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Geneva

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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**Humanitarian Debate: Law, Policy, Action**

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# Éditorial

*La notion de « victimes de guerre » est polysémique. Elle peut s'entendre comme regroupant l'ensemble des personnes que le droit humanitaire cherche à protéger lors d'un conflit armé (international ou non international). On sait que, souvent, les affrontements armés touchent – directement ou indirectement – l'ensemble de la population du (ou des) pays en guerre, que toute personne peut être atteinte dans son intégrité physique ou mentale ou dans la jouissance de ses droits fondamentaux, peut souffrir moralement ou perdre ses biens.*

*L'aide humanitaire apportée à toutes les victimes de guerre ainsi entendues vise à atténuer, dans la mesure du possible, les conséquences néfastes des conflits. Les organisations humanitaires à l'œuvre dans une situation de conflit suppléent souvent l'aide défaillante des parties et leur action doit en principe reposer sur les principes fondamentaux de la Croix-Rouge et du Croissant-Rouge : l'assistance humanitaire doit être fournie aux victimes de manière impartiale et non discriminatoire.*

*À l'issue d'un conflit, l'action humanitaire devrait se conformer aux mêmes principes. Toutefois, dans la mesure où les besoins urgents et immédiats ne suffisent plus à guider l'action, le choix des bénéficiaires ainsi que la durée et l'ampleur de l'action humanitaire semblent autrement plus difficiles à déterminer. Le CICR s'est penché sur cette question délicate et a tenté d'apporter des réponses : Marion Harroff-Tavel dessine, dans son article sur l'action du CICR dans les périodes de transition, les raisons de cette politique et les critères d'action dont l'institution s'est dotée pour appréhender au mieux de telles situations.*

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*Cependant, en droit international, la notion de « victime » se définit normalement de manière plus restrictive, car elle ne couvre que les personnes ayant subi un préjudice par suite d'un fait internationalement illicite. À cet égard, il convient de noter que le droit international humanitaire ne prévoit de réparation qu'en cas de violation de ses normes. Cette acception forme un cercle de « victimes » nettement plus étroit que pour les organisations humanitaires, puisqu'une personne tuée dans le respect du principe de proportionnalité (les fameux dommages collatéraux) ne serait pas en ce sens une « victime », tandis que son voisin, touché 100 mètres plus loin par un bombardement aveugle, le serait et pourrait donc bénéficier d'une réparation. Toutefois, même au sein de ce cercle restreint de victimes, la grande majorité n'obtient jamais la réparation à laquelle elles auraient droit. Des ouvertures se profilent toutefois à l'horizon.*

*L'article de Liesbeth Zegveld examine la question du droit à réparation des victimes de violations du droit international humanitaire et analyse les moyens juridiques mis à leur disposition ainsi que la mesure – limitée – dans laquelle elles peuvent faire valoir ce droit. La contribution d'Emmanuela-Chiara Gillard sur le même sujet conclut qu'en l'absence de mécanismes spécifiques, les victimes sont incapables de faire valoir leurs droits et n'obtiennent aucune réparation. L'émergence de mécanismes précis – à l'image de la Commission de réparation établie suite au conflit armé entre l'Érythrée et l'Éthiopie – permet d'établir des précédents, même s'ils sont cantonnés au niveau des principes. En effet,*

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*la mise en œuvre pratique de ces mécanismes, qui restent peu nombreux, est parfois délicate ; dans l'exemple cité, on a du mal à voir comment les trop nombreuses victimes des violations du droit international humanitaire commises au cours de ce conflit qui a opposé deux pays pauvres pourraient un jour recevoir une indemnité ou comment on pourrait justifier dans les faits que les autres victimes au sens large n'en obtiennent pas.*

*L'article de Fred Wooldridge et d'Olufemi Elias décrit, pour sa part, l'importance des considérations d'ordre humanitaire au sein de mécanismes tels que la Commission d'indemnisation des Nations Unies. Cette dernière a été créée par le Conseil de sécurité des Nations Unies pour examiner les demandes d'indemnités formulées par les victimes de l'invasion et de l'occupation illicites du Koweït par l'Irak en 1990. Il est intéressant de noter que cette Commission a traité en premier lieu les demandes de victimes du conflit correspondant à la définition de personnes protégées au sens des Conventions de Genève – les blessés, les prisonniers de guerre et les internés – revenant ainsi à une notion de victime beaucoup plus large que celle qui est normalement applicable en cas de réparation. Cette Commission risque cependant de rester une exception : l'application du droit international de la Charte par le Conseil de sécurité, quand il détermine une éventuelle violation, est par essence politique et souvent partielle. Les exemples récents démontrent en outre que l'indemnité due aux victimes varie énormément selon les États engagés.*

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*Au sens du droit pénal, toute personne physique à l'égard de laquelle aurait été commise une infraction relevant de la compétence du tribunal est une victime, qui peut faire valoir son droit à ce que les malfaiteurs soient traduits en justice. Le système de la juridiction universelle semble donner raison à ce type de victimes. Mais, malgré la création des tribunaux internationaux, la poursuite pénale universelle des criminels de guerre est restée exceptionnelle ; en outre, l'amnistie des crimes de guerre ou d'autres crimes internationaux est une réalité politique. L'article de Yasmin Naqvi examine la question de savoir si ces amnisties peuvent ou doivent être juridiquement reconnues et si oui, dans quelle mesure. Il apparaît, une fois encore, que la répression pénale des crimes de guerre est surtout un instrument du système international avant d'être un moyen de faire valoir le droit des victimes à ce que justice soit faite.*

# Editorial

*The notion of “war victims” has several connotations. It can be understood as meaning all persons whom humanitarian law seeks to protect in the event of international or non-international armed conflict. It is well known that armed conflicts often affect — directly or indirectly — the entire population of the country or countries at war, and that any person may be harmed physically or mentally, be deprived of their fundamental rights, suffer emotional distress or lose their property.*

*Humanitarian assistance for all victims of war, within this meaning of the term, is intended to attenuate as far as possible the harmful effects of conflicts. Humanitarian organizations working in a situation of conflict often compensate for the inadequacy of aid from the warring parties, and their activities must as a general rule be based on the Fundamental Principles of the Red Cross and Red Crescent. In other words, humanitarian assistance must be given to the victims impartially and without discrimination.*

*At the end of hostilities, humanitarian action should conform to the same principles. But when action is no longer sufficiently guided by urgent immediate needs, it seems far more difficult to determine the beneficiaries and the duration and scale of humanitarian operations. The ICRC has given thought to this sensitive issue and has tried to find appropriate answers: in her article on the work of the ICRC in periods of transition, Marion Harroff-Tavel outlines the reasons for the policy and criteria for action it has adopted to address such situations to the best of its ability.*

