sovereignty and non-intervention in Article 22(3) and (5), in terms virtually identical to those of Additional Protocol II, quoted above.

The principal purpose of these provisions of agreements on the laws of war seems to be to protect the sovereignty of potential target States, and in particular to exclude the possibility of these treaties being so interpreted as to justify forcible intervention by States in the affairs (internal or external) of another State. However, these provisions by no means exclude all military action in response to violations. For example, they do not rule out action that is by consent of a government involved in a conflict; and they do not appear to deprive the Security Council of its powers under the UN Charter.

In the 1990s, the increased interest in how international humanitarian law can be implemented inevitably resulted in a shift away from a rigid insistence on the non-intervention rule in favour of a limited (and far from uniform) acceptance that sometimes international military enforcement action may be needed. However, in those cases where military action is without the consent of the government concerned and lacks UN Security Council authorization, international law offers some conflicting principles. In an international crisis the balancing of these principles against one other is a subjective process that cannot always lead to agreed conclusions.

Requests of humanitarian organizations for military action

In a number of post-Cold War crises, international humanitarian workers and organizations have themselves called for outside military intervention in a crisis. For example, in the second half of 1992

a number of agencies called for military action to protect humanitarian aid in Somalia; and in April and May 1994 the UK charity Oxfam described the killings in Rwanda as genocide and called for international action.

In certain cases, even if they do not explicitly call for military action, humanitarian workers and organizations may provide an analysis and description of the crisis in such a way as to assist building a consensus for it. A case in point may be the evidence of the situation in Kosovo presented by a representative of UNHCR to the Security Council meeting on 10 September 1998. This contributed something to the subsequent strongly worded Chapter VII resolution on Kosovo.²⁰

Even if such workers and organizations are silent, actions taken against them can have the effect of leading to calls for intervention. Today's aid workers may sometimes, involuntarily, have a role similar to Western missionaries in distant lands in the era of European colonialism: violence against them may lead to outside intervention. Such a process may have been reinforced by the 1994 Convention on the Safety of UN and Associated Personnel, especially its above-mentioned provision in Article 7(3) requiring States parties to cooperate in implementation of the Convention, "particularly in any case where the host State is unable to take the required measures".

Special case of the ICRC

Any development that seems to associate international humanitarian workers and organizations, and indeed international humanitarian law, with demands or justifications for military action poses a serious problem for the Red Cross and Red Crescent Movement. For the ICRC in particular, the statutory requirements of impartiality and neutrality are fundamental to its effective performance of the tasks in armed conflicts that are assigned to it in international conventions.

²⁰ SC Res. 1199 (23 September 1998), adopted under Chapter VII.

The ICRC's understandable caution about being associated with positions and actions of the United Nations was indicated during the negotiations that led to the conclusion of the 1994 Convention on the Safety of UN and Associated Personnel. The ICRC stated that it did not want its personnel to be protected under this Convention. This was partly because ICRC personnel already have international legal protection deriving from the 1949 Geneva Conventions, and partly because the ICRC's role as neutral humanitarian intermediary might be jeopardized if the ICRC were perceived as closely linked with the United Nations.

The dilemmas all this poses for the ICRC were well expressed by Jakob Kellenberger, President of the ICRC, in an address at Wilton Park on 15 May 2000. He referred to "the confusion caused by the mixing of humanitarian aims with political and/or military aims in action taken by the international community in armed conflicts." He went on:

"My point is not to criticize military intervention, which can, under extreme circumstances, become the only possibility to prevent a humanitarian situation from worsening or to create the conditions for humanitarian organizations to do their work. But we should be careful with words. Whereas an intervention can well be motivated by humanitarian reasons, 'humanitarian intervention' is a problematic expression."²¹

While it is certainly right to be sceptical about the term "humanitarian intervention", the remarkable trend of the 1990s for humanitarian issues to be cited as a basis for Security Council action is not likely to be reversed. For better or for worse, military and humanitarian issues are now intertwined. The ICRC, to maintain its distinct identity, must necessarily put emphasis on its unique character and on the special roles that it performs: it simply cannot be a typical humanitarian organization, if such a thing exists.

²¹ Dr Jakob Kellenberger (President of the ICRC), "Humanitarian challenges in the midst of war", address at Wilton Park Conference,

May 15-19, 2000, text as distributed at conference, p. 6.

Consideration of the protection of civilians in key UN documents

Since the early 1990s there have been extensive discussions within the United Nations addressing the role of the military in supporting humanitarian operations. An awareness of the importance of the issue contributed to the fact that the 1994 Convention on the Safety of UN and Associated Personnel, which was negotiated at the UN Headquarters in New York, dealt extensively with the legal protection of a wide range of “associated personnel”, including those working for inter-government bodies, UN specialized agencies, and humanitarian non-governmental organizations. The discussions at the United Nations, which became frequent in the second half of the 1990s, gradually moved in the direction of concentrating not just on the legal and physical protection of aid, but on the physical protection of civilians at risk; and gradually came to accept the validity of military action, especially in opposing systematic murder of civilians. However, there is little sign that policies that should flow from these conclusions have been understood and acted upon by States, by the Security Council, or by the UN Department of Peacekeeping Operations.

One early high-level discussion of the military/humanitarian interface, in which serious differences of opinion were expressed, was the Security Council’s day-long session on 21 May 1997 on “Protection for humanitarian assistance to refugees and others in conflict situations”, in which senior representatives from many leading international agencies as well as from States took part. This, like many such discussions, was concerned more with the issue of protection of humanitarian operations than with the closely related question of protection of civilians at risk. It exposed a conflict between those in favour of international military support for humanitarian operations, and those who are sceptical or even opposed to such support, fearing above all that it would threaten the neutrality and impartiality of humanitarian work.²²

²² “Difficulty of providing military support for humanitarian operations while ensuring

impartiality focus of Security Council debate”, UN Press Release SC/6371, 21 May 1997.

In 1999, three UN documents addressed directly the question of how the international community should respond when civilians are at risk, whether in armed conflict or at the hands of a brutal regime. These were: the Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict; the Report of the Secretary-General on the Fall of Srebrenica; and the Report of the Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda. With the publication of the reports on Srebrenica and Rwanda opinion moved in the direction of accepting the importance of military action in certain extreme circumstances.

The three reports all recognize that there can be situations in which “protection” of civilians and prisoners of war in the narrow legal sense may be woefully inadequate: physical protection is needed, and may have to be provided by foreign armed forces. This is a key lesson from the disasters of the 1990s that must be taken on board by humanitarian agencies, even if they cannot associate themselves directly with such use of force. What follows is in no sense a summary of the reports; rather it is a distillation of their conclusions as to how humanitarian issues should sometimes be a basis for the initiation of military action.

Secretary-General’s Report on the Protection of Civilians in Armed Conflict

This report, issued in September 1999, was the follow-up to an open meeting of the Security Council on the matter of protection of civilians in armed conflict. It is the most general of the three reports and, perhaps for that reason, the least satisfactory. One weakness is that it presents a completely negative view of the implementation of the law of war in contemporary conflicts, stating in a typical passage:

“International humanitarian and human rights law set out the rights of civilians and the obligations of combatants during time of conflict. Yet, belligerents throughout the world refuse to respect these statutes, relying instead on terror as a means of control over populations.”²³

²³ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957

(8 September 1999), para. 3. There are similarly negative views of implementation in paras. 2, 7, 12, 13, and 21.

There is no recognition that in some conflicts certain basic norms have been observed, at least by some parties; nor is it pointed out that some of those who committed the most egregious violations of humanitarian norms (the Rwandan regime in 1994, and the Serbs at Srebrenica in 1995) subsequently suffered serious military reverses.

The report makes some worthwhile proposals regarding ratification of existing treaties, further development of the law, conflict prevention, and other matters. However, it merely reiterates certain proposals without discussing the tragedies ensuing from their application in practice in the 1990s. Thus it advocates arms embargoes in respect of situations where parties to the conflict target civilians, but fails to show any awareness of why particular forms of arms embargo came to be seen as deeply unsatisfactory in the former Yugoslavia in 1991-1996 and in Sierra Leone from 1997. Likewise it fails to offer any detailed analysis of the Security Council's actual efforts in the preceding decade to act in various conflicts to secure physical protection of vulnerable populations. On this subject, the report makes an apparently robust statement with a distinctly less than robust finale when it recommends that the Security Council

“[e]stablish, as a measure of last resort, temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population, subject to the clear understanding that such arrangements require the availability, prior to their establishment, of sufficient and credible force to guarantee the safety of civilian populations making use of them, and ensure the demilitarization of these zones and the availability of a safe-exit option.”²⁴

There is a case for the demilitarization of certain security zones — at least if it can be achieved with the agreement and ongoing consent of parties to a conflict. However, the apparent assumption here that any security zone should be demilitarized is open to two objections. First, it was precisely the zones in Bosnia that were subject to demilitarization agreements (albeit imperfect) that were conquered by

24 *Ibid.*, recommendation 39.

Bosnian Serb forces in summer 1995. Secondly, there is an obvious risk in demilitarizing a zone and then putting all reliance for defence on outside forces, especially if those forces are imbued with the mentality of the “safe-exit option”. In short, the report’s coverage of the core issue it is supposed to address — the protection of civilians in armed conflict — is not serious.

In the same part of the report the Secretary-General also recommended, in more robust mode, that the Security Council,

“[i]n the face of massive and ongoing abuses, consider the imposition of appropriate enforcement action. Before acting in such cases, either with a United Nations, regional or multinational arrangement, and in order to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias toward one region or another, the Council should consider the following factors:

- (a) the scope of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations;
- (b) the inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities;
- (c) the exhaustion of peaceful or consent-based efforts to address the situation;
- (d) the ability of the Security Council to monitor actions that are undertaken;
- (e) the limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment.”²⁵

The greatest omission in the report is one that is not easily remedied. It fails to discuss the capacity and will of States to act. Proposals such as the one above depend crucially upon major regional or global powers, equipped with intervention forces, being willing to commit their military assets over a substantial period, and to accept the possibility of casualties. There is persuasive evidence from the years since 1990 that such willingness is in limited supply. Hence the protection of civilians has sometimes assumed perverse forms: empty promises

²⁵ *Ibid.*, recommendation 40. This report (17 September 1999) on the protection of civilians in armed conflict, led promptly to the passing of SC Res. 1265

to protect the “safe areas” in Bosnia, and retaliatory bombing from a safe height as a response to ongoing killings and expulsions in Kosovo.

Secretary-General’s Report on the Fall of Srebrenica

The report of the Secretary-General on “The Fall of Srebrenica” is an extraordinarily powerful account and analysis of a difficult subject, leaving the reader in little doubt about the complex causes and tragic consequences of the failure of States and the United Nations to take serious action to protect this “safe area”. Its central lesson is put bluntly in the conclusions:

“The community of nations decided to respond to the war in Bosnia and Herzegovina with an arms embargo, with humanitarian aid and with the deployment of a peacekeeping force. It must be clearly stated that these measures were poor substitutes for more decisive and forceful action to prevent the unfolding horror.”²⁶

The report in no way denies the validity of humanitarian considerations as a basis for international involvement, but it does suggest that the resulting policies and deployments need also to involve elements that go well beyond the purely humanitarian. In particular, member States and the UN must on occasion be willing to use armed force, support one side in a conflict and oppose the other, and/or impose a settlement.

Independent Inquiry Report into UN Actions during the Rwanda Genocide

In April-July 1994 between half a million and a million people were killed in massacres in Rwanda in the worst case of genocide since the Second World War. This report examines why the international response was so weak. Its focus is on the response to the crisis within the United Nations, and says far less about the equally important subject of the responses of key national governments. The report’s narrative confirms that for too long key UN personnel, especially in New

²⁶ Report of the Secretary-General pursuant to General Assembly resolution 53/35:

The Fall of Srebrenica, UN Doc. A/54/549 (15 November 1999), para. 490.

York, failed to heed information about impending or actual massacres, and stuck for too long to the concept of impartial peacekeeping when stronger measures were required. A key conclusion of the report consciously echoes the Srebrenica report issued the previous month when it states:

“While the presence of United Nations peacekeepers in Rwanda may have begun as a traditional peacekeeping operation to monitor the implementation of an existing peace agreement, the onslaught of the genocide should have led decision-makers in the United Nations — from the Secretary-General and the Security Council to Secretariat officials and the leadership of UNAMIR — to realize that the original mandate, and indeed the neutral mediating role of the United Nations, was no longer adequate and required a different, more assertive response, combined with the means necessary to take such action.”²⁷

Conclusions

Since the end of the Cold War there has been a strong trend towards identifying humanitarian considerations as a basis for certain military mandates and actions. This trend has been observed not only in armed conflicts, whether civil or international (for example, Bosnia and Sierra Leone), but also in situations of tyrannical or brutal government (Rwanda and Haiti), uncontrolled violence (Somalia and Albania), and the establishment of international forces to help implement a peace agreement (Kosovo and East Timor). Some of the cases mentioned have had characteristics of several of these types of situation.

It is easy to criticize this trend on several grounds. First, some extremely serious humanitarian crises do not result in military action. Crises that have led to severely limited international military action, or no action at all, include those in Abkhazia in the 1990s, and the war in Chechnya in 1999-2000. There is inevitably a selective element in international military responses. Secondly, military actions taken on largely humanitarian grounds are sometimes too little, too

²⁷ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, attached to UN

Doc. S/1999/1257 (16 December 1999), pp. 50/51.

late. They are often characterized by lack of clarity about strategy and aims, reluctance to accept sacrifices, nervousness about siding with one or other of the belligerent parties, and an unwillingness to keep forces in a crisis area for more than a short period. Thirdly, humanitarian issues and organizations get entangled with politico/military matters, potentially undermining their distinctive roles. And, fourthly, there is no practical prospect of developing a coherent and agreed general international legal doctrine of humanitarian intervention. The legitimacy of military action, as well as the practical aspects thereof, must necessarily be considered, taking into account the unique aspects of each case.

Despite all the problems, there are positive outcomes from the ways in which humanitarian considerations have played some part in the initiation of military actions. Many lives have been saved in many crises, including even the controversial case of Somalia; international military action has helped to end some vicious wars, including in Bosnia; persons indicted for war crimes have been arrested by the NATO-led forces in Bosnia; many refugees, including those from Albania and East Timor, have been enabled to return to their countries; and those inclined to inflict wanton violence on civilians and prisoners are under notice that they may face serious military consequences.

As to the future, humanitarian issues seem destined to remain intertwined with decisions about the use of force in at least some crises. Whether this development is condemned or celebrated, it must probably be accepted as a fact; and it poses the challenge of how to address some of the problems associated with it, and to take the matter forward.

For humanitarian organizations it is almost inevitable that there will be a division of labour not just in their activities but also in their moral stance. Some will stress absolute impartiality and neutrality. Others may be more prepared to engage in advocacy — even, occasionally, military advocacy — and also to seek some degree of military protection for their activities. This suggests a key conclusion: while neutrality and impartiality may represent one valid moral position for humanitarian organizations, especially the ICRC, it is not the only moral position that is valid.

For States and intergovernmental bodies, two main challenges need to be faced. The first is that if military force is used in support of at least partly humanitarian goals, or in implementation of international humanitarian law, it is important that it should itself comply with that body of law. Experience suggests that there can be particular pressures in military operations with humanitarian purposes that make observance of the law difficult. The perception of those involved that a military action is disinterested, and in support of high moral purposes, can easily lead to an attitude of superiority over the people they are seeking to save. Whether committed for this or other reasons, the crimes by the forces intervening in Somalia in 1992-1995 are evidence of the seriousness of the problem. The case of the 1999 Kosovo war suggests two further grounds for worry. One is that where a military operation has the purpose of changing the policy of a government, it may involve putting pressure on individuals and installations that are as much connected with the government as they are with the army, and may have some elements of civilian function or character. A second worry exemplified by Kosovo is that conducting low-risk war by bombing from 15,000 feet may make it difficult to attack military units or to protect vulnerable civilians. These concerns arising from the Kosovo war suggest that the clear distinction in the laws of war between civilian and military targets is at risk of being eroded. In principle, the application of the laws of war to international forces is not in doubt, and important aspects of this principle have been confirmed by the Secretary-General's Bulletin of August 1999.²⁸ However, ensuring that such application is effective remains a problem.

The second challenge is how to combine humanitarian aims with the effective strategic and political management of armed force. This problem has many dimensions. In particular, there is an urgent need to develop clear concepts and procedures for a process that has recurred in an *ad hoc* and muddled fashion in the crises of the

²⁸ Secretary-General's Bulletin: "Observance by United Nations Forces of International Humanitarian Law", entry into

force 12 August 1999, UN Doc. ST/SGB/1999/13 (6 August 1999).

1990s: the metamorphosis of a peacekeeping and observer mission into an enforcement operation. For peacekeeping tasks, forces are often spread out widely within a country. For enforcement, forces must be constituted differently: they generally need to be concentrated, and an efficient system of command and control becomes even more important than in peacekeeping. Until there is a clearer idea of how such forces may be deployed and used, humanitarian issues may remain triggers more for failure than for effective intervention to achieve the humanitarian objectives that have been so frequently proclaimed and only rarely achieved.

Résumé

Problèmes et organisations humanitaires, éléments déclenchant d'actions militaires internationales

par ADAM ROBERTS

À plusieurs reprises depuis la fin de la guerre froide, les gouvernements et les organisations intergouvernementales ont justifié, notamment à travers le Conseil de sécurité, la menace ou le recours à la force par le biais d'arguments à caractère «humanitaire». Trois types de violations de normes humanitaires ont été régulièrement invoqués pour déclencher une intervention par la force, soit dans le cadre d'un conflit armé en cours, soit contre un régime brutal : atteintes graves à la vie de la population civile, refus d'autoriser des actions d'assistance à une population dans le besoin et violence exercée à l'encontre du personnel d'organisations humanitaires. Après avoir passé en revue différentes interventions ayant impliqué l'usage de la force, l'auteur examine la position des États et des organisations internationales, notamment les Nations Unies. La question de la légitimité d'un recours à des arguments humanitaires pour justifier l'usage de la force reste cependant posée. L'auteur est convaincu qu'à l'avenir, «l'humanitaire» jouera un rôle plus important que par le passé dans les considérations relatives à l'usage de la force. Il souhaite une réflexion approfondie à ce sujet.

International humanitarian law and the Kosovo crisis

by

KONSTANTIN OBRADOVIĆ †

The objective of this study is to discuss some issues concerning the situation in Kosovo in the period from the so-called Drenica events, i.e. approximately from February or March 1998, to the end of March 1999. It should be noted that the events in the Drenica area marked the onset of the armed conflicts between the Kosovo Liberation Army (KLA) and the security forces. These conflicts gradually escalated into a real “small war” waged between the police, in some cases also the army, and the KLA. After getting militarily organized (uniforms, distinctive signs, command structure, etc.), the KLA seized hold of some territories, secured complete control over them and went even further, creating its own organs of

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power. In the early nineties the sequence of events known as the “Kosovo crisis” started to develop into a situation whose legal definition depends on the answer to a key question, namely, are these confrontations to be seen as acts of terrorism, or are they combat activities that can be classified as armed conflicts? The definition chosen will determine the answers given to issues normally arising in such situations, namely questions as to the legal status, in the event of capture, of the participants in the fighting; the reciprocal rights and duties of the belligerents; the responsibility for violations of the rules; etc.

This study was practically complete when NATO launched its armed attack on the Federal Republic of Yugoslavia (FRY). Given that the war is now over, it has been fairly easy to add a few pages, but it would not have served the purpose — in my view — to keep to the framework of the previous concept.

The events as from March 1998 caused the situation in Kosovo to escalate into an internal armed conflict, at least in my opinion. This could in fact be a matter of dispute — our media kept talking about “terrorism” — but I shall explain later what facts lead me to this conclusion. In view of the current analysis, it is essential to bear in mind that if this is a case of an “armed conflict”, as I believe it is, then international humanitarian law in armed conflicts, or — in the old terminology — the law of war, applies. More specifically, those of its provisions that relate to civil war apply. Because it should never be forgotten that even when crushing an armed rebellion, an insurrection or similar riots, one cannot simply place rioters “outside the law”; in civil wars, generally speaking, the belligerent parties have always been, and are especially nowadays, bound to show at least a minimum of respect towards the adversary. Such minimal consideration is imposed by the rules of warfare.

NATO’s aggression against Yugoslavia established a state of war between the FRY and the attacking countries — or as modern terminology would have it — a situation of international armed conflict. The fact that nobody is using the word “war” or that there is no “declaration of war” as such (this was pointed out by some western media, as well as by some official spokesmen from the countries of the Alliance, in their efforts to avoid use of the concept “armed conflict” with reference

to the military intervention against the FRY) is of no relevance when it comes to the legal definition. It is clear that this case corresponds exactly to an “armed conflict” as defined in Article 2 common to the 1949 Geneva Conventions relative to the protection of victims of war, and in such a situation the application of the law of armed conflicts is obvious and undisputed. NATO’s attack on the FRY evidently did not bring an end to the fighting in Kosovo — just the opposite — and the very conflict grew by itself and by way of foreign interference from an internal into an international one. I mean international in the sense that parties to the conflict were then obliged to implement the rules applicable in an international, not in an internal, armed conflict; those rules are more severe and impose more obligations on the belligerent parties (I shall come back to this issue later, but for now I only wish to stress that the definition has no political implications).

This paper is divided into three main chapters. The first chapter gives an overview of what is currently referred to as international humanitarian law applicable in armed conflicts, and of its basic features. The next two chapters then analyse, in the light of rules of that law, the situation in Kosovo before and during the NATO aggression against our country. An examination will thus be made of the rights and duties of all involved in the conflicts, of the problem of responsibility and of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY). The concluding remarks evaluate the implementation of international humanitarian law and list possible action to be taken in order to eliminate the consequences of the violations perpetrated during the conflict.

Contemporary humanitarian law: emergence, evolution and main characteristics

(...)

Situation in Kosovo after the skirmish in Drenica (March 1998): a non-international armed conflict

It is not possible to pinpoint exactly when the the so-called KLA was constituted or when it started to get organized militarily, but this is in any case of little relevance to the present analysis. The crucial

factor is that at the end of February and the beginning of March 1998 a certain region evidently held and controlled by Albanian rebels was established in the Drenica region. I say evidently, since the security forces had to wage real armed battles with the rebels for several days before they could regain control of the territory. The rebels retreated from the area, but were neither routed nor destroyed. Throughout the year prior to NATO's aggression they managed to maintain, whether in reduced or expanded form, the areas over which they had *de facto* authority, including inhabited areas, to control the population and to sever communications. They used familiar guerrilla strategy and tactics, the same methods that had been adopted by Tito during the national liberation war and that were well known and promoted under previous regimes through the systems of general national defence and civil defence. All these facts are undisputed, since they were also reported by our press as well as by Serbian radio and TV. Witnesses, not only foreign journalists but also our own citizens, mainly Serbs and Montenegrins detained by the KLA, confirmed in their testimonies or in public statements that the rebels possessed a relatively well-structured organization and hierarchy and that their organization had set its own "rules" which served as the basis for rulings by its "courts". Consequently, in addition to the military component the organization contained an embryonic civil authority; its "commanders" were in contact and negotiations with members of the OSCE mission and also with American diplomats, for instance Ambassadors Holbrooke and Hill, all of which was broadcast via the electronic media. In brief, our security forces, sometimes also the army, obviously had to deal with forces which could hardly be defined — as was regularly the case in our press — as simply "terrorists".¹

¹ There is no doubt that KLA members behaved in certain circumstances as terrorists, and they undoubtedly undertook terrorist activities (e.g., during the period analysed here, about 140 Serbs were abducted and the majority of them were killed, although they were ordinary citizens, Serbian houses were burnt down, etc.). Yet this certainly cannot mean that all members of the organization (or

the organization itself) can be treated simply as terrorists or that somebody who really is a terrorist, because he participates in a terrorist act, can be treated as "outside the law" and, for instance, executed on the spot. Thus, even a terrorist who has laid down his arms and wants to surrender has the right to have his life spared, regardless of whether or not the terrorist act was carried out in a situation

It could on the contrary be said that these formations were organized in the same way as rebel movements have always been organized. They managed to resist for a longer time, to control a certain territory and to conduct combat operations against the legal authorities. These facts and objective indicators show that this situation was one of “non-international armed conflict” as defined in the 1977 Protocol II additional to the Geneva Conventions of 1949, under which all parties to conflict are bound to respect international humanitarian law.² This obligation is clear and unambiguous for both parties: on the one hand, the Socialist Federal Republic of Yugoslavia (SFRY) had ratified Protocol II, and the FRY “inherited” this obligation as a successor State; on the other, the KLA is a rebel movement composed of nationals, i.e., Yugoslav citizens who are bound, both as individuals and as an organization, to respect the obligations taken over by the State whose citizens they are. The fact that they might not “recognize” the FRY as their State is evidently irrelevant.

that is understood as an armed conflict in the sense of the law of armed conflicts. After all, even an ordinary robber caught during an armed robbery cannot be killed by the police if he indicates his wish to surrender. Such an act would be especially prohibited in an armed conflict. This is because such a person has the right to have his life spared, while the court decides upon the nature of his act and his possible responsibility, and metes out a penalty according to the law. Finally, even a regularly constituted and internationally recognized army — the best example is that of the German Wehrmacht during the Second World War — or its individual members may undertake terrorist acts which are otherwise prohibited by the law of armed conflicts, but this does not mean that the army as a whole is of a terrorist nature. I particularly emphasize all this because the reporting by our media could give the impression — and public opinion shares this view to a large extent — that terrorists can be treated as “rabid dogs” and are simply “outside the

law”, and that they can therefore simply be killed without any formalities when captured by the authorities.

² Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): According to Article 1 thereof, internal or non-international armed conflicts are those “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. See, in general, Y. Sandoz/C. Swinarski/B. Zimmermann (eds), *Commentary on the Additional Protocol of 8 June to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, pp. 1,347 ff. (hereinafter: *ICRC Commentary*).

The reasons why our authorities did not themselves declare a state of “non-international armed conflict” in Kosovo (the practice is that governments of countries issue such a proclamation in an appropriate form) remain unclear. A possible explanation would be that there was some fear that such an “admission” might enhance the rebels’ status in a political sense, as they would then achieve some sort of “international recognition”, or limit the authorities’ options for crushing the rebellion. If that was the predominant consideration in our government’s decision-making centres, the reasoning was totally wrong. But even more wrong and contrary to our interests as a country was, I believe, the refusal to see the real facts and to make certain moves of a formal and legal nature.

The point is that, as we have seen, the purpose of international humanitarian law is to reduce as much as possible the suffering of people in armed conflict, to spare human lives as far as the circumstances of warfare will allow, and to avoid the unnecessary and barbaric destruction of civilian objects. Humanitarian law is applied so to say “automatically”, i.e. it is applicable as soon as circumstances *objectively* indicate the existence of a situation that corresponds to the legal definition of armed conflict. Therefore, its implementation does not depend on the political will of the parties to the conflict, each of which is separately bound to apply the rules and to fulfil its obligations, regardless of the adversary’s behaviour.³

A country on whose territory a civil war has broken out gains no advantage in hiding the situation by referring to it with euphemisms such as “riots”, “acts of terrorism” and the like. It is not up to the country itself to assess whether or not (legally speaking) the situation on its territory constitutes an internal armed conflict. This is done by Contracting Parties to Protocol II, their press and their public opinion. If the majority of States in the world deem — as happened in our

³ A characteristic of the law of armed conflicts is the unilateral acceptance of obligations, not reciprocal as is normally the case in international law where non-compliance with obligations by one side automatically exempts the other side from having to

respect its commitments. The fact that the adversary violates the rules or commits war crimes or crimes against humanity does not allow the other side to respond in the same way; if it did so it would itself be breaking the rules and committing a crime.

case — that a civil war has broken out somewhere, whereas the country concerned persistently refuses to acknowledge what has become obvious, such a stance can only be politically harmful for that country. Conversely, formal recognition of the situation as an internal armed conflict, which certainly and clearly entails the obligation of implementing humanitarian law, increases the degree of protection of all persons caught up in the conflict. It especially affects the rebels by reminding them directly of their duties in this respect, as well as of the risks they run in violating them, i.e. prosecution for crimes against humanity.

In both types of conflict, internal and international, the principle of the equality of belligerent parties with regard to the law of war is applicable. This means that parties to conflict are obliged to implement the rules because of the objective fact that a conflict has occurred. The parties are under this obligation regardless of the motives behind the use of force, the objectives each of them wants to achieve or the legal or political definition used by one or the other party (“attacking party” or “victim of the attack” in the event of an international armed conflict; “legal authorities” or “rebels”, “secessionists”, etc., in an internal conflict). This is one of the principles of the “classical” law of war, and came into existence as a reaction to the medieval concept of “just” and “unjust” wars according to which a sovereign who started a war contrary to law or who was fighting for unjust goals was placed “outside the law” together with his army and his people, and had no rights nor was owed any respect. The Hague law rejects this concept together with the theory of just war, emphasizing the principle mentioned above whereby all belligerents are under the same obligation to implement the law of war. It has been said that a ban on the use of force leads to discrimination against the aggressor with regard also to implementation of the law of armed conflicts.

Such ideas, however, were rejected as senseless and harmful. They would only result in further outbursts of violence and cruelty, since all participants from the “aggressor’s” side would be deprived of every legal protection by the very fact of belonging to its armed forces or civilian population. That, too, would be unjust, since they cannot all be “guilty” of aggression. The same rule also applies in the event of an internal conflict, as it would be unjust and inhumane to

deprive of all protection all those who found themselves, voluntarily, but maybe also involuntarily, on the rebel side.

Finally, the application of humanitarian law in an internal conflict in no way means the abolition of the laws of the State, nor does it exclude the criminal or other responsibility of rebel leaders or anyone else who committed crimes of any kind or other violations of humanitarian law. During a conflict, and particularly after its end, all such individuals can be brought to court and held responsible in accordance with the law. In other words, the application of international humanitarian law by no means prevents a country and its legal authorities — the legal ones being those which were in place at the beginning of the conflict — from acting as described specifically in Article 3 of Protocol II, namely: “...by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State”. The same provision emphasizes that the application of humanitarian law shall by no means be invoked as a justification for foreign intervention nor considered as a form of “recognition” (political, international, legal, etc.) of rebels.⁴

All that has been said on the situation in Kosovo between March 1998 and 24 March 1999, when the FRY was attacked, points to the obvious conclusion that these events constituted a non-international armed conflict as defined in Article 1 of Protocol II additional to the Geneva Conventions. The parties to the conflict, which were equally bound by the rules set by the Protocol, were under an obligation to act in accordance with those rules.

After having discussed the principles governing the conduct of belligerents in any armed conflict, regardless of its character, I now intend to examine how those general principles have been transformed into firm rules by Protocol II itself.

First, all persons who are caught up in a conflict (both non-combatants and combatants who have laid down their arms or have been captured⁵) are considered by Protocol II to be “protected

⁴ *ICRC Commentary*, pp. 1,361 ff.

⁵ Protocol II does not refer to a captured combatant by the usual term “prisoner of war” nor does it give special protection to such persons, since in a civil war it is difficult

to distinguish civilians from soldiers. Article 4 uses the terms “persons who do not take a direct part or who have ceased to take part in hostilities”, giving the same degree of protection to both groups.

persons". Under Article 4 they enjoy fundamental guarantees when they are in the power of the adversary; in particular they must be treated humanely and their person, including their physical and moral integrity, must be respected, as well as their honour, convictions (also their political convictions) and religious practices. In other words, it is prohibited to kill, ill-treat or humiliate protected persons, or to threaten that "there shall be no survivors". The same provision explicitly enumerates the acts that are contrary to the humane treatment required, and which therefore "shall remain prohibited at any time and in any place whatsoever", in particular murder, cruel treatment, mutilation or any other violence to their physical or mental well-being, as well as any form of corporal punishment. There follows a prohibition of all collective punishments, taking of hostages, acts of terrorism, outrages of any kind upon personal dignity, including rape and enforced prostitution, and any form of pillage.

All protected persons who are wounded or sick must be provided with medical care and attention by the adversary. The parties to the conflict are also obliged to protect medical personnel and grant them help for the performance of their duties.⁶

Protected persons who are in the hands of the adversary and who are deprived of their liberty, for whatever reason, must be provided with certain living conditions and facilities during their detention or internment. These conditions, laid down in Article 5 of Protocol II, include adequate accommodation, food and medical care, the right to send and receive correspondence and the right to receive humanitarian assistance. The article thus mentions the normal conditions in prisons of civilized States, taking into account the specific features of civil war. The conditions are similar to those provided for by the Third and the Fourth Geneva Conventions with reference to prisoners of war

⁶ Protocol II, Arts 7-12. Article 10, on the general protection of medical duties, is of particular importance. It stipulates that no person may be punished for having carried out medical activities and services, regardless of the person benefiting therefrom; doctors or nurses may not be compelled to

perform acts contrary to the rules of medical ethics; doctors have no obligation to give information to authorities concerning the wounded and the sick, nor may they be penalized in any way for failing to give that information.

and civilian internees.⁷ In the event of penal prosecution or indictment of a person whose liberty has been restricted for reasons related to the armed conflict, during the whole procedure that person will be granted, in accordance with Article 6 of the Protocol, the usual guarantees with regard to penal procedure that are in force in every civilized State. In other words, any form of court-martial or exceptional trials, any “summary” proceedings or similar “measures” of an ostensibly “legal” nature, used by parties in civil wars simply to liquidate the opponents, yet maintaining the illusion of legality, are prohibited. Any deviation from the guarantees mentioned above (especially when resulting in serious consequences for the protected person) can easily turn into an international crime, a crime against humanity.⁸

We can conclude from the above that the rules cited so far aim at protecting individuals from the dangers present in any war for persons who fall into the hands of the adversary. Unlike Protocol I (on international armed conflicts), Protocol II contains no provision on means and methods of warfare or the conduct of hostilities. Though agreeing that the standard rules on the conduct of hostilities should be binding in civil wars too, States party to Protocol II did not reach an agreement on including the prohibition of certain methods and means of warfare in the text.⁹ Nonetheless, Part IV (Articles 13 to 16) concerning the general protection of the civilian population contains rules for the belligerent parties to follow in order to protect civilians as much as possible against the effects of military operations.

According to Article 13, paragraph 3, of Protocol II, civilians are persons who do not, and for such time as they do not, take a

⁷ *ICRC Commentary*, pp. 1,383 ff.

⁸ *ICRC Commentary*, pp. 1,395 ff.

⁹ During negotiations on Protocol II, States showed great reticence, as well as a certain amount of “inhumanity”, when formulating rules that could in any way be seen to help rebels gain political affirmation or international recognition, or obtain some sort of “equal footing” in relation to State authorities. The majority of delegations present in

Geneva were in favour of this approach, even if the price for it was often less protection for victims. Defining the concept of “combatant” and setting the rules on the conduct of hostilities were seen as possibilities for rebels to get automatic recognition as a party to an armed conflict if the Protocol were applied, and for that reason the ICRC proposals to give an exact definition of the prohibited means and methods of warfare were rejected.

direct part in hostilities.¹⁰ Such persons enjoy “general protection against the dangers arising from military operations” (Article 13, paragraph 1). The civilian population and individual civilians may not be the object of attack nor may they be terrorized by threats that they will be attacked (paragraph 2). Other provisions of Part IV — Articles 14, 15 and 16 — regulate the protection of objects indispensable to the survival of the civilian population (foodstuffs, water, cattle, etc.), the protection of works and installations containing dangerous forces (nuclear plants, dykes, etc.) and, finally, the protection of cultural objects and places of worship. To sum up, even in a non-international armed conflict it is prohibited to conduct hostilities in an indiscriminate and brutal way, and in particular to attack the civilian population deliberately. Protocol II is perfectly clear and precise in this respect. Finally, Protocol II contains a very important provision, especially relevant in the context of the Kosovo crisis: any forced movement of the civilian population is strictly prohibited. This means that civilians may not be compelled to leave their own territory for reasons connected with the conflict.¹¹

As I mentioned above, I believe that it was wrong and contrary to our country's interests not to proclaim “a situation of non-international armed conflict” in Kosovo as soon as that situation objectively existed. This was wrong in the sense that an objective situation cannot be hidden, especially in the presence of foreign journalists. Furthermore, the very fact that authorities try to hide a serious or even dramatic situation puts them in a worse political position internationally. The impression created is that there might be serious reasons behind such concealment. On the other hand, a legally clear situation produces the opposite effect. It reinforces the authorities' position and opens up more possibilities for penal prosecutions of the rebels, not only for the act of rebellion based on internal law, but for violations of the law of armed conflicts based on international legal standards which

¹⁰ *ICRC Commentary*, p. 1,453. Protocol II contains no definition of combatant. Persons who “take a direct part in hostilities”, logically, do not benefit from the protection against dangers arising from military

operations. But even such fighters who have laid down their arms may not be attacked, since they are considered to be civilians.

¹¹ *ICRC Commentary*, 1,471 ff.

were, after all, included in our criminal law. A proclaimed situation of “non-international armed conflict” and a declared obligation to apply the Protocol (without it members of armed forces of both sides are often not even aware they are carrying out acts prohibited by law) undoubtedly represent for the parties involved a powerful deterrent to committing violations. In brief, by legally clarifying the situation as an “internal armed conflict”, the authorities involved not only improve their political position within the country, since both their followers and adversaries realize that they are ready to act decisively, but also signal that they will rigorously apply the national and international rules relevant to such situations. Second, such behaviour simultaneously reinforces the international position of the given country, since most countries have always shown understanding for authorities which are seriously combating internal problems, yet respecting the law while doing so. Finally, and significantly, such a procedure ensures that international humanitarian law is better respected in the conflict itself; this is especially useful for the direct victims of war.

It is of course possible to respect humanitarian law even if the above-mentioned formal and legal steps are not taken, as was the case in our country. During the whole period under consideration, many allegations concerning violations of humanitarian law were levelled against our authorities and the KLA. Given that propaganda is powerful in any war and will use any means to accuse the opponent of all kinds of crime, it is difficult to give a reliable answer to the question whether and to what extent there were serious violations of humanitarian law, i.e. crimes against humanity.¹² I shall not pursue this question, but can only emphasize that the definitive answer can be given

¹² In an internal conflict there is no war crime, only crimes against humanity, which, in reference to the context of a criminal act, means practically the same. For the reasons behind this distinction, which are of an exclusively political nature, see Vladan Vasilijeć, “Međunarodni krivični tribunal za bivšu Jugoslaviju i kažnjavanje za teške povrede

međunarodnog humanitarnog prava” [International Criminal Tribunal for the former Yugoslavia and sanctions for severe violations of international humanitarian law], *Humanitarno pravo — savremena teorija i praksa* [Humanitarian law — contemporary theory and practice], Belgrade, pp. 380 ff.

only by a competent tribunal. Nonetheless, judging from what has been written in the press, from the reports of various non-governmental organizations such as the Fund for Humanitarian Law in Belgrade, and from some other sources, I conclude that there is sufficiently strong evidence to confirm that such acts did indeed occur. In other words, to use the language of criminal law, there are “grounds for suspicion” that such acts have been perpetrated and that they have been committed by both sides, the government and the KLA. For instance, as soon as the Drenica operation was over, there were about 40 corpses left on the spot, most of them women and children who — at least at first glance — would hardly be classified as combatants. It would have been essential, in this and in numerous similar instances, to carry out a thorough investigation in order to determine exactly under what circumstances the deaths occurred, and to inform the public accordingly. Evidently, if crimes had been committed by members of the police or other forces under the responsibility of the State, it would be necessary to bring them before our courts and pronounce severe penal sanctions. I wish to stress that our legislation is very detailed in this respect and in full agreement with our international obligations, especially with provisions contained in the 1949 Geneva Conventions.¹³

On the other hand, Albanian rebels have kidnapped — they have never even denied this — numerous Serbs and Montenegrins, mostly civilians, whom they kept in detention as hostages; some were killed, others simply disappeared. It seems that there were cases of expulsion of Serbs and other non-Albanians, of burning of Serb houses and similar offences which are all violations of humanitarian law. In not one of these cases did the the rebel “authorities” start an investigation, although they were obliged to do so. On the

¹³ The four Geneva Conventions contain common provisions for the suppression and prosecution of “grave breaches”, i.e. war crimes or crimes against humanity. See Convention I (Arts 49-54), II (Arts 50-53), III (Arts 129-132) and IV (Arts 146-149). Contracting parties must provide in their

legislation for measures to repress such criminal acts and penal sanctions for possible perpetrators. Yugoslavia has defined under Chapter XVI of its Federal Criminal Law these breaches as severe criminal acts which are to be prosecuted *ex officio*.

other hand, — as might appear strange at first sight — our authorities also failed to launch any criminal investigation into violations of humanitarian law.¹⁴

The reason could lie in our authorities' stubborn refusal to "admit" that there was indeed an internal armed conflict and to proclaim the consequent applicability of Protocol II. It is also interesting to note that Albanian rebels from the KLA never insisted that a situation of armed conflict did exist, and accordingly never demanded that international humanitarian law be applied, nor did they ever use for propaganda purposes the fact that Yugoslav and Serbian authorities kept talking about "terrorism", although it was evident there was an armed conflict going on. Although it is always in the interest of rebels to have an "internal armed conflict" declared, because in such an event they and the population are protected more effectively and more completely, the KLA did not take these steps, most likely because they did not know the legal situation. In any case, the issue of investigating grave breaches of humanitarian law has remained virtually unresolved.

I recall, however, that at the beginning of this year the International Criminal Tribunal for the former Yugoslavia (ICTY) decided to extend its mandate to the "Kosovo situation", in order to investigate alleged violations of humanitarian law and to prosecute whenever "well-founded suspicion" existed that such violations or crimes had taken place. The Chief Prosecutor of the Tribunal, Louise Arbour, intended to visit Kosovo personally. Yet our authorities denied her a visa, and the same happened to the Tribunal's investigating bodies, so that the investigation was never carried out.

The main reason for the refusal to cooperate with the Tribunal is of a political nature, is well known, and was already present at the time of the Tribunal's establishment. Indeed, our public opinion largely held that the Tribunal was "anti-Serbian", and some of our lawyers, experts on international and criminal law, took the stance that

¹⁴ According to data available to me, but which have not been officially confirmed, about two to three thousand Albanians were deprived of liberty during the period analysed. In cases where indictments were

issued, they referred to rebellion, the endangering of the State's territorial integrity, terrorism and similar criminal acts, yet neither war crimes nor crimes against humanity were mentioned.

the UN Security Council exceeded its mandate by adopting resolution SC 827(1993) and that the ICTY was therefore illegitimate.¹⁵ Sharing these views, our authorities supported this position for some time, emphasizing that the FRY did not “recognize” the Tribunal and was not willing to cooperate with it. The position was later tacitly revised, so that an office of the ICTY was even opened in Belgrade. Yet in the Kosovo situation, the Tribunal’s mandate was seen as inapplicable. These events were considered to be “an internal Yugoslav affair”, since there was no armed conflict going on.

As regards the view which holds that the Tribunal was illegitimately established, I believe it to be incorrect and indefensible.¹⁶ An argument in favour of my view is the position of United Nations member States, the majority of which accepted the ICTY as a legally and legitimately created international judicial body. Nonetheless, even if the opposite view can be defended in theory, the following position is totally untenable, namely that there was no “non-international armed conflict” in Kosovo and that the ICTY therefore had no jurisdiction to prosecute persons for violations of international humanitarian law.

First, as I have mentioned above, there are objective elements pointing to the unequivocal conclusion that the situation in Kosovo completely corresponded to the definition provided in

¹⁵ For arguments in favour of this view, see e.g. Smilja Avramov, “Međunarodno krivično pravo i Povelja UN” (International criminal law and the UN Charter), *Archives of Legal and Social Studies*, No. 5, 1994, pp. 479 ff.; Milan Bulajić, “Međunarodni sud za krivično gonjenje odgovornih za ratne zločine u bivšoj Jugoslaviji” (International Tribunal for the prosecution of persons responsible for war crimes in former Yugoslavia), Collection of documents, Belgrade, 1993, or M. Kokolj, “Međunarodni sud za krivično gonjenje odgovornih lica za ozbiljne povrede međunarodnog humanitarnog prava” (International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law), *Yugoslav*

Journal of Criminology and Criminal Law, No. 1-2, pp. 87 ff.

¹⁶ See my article, “O pravnoj osnovi konstituisanja ad hoc međunarodnog krivičnog suda za bivšu Jugoslaviju” (On the legal basis for the establishment of the *ad hoc* International Criminal Tribunal for the former Yugoslavia), *Herald of the Bar Association of Vojvodina*, Year LXVI, Book 54, No. 110, 1994, where arguments in favour of this position are put forward. Besides, this position is shared by the majority of the world’s international law experts and by a number of our own experts. See, for example, Vladan Vasilijević, *Zločin i odgovornost* (Crime and responsibility), Belgrade, 1995, with an extensive bibliography.

Article 1 of Protocol II additional to the Geneva Conventions. That the FRY did not “admit” this fact in any way had, of course, no effect on the objective reality. Let me emphasize again that humanitarian law in armed conflicts automatically applies whenever there is a corresponding “objective reality”. This is what all States party to the Geneva Conventions and the two Additional Protocols agreed to, including the FRY, so it is not possible “not to admit” the existence of such a situation or to try to avoid the application of international humanitarian law in some other way.

On the other hand, given that the FRY had agreed to cooperate with the Tribunal, be it tacitly, it is illogical to deny the latter’s jurisdiction over Kosovo, since Article 8 of the ICTY Statute clearly indicates that the Tribunal’s mandate extends as of 1 January 1991 over the whole territory of the former Yugoslavia. Since the Tribunal’s competence will cease only after the Security Council adopts a resolution to that effect, and since, from the viewpoint of *ratione loci*, Kosovo is undoubtedly a part of the former SFRY, it makes no sense, either logically or legally, to deny the Tribunal’s competence. Besides, I should like to say that I do not consider such a move politically very wise; if our authorities did not commit any violations, and even less so any crimes, as is officially maintained, then there can in my opinion be no valid reason to reject the Tribunal’s investigations. Referring to sovereignty as an obstacle to conducting an objective investigation seems to me totally inappropriate. On the contrary, as such an investigation would have been international, it would have brought to light more convincingly the crimes perpetrated by some KLA members than did the declarations made by our authorities. It is also certain that taking hostages or killing civilians are international crimes and grave breaches of international humanitarian law.

NATO’s attack on Yugoslavia: an international armed conflict

The armed attack against Yugoslavia, started by air strikes on 24 March 1999, certainly established a state of international armed conflict within the meaning of Article 2 common to the four 1949 Geneva Conventions, as reconfirmed by Article 1, paragraph 3, of

Additional Protocol I. Consequently, all parties to the conflict and all members of those parties must fully respect the Conventions and Protocol I (for States having ratified that treaty); in other words, they have to apply humanitarian law, given that its crucial provisions are contained in that code.

I recall that the question was raised in Yugoslavia, but also abroad, as to whether this was a “real war”, given that none of the attacking countries had declared a war, nor had any of them declared a state of war or a state of armed conflict with the Federal Republic of Yugoslavia.¹⁷ Another question concerned the rules regulating the behaviour of the belligerents in such an unclear situation. If we take a closer look at the definition, we see that the elements mentioned are of no relevance to the obligation of the parties to the conflict to apply the law of armed conflicts — this obligation cannot be avoided under any circumstances.

Article 2 common to the 1949 Conventions says in its first and second paragraphs that “...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

The aim of Article 2 is to define the material scope of application of humanitarian law, i.e. any situation which constitutes

¹⁷ Since the attack on Yugoslavia was started without a corresponding resolution by the Security Council, which according to Chapter VII of the Charter would authorize the use of force against the FRY in the sense of Art. 42 of the Charter, the governments of the Western Alliance did not clearly indicate their position with respect to the situation they were in, given that they had carried out an armed attack on an independent country. They tried to declare the action a “humanitarian intervention” legally justified by the

necessity to protect human rights, and also by Security Council resolutions 1199 and 1203, which indeed mention Chapter VII. In brief, there were obvious efforts to avoid the term “armed conflict”, delicate in this political context, in order to exclude the possibility of being accused of aggression. But, as we shall soon see, the obligation of the parties to apply humanitarian law in armed conflicts remains the same in any case, however the situation is defined.

an armed conflict according to objective criteria. In other words, countries are obliged to apply humanitarian rules regardless of their own definition of the conflict, regardless of their motives for the use of armed force and regardless of any other elements in connection with the conflict. I stress once again that both sides, the attackers and the attacked, are equally obliged to implement the law of armed conflicts — in conformity with the principle of equality of belligerents before the law of war mentioned earlier — and regardless of the attitude of the adversary. Thus, the aim of that wording is to stop one or more parties to conflict from avoiding the obligatory application of international humanitarian law, whether through pretexts or otherwise.

As for protected persons, these are all persons whose situation corresponds in actual fact to the definition of a prisoner of war, of a wounded, sick or shipwrecked member of the armed forces, or of a civilian, in accordance with the Conventions and Protocol I. All protected persons enjoy the protection of humanitarian law from two sources of danger: from military operations themselves and from arbitrary treatment by the adversary if they happen to fall under his authority. This protection applies equally to aliens and to nationals, at least as far as fundamental rules of humanitarian law are concerned.¹⁸ In terms of duration, the “code” is applicable for as long as protected persons are subject to the potential danger of arbitrary treatment. It is thus logical that the Conventions and Protocols cease to apply in the event of a peace treaty or any other corresponding legal and political solution

¹⁸ The rules were evidently made in favour of citizens or members of the adverse side. Yet the rules that ensure basic and minimal protection are applicable to any person in accordance with the general objective of humanitarian law, which is to protect any individual as a human being, whatever his or her nationality. Thus, humanitarian law forbids bombardment of inhabited areas, destruction of the population’s food supplies or taking of hostages among civilians. In addition, it equally forbids the brutal, indiscriminate

bombardment of a town in occupied territory for some “higher” strategic or tactical reasons, e.g. because the occupant has consolidated his position there. The same applies to destroying food supplies before the advancing enemy so that these do not fall into enemy hands, in spite of the danger of starvation for the occupied territory’s population; or to taking hostages among the domestic population because, for instance, the population of a specific area has favoured the enemy.

adopted at some international conference or by an international body, such as the Security Council. This is so in principle. However, persons under the enemy's control, such as prisoners of war or interned civilians, remain under the protection of humanitarian law until repatriation. The population of an occupied territory remains under the protection of the Fourth Geneva Convention until the withdrawal of foreign troops, as occupation may sometimes continue after the peace treaty has been signed. In brief, a whole series of provisions remains valid after the end of hostilities, if this is necessary to ensure the most complete protection of war victims.

Any breach of the law of armed conflicts is an international offence, in the same way as any violation of any international obligation in any area of international law; to be more precise, it is an internationally wrongful act which entails the international responsibility of the State party to the conflict that committed the violation, and makes it liable to pay compensation or reparations to the victim thereof. Grave breaches of the Conventions and Protocols, which indeed are war crimes, entail not only the responsibility of the State to which the perpetrator belongs, but also the criminal responsibility of the perpetrator and his accomplices.

Furthermore, the rules regulating international armed conflicts are more detailed and precise than those applicable in a non-international conflict. Although the basic principles are the same, victims of war are more comprehensively protected in an international conflict than in an internal one.

From the viewpoint of international law, NATO's armed attack against Yugoslavia is a violation of Article 2, paragraph 4, of the UN Charter, namely of the peremptory norm prohibiting the threat or use of armed force, and thus can certainly be qualified as aggression. But within the context of this analysis, the issue is irrelevant since both parties are equally obliged to implement the law of armed conflicts. However, the conflict at issue is of a specific nature insofar as the attack against the FRY was carried out exclusively from the air, so that there was no physical contact between the belligerent parties. Hence there were no prisoners of war or wounded, sick or shipwrecked military personnel. No civilian of one side could have come under the control

of the adversary.¹⁹ Therefore, during the conflict, only the rules governing the conduct of hostilities, and in particular those on air warfare, were relevant.

As the FRY armed forces did not conduct any military operation outside the national territory, various actions that occurred on the territory of the FRY between 14 March and 9 June 1999 must now be analysed from the viewpoint of humanitarian law. The term “analyse” is used because I can only respond in the abstract to whether grave breaches of the law of armed conflict took place or not, i.e. on the basis of general and public data on the conduct of military operations and their effects. A specific evaluation of each individual action could only be given on the basis of verified and well-established data concerning the behaviour of the attacker and the defender, i.e. following a procedure similar to that of a judicial or arbitral body. These differences between the “abstract” and the “specific” will be made clearer below as we examine the rules that the belligerents had to observe.

The Kosovo conflict was transformed into an international one by NATO’s attack because the general rule — according to prevailing legal opinion — is that an internal conflict becomes an international armed conflict as soon as there is actual interference from abroad. Another and contrary legal view considers that active outside help to the insurgents is the essential element that turns an internal conflict into an international one. If there is no such help, two conflicts can exist in parallel — an internal and an international one. It is difficult to determine where our case should be classified. I believe it would be correct to accept the first approach, all the more so because NATO most probably did help the KLA actively, although proof is lacking. Apart from more extensive protection for all persons in the conflict,

¹⁹ The Yugoslav side has stated that it had shot down about 70 Alliance aircraft, yet, surprisingly, none of the pilots was captured. However, three members of American land forces were captured. They were found, in circumstances that remain unclear, within the territory of the FRY near the Macedonian-Yugoslav border and were going

to be prosecuted by the FRY. It also remains unclear on what grounds they could have been brought to court, but the idea was abandoned anyway and the men were released while the conflict was still going on. The Alliance apparently did not have any members of the Yugoslav army in captivity.

there are no significant differences in the legal position of the KLA, especially not on a political level: the fact that the conflict became international did not make the KLA more “legitimate” than it had been before, and had no bearing on the political, and even less on the international legal status of the insurgents.

I shall first examine the rules that the parties to the conflict were obliged to respect during the 78-day-long military intervention by NATO against the Federal Republic of Yugoslavia. These rules are contained in Protocol I, Part IV, Articles 48 to 58.²⁰ Under the heading “Basic rule”, Article 48 reads: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall *at all times* distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” (Emphasis added). This provision confirms the classical rule, in fact the fundamental principle of the traditional law of war codified by the 1907 Hague Regulations, that a clear distinction must be made between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other, only the latter being a possible target for military operations. The rule is of an absolute nature (that is why I have highlighted *at all times*), exceptions being admitted only when explicitly allowed for by a specific provision.

Article 50, paragraph 1, defines the concept of a civilian. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A of the Third Geneva Convention and in Article 43 of Protocol I (rules defining the notion of combatant), i.e. any person who cannot be considered a combatant according to the law of armed conflicts. The scope of protection is increased by the second sentence of Article 51, paragraph 1, stipulating that in case of doubt, namely when it is not easily and immediately possible to judge

²⁰ Not all NATO members who attacked us have ratified Protocol I. However, even those that were not bound by the Protocol, but only by the Hague Regulations of 1907, were obliged to interpret the latter’s provisions in the spirit of contemporary positive

law, i.e. Protocol I. For more details concerning the relationship between the provisions of the Hague Regulations and the provisions of Protocol I, see *ICRC Commentary*, pp. 585 ff.

whether a person is a soldier or a civilian, that person shall be considered a civilian and shall not be the object of attack. On the other hand, if soldiers mingle with civilians (for instance, when isolated parts of the army are retreating together with civilians, the latter evidently in greater numbers), the presence of combatants "...does not deprive the population of its civilian character", i.e. its immunity from attack. In other words, the attacking side must be absolutely sure that the intended target is indeed a military objective and, in case of doubt, must abstain from attacking.

How are military objectives to be distinguished from civilian objects? Article 52, paragraph 1, answers this question by giving a negative definition: all objects which are not military objectives are civilian. According to its paragraph 2, military objectives are "those objects which by their *nature, location, purpose* or *use* make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (emphasis added).

At first sight, the definition in Article 52 seems very simple, making it easy to tell what is a military objective and what is not. But it really all depends on specific circumstances. The distinction between civilians and combatants, and also between civilian objects and military objectives, has to be made at all times, in accordance with the general rule that civilians must be given maximum protection from the effects of hostilities. Hence it is clear that the above definition contains two essential elements: a) the object under attack must make "an effective contribution to military action"; and b) its destruction "in the circumstances ruling at the time" must offer "a definite military advantage". These particular elements determine when the attack is admissible and when not, and their interpretation depends on the actual circumstances.

For instance, a military barracks is certainly a military objective, but if it is deserted or if there are only a few soldiers in it, and it is situated in the middle of a town, its bombardment would represent no significant "military advantage" for the attacker, as it does not make any "effective contribution" to the adversary's war effort. The situation is even more sensitive for the attacker in the case of bridges, railway

lines, transport facilities, electric plants or similar objects. These can be the object of attack, but everything depends on the specific circumstances. For example, it would be very difficult to classify the bridge at Varvarin as a military objective that had effectively contributed to the war effort of the Yugoslav army, nor did its destruction give NATO forces any “definite military advantage”. That this interpretation of the above provision is correct is confirmed in paragraph 3 of Article 52. It stipulates that where an object normally dedicated to civilian purposes (a house or a dwelling, a school, a bridge, etc.) is suspected of being used for military purposes in such a way that it makes an effective contribution to military action of the adversary, but the suspicion cannot be confirmed, then it should be presumed to be a civilian object, and the attacker should abstain from attacking it. The final conclusion, therefore, is that even if an object can clearly be qualified as a “military” objective, the belligerent has to abstain from the attack unless “military necessity” demands it.

We have seen that Article 48 provides for a strict distinction between combatants and civilians, offering maximum protection to the latter. Within the framework of this distinction, Article 51 gives more details as to prohibited attacks on civilians and civilian objects. First, paragraph 2 imposes a general ban on attacks directed against the civilian population and civilian objects; it also prohibits acts or threats of violence whose primary purpose is to spread terror among the civilian population.²¹ Paragraph 4 of the same article prohibits indiscriminate attacks which are not, or cannot, be directed at a specific military objective or which employ a method or means of combat which cannot be limited to a specific military objective. Going even further, paragraph 5 prohibits even a basically legitimate operation against a military objective if such an attack may be expected to cause what is now referred to as “collateral damage” — a term so often used in this war — whose victims are civilians and civilian objects.

²¹ It is well known that during the Second World War residential areas of big cities were being bombed (Rotterdam, 1940, to force the Netherlands to capitulate; London and Coventry during the Battle of Britain; Dresden

and Leipzig in February 1945), in order to spread terror among the population and thus make the government surrender. These and similar negative experiences led to this prohibition.

More precisely, it is prohibited by Article 51, paragraph 5 (b), to carry out an attack “which may be expected to cause *incidental loss* of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the *concrete and direct* military advantage anticipated” (emphasis added). In other words, this provision puts the principle of proportionality to the fore. During a military operation the use of force must be proportionate to the expected military advantage. If the latter is considerable, the risk of collateral damage among civilians may be taken. On the contrary, if the expected advantage is small, or non-existent, a disproportionate number of victims among civilians is inadmissible. Such an injudicious military operation can become a violation of international law or a war crime, even if the chosen military objective is a legitimate target.

To avoid such mistakes, Article 57 stipulates that general precautionary measures must be taken in the conduct of any military operation. First, the attacking side must do “everything feasible” to verify that the objective to be attacked is really a military objective within the meaning of Article 52, paragraph 2. Second, those who plan or decide upon an attack must “...take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”. Finally, they must “...refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. In addition, the same provision stipulates that an attack must be immediately cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection²² or that the injury to civilians and damage to civilian objects will be excessive.