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*In international law, however, the notion of “victim” is normally defined more restrictively, for it applies only to those persons who have been harmed by the consequences of an internationally illegal act. It should be noted in this regard that international humanitarian law provides for reparation only for violations of its norms. This acceptance of the term, compared to that of the humanitarian organizations, narrows down the range of victims considerably, since it means that a person killed in accordance with the principle of proportionality (the oft-cited collateral damage) would not be a “victim”, whereas a neighbour 100 metres away who is hit in an indiscriminate attack would be, and could therefore claim reparation. Yet even within this narrower circle of victims, the large majority never obtain the reparation to which they would be entitled.*

*Liesbeth Zegveld’s article examines the right to reparation of victims of violations of international humanitarian law and analyses the means of legal recourse at their disposal, as well as the — limited — extent to which they can enforce this right. Emanuela-Chiara Gillard’s contribution on the same subject concludes that without specific mechanisms, victims are unable to enforce their rights and do not obtain any reparation. The emergence of such mechanisms — for example, the Claims Commission established after the armed conflict between Eritrea and Ethiopia — serves as a precedent, even though they remain few in number and are circumscribed in terms of principles. Indeed, their implementation is sometimes no easy task. In the foregoing example it is hard to see, for instance, how the far too many victims of violations of international humanitarian law committed during that conflict between two impoverished countries could one day receive*

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*indemnification, or how, in the actual circumstances, non-indemnification of other victims in the wider sense could be justified.*

*The article by Fred Wooldridge and Olufemi Elias describes the importance of humanitarian considerations within mechanisms such as the United Nations Compensation Commission, established by the UN Security Council to process claims for compensation filed by victims of Iraq's unlawful invasion and occupation of Kuwait in 1990. It is interesting to note that the Commission has dealt first of all with claims from conflict victims who correspond to protected persons within the meaning of the Geneva Conventions – the wounded, prisoners of war and internees – thus reverting to a much broader notion of victim than is normally applicable in reparation cases. But this Commission may not be repeated: the Security Council's application of international law as contained in the Charter, when determining a possible violation, is essentially political and often one-sided. Recent examples show, moreover, that the compensation to which victims are entitled varies tremendously from one State to another.*

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*In criminal law, any natural person against whom a violation within a court's jurisdiction has allegedly been committed is a victim and can assert his or her right to prosecution of the perpetrators. The system of universal jurisdiction seems to acknowledge the rights of this kind of victims. However, despite the creation of international courts and tribunals, universal criminal prosecution of war criminals has remained the exception. Furthermore, amnesties for war crimes or other international crimes are a political reality. In her article Yasmin Naqvi examines the question whether these amnesties can or must be recognized by courts, and if so, to what extent. Once again, it would appear that penal repression of war crimes is first and foremost an instrument of the international system, before being a means of enforcing the right of victims to see justice done.*

The Review

## Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent

MARION HARROFF-TAVEL\*

*But what can war,  
but endless war still breed?*  
John Milton, 1648

When a country emerges from a war or civil war, its people are usually overjoyed, celebrating what they believe to be the end of a nightmare. As the guns fall silent, they come out of the shelters they may have been living in for months, they inquire about the fate of relatives and neighbours, they can have access to any health facilities that are still standing. Life returns more or less to normal, the streetlights go on at night if electrical power is restored, sidewalk cafés may reappear, young and old timidly start to hope again. The delegates of the International Committee of the Red Cross (ICRC), for their part, will always remember this time, which is superimposed on scenes of horror everyone would much rather forget but often cannot.

But what about the orphans? What about the detainees still being held in what are often dismal prisons, the mothers of missing persons who leave no stone unturned in their efforts to obtain news of their sons and daughters, the members of separated families who scour the lists of names posted in camps for the displaced, the sick people who do not know where to obtain the medicines they need to survive, the amputees who cannot cope with their mutilated bodies, the women who have been raped and subsequently rejected by a society that feels dishonoured? For some people the physical suffering of hunger and thirst, cold and pain is compounded by tormented memories, images of violence that will not go away, humiliation, shame and,

\* Marion Harroff-Tavel is the ICRC Deputy Director for International Law and Cooperation within the Movement. The original of this article is in French.

often, a deep feeling of guilt about what happened or could not be prevented. They view the future with fear — fear of vengeance, fear of violence at the hands of the gangs of thugs who loot weapons depots and of the terrorist acts perpetrated by combatants who cannot resign themselves to defeat. They worry that they will not have the strength to rebuild their lives and to provide for their families. For these people, the term “post-conflict” does not mean the same thing as it does to the international community and can sound pretentious. For them, the feeling of jubilation is short-lived — if it was ever there at all. They have yet to turn the page. This is one of the reasons the ICRC has chosen to use the word “transition” to qualify the period following the cessation of hostilities.

A transition period should be understood to mean a period of indeterminate duration which constitutes the prolongation of an armed conflict or situation of internal strife, in which armed confrontation has ended or at least entered a period of remission. Skirmishes may still take place, but a process of stabilization, at times temporary, has been set in motion. The risks associated with the fighting diminish as active hostilities end, although the security situation may deteriorate for other reasons, such as an attempt to sabotage the peace process. A political system is put in place; government institutions are set up and budgets established. The tension eases as communications are restored and the first displaced persons and released prisoners return home. Peace-keeping forces may be deployed. Each situation is, of course, different, but humanitarian organizations are prompted to consider the possibility of modifying their approach and development agencies of establishing themselves.

The beginning of a transition period is usually marked by a ceasefire or peace agreement. During this period, fragile stability takes hold; it may lead either to a lasting peace or to a resurgence of hostilities.<sup>1</sup> It is therefore difficult to state with certainty when a period of transition comes to an end. Each context is different.

<sup>1</sup> According to the World Bank, there is a very high risk that the fighting will flare anew in countries which have recently experienced a civil war. In the period immediately following the end of the hostilities, there is a 40% chance of the conflict resuming. Source: <<http://www.worldbank.org>>, in particular a press release entitled “Economic Causes of Civil Conflict and their implication for policy”, Washington, 15 June 2000, No. 2000/419. In the past, the term “peace treaty” was used to designate a political agreement aimed at re-establishing peaceful relations between the belligerents by settling the point of dispute that had prompted the hostilities. Since 1945, however, and in particular since the end of the Cold War, the term has often been used to designate agreements whose principal aim is to obtain a suspension of the hostilities but that do not resolve the dispute.

The aim of this article is to present a general overview of ICRC operations during periods of transition, as determined by the guidelines that were recently adopted by the ICRC Assembly.<sup>2</sup> In some delegations those guidelines are at present more a strategic direction than a reality, while in others they reflect longstanding practice. The ICRC intends gradually to apply the guidelines to all its activities in periods of transition, while continuing to draw on the conceptual lessons learned from experience.

This article starts by reviewing a number of preconceived ideas about periods of transition, about the connections between emergency, rehabilitation and development activities and about the notion of victim. The second section discusses the ultimate goal of the ICRC's work during periods of transition, which is to ensure respect for the victims' dignity. The third section considers the needs of the victims and how the ICRC meets them. The last section outlines the ICRC's relations with the other players. This approach has the advantage that it takes as its starting point the human reality of the victims' suffering and aspirations, which ICRC delegates witness firsthand. It is dictated by the ICRC's concern to put the victims at the centre not only of its action but also of its thinking.

### **A second look at certain preconceived ideas**

In order to position the ICRC's work in the context, we must first take a second look at a number of preconceived ideas about transition. Outside observers generally assume that security conditions and the economic situation should improve during the transition period for all those concerned. They expect development work to take over where humanitarian aid has left off. They tend to perceive the people of the countries emerging from war as assisted "victims". This point of view is not entirely accurate.

### **An often painful transition**

The cessation of hostilities does not lead to the immediate and direct renewal of economic independence, as some people hope, for three main reasons.

<sup>2</sup> The author, who takes responsibility for the content of this article, has taken certain liberties in considering the ICRC's guidelines, which focus on assistance, from a broader perspective that includes all facets of the ICRC's work in periods of transition (doctrine adopted by the ICRC's supreme governing body, the Assembly, on 12 December 2002 – A 136rev. of 8 April 2003). Her thanks go to the many colleagues at the ICRC, both at headquarters and in the field (notably in Bosnia-Herzegovina, Serbia-Montenegro / Kosovo, the former Yugoslav Republic of Macedonia, Mexico and Guatemala), who provided input for her reflections on transition.

First, most armed conflicts take place in developing countries that, even before the fighting broke out, faced an uphill struggle. The OECD's Development Assistance Committee lists the key challenges to sustainable development in developing countries as follows: extreme poverty associated with family breakdown and crime, political instability, environmental deterioration, population growth, HIV-AIDS and malaria, and marginalization.<sup>3</sup>

Next, the cessation of hostilities is often brought about by economic collapse. The country's infrastructure has been destroyed, its manufacturing sector lies in ruins, farmland has been laid to waste, food stores pillaged. There are simply no means of continuing the fighting. The warlords no longer have the resources they need to maintain their troops and sustain the networks that back them in order to benefit from their largesse. Reconstruction in such circumstances poses a daunting challenge.

Lastly, even if the guns have fallen silent, private investment is slow to arrive, given the uncertainty of the future. The process of economic reform needs time to improve the situation or, worse yet, initially has a negative effect — privatization, for example, can result in people losing their jobs. The conditions are not met for development agencies to step in, while at the same time humanitarian aid falls off because the donors are afraid the beneficiaries will become dependent and because their attention has turned to other parts of the world, to the "hot spots" that absorb most of their resources but which allow them to fund more visible assistance work than the complex capacity-building and economic assistance programmes they underwrite during periods of transition.

When humanitarian aid comes to an end in contexts such as these, the situation of the most vulnerable can deteriorate sharply if the authorities have not put in place some form of social net.

### Humanitarian aid based on strategies for sustainable development

Emergency, rehabilitation and development aid do not follow on one other.<sup>4</sup> One phase starts before the other is over. It may be necessary simultaneously

<sup>3</sup> *DAC Guidelines: Strategies for Sustainable Development*; Paris, OECD, 2001, Box 1, p. 20.

<sup>4</sup> The question of the relationship between emergency aid, rehabilitation and development work is discussed in numerous articles and books, such as: DAC Policy Statement: Conflict, Peace and Development Cooperation on the Threshold of the 21<sup>st</sup> Century, OECD, Paris; Claire Pirotte, Bernard Husson and François Grünewald (eds), *Responding to emergencies and fostering development – The dilemmas of humanitarian aid*, Zed Books Ltd, London, 1999.

to distribute emergency relief supplies to displaced persons and to conduct a primary health care programme. What is more, one programme can have several facets. A blood transfusion programme, for example, can meet an urgent need for blood to operate on the wounded, comprise the rehabilitation of a building destroyed during the conflict and help build the capacities of medical personnel via targeted training. Lastly, rehabilitation is not of necessity a stepping stone between emergency aid and development, because in some cases it is better to start from scratch than to refurbish what never worked anyway, such as a poorly conceived water-supply system.

The concept of a linear and sequential continuum consisting of emergency aid — rehabilitation — development is open to question for a number of reasons. First, the chaotic nature of today's conflicts precludes reasoning on the basis of continuity, as though successive phases followed on each other. Next, the duration of conflicts poses a special challenge: for how many years can a situation be qualified as an "emergency"? Lastly, the fact that conflicts take place in what can be limited areas makes it possible to apply different strategies to different regions within the same country.

This awareness of the relationship between emergency aid and development is a source of preoccupation to some development agents, which fear that the humanitarian organizations are ill-prepared from the human, technical and organizational points of view to participate in programmes that do not, strictly speaking, constitute emergency aid. Their fears are not entirely misplaced. (For example, local capacity-building — an approach that is characteristic of development work — is a complex field in which mistakes are easily committed and can lead to a fresh outbreak of violence. The byword must be caution.) They nevertheless stem essentially from a misunderstanding: no humanitarian organization has the mandate, the capacity or the desire to draw up national sustainable development plans comprising economic, environmental and social objectives. The scope and complexity of doing so are far beyond the resources of humanitarian organizations, which have other responsibilities.

The point, rather, is simply to do away with the artificial barriers (that are in any case no longer very clear "on the ground") between emergency aid, rehabilitation and development and to prompt the players involved, which should no longer be considered to form absolutely separate groups, to create synergies amongst themselves and to play on their complementarity. The ICRC, for example, would like to incorporate certain development strategies into its operational reasoning. As one ICRC delegate wrote, "when

the ICRC vaccinates over 100,000 head of cattle in northern Mali, it's doing emergency and rehabilitation work, but when it vaccinates the same number of cattle while at the same time training future veterinarians to be able, with the State, to render account of the health, growth and resulting prospects for Mali's livestock sector, it is participating in a development process".<sup>5</sup> By the same token, the strategic plans of development agencies can be shaped not only to reduce poverty and ensure respect for biodiversity but also to find an appropriate response to the marginalization and vulnerability of conflict victims.