²² The law of armed conflicts provides for specially protected zones (undefended localities, open towns, hospital zones, safety zones, etc.) which, provided they fulfil the

required conditions, should not be the object of attack, on any grounds whatsoever. See *ICRC Commentary*, pp. 697 ff.

Certain civilian objects enjoy special protection: cultural objects and places of worship, works and installations containing dangerous forces (nuclear plants, dams, etc.), objects indispensable to the survival of the civilian population (supplies of foodstuffs, water, etc.), as well as the natural environment.²³

All these obligations have to be respected by the defending side as well. Thus, they have to place military objectives as far away from densely populated areas as possible, in order to avoid the danger of civilians being attacked. They must take all necessary precautionary measures to protect, to the maximum extent feasible, the civilian population under their control against the dangers resulting from military operations. It is especially forbidden to use the population as a shield against enemy attack.²⁴

If we examine the air operation against the FRY in the light of the provisions set out above, there is no doubt that the attacking side, maybe also the defending side,²⁵ violated some of these rules, despite the great precision of NATO's air attacks and a relatively small number of victims among the civilian population. Violations committed by NATO forces were obviously more frequent and, which is an aggravating circumstance, had more serious consequences. For instance, the buildings of Radio and Television Serbia in Belgrade or Novi Sad could never have been classified as military objectives as defined in Article 52 of Protocol I. As for the attacks on an Albanian refugee convoy, on civilian objects in Nis or Aleksinac, or on passenger trains, it is obvious that adequate precautionary measures, indispensable in any attack, were not taken and that the nature of the objective was not checked seriously enough. Similarly, it is very difficult to find justification for the attacks on oil refineries, although these could be in principle considered as military objectives. In particular, it would not be easy

²³ Protocol I, Arts 53-56. See *ICRC Commentary*, pp. 639 ff.

²⁴ Protocol I, Art. 58. *ICRC Commentary*, pp. 691, with reference to other provisions.

²⁵ It is generally known, for instance, that in Belgrade soldiers were located in some schools, inside densely populated areas, and

that anti-aircraft defence was operational from the town proper, all of which certainly violated the Protocol, because the civilian population was put in danger. It is difficult to judge how widespread this practice was, but there is no doubt that such acts are prohibited.

to defend the claim that these attacks provided a “definite military advantage”; the fact that the Yugoslav Army seemingly did not encounter any serious difficulties due to a lack of fuel shows that this was not very important for the defenders. In addition, a legitimate question arises with regard not only to proportionality, but also the consequences for the human environment. Finally, the attacks on oil refineries and sources of electric power could also be interpreted as prohibited terrorist attacks. In brief, numerous NATO actions could certainly become objects of investigation by the ICTY,²⁶ which undoubtedly, according to its Statute, is competent to prosecute all grave breaches of international humanitarian law on the territory of the former SFRY, regardless of who committed them.

It is well known that even before the conflict and especially after it broke out, very serious allegations of persecution of the Albanian population, of crimes against humanity and even genocide, were made against our authorities in Kosovo, mostly in the western media. These allegations are backed by the fact that several hundred thousand Kosovo Albanians left the country during the war and found refuge in Macedonia, Albania and Montenegro. Given that it would be highly unusual to ascribe such a mass exodus of the population only to the dangers posed by the bombing, the claim that these people were forced by local authorities to leave their homes seems quite convincing. If the allegations are correct, this is undoubtedly a case of crimes against humanity (if the situation is qualified as a non-international armed conflict), or war crimes (if it is a conflict between States).

Such acts are prohibited and, whatever their qualification, they certainly constitute international crimes. This is so well known that I believe it hardly necessary to quote the corresponding provisions of the Geneva Conventions or Protocol I. As for the provisions of Protocol II applicable in such cases, I have discussed the issue earlier in

²⁶ A group of American and Canadian international affairs experts and lawyers have submitted a proposal to the ICTY's Chief Prosecutor to bring charges against named persons (politicians and high-ranking military personnel of NATO countries) for specified violations of humanitarian law during this

conflict. The proposal has been expertly prepared, unlike a similar proposal by a professor at the Faculty of Law in Belgrade, and can be found on the Internet. It will be interesting to see the Prosecutor's reaction, as it seems quite difficult to ignore this proposal.

the text, in support of the above affirmation. However, as in the case of violations committed by NATO forces, without an impartial investigation it is difficult for anyone, especially a legal expert, to draw any conclusions. Such an investigation would establish the facts and submit them to a judicial or arbitral body. The latter, in turn, would judge each individual case separately, examine the facts, accept or reject the evidence collected and decide whether or not a war crime or a crime against humanity has been committed. These are the reasons for my earlier remark, according to which this study can only provide an abstract analysis of the attitude of the parties to the conflict in the light of international humanitarian law. A concrete evaluation of any military act by the NATO forces, by the Yugoslav army or by Serbia's security forces can only be based on facts established by a body which enjoys general confidence with regard to its objectivity and impartiality.

Closing remarks

The analysis of facts leads me to the conclusion that there are very strong indications or — to use the terminology of our criminal law — grounds for suspicion that all sides in these armed conflicts, i.e. the FRY, KLA and NATO member States, have violated humanitarian law. Moreover, some of these violations could be qualified as grave breaches, namely as crimes against humanity or war crimes. There are general and incontrovertible legal principles, fundamental to any legal order, including the international legal order, that the law and the obligations deriving from it must be respected, and that every violation entails the responsibility of those who committed it, as well as the obligation to compensate the victims. It is thus obvious that all these indications should be examined in the course of an appropriate procedure and that, once the facts are established, the problem of responsibility should be brought before a competent international judicial or arbitral body.

The issue of responsibility arises, as we know, at two levels: as responsibility of the State for a violation (an internationally wrongful act), and as criminal responsibility of individuals, provided the violation committed by them can be qualified as a crime under international law. However, current political circumstances in the international

community give little hope that there will be an examination of responsibility at the two levels mentioned; this is also partly due to the incompleteness or imperfection of contemporary international law. I shall nonetheless give a reminder of the possibilities that exist to determine responsibility at both levels.

The responsibility of the State is naturally not the same in internal and in international armed conflict. More specifically, as long as the Kosovo conflict was a non-international one, all damage and injuries caused by the activities of security forces came within the responsibility of the State of Serbia, since those forces were an organ of it. If individuals, organized in militias, paramilitary organizations, etc., in Serbia also acted in the name and on behalf of the State (allegedly there were such cases), Serbia would also bear the responsibility for their acts; litigation would be dealt with by national courts, according to the appropriate subject-matter and territorial jurisdiction. The courts would act on the basis of private claims instituted by damaged or injured parties. They would deliberate on which rules of internal or international law were violated, on the nature of the damage or injury suffered by individuals, and on the type and form of compensation or reparation owed (which need not always be of a material kind). As for damage or injury caused to individuals by the KLA, if the insurgency were stopped and the resistance movement completely disappeared, the KLA's responsibility would be extinguished, and the victims of injury or damage could not obtain any compensation.

The situation is slightly different in the event of grave breaches of international humanitarian law or of crimes against humanity. Any individual is personally responsible for his or her acts, first of all at the domestic level before a national court (over which the ICTY has a supervisory right²⁷) or directly before the Hague Tribunal,

²⁷ It is correct that the ICTY has so-called "precedence" over national courts, i.e. it can *ex officio* take over any case, provided it establishes during the procedure or even after the final judgment that the trial was not fair, either because it was to the accused person's disadvantage or advantage. However, it is not correct to reduce this precedence to a

practically exclusive competence of the Tribunal, as some believe. This would be neither logical nor feasible: assuming that several thousand crimes were committed during the "Yugoslav wars" from 1991 on, and that there may be as many perpetrators, the Tribunal would have to work for several decades to solve only some of these cases.

if for any reason national courts are unable to function. The State is responsible only if it is established that the perpetrator acted officially, under superior orders or according to a general plan of action, in which case the State is obliged to pay compensation to the victim. Conversely, if the court establishes that the perpetrators acted on their personal initiative, so to speak “on their own”, there is no responsibility of the State.

Another point is worth emphasizing: if the rebels survive, i.e. if they win the conflict and come to power in the country, they would bear responsibility for all the unlawful acts committed by them during the civil war from the very beginning. This would also include acts committed by the previous authorities, since owing to their victory the insurgents will have assumed the position of legal authorities, whereas the previous ones would no longer exist. Applied to the specific situation of Kosovo, if the KLA manages to achieve secession and one day takes over power in an independent “State of Kosovo”, this State will be responsible for all violations committed by the KLA since March 1998, i.e. from the moment when the situation of internal disturbances and tension became an internal armed conflict within the meaning of Protocol II.

With regard to the responsibility of States in international conflicts, the issues are considerably more complicated. It is well known that one of the reasons for the “imperfection” of international law lies in the absence of a compulsory jurisdiction. Thus, unlike an individual or a legal body within an internal legal order, States are not bound to submit themselves to a judicial or arbitral procedure unless it is provided for by an international agreement to which they are bound. The Geneva Conventions have not established a compulsory jurisdiction for dealing with a breach of an obligation under the Conventions or the Protocols by one of the Contracting Parties thereto. However, under Article 90 of Protocol I a body has been set up to establish the facts (fact-finding).²⁸ The competence of the Commission must be accepted

²⁸ The full name of this body is: International Fact-Finding Commission. See *ICRC Commentary*, pp. 1,038 ff.

by means of a special declaration, similar to that given by States which have accepted the competence of the International Court of Justice (I.C.J.), i.e. on the basis of a so-called optional clause. The majority of NATO member States taking part in the conflict against the FRY had accepted the Commission's mandate, but Yugoslavia had not. So our country does not even have the possibility to make a fact-finding request concerning each case of bombing that we believe breached the law. Though our country did accept the competence of the I.C.J. on the basis of the optional clause during the armed conflict, it will be very complicated to bring the members of the NATO Alliance before the court. Admittedly, our country has already brought a case before the I.C.J., on several grounds, one of them being violation of the law applicable in armed conflict. To sum up, I believe that in practice it will be difficult to have our case dealt with by an international jurisdiction, in particular with respect to claims for compensation against individual members of the Alliance on account of the damage and losses that resulted from their violations of the law applicable in armed conflict.²⁹

However, if a jurisdiction could be established, our country could make claims against those countries whose aircraft participated in a specific action, and only for that action. For instance, it would be worth finding out whose airplanes bombed the radio and television building in Belgrade (or from whose ship missiles had been launched), then ask a tribunal or an arbitral body to establish which provision of humanitarian law was violated. If a breach is confirmed, the type of compensation or the amount of money due needs to be determined, because in such cases war reparations are normally of a material nature. The claim can be filed only by the State of the FRY, given that it is a subject of international law and, as such, can legally and legitimately seek redress through international litigation or arbitration. If the view prevailed that, owing to the military operations against the FRY the war in Kosovo became an international conflict, the FRY could, in

²⁹ Our public opinion seems to confuse two issues: on the one hand, the responsibility of NATO member States for the aggression and, on the other, the responsibility for viola-

tions of the law applicable in armed conflicts. In this brief study I do not examine responsibility for the aggression, but only for the second category of acts.

principle, also be taken to court for alleged breaches of the law of armed conflict committed by its forces³⁰ vis-à-vis the Albanian population in Kosovo (e.g. murder, destruction of property, expulsion of inhabitants from their homes, etc.). This option exists, however, only as a matter of principle, i.e. in the abstract, because all persons concerned are Yugoslav citizens. Foreign States have no legal right to file a complaint on their behalf with an international judicial body; and individuals could not initiate proceedings because they have no access to such international bodies which resolve exclusively disputes between States. The only possibility left to them is to claim compensation before domestic, i.e. Yugoslav, courts.

Concerning the international criminal responsibility of individuals, the situation is fairly clear and even simple, at least from a legal viewpoint. In the following I speak of war crimes and make no distinction whether members of NATO forces or of Yugoslav units (army, police, volunteers, etc.) are concerned, or whether rules governing the conduct of military operations or the protection of persons in the power of the adversary are involved. All States party to the Geneva Conventions are obliged to prosecute before their own courts any alleged perpetrators under their control, or to transfer them to a country that is determined to prosecute them (application of the principle *aut dedere, aut judicare*), if there is substantial evidence against them. I should like to stress that this obligation was accepted with the adoption of the Geneva Conventions, i.e. half a century ago, and is unequivocal. States primarily have the duty to prosecute their own citizens, but also prisoners of war and other foreigners who are under their control.

Of course, all procedural and other guarantees established by the Geneva Conventions and Protocol I in favour of the persons accused of such acts have to be respected. The procedure has to begin with an indictment, made at the request of the country whose citizens have been victims of the war crime. That country can also ask the authorities of countries where suspects happen to be to extradite them.

³⁰ In addition to the Yugoslav army, the existing security forces and paramilitary units of the Republic of Serbia would also be

covered, because Serbia (not being a subject of international law) cannot be held internationally responsible.

Alternatively, any individual can file a charge against a suspect with the competent authorities in his/her own or in any other country, provided he/she has information about the suspect, his/her whereabouts, etc., as well as knowledge that the person in question had committed a war crime or a crime against humanity. Thus, in law, the utmost has been done to ensure that persons who have committed such odious acts do not escape just punishment. The underlying reason for this is public awareness that this type of crime affects the *general interest of the international community*, and not only the interest of the State whose citizens have been victims of the crime in question.

As in the case of an “ordinary” criminal act, persons other than those who have committed the crime may also be held criminally responsible: helpers, instigators, people in positions of command and others. As established by the Nuremberg Tribunal after the Second World War, such responsibility may go right up to the commander-in-chief of the armed forces or the highest political body of a State, provided it has been proven that the violations committed were not mere individual acts of individual persons, but part of a definite criminal plan. In such a case the accused can be brought either before a national court of a State party to the Geneva Conventions or the International Criminal Tribunal for the former Yugoslavia. The latter has the competence to prosecute members of armed forces of NATO countries, including those at the highest echelon.

We may therefore conclude that rules concerning individual responsibility are well established in law and that it is certainly possible to implement them. However, it remains a moot question as to whether political circumstances in the international community will make it possible to follow the rules consistently and with regard to all parties in this conflict. If the Chief Prosecutor of the ICTY in The Hague does not take into serious consideration the charges brought against NATO and does not initiate proceedings, or does not convincingly explain why that was not done, the Tribunal’s already weakened credibility will be finally eroded.

With regard to international humanitarian law itself, it seems that none of the parties to this conflict has respected it. This confirms the view shared by many, that without mandatory verification of

compliance with the law and in the absence of mechanisms to enforce provisions dealing with responsibility for violations, it remains very difficult, if not impossible, to ensure that humanitarian law is implemented consistently and comprehensively in an armed conflict.

Résumé

Droit international humanitaire et la crise du Kosovo

par KONSTANTIN OBRADOVIĆ (1939-2000)

Dans sa dernière contribution académique à une matière dont il était un expert reconnu, Konstantin Obradović examine la crise du Kosovo sous l'angle du droit international humanitaire. Se référant d'abord à la situation au Kosovo avant le début des opérations militaires de l'OTAN contre la République fédérale de Yougoslavie, il conclut qu'il s'est agi d'un conflit armé non international au sens du droit humanitaire et non seulement de troubles qui relèvent uniquement du droit interne. L'intervention des forces de l'OTAN en a changé le caractère juridique, et le droit international relatif aux conflits internationaux est devenu applicable. Différents incidents survenus pendant ces opérations sont examinés à la lumière des Conventions de Genève et de ses Protocoles additionnels. L'auteur conclut avec un appel à mieux faire usage des procédures internationales de contrôle de la mise en œuvre du droit international humanitaire.

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The judgment of the ICTY Appeals Chamber on the merits in the Tadic case

New horizons for international humanitarian and criminal law?

by
MARCO SASSÒLI AND LAURA M. OLSON

When Dusko Tadic committed various atrocities on the territory of Bosnia and Herzegovina in 1992 against Bosnian Muslims, he would never have thought that he would — although involuntarily — contribute immensely to the development of international humanitarian law, of international criminal law and of some aspects of general international law. In 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was created¹ — the first such tribunal since World War II — which certainly also paved the way for the similar Tribunal created for Rwanda in 1994² and for the adoption, in 1998, of the Statute of the International Criminal Court (ICC).³

In 1994, Dusko Tadic was arrested in Germany and transferred to The Hague. In 1995, the ICTY Appeals Chamber delivered a landmark decision on Dusko Tadic's interlocutory appeal on jurisdiction.⁴ In this decision, the Appeals Chamber made findings which are

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not always uncontroversial but which certainly developed or clarified international law in various respects: that Security Council resolutions are subject to judicial review; that the ICTY was lawfully established; that the conflicts in the former Yugoslavia were both of an international and of a non-international character; that the concept of war crimes equally applies to non-international armed conflicts; and that an extensive corpus of customary international law applies in the latter conflicts and renders some behaviour a criminal offence. Who would have dared to affirm all this five years earlier?

More recently, on 15 July 1999, the ICTY Appeals Chamber delivered its judgment in the *Tadić* case.⁵ This decision is interesting not so much because of the acts of which Dusko Tadić was found guilty, but because of some additional landmark general findings on international humanitarian law and on international criminal law by which the Appeals Chamber overturned those of the Trial Chamber. It adapted — critics will say, blurred — the distinction between international and non-international armed conflicts in

¹ 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 (hereinafter: ICTY) was established through Security Council Resolution 827 of 25 May 1993. Its Statute was originally published as an Annex to the Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993).

² Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, established through Security Council Resolution 955 of 8 November 1994.

³ Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9 (1998), hereinafter: ICC Statute.

⁴ Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, ICTY Appeals Chamber, 2 October 1995 (hereinafter: *Tadić*, Appeals Chamber, Jurisdiction). For a comment on this decision, see Marco Sassòli, "La première décision de la chambre d'appel du Tribunal pénal international pour l'ex-Yugoslavie: *Tadić* (compétence)", *Revue générale de droit international public*, Vol. 100, 1996, pp. 101-134.

⁵ Judgment, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999 (hereinafter: *Tadić*, Appeals Chamber, Judgment).

international humanitarian law, and in doing so acted at variance with a judgment of the International Court of Justice (I.C.J.). It updated — critics will say, manipulated — the concept of protected persons in the 1949 Geneva Conventions. It extended the concept of criminal responsibility due to participation in a group with a common purpose beyond what lawyers from some civil law systems know in their penal law. Finally, it clarified the concept of crimes against humanity in relation to two important issues — in one of them contradicting both the UN Security Council and the UN Secretary-General. This article wishes to discuss those findings and place them in a broader context.

Was the conflict in Bosnia and Herzegovina an international one and were the Bosnian Muslims “protected persons”?

The Trial Chamber had sentenced Dusko Tadic for atrocities it qualified as violations of the laws and customs of war under Article 3 of the ICTY Statute. For those same acts it acquitted him, however, from charges of grave breaches of international humanitarian law in the sense of Article 2 of the ICTY Statute. On cross-appeal by the Prosecution, the Appeals Chamber overturned this finding.

Grave breaches of international humanitarian law

Before explaining and commenting on the rather revolutionary reasoning the Chamber adopts, it may be appropriate to recall the concept of “grave breaches” to which Article 2 of the Statute refers. The Geneva Conventions and Protocol I define a certain number of violations as “grave breaches”⁶ and establish the principle of compulsory universal national jurisdiction over persons who have allegedly committed such crimes. According to the text and the system of the Geneva Conventions and Protocols, the concept of grave breaches does not apply to violations of the law of non-international

⁶ First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Third Geneva Convention, Art. 130; Fourth Geneva Conven-

tion, Art. 147; and Protocol I, Arts 11(4), 85 and 86.

armed conflicts. Although some diverging views exist,⁷ this was correctly recognized by the Appeals Chamber in its decision on jurisdiction.⁸

First, common Article 3 of the Geneva Conventions and the entirety of Protocol II, the treaty law applicable to non-international armed conflicts, are indeed silent as to criminalization of violations thereof. Second, the field of application of the provisions on grave breaches is limited by Article 2 common to the Geneva Conventions, as it is for all articles of the Geneva Conventions other than common Article 3, to international armed conflicts. Third, the Geneva Conventions and Protocol I limit the concept of grave breaches to acts “against persons or property protected by the present Convention”, and the term “protected person” is, as far as civilians are concerned, limited to “[p]ersons... who... find themselves... in the hands of a Party to the conflict... of which they are not nationals”.⁹ Fourth, grave breaches include some acts which are not even prohibited by international humanitarian law if committed by a State against its own nationals.¹⁰

Qualification of the conflict

In order to try Dusko Tadic for grave breaches, it was crucial for both the Trial and the Appeals Chambers to qualify the conflict in which Tadic committed his crimes as international. The law of international armed conflicts applies, under Article 2 common to the four Geneva Conventions, to conflicts fought between two or more High Contracting Parties. Many conflicts are of both an international

⁷ See Separate Opinion of Judge Georges Abi-Saab in the decision of the Appeals Chamber on Jurisdiction, Chapter IV, Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), and *amicus curiae* brief presented by the United States, 17 July 1995, pp. 35-36.

⁸ Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), paras 79-83.

⁹ Fourth Geneva Convention, Art. 4.

¹⁰ Thus, “compelling a protected person to serve in the forces of a hostile Power” is a grave breach (Third Geneva Convention, Art. 130, and Fourth Geneva Convention, Art. 147), while in a non-international armed conflict civilians, although protected by the applicable law, may be under a legal obligation to serve in the governmental armed forces, even if they consider them as hostile.

and a non-international character, either because foreign powers intervene in a non-international armed conflict or because international armed conflicts are fought, as they often were during the Cold War, through local proxies. In such mixed conflicts, the law of international armed conflicts applies to the fighting between (the armed forces of) two States and the law of non-international armed conflicts to the fighting between the government and rebel forces.¹¹ According to the general rules of State responsibility, such a fragmentation of a mixed conflict into its components is not necessary when a party to a non-international armed conflict can be considered as the *de facto* agent of an intervening State, in which case the behaviour of this agent comes under the law of international armed conflicts.

As for the conflict in the Prijedor region, in which Dusko Tadic was involved, the Appeals Chamber had determined in its decision on jurisdiction that “since it cannot be contended that the Bosnian Serbs constitute a State”, it could only be classified as international based on the assumption that the Bosnian Serbs are organs or agents of the Federal Republic of Yugoslavia (FRY).¹²

To determine whether that was the case, the ICTY had to establish not only the facts but also the legal standard according to which outside support can render the law of international armed conflicts applicable to the behaviour of rebels. The Trial Chamber considered that the International Court of Justice had clarified this standard when it had to decide whether the violations of international humanitarian law committed by the Nicaraguan *contras* could be attributed to the United States as the latter’s own behaviour. The I.C.J. held that the U.S. “participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of... targets, and the planning of the whole of its operation, is still

¹¹ See *Military and Paramilitary Activities (Nicaragua v. United States of America)*, I.C.J. Reports 1986, para. 219; Dietrich Schindler, “The different types of armed conflicts according to the Geneva Conventions and

Protocols”, *Recueil des Cours de l’Académie de droit international*, Vol. 163/II, 1979, p. 150.

¹² Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), para. 76.

insufficient in itself... for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”¹³ This standard is very similar to that suggested by the authors of the ICRC *Commentary* on the Geneva Conventions, who consider that when a violation has not been committed by an agent of an occupying power but by local authorities, “what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given”.¹⁴

Under this standard, the Trial Chamber decided that after 19 May 1992 (the day on which the Yugoslav Peoples’ Army officially withdrew from Bosnia and Herzegovina), the Bosnian Serb forces could not be considered as *de facto* organs or agents of the FRY because the latter did not exercise control over the activities of the former.¹⁵ Eminent authors, another ICTY Trial Chamber and the Prosecution in its cross-appeal have strongly argued that the test applied by the I.C.J. for the purpose of establishing State responsibility cannot be used to determine whether the “grave breaches” provisions apply.¹⁶ The ICTY Appeals Chamber correctly rejects this argument.¹⁷ State responsibility and individual responsibility are admittedly

¹³ *Loc. cit.* (note 11), paras 110-115.

¹⁴ Jean S. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Commentary*, International Committee of the Red Cross, Geneva, 1958, p. 212.

¹⁵ *The Prosecutor v. Dusko Tadic*, Opinion and Judgment, Case No. IT-94-1-T, ICTY Trial Chamber II, 7 May 1997, paras 578-607 (hereinafter: *Tadic*, Trial Chamber, Judgment).

¹⁶ See William Fenrick, “The development of the law of armed conflict through the jurisprudence of the International Tribunal for the former Yugoslavia”, in Schmitt and Green

(eds), *The Law of Armed Conflict: into the Next Millennium*, International Law Studies, US Naval War College, Newport, 1998, pp. 85-92; Theodor Meron, “Classification of armed conflict in the former Yugoslavia: Nicaragua’s fall-out”, *Am. J. Int’l L.*, Vol. 92, 1998, pp. 236-242; and *The Prosecutor v. Zejnir Delalic et al.* (the *Celebici* case), Judgment, ICTY Trial Chamber, Case No. IT-96-21-T, 16 November 1998, paras 230-231 (hereinafter: *The Celebici* Judgment).

¹⁷ *Tadic*, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 103-105.

different issues, and the I.C.J. did not have to determine in the *Nicaragua* case whether the law of international or of non-international armed conflicts applied — for the simple reason that it considered the prohibitions of common Article 3 to apply, as a minimum yardstick, to both kinds of conflict.¹⁸ In our view the preliminary underlying issues are, however, the same in both cases. Indeed, before State responsibility or individual responsibility can be established in a given case, the rules according to which the State or the individual should have acted have to be clarified. Only if the acts of the Nicaraguan *contras* had been attributed to the U.S., these acts, as acts of the U.S. against Nicaragua, would have been subject to the law of international armed conflicts. Similarly, that law could apply to acts which Dusko Tadic, a Bosnian Serb, committed against Bosnian Muslims in the course of a conflict with the Bosnian government only if those acts could be legally considered as acts of another State, the FRY.

While recognizing that the same test applies in both cases, the ICTY Appeals Chamber decides that the test applied by the I.C.J. in the *Nicaragua* decision is unconvincing even for the purpose of establishing State responsibility, because it is contrary to the very logic of the law of State responsibility and at variance with State and judicial practice.¹⁹ In its view, when responsibility for a military organization is in question, overall control by a foreign State over that organization is sufficient to render the foreign State responsible for all acts of that organization and to make international humanitarian law relative to international armed conflicts applicable.²⁰

¹⁸ *Loc. cit.* (note 11), para. 219. One wonders why the ICTY could not use the same line of argument. It could thus have avoided many legal controversies.

¹⁹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 115-145.

²⁰ Earlier a Trial Chamber of the ICTY had already come to a similar conclusion in the

Celebici case. Because of the continuing involvement of the FRY, it applied the law of international armed conflicts to the detention of Bosnian Serbs by Bosnian Muslims, considering that the *Nicaragua* test was not applicable to the question of individual responsibility. See The *Celebici* Judgment, *loc. cit.* (note 16), paras 233 and 234.

First, it may be doubted whether it is appropriate for the ICTY to provide an answer to a question of general international law that differs from the answer given by the I.C.J., the principal judicial organ of the United Nations.²¹ Even if the theory of the Appeals Chamber is well reasoned, the I.C.J. can be expected to continue to apply its own theory to inter-State disputes worldwide. Double standards will therefore inevitably result. Second, with the exception of a German case concerning the former Yugoslavia, the practice mentioned by the Chamber consists mainly of cases in which a State was held responsible for armed groups acting on its own territory. There, territorial control might have been the decisive factor. The other case mentioned by the Chamber is that of an occupied territory²² where armed forces of the occupying power were actually present. In such a case the Geneva Conventions expressly prescribe that protected persons cannot be deprived of their rights — and the occupying power therefore will not be released from its responsibility — by any change introduced into the institutions of the territory.²³ It is debatable whether those precedents can be applied without further arguments to the *Tadic* case, where a local military group was constituted out of the rest of the army of the former central State, possibly by the former central authorities, on the territory of a State falling apart. Third, concerning the logic of the law of State responsibility, the Appeals Chamber is certainly correct in affirming that a State should not shelter behind a lack of specific instructions so as to disclaim international responsibility for a military group, whether at home or abroad. With regard to a group abroad, however, this argument is convincing only if that group has been entrusted with a certain task. As far as the Bosnian Serbs are concerned, it may be argued that they were carrying out their own self-assigned task. Whether rightly or wrongly, they did not want to join the State of Bosnia and Herzegovina.

²¹ UN Charter, Art. 92.

²² See the decision of the European Court for Human Rights in the case *Loizidou v.*

Turkey, Reports of Judgments and Decisions, 1996, pp. 2,216 ff., paras 56 and 57.

²³ Fourth Geneva Convention, Art. 47.

Applying the overall control test to the case of the Bosnian Serbs, the Appeals Chamber comes to the conclusion that they were under such overall control by the FRY.²⁴ It mentions, similarly to the Trial Chamber, impressive circumstantial evidence for the existence of such control. Perhaps it does not give sufficient weight to the particularities of the situation of a State breaking apart into several States, where the armed forces of the former central State necessarily have many links with the former central authorities which are now foreign authorities. As such links are inherent in the situation, they are not necessarily an indication of control. The Appeals Chamber further argues that the FRY had signed the Dayton Peace Agreement for the Bosnian Serbs. With all due respect, this argument is almost contrary to good faith when one recalls that the international community, and particularly the United States, refused to negotiate with the Bosnian Serbs and obliged the FRY to negotiate and sign for them.²⁵

In any case, there are some risks inherent in the standard the Appeals Chamber applies. First, it implies an unintended form of “judicial ethnic cleansing”. Instead of constituent peoples of Bosnia and Herzegovina, the Serbs (and Croats) are considered as “agents” of a foreign State. If their acts can be legally attributed to a foreign State, why should they themselves not be “attributed” to that State, i.e. considered to be foreigners? This is precisely what another ICTY Trial Chamber concluded in the *Celebici* case, arguing that Bosnian Serbs detained by the Bosnian government were protected

²⁴ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 146-162. Earlier, the Trial Chambers had come to similar conclusions: Review of Indictment pursuant to Rule 61, *The Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-I, ICTY Trial Chamber, 20 October 1995, para. 30.; trial of Bosnian Muslims and Croats in the *Celebici* case, *loc. cit.* (note 16), paras 233 and 234; and concerning the

involvement of Croatia in the conflict in Bosnia and Herzegovina: Review of the Indictment pursuant to Rule 61, *The Prosecutor v. Ivica Rajic*, Case No. IT-95-12-R61, ICTY Trial Chamber, 13 September 1996, para. 25.

²⁵ See Richard Holbrooke, *To End A War*, Random House, New York, 1998, pp. 4, 5, 99, 105-107, 139, 140, 148-151, 197, 243, 255, 256, 310 and 341-343.

persons because they had not accepted the nationality of Bosnia and Herzegovina.²⁶ If those persons are foreigners, their forcible transfer to their “home State” is no longer a war crime, but a favour.²⁷ Today, after the conflict, such theories are not a helpful contribution to peace and reconciliation. During a conflict, it is inconceivable that a military commander could be persuaded to respect certain rules by arguing that he is an agent of a foreign country and that his home country is his enemy.

Second, in its decision on jurisdiction, the Appeals Chamber had still, in our view correctly, pointed out that to consider the Bosnian Serbs as agents of the FRY would lead to “an absurd outcome”, in that it would place them “at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina”.²⁸ Indeed, atrocities committed by the government army of Bosnia and Herzegovina against Bosnian Serb civilians would traditionally not be regarded as “grave breaches” because those civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under the Fourth Geneva Convention. Conversely, similar atrocities committed by Bosnian Serbs against Bosnian Muslim civilians would be regarded as “grave breaches” because such civilians would be “protected persons” under the Geneva Convention, in that the Bosnian Serbs would be acting as organs or agents of the FRY of which the Bosnian Muslim civilians would not possess the nationality. It is perhaps to avoid such consequences that the Appeals Chamber also redefines in its judgment, as will be explained below, the concept of “protected persons” under the Fourth Geneva Convention.²⁹ Under the Third Geneva Convention, too, it may be wondered whether Bosnian government forces must and will treat captured members of

²⁶ See The *Celebici* Judgment, *loc. cit.* (note 16), paras 250-266, and, in particular, para. 259. It did not explain why the will of persons in a disintegrating State should be decisive in determining their nationality, although the Bosnian Serbs were not allowed

to choose the State in which they wanted to live.

²⁷ *Infra* note 42.

²⁸ Tadić, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), para. 76.

²⁹ *Infra* note 33 and accompanying text.

the Bosnian Serb and Croat forces, “legally considered as agents of Serbia or Croatia”, as prisoners of war? May they “repatriate” them at the end of the conflict to the “country on which they depend”, i.e. deport them abroad?

Who is a protected person?

Even if the conflict in which Dusko Tadic committed his acts was an international one, they may be qualified as grave breaches only if their victims were, as explained above, “protected persons”. Even in an international armed conflict, atrocities committed against fellow citizens are for that reason traditionally not considered as “grave breaches”. The Trial Chamber had concluded that the Bosnian Muslim victims of Dusko Tadic were not protected persons, as they were not in the hands of a party to the conflict of which they were not nationals,³⁰ but in the hands of Bosnian Serbs, like Dusko Tadic, who had the same nationality as their victims.³¹ On cross-appeal by the Prosecution and following suggestions to adapt the definition of protected persons “to the principal challenges of contemporary conflicts”,³² the Appeals Chamber abandons this literal interpretation of the definition of protected persons. It replaces the factor of nationality by the factors of allegiance and effective protection.³³ The justification provided is very short. On the one hand it cites some cases for which, under explicit provisions (or according to the *travaux préparatoires*) of the Geneva Conventions, nationality is not decisive, namely for refugees and neutral nationals.³⁴ The victims in the *Tadic* case were, however, neither

³⁰ *Supra* note 9 and accompanying text.

³¹ *Tadic*, Trial Chamber, Judgment, *loc. cit.* (note 5), paras 584-608. The Trial Chamber did not make clear whether it considered all of them to be nationals of Bosnia and Herzegovina or still citizens of the former Yugoslavia.

³² See Meron, *op. cit.* (note 16), pp. 238-242; Christopher Greenwood,

“International humanitarian law and the *Tadic* case”, *Eur. J. Int'l L.*, Vol. 7, 1996, pp. 273-274; Fenrick, *op. cit.* (note 16), pp. 91 - 92; and The *Celebici* Judgment, *loc. cit.* (note 16), paras 245-266.

³³ *Tadic*, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 163-169.

³⁴ See Fourth Geneva Convention, Arts 4(2), 44 and 70(2).

neutral nationals nor refugees. On the other hand it refers to the inadequacy of the criterion of nationality for contemporary conflicts and recalls that international humanitarian law must apply according to substantial relations rather than formal bounds. The latter is correct for the law of non-international armed conflicts and for resolving the question whether an armed conflict exists, whereas once the law of international armed conflicts applies, the formal status of a party, a territory or a person is relevant to determine the protective regime applicable.³⁵

The logical consequence of this theory is that from now on, all victims of international armed conflicts should benefit from the full protected persons status under the Geneva Conventions. Indeed, a State will only rarely abuse those who maintain their allegiance to it and who benefit from its effective protection. It is open to doubt whether, in international armed conflicts, States will be ready to treat their own nationals as protected persons once those persons' allegiance lies with the enemy. Some acts, such as employing protected persons in military activities or enrolling them into the armed forces, are and can be prohibited only if committed against enemy nationals.³⁶ Allegiance is also difficult to determine in the heat of the conflict. In any case, even if this approach has many advantages *de lege ferenda*, it is questionable whether it is admissible to reinterpret *ex post*, in a criminal trial, a constitutive element of a grave breach, i.e. that it must be committed against persons of another nationality.

³⁵ Full protection as "protected persons" is afforded to enemy and certain third country nationals (Fourth Geneva Convention, Art. 4), while a party's own nationals benefit from much more limited, fundamental guarantees (*ibid.*, Arts 13-26, and Protocol I, Art. 75). Combatants may be interned without any further reason until the end of active hostilities, while civilians may only be interned in exceptional circumstances (Third Geneva Conven-

tion, Arts 21 and 118, and Fourth Geneva Convention, Arts 41-43 and 78). Protected civilians benefit from much more extensive guarantees in occupied territories than on enemy national territory (compare Fourth Geneva Convention, Arts 35-46 with Arts 47-78).

³⁶ Third Geneva Convention, Arts 50 and 130, and Fourth Geneva Convention, Arts 40, 51 and 147.

Does the law of international armed conflicts always offer better protection than the law of non-international armed conflicts?

The standards the Appeals Chamber adopts considerably increase the number of cases in which war victims could benefit from the comprehensive and detailed regime laid down in the 1907 Hague Regulations, the Geneva Conventions and Protocol I, rather than from the more summary regime contained in one single article of the Geneva Conventions, namely their common Article 3, and in Protocol II. From a humanitarian point of view such a development cannot but be welcomed if it is applied to all conflicts. However, it rests on the assumption that the law of international armed conflicts offers better protection for the victims. This is not always true. The law of non-international armed conflicts is easier to apply and has a better chance of being respected in many chaotic current conflicts.

The protection offered by the law of international armed conflicts to a person who is in the hands of a belligerent differs greatly according to the nationality of that person, to whether that person is a civilian or a combatant and to the status of the territory on which he or she is found.³⁷ In a non-international armed conflict, it would often be difficult in practical terms to determine who is a “combatant” and who a “civilian”. It would be conceptually well nigh impossible to consider a government or rebels as an “occupying power” over parts of the territory of the country in which they are fighting. Even if a line could be drawn between a party’s own territory and territory it occupies, this would never have the slightest chance of being respected by a party engaged in a non-international armed conflict.

Conversely, the law of non-international armed conflicts protects according to the actual situation of a person. Most of its rules benefit, without any adverse distinction, all persons not or no longer taking an active part in the hostilities.³⁸ Other, additional rules protect

³⁷ *Supra* note 35.

³⁸ Art. 3 common to the four Geneva Conventions, and Protocol II, Art. 4.

persons in particularly risky situations, e.g. those whose liberty has been restricted for reasons related to the armed conflict or who face penal prosecutions.³⁹ It may be that such rules are much more appropriate for the necessarily less formalized and more fluid situations of many contemporary conflicts. Sometimes the rules themselves applicable to non-international armed conflicts are stricter. The abominable practice of “ethnic cleansing”, so widely utilized in the former Yugoslavia, is clearly prohibited by international humanitarian law applicable in international and in non-international armed conflicts if the means used to expel the victims are unlawful as such, e.g. murder, rape, pillage, etc. The law of non-international armed conflicts furthermore prohibits any forced movement of civilians.⁴⁰ The law of international armed conflicts is weaker on this point, for “[i]ndividual or mass forcible transfers, as well as deportations of protected persons... are prohibited, regardless of their motive” only out of occupied territories.⁴¹ Expulsions of “protected civilians”, i.e. foreigners, out of a party’s own territory are not explicitly prohibited.⁴²

We are not convinced that it is appropriate to apply one law to a situation for which other law was made. We would instead suggest — as a challenge for the new millennium — creating a new law applicable to all situations. We have, however, to admit that if States as they are today undertook such a codification exercise, the risk that they might reduce the protection foreseen for all armed conflicts would be considerable.

It should finally not be forgotten that in the former Yugoslavia and elsewhere, the distinction between the law of international and of non-international armed conflicts has only a minor bearing upon the real situation of the victims. The problem is not that

³⁹ Protocol II, Arts 5 and 6 respectively.

⁴⁰ *Ibid.*, Art. 17.

⁴¹ Fourth Geneva Convention, Art. 49(1).

⁴² Article 35 of the Fourth Convention regulates only their right to leave the territory. The ICRC *Commentary*, *loc. cit.* (note 14), p. 235, considers that “the right of expulsion has been retained”.

the wrong set of rules has been respected, but that *no* rules have been respected. None of the dreadful crimes which have destroyed that region and others would be lawful if only the law of non-international armed conflicts applied. Dusko Tadic and too many others violated even the simple rules of Article 3 common to the four Geneva Conventions.

Responsibility of participants in international crimes: were they committed within or beyond the common purpose?

Three categories of co-perpetrators

The Trial Chamber had found that Dusko Tadic had participated within an armed group in “ethnic cleansing” operations in the Prijedor region. Among other things, he removed non-Serb men from the villages of Sivci and Jaskici. In Sivci, no one was killed during such operations, while in Jaskici at least five men were later found to have been killed. There was no evidence that Dusko Tadic actually took part in those killings, and the Trial Chamber therefore concluded that Dusko Tadic could not be sentenced for them. On cross-appeal by the Prosecution, this conclusion was overturned by the Appeals Chamber. First, on the basis of the facts, it found beyond a reasonable doubt that the five victims had been killed by members of the armed group to which Dusko Tadic belonged.⁴³ Second, in law, it held that under the common purpose doctrine, Dusko Tadic could be held responsible for those killings even if they were committed by other members of his group, and even if the killing of inhabitants was not necessarily part of their common plan. According to the Chamber, such responsibility exists as soon as the risk of death became a predictable consequence of the execution of the common plan and the accused was either reckless or indifferent to that risk.⁴⁴

⁴³ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 178-184.

⁴⁴ *Ibid.*, para. 204.

Before discussing at length this third category of cases in which co-perpetrators are criminally responsible for acts committed by others, the Appeals Chamber importantly clarifies the other two — uncontroversial — categories of cases. First, there are those in which all co-defendants act pursuant to a common design and possess the same criminal intent; in such cases a participant who did not personally effect the crime (e.g. kill a civilian or rape a woman), is criminally responsible for the crime if he or she voluntarily participates in one aspect of the common design and intended the criminal result.⁴⁵ The second category concerns cases of an organized system intended to commit crimes (e.g. in World War II, the Nazi concentration camps). It is correctly seen by the Chamber as a variant of the first. Here, any participation in the enforcement of the system is sufficient as *actus reus*, while the *mens rea* requires knowledge of the nature of the system and the intent to further the common concerted design.⁴⁶ These two categories are a reasonable, useful and important crystallization of international and national precedents and of legal thinking.

The third category: responsibility of co-perpetrators beyond the common plan

The third category deserves more detailed discussion. It contains the standard leading to the responsibility of Dusko Tadić for the killings in Jaskici, and covers acts committed by one co-perpetrator which are outside the common design. The Appeals Chamber comes to the conclusion that all other co-perpetrators are responsible for such acts, if it was foreseeable that they might be committed and the accused willingly took that risk.⁴⁷ This conclusion is not based on a provision of the ICTY Statute or on a rule of international humanitarian law, but on an analysis, by the Chamber, of precedents and national legal systems.

⁴⁵ *Ibid.*, paras 196-201.

⁴⁶ *Ibid.*, paras 202 and 203.

⁴⁷ *Ibid.*, paras 204-226.

Review of precedents and practice

In reviewing precedents leading to its conclusion, the Appeals Chamber finds that British and U.S. military courts in Germany, Italian courts judging World War II events, common law jurisdictions, France and Italy adopt such an approach. It admits, however, that in Germany and the Netherlands, if one of the participants commits a crime not envisaged by the common purpose, he alone is responsible for such crime. The Chamber could have added Switzerland to that list.⁴⁸

In this review, the Appeals Chamber to some extent compares apples to oranges, as is inevitable when comparing the answers different legal systems provide for a specific question. In addition, the definition of the third category is not very clear and varies throughout the discussion by the Chamber. In the introduction, it is considered sufficient that the result not covered by the common plan is predictable and that the accused was indifferent to that risk.⁴⁹ After reviewing the Italian cases, the Chamber concludes that “it would seem that [the Italian Court of Cassation] either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*)”.⁵⁰ In the Italian and in other continental systems *dolus eventualis* and *culpa* are, however, clearly not the same thing, while the intermediate category of recklessness does not exist.⁵¹ *Dolus eventualis* entails responsibility for a deliberate crime; *culpa* is negligence. In the following paragraph of the judgment, though, one reads that “more than negligence... the so-called *dolus eventualis* is required (also called advertent recklessness in some national legal systems)”.⁵² If this was the standard,

⁴⁸ See the practice of the Swiss Supreme Court, last in *Arrêts du Tribunal Fédéral Suisse, Recueil Officiel*, Vol. 118, Part IV, pp. 227 ff., consideration 5d/cc, p. 232.

⁴⁹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 204.

⁵⁰ *Ibid.*, para. 219.

⁵¹ See Ferrando Mantovani, *Diritto penale, Parte generale*, 3rd ed., Padova, CEDAM, 1992, pp. 320-323 (containing a reference in note 21 to the German, Danish, Chilean and Argentinian law providing for the same distinction). See also *infra* note 53, for the German and Swiss law.

⁵² Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 220.

it would correspond to that of Swiss and German law, and no one could object, even when the “common purpose doctrine” in common law tradition is interpreted in this sense. Under this standard, he who knows that a result is inevitably or probably linked to his act and accepts this result is responsible for the deliberate crime, while he who hopes in the same situation that the probable result will not materialize is responsible only of negligence.⁵³ In summing up the whole chapter, the Chamber yet mentions another standard, i.e. that the crime was foreseeable and the accused willingly took that risk.⁵⁴ But this is less than *dolus eventualis*, where the result and not only the risk is accepted, and much more than the initially mentioned standard, i.e. that the result is predictable (which includes unconscious negligence) and the accused remains indifferent.⁵⁵ One may wonder which standard the Chamber finally applies. For systematic reasons, and taking into account how the standard was actually applied to the case of Dusko Tadic, it may be guessed that it is the standard summed up in the conclusion, i.e. that the crime was foreseeable and the accused willingly took that risk.

The significance of national practice

In a statement remarkable from the point of view of the theory of sources, the ICTY Chamber concludes that its overview of national legislation has not shown that there is a general principle of law recognized by the nations of the world in this field. Furthermore, such national legislation, even if it were uniform, could not be seen anyway as domestic law incorporating customary international law,⁵⁶ as it does not originate from the implementation of international law but rather runs parallel to, and precedes, international regulation.⁵⁷

⁵³ For the difficult distinction between *dolus eventualis* and *culpa* in Germany, see Claus Roxin, *Strafrecht, Allgemeiner Teil*, Vol. 1, 3rd ed., Beck, München, 1997, pp. 372-400, and, for Swiss law, Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat*, 2nd ed., Staempfli, Bern, 1996, pp. 183-187.

⁵⁴ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 228.

⁵⁵ *Ibid.*, para. 204.

⁵⁶ Such law has been vaguely suggested by the UN Secretary-General as a subsidiary source for the ICTY, see Report of the Secretary-General, *op. cit.* (note 1), para. 36.

⁵⁷ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 225.

After those two correct remarks, the Chamber nevertheless mysteriously comes to the conclusion that “the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that [that] case law reflects customary rules of international criminal law”.⁵⁸ As far as national legislation is concerned, this affirmation is contradicted by the preceding remarks, except if the standard of the Chamber is *dolus eventualis*. In the latter case, however, the Chamber should have analysed much more thoroughly whether circumstantial evidence allows such a *dolus eventualis* on the part of Dusko Tadic to be assumed. It may be added that, as the Appeals Chamber correctly mentions in several footnotes, common law jurisdictions increasingly restrict the felony murder doctrine, which is so difficult to accept for continental lawyers.⁵⁹ Furthermore, it is important to remember that this doctrine refers only to murder, while the Appeals Chamber’s ruling would apply to all crimes foreseen in the Statute.

As for international case law, the British and U.S. military courts in Germany may be considered to have applied international law in the cases before them — because otherwise the principle *nullum crimen sine lege* would have been violated towards German defendants having acted in Germany. Why does the Chamber, however, consider the very extensively reviewed Italian precedents, unlike the German and Dutch ones, as cases in which international law was applied? Was it because they referred to war events? Yet they were based on an explicit provision of the Italian Penal Code of 1931 and the reasoning used was that which Italian courts use in all other criminal cases.⁶⁰ As

⁵⁸ *Ibid.*, para. 226.

⁵⁹ *Ibid.*, paras 224, notes 287-291, and *Black’s Law Dictionary*, 6th ed., 1991, pp. 428 f.

⁶⁰ See the frequently criticized Art. 116(1) of the *Codice penale* (adopted in 1930, during the Fascist period, and still in force); Mantovani, *op. cit.* (note 51), pp. 538-541;

Giuseppe Zuccalà (ed.), *Commentario breve al codice penale, Complemento giurisprudenziale*, 3rd ed., Padova, CEDAM, 1994, pp. 339-344; Mario Romano and Giovanni Grasso, *Commentario sistematico del codice penale*, Vol. II, 2nd ed., Milano, Giuffrè, 1996, pp. 217-224.

for the international precedents set by the British and U.S. military courts in Germany, it is not clear whether they support the conclusion the Appeals Chamber draws from them. In the *Essen Lynching* case, civilians were found guilty of murder against prisoners they gathered to insult and ill-treat after a German captain had said loudly that the prisoners should not be protected from the mob and ought to be shot. No individual civilian could be found to have actually killed the prisoners who were thrown, after ill-treatment, from a bridge and then shot. There was no Judge Advocate nor a reasoned judgment in that case. The Prosecution mainly held that the civilians had the intent to kill, but that even if there was no such intent, “every person in that crowd who struck a blow is both morally and criminally responsible for the deaths”.⁶¹ Since the civilians were convicted, the Appeals Chamber “assumes” that the prosecution arguments were accepted. It is, however, not clear whether the main argument or the subsidiary argument of the Prosecutor was accepted. For the only other international case it reviews, the *Borkum Island* case, the Appeals Chamber itself has to admit that it was a clear case of a common design to kill, i.e. of category one distinguished by the Chamber.⁶² It is not clear why this case is reviewed as a precedent for category three.

Precedents in treaty law

As for references to treaties, the Chamber in fact refers to two conventions which are not yet in force. First, it mentions the International Convention for the Suppression of Terrorist Bombing of 15 December 1997, adopted by consensus by the UN General Assembly, which criminalizes an intentional contribution “either... made with the aim of furthering the general criminal activity or purpose of the group or... made in the knowledge of the intention of the group to commit the offence... concerned”.⁶³ Second, it refers to the

⁶¹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 208.

⁶² *Ibid.*, paras 210-213.

⁶³ International Convention for the Suppression of Terrorist Bombing, 15 December 1997, G.A. Res. 52/164.

Statute of the International Criminal Court which was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference — but, we would add with regret, with some notable exceptions such as the United States. For the Appeals Chamber, it expresses the *opinio juris* of the States having adopted the Statute — a very sweeping statement under any theory of sources, but a largely correct one.⁶⁴ The ICC Statute stipulates in Article 25(3)(d) that a person shall be criminally responsible for a crime if that person in any way (other than aiding and abetting or otherwise assisting in the commission of a crime) “contributes to the commission... of... a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group...; or (ii) Be made in the knowledge of the intention of the group to commit the crime”. In our view, this wording does not necessarily cover the third category, as it requires the intention of the group to commit the crime, while in the third category, only one member has the intention to commit the additional crime.

Some caveats

In conclusion, the third category, under which Dusko Tadic has been sentenced for the Jaksici killings, is perhaps not as firmly established in international law as the Appeals Chamber suggests. Some may therefore question whether its application to Dusko Tadic is compatible with the principle *nullum crimen sine lege*. Interestingly enough, no one tried to check whether the penal law of the former Yugoslavia followed the US-Italian or the Dutch-German approach.

The more important question is whether the third category constitutes a sound development of international criminal law. We think it does, subject to some caveats inherent in a requirement the

⁶⁴ See Marco Sassòli, “Bedeutung von ‘Travaux préparatoires’ zu Kodifikationsverträgen für das allgemeine Völkerrecht”,

Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 41, 1990, pp. 109-149.

Appeals Chamber mentions in passing for that category, which should not be forgotten: there must be a *criminal* enterprise and the intention of the co-perpetrator to participate in and further *such* an enterprise.⁶⁵

First, existing international law strictly distinguishes between *jus ad bellum*, i.e. the law on the (il)legitimacy of conflicts, and *jus in bello*, i.e. the law on behaviour in conflicts.⁶⁶ Therefore armed conflicts as such, even wars of aggression, should not be considered as criminal enterprises under this rule with reference to *jus in bello*.

Second, it should not be forgotten that, unlike criminal gangs in peacetime, membership in armed forces is often not optional and often not driven by criminal motivations, even though it is foreseeable that crimes will be committed. Under the standard the Appeals Chamber adopts, every member of the unfortunately numerous armed forces in countries where State structures have collapsed, a situation often resulting in simple looting,⁶⁷ would be responsible for any killings which will foreseeably be committed when some of those whose property is looted resist. It will therefore be crucial to take the individual circumstances under which a “co-perpetrator” joined the armed force into account.

Third, in our view, even the systematic and large-scale crimes committed in contemporary conflicts should not be seen as evidence that those conflicts are criminal enterprises in the sense of this rule. We have mentioned that, under some legislation, those who join a criminal group are responsible for foreseeable crimes committed, outside the common purpose, by other members of the “gang”. In

⁶⁵ Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 220.

⁶⁶ This fundamental distinction between *jus ad bellum* and *jus in bello* is recognized in the preambular para. 5 of Protocol I. See Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 83-88 and, in particular, pp. 681-682: the case of *U.S. v. William List and Others*.

⁶⁷ On such disintegration of State structures, see the *Preparatory Document drafted by the ICRC for the First Periodical Meeting on International Humanitarian Law*, Geneva, 19-23 January 1998, in Sassòli and Bouvier, *op. cit.* (note 66), pp. 482-492.

wartime, a very specific category of “gangs” exist, namely armed forces. Their members are called combatants. Contrary to criminals, those combatants have a right to participate in hostilities, including the right to kill enemy combatants, but they are bound to respect international humanitarian law.⁶⁸ They often do not. In this case, they may and must be punished. However, an essential feature of combatant status is immunity from punishment for those who respect that law. This is intended to increase respect for it. A member of armed forces does not lose this immunity because his comrades violate international humanitarian law, but only if he himself violates it.⁶⁹ A simple soldier should not be considered as a rapist because rape is committed by some of his comrades in the same force, even if this is sadly predictable in some armed forces. An exception might be appropriate only in extreme cases, where war crimes and not the fighting of an armed conflict becomes the main purpose of a given armed force. In practice, such cases are, however, covered by category two mentioned by the Chamber.

Indeed, the very basis of international criminal law and its civilizing contribution to the enforcement of international law is that criminal responsibility is individual. Compared to sanctions against States — the traditional enforcement method in the international community — punishment of individuals has a greater preventive and stigmatizing effect. It is decided in a formalized, fair procedure, without veto powers and much less influenced by political considerations than the decision-making process of the UN Security Council. Most importantly, punishment leads to the individualization of responsibility and repression. It makes clear that the horrific crimes witnessed by our century were not collectively committed by “the Serbs”, “the

⁶⁸ See Protocol I, Arts 43(2) and 44(2).

⁶⁹ Under Art. 4(A)(2) of the Third Convention the only exception to this rule concerned armed forces which did not distinguish themselves sufficiently from the civilian population. All their members lost combatant

status, including those who wore a distinctive sign. Art. 44(4) of Protocol I has individualized this rule. Every member who distinguishes himself sufficiently from the civilian population has combatant status, even if most of his comrades do not respect the rule.

Germans”, “the Croats” or “the Hutus”, but by criminal individuals. As long as the responsibility remains attributed to a State or a people, there will conversely be the seeds for future wars. It is therefore in our opinion crucial that certain concepts in international criminal law, such as the common purpose doctrine, should not lead to a re-collectivization of responsibility. It may certainly be considered that all those who fight unjust or genocidal wars or support inhumane regimes are morally and politically co-responsible for the violations of international humanitarian law committed in such contexts. In our view, this should not, however, lead to criminal responsibility based on simple membership of the group and knowledge of the policy of that group. Such a concept would in fact water down the criminal responsibility of the actual perpetrators and their leaders and create a net of solidarity around them. This in turn would not increase protection for the victims, nor would it facilitate the actual implementation of international criminal justice.

Understanding of “related to attacks on the civilian population”: may crimes against humanity be committed for purely personal motives?

Elements of crimes against humanity

In identifying the elements which must be satisfied for a conviction for crimes against humanity, the Trial Chamber found it necessary to prove the existence of an armed conflict and a nexus between the act and the armed conflict. The Trial Chamber went on to clarify that the nexus requirement comprised two caveats: 1) the act must “be linked geographically as well as temporally with the armed conflict”⁷⁰ and 2) the act must “not be unrelated to the armed conflict”⁷¹ or, as the Appeals Chamber rephrases it, the act and the conflict

⁷⁰ Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 239, citing Tadić, Trial Chamber, Judgment, *loc. cit.* (note 15), para. 633.

⁷¹ *Ibid.*, citing Tadić, Trial Chamber, Judgment, *loc. cit.* (note 15), para. 634.

must be related. The issue for the Appeals Chamber arises in the Trial Chamber's further requirement that the second caveat above involves two conditions: 1) "the perpetrator must know of the broader context in which the act occurs"⁷² and 2) "the act must not have been carried out for purely personal motives of the perpetrator".⁷³ On cross-appeal by the Prosecution, the Appeals Chamber overturns the Trial Chamber's insistence upon the second condition of this second caveat.

(Ir)relevance of "purely personal motives"

We believe that the Appeals Chamber rightly upheld the clarification by the Prosecution in its appeal that "the words 'committed in armed conflict' in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place".⁷⁴ Such a requirement is merely a jurisdictional element, not a substantive element of the *mens rea* of crimes against humanity.⁷⁵ Also remaining uncontroversial is the Appeals Chamber's clarification that no nexus is required between the accused's acts and the armed conflict. The nexus need only be established between the actions of the accused and the attack on the civilian population.⁷⁶

Yet in our view the Appeals Chamber goes too far when it eliminates the consideration of the purely personal reasons or motives for which the act may have been committed. The Chamber stipulates that the necessary elements merely require that the accused's actions "must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have *known* that his acts fit into such a pattern".⁷⁷ The individual motives of

⁷² *Ibid.*, and Tadic, Trial Chamber, Judgment, *loc. cit.* (note 15), paras 656-657.

⁷³ *Ibid.*, and Tadic, Trial Chamber, Judgment, *loc. cit.* (note 15), paras 658-659.

⁷⁴ *Ibid.*, para. 249.

⁷⁵ *Ibid.*, and Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), para. 141 (discussing whether the Statute exceeds customary international law by requiring the existence of an armed conflict).

⁷⁶ *Ibid.*, para. 251.

⁷⁷ *Ibid.*, para. 248 (footnote omitted).

the accused for committing the act are now irrelevant. Are these remaining requirements indicated by the Appeals Chamber enough to establish sufficient culpability for an accused to be convicted of a crime against humanity?

The difficulty arises with the extent of the Appeals Chamber's understanding of what is meant by "related" to an attack on the civilian population. According to the Appeals Chamber, "taking advantage of an attack on the civilian population by a regime to harm someone for reasons unrelated to the policy of that regime" is included in the meaning of the term "related". Why should it be simple murder if a man kills his Jewish neighbour in Nazi Germany with a gun because he coveted his wife — whereas it is a crime against humanity if he obtains the same result for the same motive, but simply chooses the regime's genocidal apparatus as his weapon (thus knowing that his act would fit into such a pattern)?⁷⁸

It is highly unlikely that anyone would argue that those convicted of crimes against humanity in the cases cited by the Appeals Chamber⁷⁹ did not commit crimes for which punishment should be prescribed. However, were they international crimes — in this case, crimes against humanity? In that regard the Trial Chamber's approach, setting the dual requirement that the act must be related to an attack on the civilian population and must not have been effected for the purely personal motives of the perpetrator,⁸⁰ not only curbs dilution of the definition of crimes against humanity but also ensures justice for the individual accused, i.e. that when acting for purely personal reasons not connected to the attack on the civilian population he or she is not prosecuted for a crime against humanity.