"Victims" are also survivors and even agents of change

The use of the word "victim", for lack of a better term, must not obscure the fact that during periods of transition the people who were affected by the armed conflict or internal strife have many other identities. They may, for instance, be members of a local association or religious community that comes to the aid of the destitute. Many of them have resources and capacities. They should not be perceived as mere victims. Indeed, they may reject that position in spite of their dire circumstances and not, for example, register as displaced persons, thus depriving themselves of the aid provided to that category of people. Some of them develop their own ways of improving their plight, having come up with survival mechanisms during the combat phase. Sometimes called "survivors", these people are also agents of change.<sup>6</sup>

This is especially true of women, who often did not take part in the fighting and whose experience of the war is therefore different from that of the men.<sup>7</sup> They are the driving force behind the improved psychological health of those around them. By recreating identity-based groups (women's associations, local non-governmental organizations) and thereby meeting the need every individual feels to belong, by giving the members of their families the feeling they have a home, by showing concern for the plight of others, in particular children, they demonstrate that it is possible to manage suffering and to look to the future. Hence the importance of sparing them

5 Internal source: private message quoted in GEN/CELL 00/45 bis, 17 July 2000, pp. 21-22.

6 The notion of victim is accurately described in one chapter of *Reconciliation After Violent Conflict, a Handbook*, Handbook Series, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, pp. 54-66 (preface by Desmond Tutu).

7 The ways in which women mobilize for peace and how armed conflict changes their role in society are described in Charlotte Lindsey's book, *Women facing war*, ICRC study on the impact of armed conflict on women, ICRC, Geneva, October 2001, pp. 27-32.

the social exclusion, stigmatization or discrimination of which they are all too often the victims, either because of the changed role the war forced them to take on or because of the sexual assaults they suffered.

During periods of transition, the ICRC's delegates focus on the "victims" suffering the direct effects of armed violence, including those whose situation is most urgent because of their vulnerability or the hostile nature of the environment in which they live.<sup>8</sup> At the same time, they may also lend a hand to people affected by the armed conflict who have maintained a capacity to "rebound" that others have lost, helping them move forward on the road to independence for themselves and their families, for example by providing them with training or helping them acquire the material they need to get back to work. They do not, however, do this to the detriment of people who must be protected (such as prisoners) or of the most vulnerable (often the elderly, the handicapped, the sick, displaced persons who have no means of subsistence). Finally, the ICRC may seek to use and even strengthen the capacity of the most dynamic members of a society (such as a community of doctors or nurses), so that they in turn can help its more vulnerable members.

### **What the ICRC wants for the victims: respect for their dignity**

Before describing the needs of the victims and how the ICRC meets them, we must answer a fundamental question: what is the ultimate goal of the ICRC during periods of transition and what does it consider its role to be?

Even though it is perfectly aware that this is a collective objective for which it is only partly responsible, the ICRC wants the victims of armed conflicts to feel that their dignity is respected. The essence of dignity is a universal notion that is rooted in cultures, religions, value systems, ideologies and education. Its content varies from one context to another. Everywhere in the world, however, certain attitudes are basic to meaningful dignity: respect for life and for every person's physical and spiritual integrity; protection against arbitrary acts, abuse of power and discrimination; recognition of others as people able to find solutions; support for people who have

<sup>8</sup> These people may be at the mercy of an authority they have opposed or that sees them as enemies or as a threat because of their nationality, ethnic group, religion, clan affiliation or other alliance; as a result they may be exposed to abuse of power or discrimination. Often, the same risks arise for their families and for the local humanitarian practitioners who come to their aid. They may also be people who are exposed to acts of vengeance perpetrated by the population and aimed at them or at the community to which they belong, and who do not benefit from the minimum protection they should be afforded by the forces of law and order.

been so humiliated that they have lost their self-esteem and no longer trust in their own capacities. The ICRC's ultimate goal is to help people or communities affected by armed violence to live in conditions that they consider respectful of their dignity. To that end, their fundamental rights must be respected, the needs they deem essential, in their cultural context, to a dignified life must be met, and they must play an active part in the implementation of lasting solutions to their humanitarian problems as identified by them.

Meeting that goal usually requires three kinds of action, which tend to be conducted simultaneously and as complements to each other, and whose respective weight depends on the situation. Let us consider a first case: the ICRC provides a direct, curative response to suffering that can only be eased by outside assistance — for example, it provides food or cares for the wounded and takes urgent steps to bring a halt to the abusive behaviour observed. This is the type of approach that prevails during the phase of active hostilities. In a second case, the ICRC endeavours to help individuals regain the dignity they have been robbed of and enjoy decent living conditions by identifying longer-term remedies with them: it engages thereby in activities of rehabilitation, reconstruction and restitution. This approach is particularly appropriate during periods of transition. In a third case, the ICRC acts on the environment so that individual rights are respected further down the road: it ensures the development of humanitarian law or promotes an equitable system of justice so that violations of the law are punished. This is one of the ICRC's constant responsibilities.

During transition periods, the ICRC therefore sees its role more as that of facilitator than of protagonist, even if it has no choice in some emergency situations but to play the part of the latter. Its aim is to share its humanitarian concerns with the local authorities, if they are legitimate in the eyes of population, so that they can assume their responsibilities. It wants the communities to be a part of the technical, administrative and financial management of the programmes launched during the phase of active hostilities and once that phase has ended, wants those communities to feel they have a stake in any new activity launched in their favour. No longer does the ICRC present them with ready-made projects that are then handed over. From the outset, the communities are agents of the project.

The process by which local communities are empowered to take responsibility for humanitarian action is not always smooth sailing. Not all communities have the same capacity to take their fate into their own hands. That capacity depends on many, in particular psychological, factors, for the

trauma suffered can affect the community's ability and desire to take action. In addition, the local authorities will not always make up their minds to waive outside assistance at a time when they face challenges on all sides. Lastly, humanitarian practitioners sometimes find it hard to give up projects they are running independently, for any number of reasons: time constraints, the desire for total control over all aspects of each project and the lack of competent human resources to accompany the process by which local communities are empowered. These obstacles must nevertheless be overcome, and sometimes practical steps have to be taken to that end: for example, during the phase of active hostilities the head of delegation can already designate someone to be in charge of identifying local partners as early as possible.

The approach adopted by the ICRC is meant to be respectful of local communities; it makes it easier for the ICRC to leave, because in the long run its presence will no longer be required, and it is likely to have a lasting impact.

### **The ICRC's response to the main needs**

In general terms, the ICRC — here as in every operation it conducts — must carry out a comprehensive analysis of the problems facing the countries concerned and the needs of the population as a whole. This enables it to harmonize its independent humanitarian action with the response of the States and organizations concerned to the challenges of all kinds that can pose an obstacle to the restoration of peace. In schematic terms, the needs of society can be grouped into four generic categories: security needs, the need for economic and social well-being, the need for justice and the need for good governance.<sup>9</sup> Each of these needs changes with time. By assessing those needs globally it is possible to determine where the international community's response has been inadequate.