⁷⁸ For the facts of this case, *ibid.*, n. 318, referring to the decision of the Supreme Court for the British Zone (Criminal Chamber), 9 November 1948, S. StS 78/48, *Justiz und NS-Verbrechen*, Vol. II, pp. 498-499.

⁷⁹ *Ibid.*, paras 257-266.

⁸⁰ *Ibid.*, para. 252; see also Tadić, Trial Chamber, Judgment, *loc. cit.* (note 15), para. 634.

Review of precedents and practice

The precedents cited from World War II by the Appeals Chamber in favour of its approach go very far, and perhaps they also go too far. These cases may be distinguished as the defendants had done: “in all cases cited the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives”,⁸¹ as the activities were linked to the pogroms against the Jews. Yet such a distinction is not completely satisfactory, for some of the reasons the Appeals Chamber expounds.⁸²

Perhaps more compelling is the recollection that these World War II precedents were set by courts in an occupied territory. For Germany may also be considered, at least at that time, as having been governed by the Allies, leaving Germany no longer capable of acting.⁸³ Therefore, the courts the Allies established and which set the World War II precedents were domestic courts empowered to also try acts not constituting international crimes. This may be one reason why the courts at that time were not so concerned with making the distinction sought in the Trial Chamber’s decision.

Motives do matter

One final remark must be made in response to the Appeals Chamber’s declaration that one need not even ask what are “purely personal motives”, because they “do not acquire any relevance”⁸⁴ for establishing commission of the crime and are “generally irrelevant in criminal law”.⁸⁵ This position contradicts criminal law in both civil and common law systems, in which many crimes are defined by the motive behind them or receive a higher or lower penalty according to

⁸¹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 245 (footnote omitted).

⁸² *Ibid.*, paras 257-266.

⁸³ See R. Bindschedler, “Die völkerrechtliche Stellung Deutschlands”, *Annuaire*

suisse de droit international, Vol. 6, 1949, p. 59.

⁸⁴ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 270.

⁸⁵ *Ibid.*, para. 268.

it; for instance, to convince or assist someone to commit suicide is punishable only if committed for egoistic motives⁸⁶ and fraud is a crime only if committed with the motive of enrichment.⁸⁷

The Appeals Chamber does at least clarify that motives are relevant at the sentencing stage. Yet it fails in its attempt to argue *reductio ad absurdum* concerning the “inscrutability of motives”.⁸⁸ Differentiations can in fact be made between motives. Taking the two examples the Appeals Chamber mentions, the SS official who personally hates Jews has a *mens rea* of a crime against humanity, whereas the woman denouncing her landlord because of disagreements about the cost of rent did not hate or want to eliminate all critics of the Nazis.⁸⁹ In other words the following distinction can be drawn: a woman denouncing her neighbour because she personally does not like Jews commits a crime against humanity, whereas a woman who does so to get her neighbour’s husband does not commit a crime against humanity.⁹⁰ International justice, universal jurisdiction and international law are not necessary to cope with the latter.

The Prosecution’s declarations that the Trial Chamber’s holding permits the claim of personal motives to be a defence for every accused, and that there exist difficulties of proof establishing that the action was not committed for purely personal motives, are not entirely convincing. The Appeals Chamber clarifies that the

⁸⁶ For example, Swiss Penal Code, Art. 115.

⁸⁷ Compare, for example, the difference between the much lower penalty in Art. 151 of the Swiss Penal Code for maliciously causing harm to assets and that foreseen in Art. 146 of that Code for fraud: the only difference between the two crimes being the motive of enrichment. The American law covering fraud and swindles also has such a motive requirement: “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false pretenses...”, 18 U.S.C. sec. 1341 (1988)

(emphasis added). Another example can be found in the definition of bribery under the U.S. Code: “Whoever... *corruptly* gives, offers or promises anything of value to any public official... *with intent to influence any official act...*”, 18 U.S.C. sec. 201b(1) (1998) (emphasis added).

⁸⁸ Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 269.

⁸⁹ *Ibid.*, para. 260, describing the facts of the *Sch.* case.

⁹⁰ For a description of the facts of this case, *op. cit.* (note 78).

evidentiary burden is not at issue here.⁹¹ There furthermore remain no insurmountable difficulties of proof in distinguishing between the two cases. Every day, motives, knowledge, will and *mens rea* are deduced in courts from circumstantial evidence presented. In American jurisdictions, for example, legislation has even classified murder by degrees depending upon the knowledge or intent (in contrast with recklessness or negligence) of the accused: a deliberate murder does not receive the same punishment (nor is it even the same crime) as an accidental one caused by negligence.⁹² Even in armed conflicts no one suggests abolishing the defences of self-defence or duress, even though they may give rise to difficulties of proof. As with the issues discussed above, the Appeals Chamber seems to continue to distance itself and the law both from the significance of the accused's particular thoughts (motive, *mens rea*) and actions (*actus reus*), and from the relevant armed conflict.

Further clarification of the elements of crimes against humanity: do all such crimes require a discriminatory intent?

Elements of crimes against humanity

Interestingly, the fourth ground of cross-appeal by the Prosecution, like the third ground of cross-appeal, need not have been taken up by the Appeals Chamber at all.⁹³ In its answer to the fourth ground of cross-appeal by the Prosecution, the Appeals Chamber further refines the definition of crimes against humanity. Overturning the Trial Chamber's holding, the Appeals Chamber clarifies that a discriminatory intent is necessary only for "persecution type" crimes against

⁹¹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 254.

⁹² See, for example, 18 U.S.C. sec. 1111 (1998) (defining murder), and 18 U.S.C. sec. 1112 (1998) (defining manslaughter).

⁹³ The Chamber did so because it felt it to be a matter of general significance for the Tribunal's jurisprudence. Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 281.

humanity, not for all crimes against humanity enumerated in Article 5 of the ICTY Statute.⁹⁴

A clarification is certainly welcome to facilitate the application of international penal law, as much of the present law is mixed.⁹⁵ Some may have doubts, similar to those we expressed concerning the Appeals Chamber's decision on the third ground of cross-appeal by the Prosecution discussed in the previous section of this article, as to whether such a clarification actually marks a positive step for international penal law or whether it risks detracting from the seriousness of crimes against humanity by making them seem commonplace.

The Appeals Chamber mentions that its clarification prevents *lacunae*, whereas the Trial Chamber's interpretation would fail "to protect victim groups not covered by the listed discriminatory grounds".⁹⁶ Those policy arguments are pertinent. However, much of the same issue raised in the previous section of this article is also applicable here. The Appeals Chamber explains that, for example, if a discriminatory intent were required, random violence intended to terrorize the civilian population would not be penalized as a crime against humanity. The Chamber provides further examples of groups that would not be covered by the discriminatory intent grounds listed in Article 5(h) or by those stated in the Report of the Secretary-

⁹⁴ ICTY Statute, Article 5: *Crimes against humanity*

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

⁹⁵ See, for example, the description and analysis of the varying interpretations, made by the Trial Chamber, of whether crimes against humanity require a discriminatory intent. Tadić, Trial Chamber, Judgment, *loc. cit.* (note 15), para. 650, n. 154, and paras 651-652; compare this analysis with that made by the Appeals Chamber, Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 289-291.

⁹⁶ Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 285.

General:⁹⁷ in Nazi Germany, crimes targeting those with physical or mental disability or because of age, infirmity or sexual preference; the “class enemies” exterminated during the 1930s in the Soviet Union; or, in Cambodia, the urban educated deported under the Khmer Rouge between 1975-1979.⁹⁸ Yet should a policeman who simply imprisons a civilian during an armed conflict to obtain information or, as personal motives do not exclude a crime against humanity, to take revenge in a family dispute be accused of a crime against humanity, even if he had no intention of discriminating against one group or another?

Interpreting the Statute: (ir)relevance of the *travaux préparatoires*

The method of interpreting the Statute undertaken by the Appeals Chamber, i.e. giving effect to the text’s natural and ordinary meaning, making comparisons to customary international law and only then assessing the intentions of its drafters, remains in and of itself not so controvertible. Nevertheless, two points regarding its interpretation of the text of Article 5 must be mentioned. First, the Appeals Chamber expresses the wish to apply the Statute according to its ordinary meaning and, in doing so, explains that because the article does not specifically mention discriminatory intent it must not be intended and a contrary reading would render Article 5(h) concerning “persecutions” superfluous. Yet if that is the case, what is the explanation for the conflicting interpretations of the law, in view of the fact that in previous texts crimes against humanity were similarly defined?⁹⁹ It might

⁹⁷ Those grounds mentioned are national, political, ethnic, racial or religious. Report of the Secretary-General, *loc. cit.* (note 1), para. 48. The statement by the U.S. as a member of the Security Council also included gender, see UN SCOR, p. 16, UN Doc. S/PV.3217; see also Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 300.

⁹⁸ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 285.

⁹⁹ See, e.g. Art. 5(c) of the Statute of the Military Tribunal for the Far East, and Art. II(1)(c) of Control Council Law No. 10. See also *supra* note 95 (referring to the description and analysis made by the Trial Chamber and the Appeals Chamber of the varying interpretations of the elements of crimes against humanity).

also be argued that Article 5(h) has a sense as a subsidiary clause covering persecutions by means other than those listed in subparagraphs (a) to (g) and (i), such as making the life of a discriminated group economically impossible. Second, it is quite logical that when interpreting an article of a treaty or statute, the interpreting body would do as the Appeals Chamber did here and seek to understand the “goals of the framers of the Statute”.¹⁰⁰ Here, the Appeals Chamber considers that the framers wanted to make all crimes against humanity punishable. However, it is of interest to note, as will be explained later, that in doing so the Appeals Chamber proceeds, in fact, to justify discarding some of the *travaux préparatoires* of the Statute on the basis of its own interpretation of Article 5.

One observation must also be made concerning the Appeals Chamber’s analysis of customary international law. It is, mainly, that to substantiate its point the Appeals Chamber cites the Draft Code of Crimes Against the Peace and Security of Mankind,¹⁰¹ an instrument not yet adopted, and again¹⁰² the Statute of the International Criminal Court,¹⁰³ a treaty not yet in force. The Appeals Chamber uses the Statute of the International Criminal Court as an expression of the *opinio juris* of the signatory States, but here, too, it must be remembered that several influential States unfortunately have not signed the Statute. Applying the same logic used when it interpreted Article 5 of its own Statute, the Appeals Chamber infers from the absence of wording specifically requiring discriminatory intent in Article 7, paragraph 1, of the ICC Statute that this element is not required. But once again, this absence of a specific mention of such a requirement is no different from past definitions of crimes against humanity.¹⁰⁴

¹⁰⁰ Tadić, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 285.

¹⁰¹ Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session, May 6-July 26, 1996*, UNGAOR 51st Sess., Supp. No. 10 (A/51/10).

¹⁰² *Loc. cit.* (note 5), para. 291, and paras 221 f. (providing the Appeals Chamber’s first reference).

¹⁰³ *Supra* note 3.

¹⁰⁴ *Ibid.*, Art. 7(1); see also *supra* note 95 (referring to the description and analysis by the Trial Chamber and the the Appeals Chamber of the varying interpretations of the elements of crimes against humanity).

The aspect of the Appeals Chamber's analysis, however, that arouses the most interest from the point of view of general international law is its regard, or rather disregard, for the *travaux préparatoires* of its creating body. In its analysis, the Chamber eliminates the relevance of these sources.¹⁰⁵ This dismissal of the *travaux préparatoires* began in the Chamber's initial interpretation of Article 5 of the Statute,¹⁰⁶ as was mentioned above, and continued in subsequent sections of its decision devoted solely to the relevance of these documents.

The Appeals Chamber admits that its decision contradicts both the Report of the Secretary-General¹⁰⁷ and three statements made by the United States, France and the Russian Federation in the Security Council¹⁰⁸ prior to the adoption of the Statute.¹⁰⁹ Nonetheless, the Chamber explains that the Report of the Secretary-General does not have the same legal standing as the Statute, as it was only "approved" by the Security Council and the Security Council only intended it to be an explanatory document for the Statute; thus, if the Report manifestly contradicts the Statute, the Statute prevails.¹¹⁰ Yet the Appeals Chamber then goes on to state another requirement concerning the Report — that it must "sufficiently indicate" that the Security Council intended to deviate from customary international law. It concludes that the Report does not provide this "sufficient indication" of the intention that "Article 5 should deviate from customary international law by requiring a discriminatory intent for all crimes against humanity".¹¹¹ Therefore, although the Appeals Chamber admits that a discrepancy between the will of the drafters and the text does exist (under the Appeals Chamber's interpretation of Article 5), it concludes that the provision is so clear it should prevail.¹¹² Of course, the

¹⁰⁵ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), paras 285 and 293-304.

¹⁰⁶ *Ibid.*, para. 285.

¹⁰⁷ Report of the Secretary-General, *op. cit.* (note 1).

¹⁰⁸ For statements by Security Council members, see UN Doc. S/PV.3217.

¹⁰⁹ Tadic, Appeals Chamber, Judgment, *loc. cit.* (note 5), para. 293.

¹¹⁰ *Ibid.*, para. 295.

¹¹¹ *Ibid.*, para. 296.

¹¹² *Ibid.*

Chamber relies on its own interpretation of Article 5 in order to diminish the value of the Report of the Secretary-General.¹¹³

In its discussion of the statements made by some Security Council members, the Appeals Chamber declares that it “rejects the notion that these three statements — at least as regards the issue of discriminatory intent — may be considered as part of the ‘context’ of the Statute, to be taken into account for the purpose of interpretation of the Statute...”¹¹⁴ So can these statements be used for other points... when it suits the Appeals Chamber? That appears to be the case, as the Appeals Chamber itself refers to its previous, favourable appraisal and use of these documents to support its interpretation of the Statute beyond its wording.¹¹⁵ It is to be hoped that the Appeals Chamber has not adopted a pick-and-choose approach in its use of sources from its creator in interpreting the Statute. However, the fact that it has used precisely this same Report of the Secretary-General, as well as the same statements by Security Council members, to support a previous interpretation of the Statute gives cause for apprehension.

A fundamental issue underlying this discussion is whether international law is based on the will of States or on something else. But even those who do not have a voluntarist theory of the source of international law — and those who do not have a positivist approach at all — will note with interest that the Appeals Chamber not only correctly considers that the Security Council is not *legibus solutus*;¹¹⁶ it does not appear to matter at all what it thought. The Appeals Chamber’s action will certainly play a part in future considerations as to how much weight should be given to the intentions of the creating body and the *travaux préparatoires*.

The possible establishment of the International Criminal Court should be eagerly anticipated by the international community

¹¹³ *Ibid.*, paras 282-286.

¹¹⁴ *Ibid.*, para. 300.

¹¹⁵ *Ibid.*, para. 304. See, e.g. Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), paras 75, 88 and 143.

¹¹⁶ Tadic, Appeals Chamber, Jurisdiction, *loc. cit.* (note 4), para. 28.

as a distinct step forward for international penal law. If it is established, it will certainly also face issues concerning the interpretation of its own Statute. With this precedent set by the Appeals Chamber, the future ICC would likewise be justified in disregarding the intentions of its creators. Will States wish to accept the jurisdiction of a court, knowing that it too may and can disregard their will, expressed not only in the Statute but also the *travaux préparatoires*? As for politics, with such opinions the Appeals Chamber puts the acceptance of the ICC at risk. Finally, the approach of the Appeals Chamber does not add to the predictability of international justice, which is an important feature of any criminal justice system and its fairness towards the accused.

Conclusion

Like previous decisions, the ICTY Appeals Chamber's judgment on the merits of the *Tadic* case has certainly refined and developed international humanitarian law and international criminal law. Many of the Chamber's legal findings are sound interpretations of existing law on important issues which deserved a first, authoritative clarification. Other points, upon which we focused in this article in order to continue scholarly discussion, raise more doubts. The blurring of the traditional distinction between international and non-international armed conflicts and the concomitant redefinition of the concept of protected persons *contra legem* are well meant, but perhaps not entirely thought through to their final consequences. The affirmation that the responsibility of participants in international crimes goes beyond the common purpose closes gaps in criminal responsibility and corresponds to an important moral imperative. It is, however, based on a disputable comparative analysis and on a mysterious theory of sources, and may therefore be questioned under the principle *nullum crimen sine lege*. To include crimes committed for purely personal motives among crimes against humanity makes life easier for prosecutors and is not contrary to natural justice. It risks, however, making crimes against humanity seem commonplace and thus less significant, and is based on legal arguments which are not entirely convincing. Not to require a discriminatory intent for all crimes against humanity may in the final analysis be reasonable, but is based on arguments

completely emancipating the Chamber from its creators, which may make States afraid to accept jurisdiction of international courts over their citizens.

If some criticism is expressed in this article with regard to the legal theories developed by the ICTY Appeals Chamber, it is not because we sympathize with war criminals, but because we believe that international justice for war victims can continue its breathtaking evolution only if it is based on sound legal thinking and if it exclusively applies rules we would like to see applied and which everybody is willing to apply. Any manipulation of the law has to be avoided, even if it is done for a just cause. To give genuine protection to war victims everywhere and to foster reconciliation in the Balkans, the jurisprudence of the ICTY has to be perceived as fair even by the accused, not only procedurally but also because of the substantive rules it applies.

International law has, for sure, to be changed and adapted to social needs while being applied to real-life events. For customary law, this is the traditional way to develop. We would, however, expect a criminal tribunal, because of the principle *nullum crimen sine lege*, to exercise particular restraint when developing the law in sentencing crimes or applying theories which did not exist under the law as it stood before it was developed by the Tribunal (and before the Tribunal even came into being). In this and other respects we have some doubts whether the very innovative and imaginative solutions applied by the ICTY Appeals Chamber to several issues discussed in this article are fair to the accused. They were certainly not necessary to repress the terrible crimes he had committed. In this respect, one sometimes has the impression that the ICTY is comparable to an elderly person wanting to clarify as many questions as possible before dying, while ordinary courts build up their jurisprudence by crossing each bridge when they come to it.

The new solutions worked out by the Appeals Chamber may point in the right direction for future developments. We are afraid, however, that they may not encourage States to ratify the Statute of the International Criminal Court, as imaginative and innovative solutions are precisely what some States fear. Even apart from diplomatic considerations, any justice system — and in particular

criminal justice — gains authority if the decisions of its courts are, unlike scholarly articles, predictable.

Our answer to the question asked in the title of this article therefore remains hesitant. The reason may also be that our feelings as international lawyers differ from those of criminal lawyers, and that a civil law training leads to sensibilities other than those resulting from a common law training. International criminal justice, by definition, must continue to reconcile and harmonize those different approaches.



Résumé

L'arrêt de la Chambre d'appel du TPIY dans l'affaire Tadic : nouvelles perspectives pour le droit international humanitaire et le droit international pénal ?

par MARCO SASSÒLI ET LAURA M. OLSON

L'arrêt du 15 juillet 1999 de la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie confirme la condamnation de Dusko Tadic pour violations graves du droit international humanitaire. Cette décision a apporté des réponses nouvelles, et en partie controversées, à plusieurs questions importantes, réponses qui ne manqueront pas d'influencer la pratique du droit international humanitaire. Les auteurs passent en revue ces questions, dont, notamment, la qualification juridique du conflit (ou plutôt des conflits) sur le territoire de l'ex-Yougoslavie ; le concept de la participation au crime ; la définition de la notion de personne protégée ; l'applicabilité du concept de crime de guerre aux situations de conflits armés non internationaux ; l'importance des règles coutumières en matière de criminalisation de certains comportements lors de conflits armés non internationaux ; la notion de crime contre l'humanité. Les auteurs reconnaissent l'influence positive de certaines de ces décisions et considérations sur le cours de la justice pénale internationale, tout en y apportant quelques critiques.

Preparatory Commission for the International Criminal Court: The Elements of War Crimes

Grave breaches and violations of Article 3 common to the Geneva Conventions of 12 August 1949

by

KNUT DÖRMANN

Two years after the adoption of the Statute of the International Criminal Court (ICC Statute) in Rome in July 1998 further important steps leading to the establishment of the Court have been taken. As at 15 July 2000, 14 States had ratified the Statute (Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, Belize, Tajikistan, Iceland, Venezuela, France, Belgium and Canada). The Statute will enter into force once it has been ratified by 60 States. Given that many States are obliged to enact national legislation or even to change their constitution before ratification in order to comply with their obligations under the Statute, the required number of 60 ratifications will probably not be reached in the short term. It is very encouraging, however, that many States have already made substantial progress towards ratification.

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In addition to various activities taking place at the national level in preparation for ratification of the Statute and the elaboration of national implementing legislation, two important documents necessary for the functioning of the Court had to be adopted by the Preparatory Commission for the International Criminal Court (PrepCom):¹ a document entitled "Elements of Crimes" (EOC), and the Rules of Procedure and Evidence. The requirement to draft these documents, which had to be finalized before 30 June of this year, is indicated in the Statute itself. The PrepCom has also started work on other outstanding issues, such as reaching agreement on a definition of the crime of aggression, including the conditions under which the ICC shall exercise its jurisdiction with respect to this crime; drafting a relationship agreement between the Court and the United Nations; developing basic principles governing a headquarters agreement; and drawing up financial rules and regulations. (The definition of aggression does not have to be agreed upon before the first review conference seven years after the Statute's entry into force.)

This article will discuss the EOC Working Group's findings with regard to the elements of war crimes, in particular the war crimes derived from the grave breaches provisions of the Geneva Conventions of 12 August 1949 on the protection of war victims and their common Article 3. This overview of the negotiations is not intended to be exhaustive, and the choice of some specific issues for the purpose of this article does not imply that the PrepCom has reached "perfect" solutions in other sections of the "Elements of Crimes".

The PrepCom concluded the first reading of the draft EOC document at the end of 1999. The first draft read covered all the crimes listed in Articles 6 to 8 of the ICC Statute. At the fourth session of the PrepCom in March 2000 the second reading of Articles 6

¹ See UN General Assembly Resolution 53/105 of 8 December 1998 and Resolution F adopted by the United Nations Diplomatic

Conference on the Establishment of an International Criminal Court on 17 July 1998.

(genocide) and 8 (war crimes)² was completed. The section on crimes against humanity (Article 7) was finalized and the whole document fine-tuned at the last session in June 2000.

General remarks

The basis for the work on the elements of crimes is laid down in Article 9 of the ICC Statute, which stipulates that they “shall assist the Court in the interpretation and application of Articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]”, thereby clearly indicating that the elements themselves are to be used as an interpretative aid and are not binding upon the judges.³ The “Elements” must “be consistent with this Statute”.

The negotiations of the Working Group were largely based upon a comprehensive document drafted by the United States, joint Swiss/Hungarian and Swiss/Hungarian/Costa Rican proposals and other documents, in particular those presented by the Japanese, Spanish and Colombian delegations. The ICRC prepared a study relating to all war crimes, which was tabled at the request of seven States (Belgium, Costa Rica, Finland, Hungary, Republic of Korea, South Africa and Switzerland). The document, which was submitted in seven parts, presented relevant sources based on extensive research on and analysis of international humanitarian law instruments, the relevant case law of international and national war crimes trials (Leipzig Trials after the First World War, post-Second World War trials, including the Nuremberg and Tokyo Trials, and national case law, as well as decisions by the *ad hoc* Tribunals for the former Yugoslavia and Rwanda), human rights law instruments and the case law of the UN Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights.⁴

² The text, which is the basis for this article, is contained in: PCNICC/2000/WGEC/L.1 and Corr.1, PCNICC/2000/WGEC/L.1/Add.2 and Corr.1.

³ Dörmann/Kreß, “Verfahrens- und Beweisregeln sowie Verbrechenselemente zum Römischen Statut des Internationalen Strafgerichtshofs: Eine Zwischenbilanz”, *Human-*

itäres Völkerrecht – Informationsschriften, No. 4, 1999, p. 303.

⁴ PCNICC/1999/WGEC/INF.1, PCNICC/1999/WGEC/INF.2, PCNICC/1999/WGEC/INF.2/Add.1, PCNICC/1999/WGEC/INF.2/Add.2, PCNICC/1999/WGEC/INF.2/Add.3.

Elements of war crimes

Relationship to Part 3 of the ICC Statute — General principles of criminal law

The relationship between these crimes and general principles of criminal law presented the Working Group with a particularly difficult drafting problem. Long discussions on this issue were held during an intersessional meeting organized by the Italian government and the International Institute of Higher Studies in Criminal Sciences in Siracusa (Italy). The results of the Siracusa meeting provided a useful basis for the PrepCom discussions.⁵ Several of the questions raised during the intersessional meeting are now addressed in a general introduction applicable to all crimes, which reads as follows:

“1. Pursuant to Article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including Article 21, and the general principles set out in Part 3 are applicable to the Elements of Crimes.

2. As stated in Article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e. intent, knowledge or both, set out in Article 30 applies. Exceptions to the Article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.

4. With respect to mental elements associated with elements involving value judgement, such as those using the terms

⁵ See report reproduced in PCNICC/2000/WGEC/INF.1*.

‘inhumane’ or ‘severe’, it is not necessary that the perpetrator⁶ personally completed a particular value judgement, unless otherwise indicated.

5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime.(...)

6. The requirement of ‘unlawfulness’ found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes. (...).”

With regard to the content of this general introduction, the following comments may be made.

The first paragraph stresses the non-binding character of the EOC derived from Article 9(3) of the ICC Statute, and clarifies the relationship between the EOC and the provisions of the Statute.

Paragraph 2 of the introduction details the manner in which Article 30 of the ICC Statute is to be applied in relation to the EOC.⁷ In particular, this paragraph explains the reason why little mention of the accompanying mental element is made in the elements of the various crimes. During the sessions of the PrepCom it became obvious that the relationship between Article 30 of the ICC Statute and the definition of the crimes is difficult to reflect adequately in the EOC document. Delegations struggled to find a coherent approach, and the questions of whether the mental element should be defined

⁶ “As used in these Elements, the term ‘perpetrator’ is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.” See para. 8 of the general introduction, PCNICC/2000/WGEC/L.1 and corr.

⁷ Art. 30 reads as follows: “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

for every crime, whether Article 30 alone is sufficient or whether the judges should make their own determination were hotly debated, particularly as considerable differences in national legal systems make it almost impossible to address the mental element of war crimes in a consistent manner.

Probably the most problematic question as to the interpretation of Article 30 relates to what is meant by “unless otherwise provided”, i.e. what other legal sources are of relevance in this context. For example, does this formulation mean that Article 30 defines the mental element for every crime exclusively, unless the Statute itself otherwise provides, even if it is more restrictive than customary international law? Or does it mean that the mental element might also be specifically defined in the EOC? It appears that, in addition to the various standards explicitly set out in the Statute, most, if not all, delegations agreed that a deviation from the rule in Article 30 may be required by other sources of international law as defined in Article 21 of the Statute, in particular by applicable treaties and established principles of international humanitarian law. In this regard, the jurisprudence of the *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) may provide valuable interpretative insights. In relation to the mental element applicable to grave breaches of the Geneva Conventions, which are discussed in greater detail below, the Trial Chamber of the ICTY held: “[A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [with the list of grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence”.⁸

It will be up to the future judges of the ICC to determine how to bring this jurisprudence into line with the rule in Article 30. The judges might face a similar problem with the term “wilful”, which is used in some of the crimes listed in Article 8 and has not been repeated in the EOC. The Court will have to determine whether, in

⁸ *The Prosecutor v. Tihomir Blaskic*, ICTY Trial Chamber, Judgement, IT-95-14-T, para. 152.

fact, the standard contained in Article 30 and the definition of “wilfulness” in the jurisprudence of the *ad hoc* Tribunals coincide.

The second interpretative problem is related to the notion of “material element”. Article 30 states that material elements must be committed with intent and knowledge, but does not clearly define what is meant by “material”. The provision itself gives some indications insofar as its paragraphs 2 and 3 mention three types of non-mental elements (conduct, consequence and circumstance), which might therefore be considered as material elements in the sense of the Statute. However, Article 30 itself does not answer the question whether there are perhaps other elements, for example related to jurisdiction, which would require no accompanying mental element at all. This explains why there was considerable debate over the nature of some non-mental elements, in particular in relation to one specific element in the war crimes section which describes the context in which a crime must be committed in order to be considered a war crime.⁹

For many delegations, the third paragraph of the general introduction was of particular importance. They feared that some of the mental elements introduced in the EOC created an excessively heavy burden for the Prosecutor. It was thus considered necessary to emphasize that the actual knowledge or intent of the perpetrator can generally be inferred from the circumstances and that the Prosecutor will not be required to specifically prove these elements in every case.

Paragraph 4 gives some guidance for the judges on how to handle so-called value judgements. While the Siracusa Report emphasized that “[t]he issue was whether a statement was required in the Elements of Crimes clarifying that the Prosecutor is not obliged to prove that the accused personally completed the correct normative evaluation, i.e. that the accused considered his acts ‘inhumane’ or ‘severe’. There was a general view that this proposition was sufficiently evident and that further elaboration in the Elements of Crimes was not required”, it was nevertheless decided by the PrepCom that a clarification is needed in order to ensure that the standard of knowledge

⁹ See below in more detail.

required by Article 30 of the ICC Statute does not apply to such elements. It is submitted here that on the basis of the clarification in the general introduction, it is the judges who must determine whether a particular form of conduct can be held to have been “inhumane” or “severe”. The perpetrator need not come to the correct normative conclusion. The Prosecutor will therefore only be required to demonstrate that the perpetrator knew that harm would occur in the ordinary course of events as the result of his conduct. It would thus not be a valid defence for the accused to say: “I knew that I was going to cause harm, but I did not estimate that it would be severe”.

The fifth paragraph clarifies that grounds for excluding criminal responsibility are dealt with in the EOC only in exceptional cases.

Paragraph 6 is one of the most crucial paragraphs of the introduction. It is drafted in a somewhat ambiguous manner and can be explained only by reference to the negotiating history of the EOC. The term “unlawful” does not refer to grounds for excluding criminal responsibility in the sense of the Statute. It was instead intended to act as a “place marker” that refers back to relevant provisions of international humanitarian law. For example, the war crime of deportation (ICC Statute, Art. 8(2)(a)(vii)) can only occur in situations where the Fourth Geneva Convention’s Article 49(2) and (3) describing lawful evacuations is not applicable. The war crime of “appropriation and destruction” in the sense of Article 8(2)(a)(iv) of the ICC Statute must be read in conjunction with the provisions dealing with different kinds of protected property in the Geneva Conventions. The term “unlawful” serves *grosso modo* the same purpose as the terms “in violation of the relevant provisions of this Protocol” and “in violation of the Conventions or the Protocol” in Article 85(3) and (4) of Additional Protocol I of 8 June 1977.

During the intersessional meeting in Siracusa there was also a debate over whether it was necessary to elaborate on other forms of criminal responsibility, such as those which are defined in the ICC Statute’s Articles 25 (dealing with, for example, different forms of participation in the commission or attempted commission of a crime, etc.) and 28 (dealing with command and superior responsibility).

Despite the fact that at the first session of the PrepCom, the United States submitted a proposal on this issue, the general view was that the provisions in the Statute are sufficient and no additional elements addressing those forms of criminal responsibility are needed. The text of the EOC therefore addresses only the direct perpetrator; it does not deal with other forms of individual criminal responsibility.

War crimes as contained in Article 8(2)(a) of the ICC Statute — Grave breaches of the Geneva Conventions

a) Material and personal field of application

The elements of each crime listed in Article 8(2)(a) of the ICC Statute contain four common elements describing the material and personal scope of application as well as the accompanying mental elements. Both non-mental elements are derived from the introductory paragraph of Article 8(2)(a): “Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention.” The first common element reads as follows: “The conduct took place in the context of and was associated with an international armed conflict.”

The words “in the context of and was associated with” are meant to draw a clear distinction between war crimes and ordinary criminal behaviour. The PrepCom clearly derived this formulation from the jurisprudence of the *ad hoc* Tribunals. The words “in the context of” followed the concept as developed by the ICTY according to which “international humanitarian law applies from the initiation of (...) armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached”,¹⁰ and “at least some of the provisions of the [Geneva] Conventions apply to the entire territory of the Parties to the conflict, not just the vicinity of actual

¹⁰ *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Decision on the defence

motion for interlocutory appeal on jurisdiction, 2 October 1995, IT-94-1-AR72, para. 70.

hostilities (...) particularly those relating to the protection of prisoners of war and civilians”,¹¹

The words “in association with” were meant to reflect the jurisprudence of the *ad hoc* Tribunals which states that a sufficient nexus must be established between the offences and the armed conflict. Acts unrelated to an armed conflict, for example a murder for purely personal reasons such as jealousy, are not considered to be war crimes.

The *ad hoc* Tribunals have used an objective test to determine the existence and character of an armed conflict, as well as the nexus to it. Taking this approach, the ICTY has apparently treated this element as being merely jurisdictional. For example, in the *Tadic* Judgement the Trial Chamber held that:

“The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.”¹²

On the basis of this jurisprudence, some delegations to the PrepCom argued persuasively that the Prosecutor need not demonstrate that the perpetrator had any knowledge of the existence of, or of the international or non-international character of, an armed conflict. Other delegations took the view that the cases decided by the Tribunals so far have clearly taken place in the context of an armed conflict and that the requirement of knowledge has therefore never been an issue.

After long and delicate negotiations at the PrepCom, the Working Group accepted the following package. For each crime the following elements are spelled out:

“The conduct took place in the context of and was associated with an international armed conflict.

¹¹ *Ibid.*, para. 68.

¹² *The Prosecutor v. Dusko Tadic*, ICTY Trial Chamber, Judgement, 7 May 1997, IT-94-1-T, para. 572 (emphasis added). See also Jones,

The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 2nd edition, Ardsley, NY, 2000, p. 51.

The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”¹³

In the general introduction, there is the following interpretative clarification, which must be seen as an integral part of the set of elements: “With respect to [these] elements listed for each crime:

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms ‘took place in the context of and was associated with.’”

The wording of this package is rather confusing and ambiguous, perhaps even contradictory, as the definition of the mental element creates the impression that full knowledge of the facts that established an armed conflict is required. This impression, which would contradict the intention of the drafters, is not really attenuated by the third paragraph of the introduction or *chapeau* to the war crimes section. From there one can only conclude that some specific form of knowledge is required. Apparently, the perpetrator needs only to know the nexus between his acts and an armed conflict. However, what does this mean in practice? Does the Prosecutor need to prove the motives of the perpetrator (personal motives or motives related to an armed conflict) in every case? In order to clarify the intentions of the drafters, it is therefore worthwhile to indicate the assumptions underlying the clarification as summarized by the sub-coordinator of the EOC Working Group:

¹³ The original proposal on the mental element read as follows: “The accused was aware of *the* factual circumstances that established the existence of an armed conflict” (emphasis added). The definite article was

dropped in order to indicate that the perpetrator needs only to know some factual circumstances, but definitely not all the factual circumstances that would permit a judge to conclude that an armed conflict was going on.

- There is no need to prove that the perpetrator made any legal evaluation as to the existence of an armed conflict or its character as international or non-international.
- There is no need to prove that the perpetrator was aware of the factual circumstances that made the armed conflict international or non-international.

This conception as to the degree of knowledge in relation to the element describing the context was shared by almost every delegation. As to the awareness of the factual circumstances that made a situation an armed conflict and as to the proof of the nexus, the views were divided into two groups. The majority felt that it does need to be shown that the perpetrator was aware of at least some factual circumstances. Those who hold that view agreed that the mental requirement as to those factual circumstances is lower than the Article 30 standard and should be “knew or should have known”. They recognized that in most situations, it would be so obvious that there was an armed conflict that no additional proof as to awareness would be required; there might, however, be some instances where proof of *mens rea* may be required. The other side insisted that no mental element is required at all. This picture gives at least some guidance in determining the requisite level of knowledge. There are no indications that the Prosecutor must prove knowledge of a higher level than that which is reflected in the majority view.

The third and fourth common elements of the crimes under Article 8(2)(a), which define those persons who may be victims of grave breaches of the Geneva Conventions and the requisite mental element, are drafted as follows: “Such person or persons were protected under one or more of the Geneva Conventions of 1949. The perpetrator was aware of the factual circumstances that established that protected status.”¹⁴ The latter element recognizes the interplay between Articles 30 and 32 of the ICC Statute, emphasizing the general rule that

¹⁴ Given that Art. 8(2)(a)(iv) deals not with crimes committed against protected persons, but against protected property, the elements read as follows: “Such property was protected

under one or more of the Geneva Conventions of 1949. The perpetrator was aware of the factual circumstances that established that protected status.”

while ignorance of the facts may be an excuse, ignorance of the law is not.

During the negotiations some concern was expressed about whether the recent jurisprudence of the ICTY on protected persons under the Fourth Geneva Convention should be specifically reflected in the elements. Article 4 of that Convention defines protected persons as “those who (...) find themselves (...) in the hands of a Party to the Conflict or Occupying Power of which they are not nationals”.

The ICTY has held that, in the context of present-day inter-ethnic conflicts, Article 4 should be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he or she is of the same nationality as his or her captors.¹⁵ In the *Tadic* Judgement, the Appeals Chamber concluded that “not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test”.¹⁶ This formulation relies on a teleological approach to the interpretation of Article 4 of the Fourth Geneva Convention, that emphasizes that the object of the Convention is “the protection of civilians to the maximum extent possible”. In the words of the *Tadic* Judgement, the primary purpose of Article 4 “is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.”¹⁷

After some discussion, the PrepCom decided that no closer specification of the objective element was necessary, and the future ICC will thus be free to adopt the views expressed by the ICTY in relation to the protected status of persons under Article 4 of the Fourth Geneva Convention. There was some fear that the required mental element could create a threshold which is too high in relation to this particular

¹⁵ *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 166.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 168.

problem. In this context, it must be emphasized that the *ad hoc* Tribunals have always determined protected status on a purely objective basis. However, as to the factual knowledge required, the PrepCom has specified in a footnote that the perpetrator needs only to know that the victim belonged to an adverse party.¹⁸ Knowledge as to the nationality of the victim or the interpretation of the concept of nationality is not required.

b) Elements of specific war crimes — an overview

The following is an overview of some of the contentious issues discussed during the PrepCom in relation to particular war crimes.

An especially thorny problem as to specific grave breaches existed with regard to the crime of torture. Torture is defined in the Statute as a crime against humanity (Art. 7(2)(e)): “‘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, lawful sanctions.”

In several decisions, however, the *ad hoc* Tribunals based their definition of the war crime of torture on the definition given in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which they considered to reflect customary international law also for the purposes of international humanitarian law¹⁹ and defined the elements accordingly.²⁰ The

¹⁸ PCNICC/2000/WGEC/RT.2/Corr.3.

¹⁹ *The Prosecutor v. Zejnir Delalic and others*, ICTY Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 459.

²⁰ *Ibid.* and para. 494:

“(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,

(ii) which is inflicted intentionally,

(iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed, intimidating or coercing the victim or a third

person, or for any reason based on discrimination of any kind,

(iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”

In a later judgement, the ICTY described some specific elements that pertain to torture as “considered from the specific viewpoint of international criminal law relating to armed conflicts”. Thus, the Trial Chamber considers that the elements of torture in an armed conflict require that torture:

“(i) consists of the infliction by act or

Torture Convention contains the following elements, which are not included in the ICC Statute: “[the] pain or suffering, [must be] inflicted on a person for such purposes as obtaining (...) information or a confession, punishing (...), or intimidating or coercing (...), or for any reason based on discrimination of any kind,” and “[the] pain or suffering [must 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.”

Some delegations to the PrepCom felt that either the purposive element or the element of official capacity or both were necessary in order to distinguish torture from the crime of inhuman treatment. Others argued that in line with the case law of the European Court of Human Rights, it is the severity of the pain or suffering inflicted that should be used to draw a distinction between the two crimes.

The compromise found at the end of the PrepCom’s discussion of the issue respects, to a large extent, the case law of the *ad hoc* Tribunals. It incorporates the purposive element by repeating the illustrative list of the Torture Convention²¹ and drops the reference to the official capacity. The elements as drafted do not preclude taking into consideration any further clarifications given by the ICTY. With

omission of severe pain or suffering, whether physical or mental; in addition

- (i) this act or omission must be intentional;
- (ii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;
- (iii) it must be linked to an armed conflict;
- (iv) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a *de facto* organ of a State or any other authority-wielding entity.”

The Prosecutor v. Furundzija, ICTY Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T, para. 162.

²¹ The ICTY held in this regard: “The use of the words ‘for such purposes’ in the customary definition of torture [the definition contained in the Torture Convention], indicates that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative”, *loc. cit.* (note 19), para. 470. However, the ICTR seemed to suggest an exhaustive list by formulating “for one or more of the following purposes”. *The Prosecutor v. Jean Paul Akayesu*, ICTR Trial Chamber, Judgement, ICTR-96-4, para. 594. In the *Musema* Judgement it defined torture along the lines of the Torture Convention with a non-exhaustive list. *The Prosecutor v. Alfred Musema*, ICTR Trial Chamber, Judgement, ICTR-96-13, para. 285.

regard to the purposive element the ICTY emphasized that “there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not to be predominating or sole purpose.”²²

Given that the list of prohibited purposes in the EOC is not exhaustive, the fact that the purpose of “humiliating”, as suggested by the ICTY in the *Furundzija* case,²³ has not been added is not harmful.

With regard to the omission of the element of official capacity, the PrepCom went a step further than the *ad hoc* Tribunals, but clearly followed the trend set by them, which had already softened the standard contained in the Torture Convention to a certain extent. In the *Delalic* case the ICTY held that:

“Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.”²⁴

Another controversial point concerned the elements of “inhuman treatment” (ICC Statute, Art. 8(2)(a)). Some delegations expressed the view that the criminal conduct should not be limited to the infliction of severe physical or mental pain, but should also include conduct constituting “a serious attack on human dignity”. This

²² *Loc. cit.* (note 19), para. 471.

²³ With respect to the addition of the purpose “humiliating” under (iii), the ICTY held in the above-mentioned judgement that it is “warranted by the general spirit of international humanitarian law; the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such international treaties as the Geneva

Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from ‘outrages upon personal dignity’. The notion of humiliation is, in any event, close to the notion of intimidation, which is explicitly referred to in the Torture Convention’s definition of torture.” *Loc. cit.* (note 20), para. 163.

²⁴ *Loc. cit.* (note 19), para. 473.

opinion is largely based on the jurisprudence of the ICTY which has recognized that serious attacks on human dignity may constitute inhuman treatment.²⁵ In the end, the PrepCom decided not to include attacks on human dignity in the definition of acts constituting inhuman treatment, because the crime of “outrages upon personal dignity, in particular humiliating and degrading treatment” would cover such conduct. This interpretation is not problematic in the context of the ICC, but may have unintended implications for the interpretation of the Geneva Conventions. If serious attacks on human dignity are included in the concept of inhuman treatment, then the grave breaches regime and mandatory universal jurisdiction will apply, which means that States are obliged to search for and prosecute alleged perpetrators independently of their nationality and of where the act has been committed. If, however, such attacks are covered only by the crime of “outrages upon personal dignity”, the concept of permissive universal jurisdiction applies and States are obliged to suppress such conduct only on their territory or by their nationals.

The discussions on Article 8(2)(a)(iv) of the ICC Statute in relation to the crime of “extensive destruction and appropriation of property” have been very significant for the negotiations on crimes derived from the grave breaches provisions of the Geneva Conventions.

Article 8(2)(a) repeats established language from the Geneva Conventions; nevertheless, it proved difficult to draft the elements, possibly because the grave breaches provisions refer back to various articles of the Conventions which establish different levels of protection. In the case of appropriation or destruction they define different standards for specific protected property. This may be illustrated by the protection accorded to civilian hospitals on the one hand and to property in occupied territories on the other.

Article 18 of the Fourth Convention defines the protection of civilian hospitals against attacks, i.e. against destruction, in the following terms:

²⁵ *Loc. cit.* (note 19), para. 544 and *loc. cit.* (note 8), para. 155.

“Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.”

Article 19 specifies the strict conditions under which civilian hospitals lose their protection:

“The protection to which civilian hospitals 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 due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.”

Article 53 of the same Convention defines the protection of property in occupied territory in a different manner:

“*Any destruction* by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, *is prohibited, except where such destruction is rendered absolutely necessary by military operations.*” (Emphasis added.)

Considering these examples, the drafting of the elements of crime had to be done in a way that properly reflected these standards. The meaning of “not justified by military necessity” as contained in Article 8(2)(a)(iv) of the ICC Statute is crucial in this regard. It is important to indicate that military necessity covers only measures that are lawful in accordance with the laws and customs of war. Consequently, there can be no derogation on grounds of military necessity from a rule of the law of armed conflict unless this possibility is explicitly provided for by the rule in question. It would have been desirable to clearly express this understanding in the EOC document.

For the war crime of “Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power” (Art. 8(2)(a)(v)), the PrepCom decided to combine the language of the grave breaches provisions with Article 23 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land. The prohibited conduct is described as: “The perpetrator coerced one or more persons [protected under one or more of the Geneva Conventions], by act or

threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power." The word "otherwise" indicates that the aspect dealt with in the Hague Regulations — "to take part in the forces of a hostile power" — is just one particular example of the prohibited conduct described in the Geneva Conventions, i.e. to "serve in the forces of a hostile power". There is a large overlap between the crime defined in Article 8(2)(a)(v) of the ICC Statute and the crime defined in its Article 8(2)(b)(xv), which is solely based on Article 23 of the 1907 Hague Regulations.

With regard to the crime "Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" (Art. 8(2)(a)(vi)), the prohibited conduct is defined as "The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the Third and Fourth Geneva Convention of 1949." It must be emphasized that a clear majority of States supported the view that the crime may also be committed if judicial guarantees other than those explicitly defined in the Geneva Conventions (for example, the presumption of innocence and other guarantees contained only in the 1977 Additional Protocols) are denied. This view is reflected in the use of the words "in particular".

Concerning the crime "Unlawful deportation or transfer" (Art. 8(2)(a)(vii)), the PrepCom adopted the interpretation that Article 147 of the Fourth Geneva Convention, which must be read in conjunction with Article 49 thereof, prohibits all forcible transfers, including those within an occupied territory, as well as deportations of protected persons from occupied territory.²⁶

In relation to the crime of "Unlawful confinement" (Art. 8(2)(a)(viii)), one clarification of the elements seems to be pertinent. The prohibited conduct is defined as: "The perpetrator confined or continued to confine one or more persons to a certain location." The words "continued to confine" are intended to cover cases where a protected

²⁶ The relevant element reads as follows: "The perpetrator deported or transferred one or more persons to another State or to another location" (emphasis added). See in this regard commentary to Art. 85, Sandoz/

Swinarski/Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, No. 3502, p. 1,000, especially note 28.

person has been lawfully confined in accordance with, in particular, Articles 27, 42 and 78 of the Fourth Geneva Convention but whose confinement becomes unlawful at a certain moment. Pursuant to the ICTY's ruling in the *Delalic* case, a confinement remains lawful only if certain procedural rights, which may be found in Article 43 of the Fourth Convention, are granted to the persons detained. Since that Convention leaves the initiation of such measures of confinement largely to the discretion of the respective party, the Tribunal concluded, as does the Convention, that "the [detaining] party's decision that [internment or placing in assigned residence of an individual] are required must be 'reconsidered as soon as possible by an appropriate court or administrative board'".²⁷ It added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to rescind them. The Tribunal concludes that "the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires".²⁸

Referring to Article 78 of the Fourth Geneva Convention, which safeguards the basic procedural rights of civilians confined in occupied territories, the Tribunal found that "respect for these procedural rights is a fundamental principle of the convention as a whole".²⁹ Therefore, "[a]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43, Fourth Geneva Convention",³⁰ or, in the case of confinement of civilians in occupied territory, as prescribed in Article 78.

These considerations expressed by the ICTY in the *Delalic* case are now clearly covered in the EOC document.

With regard to the war crime of "Taking of hostages" (Art. 8(2)(a)(viii)), it is worth noting that the elements of this offence are largely based on the definition taken from the 1979 International

²⁷ *Loc. cit.* (note 19), para. 580.

²⁸ *Ibid.*, para. 581.

²⁹ *Ibid.*, para. 582.

³⁰ *Ibid.*, para. 583.

Convention against the Taking of Hostages, which is not a treaty of international humanitarian law and was drafted in a different legal context. However, as in the case of the crime of torture, the definition of the crime of hostage-taking was adapted by the Working Group to the context of the law of armed conflict. The Hostage Convention defines hostage-taking in Article 1, paragraph 1, as “any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the ‘hostage’) in order to compel a third party, namely a State, an international organisation, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage”.

Taking into account the case law from the Second World War, this definition was considered to be too narrow. The text in the EOC, therefore, defines the specific mental element in the following terms, adding the emphasized element:

“The perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons, to act or refrain from acting as an explicit or implicit condition for *the safety or the release of such person or persons.*”³¹

War crimes as contained in Article 8(2)(c) of the ICC Statute — Violations of Article 3 common to the Geneva Conventions

The elements for the crimes listed in Article 8(2)(c) of the ICC Statute contain four common elements, describing the material and personal scope of application, that are repeated for each crime. The non-mental elements are derived from the introductory paragraph of Article 8(2)(c). The first common element reads as follows: “The conduct took place in the context of and was associated with an armed

³¹ Emphasis added. — In the *Blaskic* case the ICTY has been less specific and defined the crime in the following terms: “Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However... detention may be lawful in some circumstances, *inter*

alia to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage.” *Loc. cit.* (note 8), para. 158.

conflict not of an international character.” As in the case of Article 8(2)(a), the mental element — “The perpetrator was aware of factual circumstances that established the existence of an armed conflict” — is added as the second common element. The general introduction to the war crimes section described above is also applicable.

The third and fourth common elements are drafted in the following way: “Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities. The perpetrator was aware of the factual circumstances that established this status.” These elements define, for the purposes of Article 8(2)(c) of the ICC Statute, those who may be victims of a war crime and the required knowledge of the perpetrator. The wording as to the victims differs from that of common Article 3 and the introductory paragraph of the ICC Statute’s Article 8(2)(c). However, many States took the view that this formulation reflects the correct interpretation of Article 3 common to the Geneva Conventions and avoids ambiguity. It was the understanding of the drafters in informal consultations that the term “*hors de combat*” should not be interpreted in a narrow sense. In addition to the examples contained in common Article 3, reference was made to Articles 41 and 42 of Additional Protocol I.

The specific elements of most war crimes under subparagraph (c) are defined more or less in the same manner as for those in Article 8(2)(a) of the ICC Statute. It was the view of States that there can be no difference between wilful killing and murder, between inhuman and cruel treatment, between torture or the taking of hostages in international or in non-international armed conflicts. This approach seems to be in conformity with the case law of the ICTY.³²

³² The ICTY concluded — with regard to any difference between the notions of “wilful killing” in the context of an international armed conflict on the one hand, and “murder” in the context of a non-international armed conflict on the other — that there “can be no line drawn between ‘wilful killing’ and ‘murder’ which affect their content”, *loc. cit.* (note 19),

paras 422 and 423. According to the Tribunal, “cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function

With regard to Article 8(2)(c)(iv), it is worthwhile indicating that the drafting of the elements of this crime was largely influenced by the content of Article 6(2) of Additional Protocol II. The specific elements in the text read now as follows:

“Article 8(2)(c)(iv): War crime of sentencing or execution without due process

1. The perpetrator passed sentence or executed one or more persons. (...)

4. There was no previous judgment pronounced by a court, or the court that rendered judgment was ‘not regularly constituted’, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgment did not afford all other judicial guarantees generally recognized as indispensable under international law.

5. The perpetrator was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial. (...).”

On the basis of Article 6 of Additional Protocol II, the term “regularly constituted court”, as contained in Article 3 common to the Conventions and in Article 8(2)(c)(iv) of the ICC Statute, is defined as a court that affords the essential guarantees of independence and impartiality. The issue of whether a list of fair trial guarantees should be included as suggested in the Swiss/Hungarian/Costa Rican proposal has been controversial.³³ Some States feared that even an illustrative list would suggest that rights omitted were not indispensable, others feared that there could be a discrepancy between this list of fair trial guarantees and those contained in the Statute, and a third

for the purpose of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions”, *ibid.*, para. 552. Concerning any difference between the notion of “torture” in the context of an international armed conflict on the one hand, and in the context of a non-international armed conflict on the other, the ICTY concluded that “[t]he characteristics of the offence of torture under common

article 3 and under the ‘grave breaches’ provisions of the Geneva Conventions, do not differ”, *ibid.*, para. 443. As to the taking of hostages in an international armed conflict the ICTY held: “Les éléments de cette infraction sont similaires à ceux de l’article 3 b) des Conventions de Genève qui sont couverts par l’article 3 du Statut”, *loc. cit.* (note 8), para. 158.

³³ PCNICC/1999/WGEC/DP.10.

group took the view that violation of only one right would not necessarily amount to a war crime. Instead of weakening the value of such a list of fair trial guarantees by an introductory paragraph defining what is to be considered indispensable, States preferred not to include such a list. In addition, the concerns of the third group of States are reflected in a footnote which reads as follows: "With respect to elements 4 and 5, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial."

Conclusions

The PrepCom had an enormous task to accomplish over the two years it took to finalize a document on the elements of war crimes. The document had to be more specific than the definitions of the crimes themselves, without unduly tying the hands of the judges or reducing the scope of their judicial discretion. Trying to be as specific as possible and providing useful guidance always involves a risk that something is left out. This risk is most likely to occur in relation to international humanitarian law. As has been shown in this article concerning the example of "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly", the grave breaches provisions refer back to various articles of the Geneva Conventions which establish a different level of protection and define different standards for specific protected property. Contrary to crimes against humanity, which have now been defined for the first time in the ICC Statute, the relevant humanitarian law treaties, in particular the Geneva Conventions, provide the necessary framework to enable the judges to "find the law".

In spite of the misgivings expressed in this article, it can be said that the "Elements of Crimes" appear to a very large extent to be drafted in accordance with existing international humanitarian law. Nevertheless, some problematic and contentious issues are indicated which might need further reflection. This task must and will be performed by the judges themselves, using the "Elements" for guidance. These should not be an absolute strait-jacket for the judges, who will still need to look into the pertinent legal instruments and to analyse

State practice and *opinio iuris* in order to determine existing rules of customary international law. It is a task that the judges of the *ad hoc* Tribunals have accomplished so far even without having a document entitled “Elements of Crimes”.



Résumé

Commission préparatoire de la Cour pénale internationale : Les éléments des crimes de guerre Partie I — Infractions graves et violations de l'article 3 commun des Conventions de Genève par KNUT DÖRMANN

L'auteur présente et analyse les résultats des travaux de la Commission préparatoire de la Cour pénale internationale chargée d'élaborer les éléments des crimes de guerre qui compléteront les dispositions du Statut de Rome. Dans une première partie, il examine plusieurs questions à propos des relations existant entre la définition des différents crimes et les principes généraux de droit pénal. Il analyse ensuite les éléments des crimes dérivés des infractions graves aux Conventions de Genève et au Protocole additionnel I, et les violations de l'article 3 commun à ces Conventions. Il relève que la Commission préparatoire a été confrontée au défi de refléter correctement le droit international humanitaire existant. L'auteur conclut avec quelques réflexions sur la valeur des résultats obtenus.

**Faits
et documents**

**Reports
and documents**

Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child

by **DANIEL HELLE**

Pursuant to five sessions held in preceding years and two weeks of negotiations in the period of 10-21 January 2000, the Inter-Sessional Open-Ended Working Group of the United Nations Human Rights Commission adopted the text of Draft Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.¹ It was formally presented to the Commission on Human Rights in April 2000, and will be forwarded through ECOSOC to the General Assembly for formal adoption in June 2000. The Draft Protocol will thereafter be open to ratification, and will enter into force three months after it has been ratified by ten States.

The present paper provides a brief overview of the background to the development of the new Protocol, and examines the first four articles contained therein in the light of other provisions of international law and the position adopted by the International Red Cross and Red Crescent Movement. These four articles set out the main substantive standards regulating the recruitment and participation of children in hostilities, while the remaining provisions can be considered as dealing more with measures of implementation or procedural issues.

DANIEL HELLE is a member of the Legal Division of the International Committee of the Red Cross.

Background

Aside from the general protection provided to children through general human rights and humanitarian law instruments, children are also entitled to the protection provided by the 1989 Convention on the Rights of the Child (CRC). This instrument has been ratified by nearly all States in the world.² Of particular relevance to the protection of children affected by armed conflict is Article 38 of the Convention, which stipulates that:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

From the very start, Article 38 was subject to considerable criticism, for two reasons. First, it is the only provision of the Convention departing from the general age limit of 18 years, in spite of the fact that it deals with one of the most dangerous situations that children can be exposed to armed conflict. Second, with respect to the prohibition against recruitment and participation, it largely confined itself to repeating Article 77 of Protocol I additional to the Geneva Conventions, applicable in international armed conflict. In so doing, it not only brought nothing new, but could also detract attention from the stronger

¹ Text reproduced on pp. 810 (in French) and on pp. 817 (in English).

² Exception: Somalia and the United States of America.

standard contained in Protocol II additional to the Geneva Conventions, which provides a more absolute and comprehensive prohibition for non-international armed conflict.³ Against this background, and in line with a growing awareness and concern within the international community of the severe plight of children affected by armed conflict, an initiative was taken within the United Nations system only a few years after the entry into force of the CRC to raise the minimum age for recruitment and participation in hostilities to 18 years.

This initiative was largely in common with the position adopted by the International Red Cross and Red Crescent Movement, which in 1993 initiated the development of a plan of action aimed at developing further the Movement's existing activities in favour of children.⁴ The 1995 Plan of Action enounces two commitments, the first of which is "to promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years".⁵ That same year, the 26th International Conference of the Red Cross

3 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art. 4 (excerpts):

Article 4 - Fundamental Guarantees

3. Children shall be provided with the care and aid they require, and in particular: (...)

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities (...).

4 The Plan of Action was prepared on the basis of a consultative process within and outside the Movement, and endorsed by the Council of Delegates in 1995.

5 The second commitment is "to take concrete action to protect and assist child victims of conflict". Six objectives with corresponding tasks are outlined to implement these commitments.

As regards the first commitment, National Societies are *inter alia* asked to persuade their governments to promote this idea inter-

nationally and to adopt appropriate national legislation. The ICRC and the International Federation are requested to supply National Societies with relevant documents, to make their view known in international fora and to actively participate in the UN Working Group established to draft an Optional Protocol to the Convention on the Rights of the Child. Other objectives are to identify children at risk of becoming soldiers and provide them with alternative activities, and to raise awareness in society not to allow children to join armed forces or groups.

The components of the Movement are also asked to address psycho-social as well as physical needs of children. Separate sets of suggestions are made for children living with families and those who are unaccompanied. Finally, the Plan of Action contains the requests to advocate in favour of children who participated in armed conflict in order to make society and the local community accept these children.

and Red Crescent in a resolution recommended “that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities”.⁶

Along with many other organizations and States, the ICRC expressed support for the development of an optional protocol to the CRC. It has made its view known in international fora (through statements at the UN Commission on Human Rights and the General Assembly) and has participated actively in the drafting process, notably by preparing a comprehensive document presenting the position of the ICRC on some of the key issues under consideration.⁷

Content and evaluation of some core provisions of the Optional Protocol

The content of some provisions of the Optional Protocol is presented below, together with a brief analysis and evaluation of the issues addressed.