Some of these needs do not necessarily come within the purview of the humanitarian community, but it is nevertheless essential for the well-being of the victims of armed conflicts that they be met. Two examples are the restoration of law and order and the desire for good governance. The immediate priority may not always be to distribute food or rebuild homes that have

<sup>9</sup> The conditions in which countries emerge from conflict and the range of tasks that must be performed in a reconstruction process vary from case to case, but the typology of needs before return to normalization is basically the same.

been destroyed, but rather to maintain law and order and set up institutions able to re-establish communications within the country, to open schools, to pay the salaries of civil servants and the pensions of the elderly. It is also important to put in place a government that can legitimately represent the aspirations of all the country's people at the international level.

The following lines focus on the needs usually observed by the ICRC on an empirical basis and to which it can provide, if not the entire answer, then at least the start of an answer that others will complete. We shall consider by turns the need for security and protection, material needs, the need for justice and the need for recognition. These needs are the flip side of rights that must be defended as such and that the former warring parties have an obligation to uphold. There is therefore no contradiction between an approach based on the victims' needs and a rights-based approach.

The need for security in the face of the threat posed by former combatants, crime and weapons

The survivors have an enormous craving for security.<sup>10</sup> The constraints they accepted to survive the armed conflict — hiding in their homes, barricading themselves against looters, abandoning their mine-infested fields — become unbearable when hope is reborn. To meet the need for security, care must be taken that the former enemies do not resort to force again and that they do not fall prey to criminal networks. Once demobilized, former combatants want to go home and return to a normal life. This is particularly important for child soldiers. Public order must be guaranteed by a police force trained for that purpose and that is respectful of human rights. There must be some form of democratic control over the police force and over the armed forces and the intelligence services. People and communities that are at risk are entitled to special protection. The final but hardly least daunting challenge is to clear the land of unexploded ordnance.

In this respect, the ICRC's role, while modest in comparison to that of other players, is nevertheless worth a closer look. It is essentially but not

<sup>10</sup> Security is analysed here in the narrow sense of the word and not from the point of view of human security, which is a broader concept encompassing protection against disease, hunger, environmental problems, human rights violations, etc. For an analysis of human security in periods of transition, see Jennifer Leaning and Sam Arie, "Human Security: A Framework for Assessment in Conflict and Transition", *Working Paper Series*, Volume 11, Number 8, Harvard Center for Population and Development Studies, Harvard School of Public Health, September 2001.

exclusively preventive. In terms of weapons, for example, the ICRC prompts the States and civil society to take measures to control the trade in small arms,<sup>11</sup> to implement the Ottawa treaty on anti-personnel landmines<sup>12</sup> and to take legal steps to limit the use and effects of the explosive remnants of war.<sup>13</sup> It emphasizes the dissemination of humanitarian (and human rights) law to the police force, which is in charge of ensuring the safety of the people whose plight is of concern to it.<sup>14</sup> In addition, it can make it easier for former combatants to return to their villages by carrying out relief or medical activities in their favour on the road home. In such cases, it of course pays special attention to child soldiers.

The need for protection from abuse of power at the hands  
of the authorities and from persecution by a hostile population

The corollary to the need for security is the right to protection conferred by international humanitarian law on certain categories of people for a long time after the end of active hostilities and, in certain cases, military operations:<sup>15</sup> detainees, missing or displaced persons, the sick and wounded, foreigners on the territory of a party to the conflict without diplomatic protection from their State of origin, children evacuated during the conflict to third countries, the population of occupied territories, people in mine-infested areas, the victims of blockades and, in a way, the dead — because people are entitled to respect even in death. When the active hostilities cease, some people are exposed to abuse of power, to persecution, discrimination, marginalization, or forgotten. The State structures that are supposed to

<sup>11</sup> *Arms availability and the situation of civilians in armed conflicts: a study by the ICRC*, commissioned by the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent (Geneva, 1995), Geneva, June 1999.

<sup>12</sup> *Landmines must be stopped: overview 1999*, 2<sup>nd</sup> ed. ICRC, Geneva, November 1999.

<sup>13</sup> *Report of the International Committee of the Red Cross to the Preparatory Committee for the 2001 Review Conference of the United Nations Convention on Certain Conventional Weapons*, 14 December 2000, First Preparatory Committee for the Second Review Conference of the States Parties to the Convention on Certain Conventional Weapons (on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects), CCW/CONF.II/PC.1/WP.1, 11 December 2000.

<sup>14</sup> The ICRC has published a book that serves as the basis for instruction in this respect: Cees De Rover, *To serve and to protect, Human rights and humanitarian law for police and security forces*, ICRC, Geneva, 1998.

<sup>15</sup> The legal considerations set forth in this section are largely based on the work of Anne Ryniker, Deputy Head of the Legal Division, whom we thank for her contribution to this article. Internal source A 1236rev. of 8 April 2003.

uphold their rights are often non-existent, do not function or operate inadequately. As a result, groups of people who belong to the opposition or who are identified with it may find themselves in a very precarious situation, with no one to stand up for their rights. The same holds true when the regime changes for the people who were close to the former authorities.

There is a widespread but mistaken belief that humanitarian law ceases to apply when active hostilities are interrupted. The fact is that States remain subject not only to numerous obligations that continue in the wake of the conflict but also to new ones which take effect at that point. In international conflicts, it is the end of military operations or the end of the occupation that marks the end of the applicability of humanitarian law, save — in either case — for the categories of persons whose final release, repatriation or settlement takes place subsequently. In internal conflicts, there is no provision regarding the end of the applicability of humanitarian law. Nevertheless, it would be difficult to concede that the humanitarian law which protects certain categories of persons during active hostilities ceases to protect them when the fighting stops, despite the fact that their need for protection has not necessarily disappeared.

If the period of transition is in fact the prolongation of an armed conflict or constitutes the direct results of an armed conflict, the ICRC carries out the tasks assigned to it under humanitarian law.<sup>16</sup> It also ensures compliance with the law by making representations to the parties concerned. Its traditional areas of activity include:

- the protection of civilians from the effects of any hostilities that may still take place or from acts of violence committed by the former enemy; this is a difficult task, one that in some contexts is too dangerous for the ICRC to perform but that nevertheless lies at the heart of the organization's mandate;
- visits to persons deprived of their liberty (prisoners of war, civilian internees, security detainees);<sup>17</sup> such visits can continue for years after the

<sup>16</sup> The protection afforded to people by the law is the topic of a book that highlights the development of ICRC practice, how changes in that practice shaped humanitarian law and the way in which the law serves as a foundation for humanitarian action: François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan/ICRC, Oxford/Geneva, 2003.