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

This must be considered as the most important provision of the new draft Protocol. The raising of the age limit for participation in hostilities from 15 to 18 years represents a clear improvement of the present protection provided by international law, and reinforces the current trend to shield all children from the horrors of armed conflict, and in particular from participation in hostilities. Other instruments reflecting this trend are the 1990 African Charter on the Rights and Welfare of the Child and the 1999 International Labour Organisation Convention (182) on the Prohibition of and Immediate Action for the Elimination of the Worst Forms of Child Labour.

⁶ Resolution 2 C.(d), reprinted in *IRRC*, No. 310, January-February 1996, p. 63. — Relevant parts of this resolution have been included in preambular para. 9 of the draft Optional Protocol.

⁷ See UN Doc. E/CN.4/1998/WG.13/2 (paras 53–105).

In practical terms, the new standard should also help prevent the participation by children under the age of 15 years in hostilities, for whereas military commanders might have claimed in the past that such children in their ranks were in fact 15 years old, and only looked younger than their real age (for instance owing to long-term malnutrition), it will at least be evident hereafter that they are not 18 years old.

As regards the scope of the obligation contained in Article 1, two weaknesses must, however, be noted. The first relates to the nature of the obligation imposed on States, which is one of conduct rather than of result. According to the provision, States have a duty to “take all feasible measures to ensure” that participation of children does not occur, a wording which is largely in common with the corresponding text of Protocol I additional to the Geneva Conventions.⁸ It would have provided children with better protection if States had undertaken to “take all necessary measures” to this end or, even better, if they had a duty to “ensure” that such participation does not take place. It is to be hoped that the Committee on the Rights of the Child will apply a strict interpretation when reviewing whether States have indeed taken all “feasible measures” towards the stated objective.

The second weakness lies in the extent of the protection provided to children against being involved in hostilities. According to the provision, they are protected against taking “direct part in hostilities”. As noted above, this text is weaker than the corresponding clause in Additional Protocol II, which precludes any participation by simply stipulating that children shall not be allowed to “take part in hostilities”.

The scope of this article does not allow for a detailed review of various legal terms utilized to designate and distinguish between various forms of participation in hostilities. Nonetheless, the following examples of indirect participation in hostilities, which the new Proto-

⁸ Protocol I, Art. 77, para 2:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them

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col does not seem to prohibit — namely “to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage”⁹ — should serve to demonstrate that children may still be exposed to considerable dangers on the battlefield even after the Protocol has entered into force. Needless to say, the involvement of children in such activities on the front line puts them at serious risk of physical injury and emotional trauma, which may often not be much less than if they were to take “direct part” in hostilities.

It may be noted that an alternative wording, inspired by the Rome Statute of the International Criminal Court, would have provided considerably better protection. However, it failed to achieve consensus in the Working Group and thus was not retained.¹⁰

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

The raising of the age limit from 15 to 18 years for compulsory recruitment also represents a clear improvement of the present situation. The current protection provided by Article 38, paragraph 3, of the Convention on the Rights of the Child and Article 77, paragraph 2, of

⁹ Examples taken from Y. Sandoz/C. Swinarski/B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 4557 (on Protocol II, Art. 4)

¹⁰ The alternative wording reads in relevant parts “shall not be used (...) to actively take part in hostilities”.

The ICC Statute lists among the war crimes “Conscripting or enlisting children under the age of fifteen years (...) or using them to participate actively in hostilities”. The understanding under which delegations eventually adopted “using” and “participate actively” in Rome was “in order to cover both direct participation in combat and also active participation in military activities linked to combat

such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.” See Michael Cottier, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, p. 261, with further references.

Additional Protocol I against forced recruitment of children between 15 and 18 years of age is weak, since States Parties “shall endeavour” only to give priority to those who are oldest.

Article 2 constitutes an important corollary to the prohibition against participation in hostilities. Indeed, wherever children have been recruited and have received military training, it will be tempting to make use of their skills in the event of conflict, particularly if they are incorporated in regular military units and the crisis is of such a scale that every available capacity is required. To preclude the presence of children in military units is therefore an important safeguard to avoid their involvement in hostilities.

It has on occasion been contended that according to international humanitarian law, a child is deemed to be a person under the age of 15 years, and even that it would be contrary to this body of law to consider a person under the age of 18 years as a child. It is rightly observed that international humanitarian law, unlike human rights law, does not contain any definition of children, a fact that is attributable to the lack of a common understanding among delegates during earlier negotiations on the relevant age limit. In order to reach a consensus among them, any specification as regards the age limit was therefore omitted in the various legal instruments.

It would be wrong, however, to deduce from existing humanitarian law that it precludes considering persons above the age of 15 years as children. It may be noted, for instance, that the Fourth Geneva Convention utilizes a variety of age limits when providing special protection for children, depending on the specific needs that the law seeks to address in different contexts. Thus, the provisions range from new-born babies (maternity cases), children under the age of seven years (prescribing access for them and their mothers to hospital and safety zones), 12 years (wearing of identity discs to preserve their identity in case they are separated from their parents, for instance as a result of bombardment and flight), 15 years (for instance for the provision of relief supplies and child welfare facilities), to 18 years (protection against compulsory labour and against the death penalty).

On a textual basis, it can be observed that when the law uses terms like “children under 15”, this implies that there are also children

over 15. As regards preferential treatment for children above that age, the law uses terms such as “persons under 18 years of age”. This wording avoids the implication that there are children over the age of 18, but does not rule out considering persons below that age as children. Furthermore, Article 77 of Protocol I, entitled “Protection of children”, includes the protection of persons under 18 years of age. Similarly, the *Commentary* on the Fourth Geneva Convention published by the ICRC lists the provisions specific to persons under the age of 18 years among the provisions prescribing preferential treatment for children.¹¹

When the term “children” is being utilized in a provision without any age specification, the relevant age must accordingly in each specific case be determined in the light of the interest protected, and the conclusion reached will be relevant for the specific provision being examined only. To adopt a general notion of “child” in the absence of a definition, as being relevant only those under 15 years of age, would be detrimental to the interest of the child and thus not in conformity with the spirit underlying international humanitarian law.¹²

Article 3

1. States Parties shall raise the minimum age in years for the voluntary recruitment of persons into their national armed forces...

3. States Parties which permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure (...) that:

such recruitment is genuinely voluntary (...) is done with the informed consent...;

such persons provide reliable proof of age...

5. The requirement to raise the age in paragraph 1 does not apply to schools operated by or under the control of the armed forces of the States Parties...”

¹¹ Jean S. Pictet (ed.), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 284 ff. (ad Art. 50).

¹² For a brief overview of the protection provided to children and as an example of a provision-specific interpretation, *ibid.*, ad Art. 50, para. 1.

This provision raises the minimum age for voluntary recruitment by at least one year, in accordance with the declaration to be submitted by States when becoming party to the new Protocol. In other words, the minimum age for voluntary recruitment would hereafter be 16 years.

While raising the present age limit of 15 years is in itself a welcome development, Article 3 also weakens considerably the protection provided by Article 2, and in fact the entire Protocol. This is so, in particular, because it may be difficult to determine in practice whether child soldiers have been voluntarily recruited or not.

The safeguards that have been included to ensure that recruitment is indeed voluntary, and that no child under the minimum age is recruited, are positive features of the provision, but may be difficult to implement in practice. For instance, in a number of developing countries affected by armed conflict it may be questionable whether the requirement to provide "reliable proof of age" can be satisfied, given that birth registration systems often hardly exist there.

In addition, the protection provided by the first paragraphs of Article 3 suffers from an important exception, since the requirement to raise the age for voluntary recruitment does not apply to schools operated by or under the control of the armed forces. The lower age set for voluntary recruitment and the exemption made for military schools were motivated by many delegations as being necessary to secure a sufficient number of applicants, possessing the required profile, for the needs of their national armies. In this regard, it was emphasized that a system based on voluntary service by persons under 18 years was preferable to a system of compulsory service for those above that age, and that military schools often represent one of the few available opportunities for youths living in poor countries to acquire a higher education.

While such concerns are understandable, it would have been desirable for voluntary recruitment and military education to have been secured through alternative means, for instance by providing career prospects and military instruction through institutions which were not considered as an integral part of the State's armed forces. The wording of the provision allows for the possibility of circumventing the age limits set for recruitment, as well as for considering such pupils

as members of the armed forces, and thus as military targets. Evidently, this departure from the “straight 18” objective, which was pursued by many other delegations, seriously weakens the prospects of preserving children from being involved in armed conflict in the future.

Article 4

1. Armed groups, distinct from the armed forces of a State, should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

According to this provision, non-State entities are not allowed to recruit children, whether forcibly or voluntarily, nor to let them participate in hostilities, be it in a direct or indirect manner.

The provision is positive in that it indicates the willingness of States to regulate the behaviour of non-State entities, and thus also to address situations of non-international armed conflict. The ICRC strongly supported including the issue of non-State entities in the new Protocol, given that the involvement of children in non-international armed conflicts is just as deadly and traumatizing for the children concerned as in international ones. The fact that the presence of child soldiers seems to be particularly widespread in internal armed conflicts also underscores the need to address these situations.

However, Article 4 has been drafted in a way which leaves doubts as to how effective it will be to prevent the recruitment and participation of children in situations of internal armed conflict, mainly because the wording “should not”, as opposed to “shall not”, seems to impose a moral, as opposed to a legal, obligation under international law. In this regard, the wording chosen seems to be motivated by the concern of many States not to depart from the classical approach of international human rights law, according to which the broad rule is that only States have an obligation under human rights law, whereas the behaviour of non-State entities is to be regulated by

domestic law.¹³ However, the criminal repression under domestic law which Article 4 provides for is likely to have little deterrent effect. First, because those who take up arms against the lawful government of a country already expose themselves to the most severe penalties of the law, so that a threat of (additional) penal sanctions for recruiting minors may be of only marginal concern, and second, because the capacity of governments to enforce their domestic law is very limited in many contemporary situations of non-international armed conflict.

Notwithstanding the concern of governments not to add to any confusion as to the subjects responsible under international human rights law, it seems that it would have been feasible to provide for a direct legal obligation of non-State entities under the new Protocol. One possibility would have been to define recruitment and use in hostilities of persons under the age of 18 years as a crime under international law. Another would have been to incorporate part of international humanitarian law in the Protocol, so that the legal responsibility of non-State entities was limited to situations of armed conflict (this could have been done, for instance, by drafting a text such as “In situations covered by common Articles 2 and 3 to the Geneva Conventions, persons under the age of 18 years shall neither be recruited into the armed forces or other armed groups, nor allowed to take part in hostilities”). It may be argued in this regard that Article 38 already represents a partial incorporation of international humanitarian law, and that the Protocol’s subject-matter — armed conflict — would have justified this approach. Nonetheless, States were not prepared to take this step during the negotiations. The text therefore remains in line with traditional human rights law, a legal regime that is less suitable than humanitarian law (which is also legally binding on non-State entities) would have been to address the problems concerned.

Lastly, another cause for doubts as to the effectiveness of Article 4 is the fact that the obligation imposed on non-State entities differs from, and is wider than, that imposed on States. The provision may

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perhaps be useful as a basis for advocacy vis-à-vis armed groups, but they may also consider the Optional Protocol as containing a “double standard” and consequently that the moral force of the norm imposed upon them is weak. Accordingly, it is uncertain whether non-State entities will feel bound by and thus respect the provision. It may be observed in this regard that humanitarian law has always been based on the premise of equal obligations on all sides, and that this argument is often put forward when seeking to induce parties to conflict to implement the law.

Concluding comments

In view of the tragic situation of children affected by armed conflicts, and in particular the all too frequent cases where they have been coerced or allowed to take part in hostilities, the development of an optional protocol to the Convention on the Rights of the Child is a welcome initiative.

Evidently, the draft is not as strong as many would have hoped, or indeed is considerably weaker, and it is to be hoped that the Committee on the Rights of the Child will compensate for some of the shortcomings of the text by making a strict interpretation of it. It is promising in this respect that the Committee seems to be of the opinion that the CRC applies as a whole to all children, so that for instance the best interest of the child, the right to life and the right to respect for family life will also apply to children who are at risk of being recruited or of participating in hostilities, or have been in that plight.

Despite the weaknesses noted above, the new Protocol does represent an undeniable progress and serves to consolidate existing international law on the protection of children against recruitment and participation in hostilities. It is worth noting that the Protocol imposes a duty on States to take measures to ensure not only the effective implementation of the provisions discussed above, but also the demobilization of child soldiers and their rehabilitation and reintegration into society. It furthermore provides for international assistance to this end, which may often be required for effective implementation of the Protocol. Indeed, armed conflicts often result in devastated societies in which children at risk may be tempted to join armed forces or armed

groups as a source of income and respect, and which can do little to restore them to a normal life unless specific assistance is given for that purpose.

In conclusion, it is to be hoped that the new Optional Protocol will rapidly be universally ratified, as the 1989 Convention on the Rights of the Child almost has been already, and will help in future to effectively address the plight of children caught up in war.

Projet de Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés

Les États Parties au présent Protocole,

Encouragés par l'appui considérable recueilli par la Convention relative aux droits de l'enfant, qui dénote une volonté générale d'œuvrer pour la promotion et la protection des droits de l'enfant,

Réaffirmant que les droits des enfants doivent être spécialement protégés et lançant un appel pour que la situation des enfants, sans distinction, soit sans cesse améliorée et qu'ils puissent s'épanouir et être éduqués dans des conditions de paix et de sécurité,

Troublés par les effets préjudiciables et étendus des conflits armés sur les enfants et leurs répercussions à long terme sur le maintien d'une paix, d'une sécurité et d'un développement durables,

Condamnant le fait que des enfants soient pris pour cible dans des situations de conflit armé ainsi que les attaques directes de lieux protégés par le droit international, notamment des endroits où se trouvent généralement de nombreux enfants, comme les écoles et les hôpitaux,

Prenant acte de l'adoption du Statut de la Cour pénale internationale, qui inclut en particulier parmi les crimes de guerre, dans les conflits armés tant internationaux que non internationaux, le fait de procéder à la conscription ou à l'enrôlement d'enfants de moins de 15 ans dans les forces armées nationales ou de les faire participer activement à des hostilités,

Considérant par conséquent que pour renforcer davantage les droits reconnus dans la Convention relative aux droits de l'enfant, il importe d'accroître la protection des enfants contre toute implication dans les conflits armés,

Notant que l'article premier de la Convention relative aux droits de l'enfant spécifie qu'au sens de ladite Convention, un enfant s'entend de tout être humain âgé de moins de 18 ans, sauf si la majorité est atteinte plus tôt en vertu de la législation qui lui est applicable,

Convaincus que l'adoption d'un protocole facultatif se rapportant à la Convention, qui relèverait l'âge minimum de l'enrôlement

éventuel dans les forces armées et de la participation aux hostilités, contribuera effectivement à la mise en œuvre du principe selon lequel l'intérêt supérieur de l'enfant doit être une considération primordiale dans toutes les décisions le concernant,

Notant que la vingt-sixième Conférence internationale de la Croix-Rouge et du Croissant-Rouge tenue en décembre 1995 a recommandé, notamment, que les parties à un conflit prennent toutes les mesures possibles pour éviter que des enfants de moins de 18 ans ne prennent part aux hostilités,

Se félicitant aussi de l'adoption par consensus, en juin 1999, de la Convention No 182 (1999) de l'Organisation internationale du Travail concernant l'interdiction des pires formes de travail des enfants et l'action immédiate en vue de leur élimination, qui interdit l'enrôlement forcé ou obligatoire des enfants en vue de leur utilisation dans des conflits armés,

Condamnant avec une profonde inquiétude l'enrôlement, l'entraînement et l'utilisation — en deçà et au-delà des frontières nationales — d'enfants dans les hostilités par des groupes armés distincts des forces armées d'un État, et reconnaissant la responsabilité des personnes qui recrutent, forment et utilisent des enfants à cet égard,

Rappelant l'obligation pour toute partie à un conflit armé de se conformer aux dispositions du droit international humanitaire,

Soulignant que le présent Protocole est sans préjudice des buts et principes de la Charte des Nations Unies, notamment l'Article 51, et des normes pertinentes du droit humanitaire,

Tenant compte du fait que des conditions de paix et de sécurité fondées sur le respect intégral des buts et principes de la Charte des Nations Unies et le respect des instruments relatifs aux droits de l'homme applicables sont essentiels à la pleine protection des enfants, en particulier pendant les conflits armés et sous une occupation étrangère,

Conscients des besoins particuliers des enfants qui, en raison de leur situation économique et sociale ou de leur sexe, sont particulièrement vulnérables à l'enrôlement ou à l'utilisation dans des hostilités en violation du présent Protocole,

Conscients également de la nécessité de prendre en considération les causes économiques, sociales et politiques profondes de la participation des enfants aux conflits armés,

Convaincus de la nécessité de renforcer la coopération internationale pour assurer la réadaptation physique et psychosociale et la réinsertion sociale des enfants qui sont victimes de conflits armés,

Encourageant la participation des communautés et, en particulier, des enfants et des enfants victimes, à la diffusion de l'information et aux programmes d'éducation concernant l'application du présent Protocole,

Sont convenus de ce qui suit :

Article premier

Les États parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les membres de leurs forces armées qui n'ont pas atteint l'âge de 18 ans ne participent pas directement aux hostilités.

Article 2

Les États parties veillent à ce que les personnes n'ayant pas atteint l'âge de 18 ans ne fassent pas l'objet d'un enrôlement obligatoire dans leurs forces armées.

Article 3

1. Les États parties relèvent en plusieurs années l'âge minimum de l'engagement volontaire dans leurs forces armées nationales par rapport à celui fixé au paragraphe 3 de l'article 38 de la Convention relative aux droits de l'enfant, en tenant compte des principes inscrits dans ledit article et en reconnaissant qu'en vertu de la Convention, les personnes âgées de moins de 18 ans ont droit à une protection spéciale.

2. Chaque État partie dépose, lors de la ratification du présent Protocole, une déclaration contraignante indiquant l'âge minimum à partir duquel il autorise l'engagement volontaire dans ses forces armées nationales et décrivant les garanties qu'il a prévues pour veiller à ce que cet engagement ne soit pas contracté de force ou sous la contrainte.

3. Les États parties qui autorisent l'engagement volontaire dans leurs forces armées nationales avant l'âge de 18 ans mettent en place des garanties assurant, au minimum, que :

cet engagement soit effectivement volontaire ;

cet engagement ait lieu avec le consentement, en connaissance de cause, des parents ou gardiens légaux de l'intéressé ;

les personnes engagées soient pleinement informées des devoirs qui s'attachent au service militaire national ;

ces personnes fournissent une preuve fiable de leur âge avant d'être admises audit service.

4. Tout État partie peut, à tout moment, renforcer sa déclaration par voie de notification à cet effet adressée au Secrétaire général de l'Organisation des Nations Unies, qui en informe tous les autres États parties. Cette notification prend effet à la date à laquelle elle est reçue par le Secrétaire général.

5. L'obligation de relever l'âge minimum de l'engagement volontaire visée au paragraphe 1 ne s'applique pas aux établissements scolaires placés sous l'administration ou le contrôle des forces armées des États parties, conformément aux articles 28 et 29 de la Convention relative aux droits de l'enfant.

Article 4

1. Les groupes armés distincts des forces armées d'un État ne devraient en aucune circonstance enrôler ni utiliser dans les hostilités des personnes âgées de moins de 18 ans.

2. Les États parties prennent toutes les mesures possibles dans la pratique pour empêcher l'enrôlement et l'utilisation de ces personnes, notamment les mesures d'ordre juridique voulues pour interdire et sanctionner pénalement ces pratiques.

3. L'application du présent article du Protocole est sans effet sur le statut juridique de toute partie à un conflit armé.

Article 5

Aucune disposition du présent Protocole ne peut être interprétée comme empêchant l'application de dispositions de la législation d'un État partie, d'instruments internationaux et du droit international humanitaire plus propices à la réalisation des droits de l'enfant.

Article 6

1. Chaque État partie prend toutes les mesures — d'ordre juridique, administratif et autre — voulues pour assurer l'application et le respect effectifs des dispositions du présent Protocole dans les limites de sa compétence.

2. Les États parties s'engagent à faire largement connaître les principes et dispositions du présent Protocole, aux adultes comme aux enfants, à l'aide de moyens appropriés.

3. Les États parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes relevant de leur compétence qui sont enrôlées ou utilisées dans des hostilités en violation du présent Protocole soient démobilisées ou de quelque autre manière libérées des obligations militaires. Si nécessaire, les États parties accordent à ces personnes toute l'assistance appropriée en vue de leur réadaptation physique et psychologique et de leur réinsertion sociale.

Article 7

1. Les États parties coopèrent à l'application du présent Protocole, notamment pour la prévention de toute activité contraire à ce dernier et pour la réadaptation et la réinsertion sociale des personnes qui sont victimes d'actes contraires au présent Protocole, y compris par une coopération technique et une assistance financière. Cette assistance et cette coopération se feront en consultation entre les États parties concernés et les organisations internationales compétentes.

2. Les États parties qui sont en mesure de le faire fournissent cette assistance par l'entremise des programmes multilatéraux, bilatéraux ou autres déjà en place ou, le cas échéant, dans le cadre d'un fonds de contributions volontaires constitué conformément aux règles établies par l'Assemblée générale.

Article 8

1. Chaque État partie présente, dans les deux années qui suivent l'entrée en vigueur du présent Protocole en ce qui le concerne, un rapport au Comité des droits de l'enfant contenant des renseignements détaillés sur les mesures qu'il a prises pour donner effet aux dispositions du présent Protocole, notamment celles concernant la participation et l'enrôlement.

2. Après la présentation du rapport détaillé, chaque État partie inclut dans les rapports qu'il présente au Comité des droits de l'enfant conformément à l'article 44 de la Convention tout complément d'information concernant l'application du présent Protocole. Les autres États parties au Protocole présentent un rapport tous les cinq ans.

3. Le Comité des droits de l'enfant peut demander aux États parties un complément d'information concernant l'application du présent Protocole.

Article 9

1. Le présent Protocole est ouvert à la signature de tout État qui est partie à la Convention ou qui l'a signée.

2. Le présent Protocole est soumis à la ratification ou ouvert à l'adhésion de tout État.

Les instruments de ratification ou d'adhésion sont déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

3. Le Secrétaire général de l'Organisation des Nations Unies, en sa qualité de dépositaire de la Convention et du Protocole, informe tous les États parties à la Convention et tous les États qui ont signé la Convention du dépôt de chaque déclaration en vertu de l'article 3 et de chaque instrument de ratification ou d'adhésion au présent Protocole.

Article 10

1. Le présent Protocole entrera en vigueur trois mois après la date de dépôt du dixième instrument de ratification ou d'adhésion.

2. Pour chacun des États qui ratifieront le présent Protocole ou qui y adhéreront après son entrée en vigueur, ledit Protocole entrera en vigueur un mois après la date du dépôt par cet État de son instrument de ratification ou d'adhésion.

Article 11

1. Tout État partie peut, à tout moment, dénoncer le présent Protocole par voie de notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies, qui en informera les autres États parties à la Convention et tous les États qui ont signé la Convention. La dénonciation prendra effet un an après la date à laquelle le Secrétaire général de l'Organisation des Nations Unies en aura reçu notification. Toutefois, si à l'expiration de ce délai d'un an, l'État partie auteur de la dénonciation est engagé dans un conflit armé, celle-ci ne prendra pas effet avant la fin dudit conflit.

2. Cette dénonciation ne saurait dégager l'État partie de ses obligations en vertu du présent Protocole à raison de tout acte accompli avant la date à laquelle la dénonciation prend effet, pas plus qu'elle ne compromet en quelque manière que ce soit la poursuite de l'examen de toute question dont le Comité serait saisi avant la date de prise d'effet de la dénonciation.

Article 12

1. Tout État partie peut proposer un amendement et le déposer auprès du Secrétaire général de l'Organisation des Nations Unies. Celui-ci communique les amendements proposés aux États parties, en leur demandant de faire savoir s'ils souhaitent qu'une conférence des États parties soit organisée en vue d'examiner les propositions et de les mettre aux voix. Si, dans les quatre mois qui suivent cette communication, un tiers au moins des États parties se prononcent en faveur d'une telle conférence, le Secrétaire général la convoque sous l'égide de l'Organisation des Nations Unies. Toute modification adoptée par une majorité d'États parties présents et votants à la conférence est présentée à l'Assemblée générale pour approbation.

2. Une modification adoptée conformément au paragraphe 1 du présent article entre en vigueur lorsqu'elle a été approuvée par l'Assemblée générale des Nations Unies et acceptée par une majorité des deux tiers des États parties.

3. Lorsqu'une modification entre en vigueur, elle a force obligatoire pour les États parties qui l'ont acceptée, les autres États parties demeurant liés par les dispositions du présent Protocole et par toutes autres modifications antérieurement acceptées par eux.

Article 13

1. Le présent Protocole, dont les textes anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposé aux archives de l'Organisation des Nations Unies.

2. Le Secrétaire général de l'Organisation des Nations Unies fera parvenir une copie certifiée conforme du présent Protocole à tous les États parties à la Convention et à tous les États qui ont signé la Convention.

Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict

The States Parties to the present Protocol,

Encouraged by the overwhelming support for the Convention on the Rights of the Child,

Demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child,

Reaffirming that the rights of children require special protection and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security,

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development,

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals,

Noting the adoption of the Statute of the International Criminal Court and, in particular, the inclusion in the Statute of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities as a war crime in both international and non-international armed conflicts,

Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child, there is a need to increase the protection of children from involvement in armed conflict,

Noting that Article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,

Convinced that an optional protocol to the Convention, raising the age of possible recruitment of persons into armed forces and their

participation in hostilities, will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities,

Welcoming also the unanimous adoption, in June 1999, of ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, *inter alia*, forced or compulsory recruitment of children for use in armed conflict,

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

Stressing that this Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law,

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation,

Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to this Protocol owing to their economic or social status or gender,

Mindful also of the necessity to take into consideration the economic, social and political root causes of the involvement of children in armed conflicts,

Convinced of the need to strengthen international cooperation in implementation of this protocol, as well as physical and psychosocial

rehabilitation and social reintegration of children who are victims of armed conflict,

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of information and education programmes concerning the implementation of the Protocol,

Have agreed as follows:

Article 1

State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

State Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

1. States Parties shall raise the minimum age in years for the voluntary recruitment of persons into their national armed forces from that set out in article 38.3 of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol which sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties which permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

- such recruitment is genuinely voluntary;
- such recruitment is done with the informed consent of the person's parents or legal guardians;
- such persons are fully informed of the duties involved in such military service; and
- such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in paragraph 1 does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

1. Armed groups, distinct from the armed forces of a State, should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law which are more conducive to the realization of the rights of the child

Article 6

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.

2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery, and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation among concerned States parties and relevant international organizations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, *inter alia*, through a voluntary fund established in accordance with the General Assembly rules.

Article 8

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child in accordance with Article 44 of the Convention any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of this Protocol.

Article 9

1. The present Protocol is open for signature by any State which is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification or open to accession by any State.

Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General of the United Nations, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States which have signed the Convention of each instrument of declaration pursuant to Article 3, ratification or accession to the Protocol.

Article 10

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after its entry into force the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 11

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States which have signed the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act which occurs prior to the date at which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

Article 12

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of

such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present Article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments which they have accepted.

Article 13

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States which have signed the Convention.

Mise en œuvre du droit international humanitaire

Chronique semestrielle de législation et de jurisprudence nationales
janvier-juin 2000

A) Législation

Bélarus

La *loi sur l'usage et la protection de l'emblème de la croix rouge et du croissant rouge dans la République du Bélarus* a été adoptée par le Parlement le 3 avril 2000. Le projet a été élaboré par la Commission pour la mise en œuvre du droit international humanitaire conformément au plan d'activités pour 1999. La loi inclut un système complet de mesures sur l'usage et la protection de l'emblème de la croix rouge et du croissant rouge. Des sanctions pour les cas d'abus sont prévues dans le projet de code des infractions administratives et dans le nouveau code pénal.

Canada

La *loi concernant le génocide, les crimes contre l'humanité et les crimes de guerre et visant la mise en œuvre du Statut de Rome de la Cour pénale internationale, et modifiant certaines lois en conséquence* (Lois du Canada 2000, Chapitre 24) a reçu la sanction royale le 29 juin 2000. Elle a pour double objectif de permettre de coopérer pleinement aux enquêtes et poursuites entamées par la Cour pénale internationale et de maintenir et améliorer la capacité du Canada à poursuivre et à punir les personnes accusées de crimes contre l'humanité et de crimes de guerre, et ce également sur la base du principe de compétence universelle. Cette loi consolide les infractions de génocide, de crime contre l'humanité et de crime de guerre, apporte des changements aux lois fédérales portant sur l'extradition et l'entraide judiciaire afin que soient respectées les obligations découlant du Statut de Rome de la Cour pénale internationale. Couvrant de multiples aspects, elle traite notamment de la question de la responsabilité des commandants, des moyens de défense (dont celui relatif à l'ordre supérieur), et stipule que toute immunité pouvant exister en vertu du droit canadien n'empêchera pas le transfé-

rement vers la Cour pénale internationale ou tout tribunal international établi par une résolution du Conseil de sécurité des Nations Unies.

République tchèque

La République tchèque a adopté, le 18 octobre une nouvelle législation relative à la mise en œuvre du traité d'Ottawa sur les mines terrestres antipersonnel (*Loi n° 305/1999 sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, et portant amendement de la loi 140/1961 — Code pénal tel qu'amendé*). La loi comporte deux sections. La première, entrée en vigueur le 3 décembre 1999, interdit la possession, l'usage, le développement, la production, le transfert, le stockage et la collecte de mines antipersonnel et de leurs composants, ainsi que l'usage et le transfert des brevets pertinents. Le ministère de la Défense est chargé du contrôle des personnes possédant des mines terrestres et de la destruction de celles-ci. Une seconde section, qui entre en vigueur le 30 juillet 2000, amende le Code pénal tchèque, afin d'y insérer une disposition (article 185a) qui prévoit l'incrimination et la poursuite des personnes qui développent, produisent, importent, exportent, possèdent, collectent ou manient des armes, des moyens de combat ou des explosifs prohibés par le droit national ou international.