<sup>17</sup> After the end of the Second World War, about 5,000 visits were carried out to German and Japanese prisoners of war captured in the course of the conflict; at present, visits are being carried out to prisoners being held in respect of the longstanding conflict in the Western Sahara.

end of active hostilities; they serve, just before a repatriation, to ascertain, in the course of individual interviews, that the prisoners are willing to go home;

- the release and repatriation of captives.<sup>18</sup> Indeed, in an international armed conflict the prisoners of war and civilian internees must be repatriated without delay at the end of active hostilities.<sup>19</sup> In internal conflicts, when the fighting ends, Protocol II requires the authorities in power to endeavour to grant the broadest possible amnesty to those who participated in the armed conflict or who were deprived of their liberty for reasons relating to the armed conflict,<sup>20</sup> and the said amnesty to be limited to those who took up arms and not extended to war crimes committed during the conflict;
- lastly, assistance for the return of internally displaced persons and, unless the United Nations High Commissioner for Refugees or the parties to the conflict themselves take charge of this activity, the repatriation of refugees.

These are but a few examples. The ICRC must help the erstwhile adversaries to fulfil their obligations, of which they have many. They must search for and collect the sick and wounded, protect them from pillage and ill-treatment and provide them with the care they need. They have to facilitate the tracing efforts made by the members of separated families so that they can renew contact with each other and if possible reunite. Another equally important obligation is that of clarifying the fate of people whose disappearance has been notified by the adverse party. Lists must be exchanged of the location and designation of graves and information given on the people buried in them. The list goes on, but we shall stop here. These examples are meant to illustrate that the need for protection remains high in periods of transition, and the ICRC is responsible for ensuring compliance with the

<sup>18</sup> One particularly large-scale programme involved the repatriation of 247,000 soldiers demobilized in Ethiopia in 1991, when the government was overthrown.

<sup>19</sup> Article 118, Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention), and Article 133(1), Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention). Furthermore, prisoners of war and civilian internees who are the object of criminal proceedings or have been sentenced to imprisonment may be detained until the proceedings have been completed or the sentenced served, as the case may be, but they continue to benefit from the protection of the Geneva Conventions and are entitled to visits from the ICRC.

<sup>20</sup> Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

rules conferring that protection. It is therefore obvious that the ICRC must be present in the countries emerging from war, if only to discharge that task.

#### Material needs (water, food, housing, health)

During periods of transition, the efforts of communities and individuals to meet their essential needs are hamstrung by their own physical and psychological vulnerability or the temporary vulnerability arising from the environment in which they live. What is more, they may not receive the assistance they require to meet those needs, because the authorities lack the means or willingness to provide it, or because national and international humanitarian practitioners have forgotten them, have lost interest in them or lack the resources to come to their aid. Their dramatic plight is often played out against a backdrop of endemic poverty, disease, weather-related disasters and poor governance. Such situations are widespread, and the lines below focus on how the ICRC responds to material needs during periods of transition and on the lessons it has learned from its experience.

No matter how anxious the ICRC is to withdraw from assistance programmes it cannot maintain indefinitely, it considers that it has a *residual responsibility* vis-à-vis the persons it has assisted during the conflict, particularly those who may be endangered were it to cease its work (for example, tuberculosis patients for whom an interruption in treatment would be more harmful than an absence of treatment) or those the ICRC knew would need a long-term commitment when it began its activities (such as the disabled it has fitted with artificial limbs that have to be maintained or replaced).

The ICRC may also decide to launch *new activities* during a transition period, especially if their aim is to prevent or satisfy urgent needs among those affected by armed violence.<sup>21</sup> There might, for example, be pockets of people to which it did not have access during the clashes, or detainees it was unable to visit. In the case of needs that are not urgent, the ICRC decides to launch new activities on a case-by-case basis and only after having analysed a series of criteria, the most important of which is probably that the ICRC truly has something to contribute by its presence and action. That “extra” that the ICRC can provide and others cannot usually stems from its knowledge of the context, in which it was often the only active protagonist during the phase of active hostilities, from its contacts with those who hold power, from its understanding of the victims’ needs, from its operational set-up, and

<sup>21</sup> These people must correspond to the descriptions given in footnote 8 above.

from the acceptability it has earned thanks to the independence, neutrality and impartiality underpinning its activities. If the conditions for launching new activities are met, and in particular if the necessary skills are available, the ICRC must still see a specific interest in doing so. That would be the case, for example, if the ICRC thought that by responding to material needs it could further its efforts to protect certain categories of people who are in danger, or it could maintain what has been achieved by past programmes, or help ease the prevailing tension.

The ICRC has been working in periods of transition for decades,<sup>22</sup> and its experience of such situations has taught it a number of things.

- The importance of thinking about the long term during the emergency phase and of having a well-thought-out entry strategy.

The first lesson is that in order gradually to scale back activities during the transition period, it is vital to start thinking about the period that will follow during the acute phase of an armed conflict. In other words, if the entry strategies are well thought out, it will be very much easier to devise exit strategies. What exactly does this mean?

- During the phase of active hostilities, delegates must itemize existing systems, structures and processes and ensure that nothing is destroyed which would be very difficult to reconstruct later (e.g. a system for the supply of medicines based on the recovery of costs, which would be jeopardized by untimely distributions of goods available locally). To this end, the delegates must seek to identify shared plants, means of production and the distribution channels which exist or existed before the fighting broke out.
- In order to prepare the medium or long term in the emergency phase, potential partners, preferably locals, must be identified and involved in the operation as soon as possible. This often means involving the National Red Cross or Red Crescent Society.
- The activities launched during the crisis must take sufficient account of the local situation, particularly from the point of view of operating costs, so that local people are able to continue them during the transition period (for example, they must: employ local staff who will continue

<sup>22</sup> Some examples are: the Indochina Operational Group headed by the ICRC in Vietnam, Laos and Cambodia after the conclusion of the 1973 Paris Agreement; the massive distributions of relief supplies in Cambodia after the overthrow of the Khmer Rouge regime in 1979; more recently, various programmes in the southern Caucasus, the Balkans and East Timor.

working after the crisis is over; ensure, as far as possible, that the pay offered does not exceed local levels; construct medical facilities to a standard appropriate to the local context; employ technologies which make use of components available on the local market; refuse to become involved in prestige projects).