Turkménistan

La loi approuvant le programme de dispositions législatives pour les réformes et les transformations par le Président du Turkménistan, Saparmurat Turkmenbashi a été promulguée par le Président et publiée dans la gazette officielle («Turkménistan neutre», n° 88/22599) le 8 avril 2000. Elle établit une sorte de plan d'activité du législateur pour les années à venir et comporte notamment une mention de la loi sur la protection civile et de la loi sur l'usage et la protection des symboles et signes distinctifs de la croix rouge et du croissant rouge.

Yémen

La loi n° 43/1999 concernant l'organisation et l'usage des emblèmes du croissant rouge et de la croix rouge et l'interdiction de l'abus de leur usage a été promulguée le 20 septembre 1999 par le président de la République

avec entrée en vigueur immédiate (publiée au Journal officiel de la République yéménite, n° 18, le 30 septembre 1999). Cette loi établit la distinction entre l'usage à titre protecteur et celui à titre indicatif des emblèmes de la croix rouge et du croissant rouge, précise les catégories de personnes qui y ont respectivement droit et prévoit des sanctions pour les cas d'abus (amende maximale ou peine d'emprisonnement pour une période n'excédant pas un an) avec une mention particulière du cas de l'usage perfide. Les sanctions couvrent également l'usage intentionnel des dénominations de la croix rouge ou du croissant rouge, de tout autre emblème distinctif et de tout autre signe ou dénomination qui constitue une imitation ou qui provoque la confusion. La loi dispose encore que dans les cas qui ne sont pas couverts par ses dispositions, il sera fait référence à la Convention de Genève pertinente et aux Protocoles additionnels de 1977. Elle prévoit en outre, la création d'une commission nationale de droit international humanitaire, dont la composition, les fonctions et les compétences seront précisées par décret présidentiel¹.

B) Jurisprudence

Suisse

Le Tribunal militaire d'Appel 1 a condamné, le 26 mai 2000, un ancien maire d'une commune rwandaise à 14 ans de prison pour violation des Conventions de Genève de 1949. En première instance (Tribunal militaire de Division 2, 30 avril 1999)², le notable avait été reconnu 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 des personnes et des biens » et condamné en conséquence à la réclusion à vie. Le Tribunal d'appel a, quant à lui, estimé les juridictions militaires incompétentes, en l'occurrence, pour connaître du crime d'assassinat, ce qui rapporte la peine maximale à 20 ans. En raison de la « marge de manœuvre réduite » qui s'offrait à l'époque au maire, les

¹ Voir *infra*.

² Voir *RICR*, vol. 81, n° 835, septembre 1999, p. 691.

juges ont fixé cette peine à 14 ans. Quant à savoir si des crimes de guerre pouvaient être commis par des civils, le Tribunal confirme la réponse positive donnée par les juges de première instance, qui ne faisaient pas leurs conclusions sur ce point de la chambre de première instance du Tribunal pénal international pour le Rwanda dans l'affaire Akayesu. Estimant que l'on ne peut pas, en l'occurrence, dissocier la guerre du génocide, le Tribunal militaire d'Appel 1 précise que, dans l'attente de la prochaine introduction dans le droit suisse de la norme pénale réprimant le génocide, les tribunaux militaires sont compétents en la matière sur la base du droit des conflits armés de nature coutumière. Il se distancie sur ce point de l'avis des juges de première instance.

C) Commission nationales

Colombie

La *Comisión Intersectorial Permanente para los Derechos Humanos y el Derecho Internacional Humanitario* a été créée par décret n° 321 du 25 février 2000. Placée sous la direction du vice-président de la République, elle réunit des représentants des ministères de l'Intérieur, des Affaires étrangères, de la Justice et du Droit, de la Défense nationale, du Travail et de la Sécurité sociale, ainsi que du Haut Commissaire pour la paix. Cette Commission a notamment pour mandat d'encourager la diffusion du droit international humanitaire, d'en garantir l'adoption des mesures nationales de mise en œuvre, d'évaluer périodiquement les progrès accomplis, de consolider les mécanismes institutionnels et de promouvoir la coopération entre le gouvernement et d'autres organisations. Elle vise également à assurer le suivi du plan d'action national, adopté dans l'optique de promouvoir le respect et les garanties des droits de l'homme et l'application du droit international humanitaire.

Croatie

Par décision adoptée le 13 juillet 2000 et signée par le premier vice-premier ministre croate, le gouvernement de la République de Croatie a établi la Commission nationale de droit international huma-

nitaire. Créée en tant qu'organe inter-ministériel placé sous l'autorité du gouvernement, la nouvelle commission est chargée de la coordination de toutes les activités des structures de l'État qui ont trait à la protection et à la promotion du droit international humanitaire, y compris le Parlement croate, le bureau de l'ombudsman et les organisations non gouvernementales pertinentes. Parmi ses fonctions figurent notamment la collecte de l'information sur l'état de la mise en œuvre du droit humanitaire en Croatie, l'évaluation de celui-ci et la rédaction de recommandations dans ce domaine, en particulier en vue de la création de groupes de travail *ad hoc* pour l'adoption de mesures de mise en œuvre requises ; la préparation de rapports périodiques, comme demandé, sur cette mise en œuvre. Tous les ministères et autorités compétents, ainsi que la Croix-Rouge croate, sont représentés dans la nouvelle Commission, dont le secrétariat est placé entre les mains du Département des droits de l'homme du ministère croate des Affaires étrangères.

Égypte

Le premier ministre égyptien a signé, le 23 janvier 2000, le décret établissant une commission nationale de droit international humanitaire en vue de la mise en œuvre et de la diffusion de celui-ci (Décret du premier ministre n° 149 — 2000). Placée sous la présidence du ministre de la Justice, la Commission est composée de cinq ministères, de la Sécurité publique et du Croissant-Rouge égyptien. Elle a pour fonction de promouvoir la mise en œuvre des règles du droit international humanitaire et la formulation de propositions à cet effet aux décideurs, d'établir un plan annuel de diffusion, et d'encourager la formation au droit international humanitaire des cadres nationaux responsables de sa mise en œuvre et de son respect, y compris les médias.

Guatemala

La *Comisión guatemalteca para la aplicación del derecho internacional humanitario* a été créée par accord gouvernemental n° 948-99 (publié dans le *Diario de Centro America* n° 23 du 12 janvier 2000). Elle se compose des représentants suivants : ministères des Affaires étrangères, de l'Intérieur, de l'Education, de la Défense, de la Santé publique et du

Bien-être social, Comité présidentiel pour la coordination de la politique gouvernementale en matière de droits de l'homme, Secrétariat pour la paix, système et barreau judiciaire, Congrès de la République, Bureau du Procureur général de l'État, Bureau du Procureur de l'État pour les droits de l'homme, Croix-Rouge guatémaltèque. La présidence et le secrétariat sont assurés par le ministère des Affaires étrangères. Le mandat de la Commission inclut la recommandation de mesures de mise en œuvre du droit international humanitaire au gouvernement, la rédaction de projets de lois et règlements pour considération par le président et la diffusion du droit international humanitaire.

Grèce

Une commission nationale pour la mise en œuvre et la diffusion du droit international humanitaire en Grèce a été formellement constituée par un décret ministériel, en mars 2000. Présidé par le ministère des Affaires étrangères, il réunit des représentants des ministères de l'Éducation, de la Justice, de la Défense et de la Croix-Rouge hellénique. Son mandat inclut la diffusion du droit international humanitaire, la traduction et la production de matériel dans ce but, l'élaboration de recommandations pour la ratification du Statut de Rome de la Cour pénale internationale et l'adoption de mesures nationales de mise en œuvre de celui-ci. En outre, la Commission est chargée de l'examen de la législation actuelle en matière pénale, de protection de l'emblème et de protection civile au regard des exigences du droit international humanitaire.

Hongrie

Par décret n° 2095/2000 (V.9) signé par le premier ministre et rendu public le 9 mai 2000, le gouvernement de la République de Hongrie a établi une Commission nationale consultative pour la diffusion et la mise en œuvre du droit international humanitaire. Le mandat de ce nouvel organe est de coordonner les activités des différents ministères concernés et de faire des recommandations au gouvernement sur des sujets touchant à la mise en œuvre nationale du droit humanitaire, y compris en apportant un soutien pour les préparatifs, en

cours en Hongrie, en vue de la ratification du Statut de la Cour pénale internationale. Les autres fonctions incluent notamment la promotion de la diffusion et de l'enseignement du droit international humanitaire aux forces armées et de police et dans les milieux éducatifs civils. La Commission, qui a tenu sa première réunion au début du mois de juin, est présidée par le vice-directeur du département du droit international du ministère hongrois des Affaires étrangères. Le secrétariat est confié à la Croix-Rouge hongroise.

Sri Lanka

En mars 2000, le gouvernement de Sri Lanka a établi une Commission nationale de droit international humanitaire, suite à une proposition du CICR et à un symposium organisé à cet effet en juillet 1999 par le CICR et le ministère des Affaires étrangères. Les travaux de la Commission seront coordonnés par ce dernier ministère. Lors de sa première réunion, la Commission a décidé la création d'un sous-comité pour examiner la question de l'adoption d'une législation nationale sur le droit international humanitaire et considérer l'adhésion à la Convention de La Haye de 1954 sur la protection des biens culturels en période de conflit armé. Le sous-comité est constitué de représentants des ministères de la Justice, des Affaires culturelles, de la Santé et des Affaires étrangères, ainsi que des départements du procureur général et du rédacteur juridique, des armées de terre, de mer et de l'air, et des forces de police sri-lankaises.

Yémen

Conformément à la loi n° 43/1999³, le *décret présidentiel n° 408/1999 portant création de la Commission nationale pour les affaires du droit international humanitaire* a été adopté le 11 décembre 1999 avec entrée en vigueur immédiate (publié au Journal officiel de la République du Yémen n° 24 du 31 décembre 1999). Cette commission est présidée par le vice-président du Conseil des ministres (ministre des Affaires étrangères), assisté du ministre de la Santé comme vice-président. Elle est composée des secrétaires du ministère des

3 Voir *supra*.

Affaires juridiques et des Affaires du Conseil des députés (en ce qui concerne le Journal officiel, les recherches et le contrôle légal), du ministère de la Justice (affaires judiciaires), du ministère de l'Education et de l'Enseignement (manuels et l'orientation) et du ministère de l'Information. En font également partie les chefs des départements juridiques des ministères de la Défense, de l'Intérieur et des Affaires étrangères, ainsi que le secrétaire général de la Société du Croissant-Rouge yéménite. Parmi les fonctions et compétences de la Commission figurent: l'examen des législations pertinentes en vigueur, en vue de leur révision avec rédaction de propositions; l'identification des mécanismes, des mesures et des procédés à même de garantir l'application du droit international humanitaire; l'adoption de plans et programmes en vue d'assurer la diffusion de ce droit à toutes les couches de la société; la supervision de la loi n° 43/1999 relative à l'emblème⁴; l'organisation de séminaires et autres événements nationaux portant sur le droit international humanitaire et la participation aux conférences et événements régionaux et internationaux appropriés; la participation à l'étude des projets de traités de droit international humanitaire; la coopération et l'échange d'expertise avec les organisations régionales et internationales œuvrant dans le domaine du droit international humanitaire et la coordination entre les efforts du gouvernement et ceux de la communauté internationale à ce sujet. Le règlement intérieur de la Commission, qui inclura entre autres des dispositions relatives au secrétariat, sera adopté par décision de son président.

4 *Idem.*

Adhésion de la Lituanie aux Protocoles additionnels aux Conventions de Genève du 12 août 1949

La Lituanie a adhéré sans faire de déclaration ni de réserve, le 13 juillet 2000, aux Protocoles additionnels aux Conventions de Genève du 12 août 1949 relatifs à la protection des victimes des conflits armés internationaux (Protocole I) et non internationaux (Protocole II), adoptés à Genève le 8 juin 1977. Les Protocoles entreront en vigueur pour la Lituanie le 13 janvier 2001.

La Lituanie est le 157^e État partie au Protocole I et le 150^e au Protocole II.

La Lituanie a également reconnu la compétence de la Commission internationale d'établissement des faits, conformément à l'article 90 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I).

Accession by Lithuania to the Protocols Additional to the Geneva Conventions of 12 August 1949

Lithuania acceded on 13 July 2000, without making any declaration or reservation, to the Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977. The Protocols will come into force for Lithuania on 13 January 2001.

This accession brings to 157 the number of States party to Protocol I and to 150 those party to Protocol II.

Lithuania also made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

Adhésion de l'Érythrée aux quatre Conventions de Genève du 12 août 1949

L'Érythrée a adhéré sans faire de déclaration ni de réserve, le 14 août 2000, aux quatre Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre.

L'Érythrée est le 189^e État partie aux quatre Conventions de Genève.

Accession to the four Geneva Conventions of 12 August 1949 by Eritrea

Eritrea acceded on 14 August 2000, without making any declaration or reservation, to the four Geneva Conventions of 12 August 1949 for the protection of war victims.

This accession brings to 189 the number of States party to the four 1949 Geneva Conventions.

Livres et revues

Books and reviews

Marco Sassòli and Antoine Bouvier, in cooperation
with Laura M. Olson, Nicolas A. Dupic and Lina
Milner

How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law

International Committee of the Red Cross, Geneva, 1999,
1,493 pages

All those who teach international humanitarian law and those who think of teaching it will no doubt welcome this first-ever major coursebook in international humanitarian law, one that is both comprehensive and affordable. As one of the instructors who has taught international humanitarian law in a major law school for about two decades, I found the lack of a readily available coursebook and the need to prepare my own materials a considerable inconvenience. For those less familiar with international humanitarian law, the lack of a coursebook was a real discouragement to structuring a course and teaching in this area.

During the past academic year, I have used the new coursebook at Harvard Law School and at Berkeley Law School and, in light of this favourable experience, I shall use it at NYU Law School starting this Fall.

The book is composed of three parts. The first, consisting of fifteen chapters, presents outlines and bibliographies of the principal topics, such as sources, distinction between civilians and combatants, combatants and POWs, protection of the wounded, sick and ship-

wrecked, protection of civilians (including in occupied territories), conduct of hostilities, naval and air warfare, non-international armed conflicts, implementation (including war crimes), the relationship between human rights and humanitarian law, and the ICRC. I found particularly helpful the chapters on POWs, protection of civilians, conduct of hostilities (the Hague Law), non-international armed conflicts, and the relationship between human rights and international humanitarian law. These outlines will benefit teachers in the preparation of their classes, as well as students working in research and preparing their seminar papers. I myself have not assigned these outline chapters to my students, preferring to concentrate on the primary materials contained in Part II.

Part II, "Cases and Documents", is the core of the book. By providing edited sections of major humanitarian law treaties (the easily available 1949 Geneva Conventions and the 1977 Additional Protocols are not included), statements and cases of international and national tribunals, it constitutes the coursebook's principal contribution. Part II is divided into two long chapters. The first contains general statements on international humanitarian law, starting from the Hague Regulations of 1907 and going on to the chemical weapons protocol, the conventional weapons conventions and protocols thereto, the Rome Statute of the International Criminal Court, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, UN reports on questions pertinent to international humanitarian law, important examples of national laws implementing it, and the nuclear weapons advisory opinion of the International Court of Justice.

All of these are important. I, myself, found it particularly useful to relate the discussion of general treaties in chapter one to cases in chapter two and thus encourage a discussion of sources and the evolution of international humanitarian law, including customary law. The second chapter, "Cases and Documents relating to Past and Contemporary Conflicts", presents a uniquely rich mix of primary materials, such as cases and official statements, ideal for assignment to students for preparation of statements on specific topics. Included, among others, are decisions of Nuremberg and Tokyo tribunals and

national tribunals arising from the events of World War II, a selection of cases and materials from Malaysia, Korea, Vietnam, Nigeria and the Indo-Pakistan conflict, an excellent selection of cases on the Israel-Arab conflict and occupied territories, Panama and the capture of Noriega, both the Gulf War and the Iran-Iraq war, the Falklands/Malvinas conflict, Sri Lanka, the conflicts in the former Yugoslavia (with key decisions of the ICTY), conflicts in Somalia and the African Great Lakes region, Turkey, Afghanistan and Chechnya.

The third and the shortest part of the book contains possible teaching outlines for longer and shorter course modules.

The coursebook provides an excellent vehicle for courses and class discussions in both theoretical and practical topics and a wealth of fascinating cases sure to attract student interest. By refraining from adopting a particular approach to international law theories and doctrines, the authors encourage teachers to develop their own method and to select their preferred materials from the rich menu provided by the coursebook. Coming at a time of high interest in international humanitarian law, as well as in international criminal law, the book could make a significant contribution to ending the dismal neglect of international humanitarian law in most law schools and universities.

The editors and the ICRC should start planning periodic documentary supplements on the most recent developments in international humanitarian law. Bouvier and Sassòli were not able to take into account the new ICRC study of customary rules of international humanitarian law, which is scheduled to appear in 2001. That study will be the perfect companion volume to the coursebook. Prepared on a rich basis of national and international practice, the customary law study will show that there is much more practice, *opinio juris*, and, consequently, custom than we could have ever expected.

It is with the greatest pleasure that I recommend the coursebook to all teachers of international humanitarian law and international criminal law and congratulate the ICRC, Marco Sassòli and Antoine Bouvier, and their assistants Laura M. Olson, Nicolas A. Dupic and Lina Milner for an excellent job. Their erudite and tireless efforts

have produced a comprehensive coursebook of very high quality. It should help international humanitarian law to obtain pride of place in all universities and major law schools.

THEODOR MERON

Charles L. Denison Professor of Law
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Françoise Bouchet-Saulnier

Dictionnaire pratique du droit humanitaire

Éditions de La Découverte & Syros, Paris, 2000, 492 pages

L'auteur, Françoise Bouchet-Saulnier, docteur en droit, responsable juridique de *Médecins sans frontières* et directeur de recherches à la Fondation de cette organisation non gouvernementale, vient de publier une deuxième édition mise à jour d'un dictionnaire fort utile. Rédigé et présenté de manière à être accessible au plus grand nombre, il comporte 300 entrées donnant les informations essentielles sur chacun des mots et expressions traités et renvoyant à d'autres.

L'ouvrage est susceptible d'intéresser le juriste aussi bien que le non-initié soucieux d'aborder un thème très en vogue aujourd'hui : « l'humanitaire ». L'auteur semble considérer, comme beaucoup de personnes actuellement, que tout est « humanitaire » (ainsi, y a-t-il une entrée au mot « Adoption »). Françoise Bouchet-Saulnier note, dans son introduction, que le droit humanitaire a été « longtemps réservé aux situations de conflits armés » et estime que « l'action humanitaire apparaît aujourd'hui comme un mode de gouvernement minimal adopté par les organisations internationales telles que l'Organisation des Nations Unies, l'Union européenne et certains États ». L'action humanitaire devrait donc venir régler tous les problèmes de l'être humain placé dans une situation difficile en raison de la guerre, de catastrophes naturelles ou encore du fait de l'incapacité plus ou moins grande des États à gérer des difficultés d'ordre économique ou social

(ainsi trouve-t-on des entrées aux sigles « OMS » ou « UNICEF »). Mais il nous semble alors préférable de parler d'« assistance » ou d'« aide » humanitaire.

Ce dictionnaire intègre un domaine, celui des droits de l'homme, certes proche du droit international humanitaire, mais qui s'en différencie par son application dans l'espace et dans le temps. En effet, alors que les droits de l'homme devraient être respectés en temps de paix comme de guerre, le droit international humanitaire s'applique lors des conflits armés internationaux ou non internationaux et l'action humanitaire, qui s'organise autour du droit international humanitaire, concerne, elle aussi, les temps de guerre. D'ailleurs, à l'entrée « Troubles et tensions internes », l'auteur écrit, avec raison, que le droit international humanitaire « ne s'applique pas dans ces situations où les actes de violence sporadiques et isolés et les émeutes ne présentent pas un seuil de violence organisé suffisant pour parler de « conflit ». Néanmoins, on sait que la Croix-Rouge, créée en 1863 en vue de secourir les blessés de guerre, a développé depuis de très longues années des activités de secours en temps de paix pour les plus démunis. Le CICR lui-même a pensé très tôt au rôle que les Sociétés nationales pourraient jouer dans la lutte contre la tuberculose, et un vœu en ce sens avait été voté à la Conférence internationale de la Croix-Rouge de Londres, en 1907.

Ce dictionnaire n'en concerne pas moins très largement le droit international humanitaire : la Croix-Rouge, les Conventions de Genève de 1949 et les Protocoles additionnels de 1977 y occupent une place prépondérante à travers différentes entrées telles que : « Agence centrale de recherches », « personnel sanitaire », « respect du droit international humanitaire ou « Cour pénale internationale ». Le droit concernant la conduite de la guerre fait aussi partie du droit international humanitaire (le Protocole additionnel I comporte un titre II intitulé : « Méthodes et moyens de guerre, statut de combattant et de prisonnier de guerre »), et l'auteur consacre, à juste titre, des entrées aux mots et expressions « combattant », « crime de guerre – crimes contre l'humanité », « mines » ou « objectif militaire ».

Françoise Bouchet-Saulnier souligne que le droit international humanitaire, qui « traite d'urgence vitale et immédiate, a été

placé sous la sauvegarde du Comité international de la Croix-Rouge», et rappelle que les « quatre Conventions de Genève signées en 1949 par l'ensemble des États et leurs Protocoles additionnels de 1977 résument et codifient l'ensemble de ce patrimoine juridique et l'adaptent aux formes et aux armes de guerre les plus récentes ».

VÉRONIQUE HAROUEL

Docteur en droit

Maître de conférences

à l'Université de Paris VIII

Publications récentes — Recent publications

Comité international de la Croix-Rouge, *Rapport d'activité 1999*, Genève, 2000

International Committee of the Red Cross, *Annual Report 1999*, Geneva, 2000

Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge, *Rapport annuel 1999*, Genève, 2000

International Federation of Red Cross and Red Crescent Societies, *Annual Report 1999*, Geneva, 2000

World Disasters Report, Focus on Public Health, International Federation of Red Cross and Red Crescent Societies (ed.), Geneva, 2000, 240 pages

Yearbook of International Humanitarian Law, Vol. 2, 1999, T.M.C. Asser Press, The Hague, 2000, 660 pages

**Antonio Cassese, docteur *honoris causa*
de l'Université de Genève**

Antonio Cassese, professeur ordinaire à l'Université de Florence, est l'une des personnalités les plus marquantes et les plus attachantes du monde du droit international contemporain, tant sur le plan strictement académique que sur celui de l'action pratique en faveur de la justice internationale et des droits de l'homme.

Sa carrière d'universitaire brillant, de grande renommée internationale, doit beaucoup à une formation de haut niveau, parfaite à Genève, à l'Institut universitaire de hautes études internationales. Antonio Cassese a enseigné auprès d'universités prestigieuses, tant en Italie que dans d'autres pays (et à Genève en particulier, en tant que professeur invité). Auteur prolifique et engagé, il a publié un nombre impressionnant d'ouvrages et d'études de qualité, examinant en profondeur tous les développements les plus significatifs du droit international d'aujourd'hui. Il s'est spécialement dédié à l'analyse du droit international des droits de l'homme et du droit international humanitaire.

Son engagement et son dynamisme l'ont amené vers la pratique des relations internationales, qu'il a considérablement marquée par une action intelligente, cohérente, courageuse et généreuse, toujours menée, dans une multitude d'enceintes internationales, à l'enseignement d'une approche humaniste et progressiste. Il convient de souligner, notamment, le rôle d'exception qu'il a su jouer en faveur du droit humanitaire et des droits de l'homme, grâce à son activité de premier président du Comité du Conseil de l'Europe pour la prévention de la torture (1989-1993), puis de juge et premier président du Tribunal pénal international pour l'ex-Yougoslavie (1993-2000).

Par la collation du doctorat *honoris causa* au professeur Cassese, l'Université de Genève, qui a contribué à sa formation et qu'il a servie en tant qu'enseignant, entend exprimer la profonde reconnaissance qui lui est due pour l'œuvre admirable d'une vie dépensée au service des idéaux de justice et d'humanité.

FACULTÉ DE DROIT DE L'UNIVERSITÉ DE GENÈVE

Janvier 2000

Konstantin Obradovic

1939 - 2000

Le professeur Konstantin Obradovic est décédé en mars de cette année. La nouvelle a frappé tous ses nombreux amis, qui voyaient en lui un éternel jeune homme, toujours prêt à s'enthousiasmer pour de bonnes causes, à se révolter contre l'injustice et la violence.

Konstantin Obradovic était un professeur reconnu et unanimement apprécié, qui a enseigné dans plusieurs universités en République fédérale de Yougoslavie, mais aussi dans de nombreuses universités étrangères. Ce qui frappait chez lui, c'était le souci de toujours aller au fond des choses, de ne pas se contenter de raisonnements juridiques de surface, satisfaisants pour l'esprit mais éloignés de la réalité. Cette attitude fut la sienne pour l'ensemble des problèmes internationaux, et tout particulièrement pour ceux relevant du droit international humanitaire, matière dont il était un des experts les plus connus et à laquelle il portait un attachement privilégié.

Konstantin Obradovic avait en effet participé à la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire qui, à travers quatre sessions organisées de 1974 à 1977, avait élaboré et adopté les deux Protocoles additionnels aux

Conventions de Genève. Ces textes constituent des développements de première importance du droit international humanitaire, notamment en ce qui concerne les règles fixant des limites humanitaires à la conduite des hostilités et celles applicables lors des conflits internes.

Or, ce résultat remarquable paraissait inespéré à l'époque où il a été obtenu, tandis que se déroulaient encore des guerres de libération coloniale et que l'on était en pleine guerre froide. Si cela a néanmoins été possible, c'est bien grâce à l'esprit constructif, voire amical, qui s'était instauré entre les experts et les diplomates qui suivaient ces travaux. En effet, au travers des longues sessions annuelles s'est créée une communauté politique et académique qui s'est soudée au-delà des idéologies, et dont les membres ont progressivement cherché à mieux comprendre la source des divergences, à rechercher des compromis. Plusieurs de ces diplomates ou experts se sont par ailleurs retrouvés entre les sessions de la Conférence diplomatique à l'Institut international de droit humanitaire de San Remo (Italie). Fraîchement créé, cet organe a pu jouer alors un rôle de premier ordre en offrant un cadre sympathique et informel à tous ceux qui donnaient beaucoup d'eux-mêmes pour faire aboutir un projet auquel ils s'attachaient chaque jour davantage.

Konstantin Obradovic était l'une des personnalités les plus marquantes de cette communauté et, jusqu'à sa mort, il avait gardé avec beaucoup des membres de celle-ci des liens d'amitié. Comme plusieurs autres experts, il avait continué de longues années à défendre les textes adoptés et leur cause, en travaillant à leur ratification, en contribuant à leur diffusion, ou en collaborant à leur insertion dans les législations nationales.

On ne saurait par ailleurs rappeler ces liens d'amitié sans mentionner la relation affectueuse que Konstantin Obradovic avait nouée depuis la Conférence diplomatique avec un grand nombre de collaborateurs du CICR. Ce fut par exemple le cas lors de séminaires où il se retrouvait presque « en famille » ou, ces dernières années, avec les délégués du CICR en poste à Belgrade. Il a également contribué à la *Revue*, qui publie d'ailleurs son dernier article dans le présent numéro.

Dans le cœur de ses innombrables amis, Kosta avait une place particulière. Kosta, dis-je, car le professeur Konstantin Obradovic devenait très rapidement Kosta pour ceux qui l'approchaient, cet ami

ouvert, direct, « râleur », Kosta au grand cœur qui défendait ses idées avec force et conviction. Que d'heures n'a-t-on pas passées à discuter, à chercher des solutions aux problèmes écrasants qui se sont abattus sur son pays, ou même à refaire le monde.

Très actif dans son pays, Konstantin Obradovic avait contribué avec ardeur à la promotion du droit humanitaire et à la formation dans ce domaine. Il a participé à d'innombrables séminaires et publié de nombreux livres et articles, avec le souci constant de faire comprendre au plus grand nombre comme aux spécialistes les enjeux des droits de l'homme et du droit international humanitaire.

Le démantèlement désordonné de la Yougoslavie, puis l'engrenage de la méfiance, de la haine et de la violence qui s'est installé dans les Balkans, le mépris affiché par beaucoup à l'égard de valeurs pour lesquelles il s'était tant battu, tout cela avait profondément affecté Konstantin Obradovic. L'amertume le gagnait souvent, mais son esprit combatif le poussait à continuer de s'engager pour sortir de ce cercle vicieux, pour défendre les principes essentiels des droits de l'homme et du droit international humanitaire. À cet égard, il avait, pour une courte période, été ministre fédéral adjoint pour les droits de l'homme et pour les minorités, ce qui représentait pour lui un gage d'espoir.

En Yougoslavie, mais aussi à Genève, à San Remo — il était membre de l'Institut de droit humanitaire et un fidèle participant à ses tables rondes — et dans bien d'autres endroits, la voie rocailleuse de Kosta va cruellement manquer, comme dans le cœur de toute la « famille des humanitaires ».

Que sa femme et sa famille veuillent bien accepter notre profonde sympathie et nos plus sincères condoléances.

Salut, Kosta !

YVES SANDOZ
CICR

Le Comité international de la Croix-Rouge et la protection des victimes de la guerre

par François Bugnion, Comité international de la Croix-Rouge, Genève, 1994/2000, 1444 pages, CHF 59,-, 2^e édition inchangée, avec une préface de Cornelio Sommaruga, président du CICR de 1987 à 1999

Fondateur du Mouvement international de la Croix-Rouge et du Croissant-Rouge et promoteur des Conventions de Genève de 1949, le CICR est présent depuis plus d'un siècle sur la plupart des champs de bataille.

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