- In order not to have to continuously raise the level of the objective to be met in terms of water, hygiene, habitat and agriculture — expectations will rise as progress is made — the coordinators in charge of each area of activity must determine the upper threshold from the outset, with the participation of the project beneficiaries. That threshold must take account of cultural considerations, for the essentials of a life with dignity depend on the context. It must also be based on the minimum living standards expected for the population as a whole at the end of the crisis, bearing in mind that those standards are generally much lower than those prevailing beforehand.
- The ICRC must make it clear from the outset that any humanitarian action it undertakes will be for a limited duration, the end of which will depend on the type of strategy chosen. It must make this clear to the representatives of the people it assists and to the authorities. It may reach agreements with the latter, making them responsible for taking over ICRC projects, if necessary in successive stages, once the State structures are fully re-established.
- Lastly, setting in place mechanisms to preserve “institutional memory” helps ensure that new operations do not overlook past experience and repeat the errors of the past for want of information, and serves to keep track of the commitments made.

What does all this tell us about exit strategies? First, they are all too often conceived exclusively in terms of the hand-over of programmes to a partner, whereas the priority should be to have the communities assisted take charge of their problems or to prompt the authorities to act (the government could grant a specific status to displaced people, enabling them to benefit from social welfare, or award unoccupied land to refugees along with the means of exploiting it, for example by irrigation). Secondly, it is difficult to hand over programmes because few organizations want to take responsibility for a hospital or orthopaedic workshop they did not set up, and they are not always successful when they take such a responsibility. Lastly, the programme must be handed over at the right time: the eagerness to withdraw that is ingrained in the collective subconscious of all humanitarian practitioners is

not always a good prompt. True exit strategies are... good entry strategies, a method that allows the “beneficiaries” to be apprentices of their own autonomy, a long-term view in the emergency phase, accompanied by consideration of the means of ensuring the sustainability of certain programmes, the search for partners as early as possible and good public communication. It goes without saying that this implies a change of culture among humanitarian practitioners, including within the ICRC, and hence an effort at training and evaluation.

- Strengthening systems rather than providing direct assistance

The second lesson that the ICRC has learned is that it must pay particularly close attention to the strengthening of systems and processes. More often than not, the prison, health, agricultural and water-supply systems have been severely damaged if not destroyed during the crisis. It may be far more intelligent to bring in spare parts for a water pump, to help the Water Board restart a water-supply system or to set up a basic health care programme for displaced persons than to truck in water and medicines. What this activity is lacking in visibility it makes up for in effectiveness. It also has the advantage of having a lasting impact, and is a means of not creating a chronic dependency through distributions that are harmful from the psychological, economic and social points of view. In the same way, in places of detention it might be a good idea to go from meeting the needs of certain categories of prisoners (prisoners of war, civilian internees, security detainees) to a structural approach benefiting all detainees, including those in whom the ICRC is more especially interested.

This being said, it is of course up to the authorities of the country concerned to make policy decisions on the choice of system. It is not for the ICRC to choose between rehabilitating referral hospitals and setting up a system of decentralized dispensaries. It can give the medical community or the Ministry of Health analytical information based on its experience, but it is for the authorities to decide whether a cost recovery system makes sense in a cultural context accustomed to free care. In some cases the ICRC has also acted to ensure that a national health policy drawn up in the capital is applied in areas once controlled by the opposition or in which the authorities are not welcome.

The strengthening of infrastructure does not in principle replace all direct assistance, for there are always some victims who will need such help, if only because they cannot wait for work on systems to have an effect. It

must also be borne in mind that the strengthening of infrastructure is not a disembodied activity. It benefits individuals. It also has the advantage of favouring those in need without creating imbalances that could give rise to tension in a population whose fractures have not necessarily healed. For instance, a system to heighten awareness of landmines will be of benefit to all the people living in a mine-infested region.

- A participative approach

There is a third lesson that the ICRC endeavours to put into practice more systematically during periods of transition: to make the people affected by armed violence take part in the decisions concerning them. At the height of the fighting, humanitarian practitioners as a rule act quickly, using their distribution channels to bring in relief supplies; they do not always have time to include very many people in their decisions. Effectiveness and speed outweigh all other considerations. This approach, adopted in the face of extraordinary circumstances, is justified only by the seriousness of the situation owing to the fighting. During periods of transition, an entirely different approach must be adopted. The type of participation chosen depends on the purpose of the operation and the results it is expected to produce. The humanitarian practitioners can consult the community concerned, involve it in the decision-making process, or work alongside it, as the case may be. They may even stay in the background and allow the community to design, implement and evaluate the project, so long as it — the project — is in keeping with their mandate, principles and resources. The earlier they do this, the better.

This approach is not entirely risk-free. Caution must be exercised on three points: not to foster tension in the society, given that the groups chosen to take part in a project represent a particular clan, political group, religious community; not to give too much responsibility too soon to a community that is not ready to shoulder it; to ensure that the groups of people participating in the project do not favour those whose identity they share and that they respect the principle of impartiality in full. In short, the way forward is clear, but all concerned must proceed prudently.

In establishing a participatory approach, the ICRC must take care to ensure that, in periods of transition as well as in the acute phase of conflict, women take part in defining the objectives of humanitarian projects and programmes and in the choice of strategies. Where the local culture is a stumbling block, it must consult at local level with a representative sample of

women to determine with them how best to involve them in a way that does not place them at risk.

- Building local capacities

The fourth and final lesson, which is related to the previous one, is that it is crucial to build local capacities.<sup>23</sup> In Afghanistan, for example, the handicapped receive training and a micro credit, enabling them to start a small business. They are granted modest interest-free loans that they have to pay back. A committee of specialists, all of them handicapped as well, examine the viability of the projects submitted and follow up on their implementation.<sup>24</sup> In Serbia, displaced women are taught to make clothes so that they can be hired by a textile manufacturer. They thus learn a trade and earn an income that will one day allow them to leave the collective centre, which is often overcrowded and where life is difficult. As they grow financially independent and enter into contact with other women working in the same workshop, some of them gradually overcome the loss of self-esteem that all too often goes hand-in-hand with the humiliation suffered during years of conflict. In the long run, the entire family benefits from the money they earn, including the most vulnerable.

As these examples illustrate, building capacities implies a transfer of knowledge and skills. But local capacity-building is not just a matter of know-how or financial support. For individuals to regain their self-confidence and themselves strive to improve their plight in the long term, moving from victimhood to protagonist in the process, requires a capacity to “rebound” they can only find in themselves but the emergence of which is also nurtured by the trust and respect they receive for their skills. Therein lies the complexity and scope of the undertaking.

The same approach must be adopted towards any community for which the ICRC wants to develop the capacity to resolve a humanitarian problem, whether among the authorities or civil society. It may be judicious in some cases to help the family or neighbours of the destitute, who are then cared for as the community itself undertakes to provide for their needs. Support networks are very effective in many cultural contexts — and this must not obscure the fact that access to humanitarian assistance sometimes reinforces

<sup>23</sup> Ian Smillie (ed.), *Patronage or Partnership, Local Capacity Building in Humanitarian Crises*, Humanitarianism and War Project, Kumarian Press, Bloomfield, 2001.

<sup>24</sup> “Afghanistan: Micro-credit programme for the disabled”, *News*, No. 03/44, ICRC, 29 April 2003.

the status of the most vulnerable within their communities and also enables them to receive, in exchange for the material goods they share, the support of the group to which they belong.

### The need for truth and justice

The need for truth, justice, revenge, forgiveness, the need to forget and receive reparations: every human being confronted with violence reacts differently. There are those who withdraw into painful silence, those who bear witness for the sake of future generations, those who try to avoid the past, and those who overcome tyranny and hatred via altruism. The list goes on, for the relationship between memory and suffering takes many forms. The same holds true for the society reacting to the horrors that have taken place: it may suffer from collective amnesia, establish commissions of inquiry, tribunals or educational programmes, erect monuments honouring the memory of the victims. There is no end to the attitudes shown and initiatives taken to establish the truth and treat the social suffering that is not just the sum of individual suffering but a distinct pain, often that of the group whose identity was affected. Reconciliation is the ultimate goal, but it is also admittedly a very ambitious objective, perhaps even too much to hope for, at the end of a period of armed violence, and co-existence is in many cases already a huge step forward.<sup>25</sup>

Truth and justice are basic requirements. First and foremost for individuals, to enable them not to dwell on the past and to contemplate the future. For society, as well. Until responsibility for the atrocities committed has been attributed to individuals, it remains, in people's minds, the collective responsibility of the clan, ethnic group, political party or religious community concerned, or of the people in the region, valley or village against whom they fought. The perpetrator of war crimes must have a name, or the crime will continue to be attributed to the group.

The way in which the truth is established and justice rendered varies from country to country and has changed considerably in the past few years, as evidenced by recent examples. South Africa set up a Truth and Reconciliation Commission to cope with its apartheid past. The United Nations Security Council has established two international tribunals to prosecute certain crimes committed during the conflict in the former Yugoslavia and the

<sup>25</sup> Martha Minow explores how human beings react to the atrocities they have suffered, witnessed or perpetrated in her book, *Between Vengeance and Forgiveness — Facing History after Genocide and Mass Violence*, Boston, Beacon Press, 1998.

genocide in Rwanda. A permanent International Criminal Court, established by the Rome Statute of 1998, should soon start prosecuting grave violations of humanitarian law. These measures certainly constitute progress, even though the wheels of justice turn slowly and the number of those prosecuted remains symbolic. They are evidence of the determination of States to ensure respect for international humanitarian law and contribute to the public stigmatization of extremely cruel behaviour such as wilful murder, torture and hostage-taking.

The ICRC's legal contribution to the process of justice is essentially made at the national level. Indeed, it is up to the States more than any other player to ensure that violations of humanitarian law are punished. It would be less important to have a system of international justice if national jurisdictions functioned and if appropriate criminal legislation had been adopted — not to mention the contexts of widespread chaos in which such jurisdictions do not even exist because the structure of the State has collapsed. The States must adopt the measures required to punish violations of humanitarian law; they must enact laws and internal rules to that effect. This task can be facilitated by constituting national committees for the implementation of humanitarian law to assess existing domestic legislation in the light of the obligations arising from international humanitarian law, to draw up recommendations (proposing in particular amendments to existing legislation and the adoption of the requisite rules) and to help spread knowledge of humanitarian law. The ICRC helps the States adopt appropriate measures and facilitates the exchange of information on each State's legal experience. It sometimes also helps provide instruction to judges and court personnel who wish to expand their knowledge of humanitarian law.

In short, the ICRC's contribution is essentially legal and technical in nature; its aim is to promote the conditions the national courts need to perform their tasks. The ICRC does not bear witness in court on what its delegates observe in the course of their humanitarian work, for its mission to protect the victims of armed conflict requires it to have a working relationship based on trust with all the protagonists of the violence, including those who could be brought before the courts. Indeed, the international community has recognized the special and at times unique character of the ICRC's humanitarian work and understands why the ICRC should not be called as a witness.<sup>26</sup>

<sup>26</sup> See Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court; Decision of 27 July 1999 in *Prosecutor v Simić et al*, Case No. IT-95-9, Trial Chamber of the International Tribunal for the former Yugoslavia.

### The need for recognition and sometimes for psychological support

Armed violence is a source of humiliation. When that humiliation is publicly dealt, it often becomes a feeling of shame that takes different forms depending on the cultural context. The feeling of having lost face, fear for one's mental health, attacks against one's identity, all constitute a threat to the integrity of the human being that some people feel more sharply than physical pain.<sup>27</sup> Individual resilience, the ability to absorb shocks and transform them into positive experiences, varies. What is apparent, however, is the need felt by the victims of armed violence to be well considered, to have a sense of self-esteem, to be recognized, be they prisoners who have been tortured, women who have been raped or other people traumatized by the events.

For the ICRC's delegates, responding to this need is above all a matter of attitude. This is why they put the emphasis on a participative approach and on capacity building, on the process of humanitarian action as much as on its outcome.

The question then arises of a more specific response to the victims' plight. Some of them sometimes need medical assistance. Humanitarian agencies for the most part go no further than treating physical ills and providing material support in the form of water, food and housing, because they lack the ability, skills and means of doing anything else, and because they believe that the response to trauma differs in each culture. They forget that health is not limited to physiological needs and that caring for or feeding the body is but the beginning of a process of restoring health and dignity.

It is time for humanitarian agencies to play an active part in heightening the international community's awareness of the fundamental problem posed by the psychological repercussions of armed violence. Preventing fresh outbreaks of violence is not merely a matter of setting up early-warning mechanisms, of deploying interpositional forces or of negotiating international agreements. If nothing is done to help individuals who have suffered horrendously traumatic events to overcome them and to regain their dignity and identity, many of them will find no outlet but hate, the violence inflicted on others serving to erase the humiliation suffered. The end of one conflict thereby risks sowing the poisoned seeds of the next.

<sup>27</sup> This phenomenon is described by James Gilligan, M.D., on the basis of his experience as Director of Mental Health for the Massachusetts prison system, in his book *Violence, reflections on a national epidemic*, Vintage Books, A Division of Random House Inc., New York, 1997.

While the ICRC does not plan to start providing individual therapy, it does seek remedies for the psychological suffering of certain categories of people whom it aids by mobilizing the resources available to other players, giving preference to the components of the International Red Cross and Red Crescent Movement. Help is provided, for example, to the families of the missing when they learn that a loved one has died. The discovery of a picture of the victim's clothing, in a photo album of the objects found on the bodies in a mass grave, is a painful moment. Red Cross and Red Crescent volunteers, trained for that task, are with the families at that tragic moment, which marks the beginning of a process of mourning. The ICRC may also provide support for National Society programmes to assist people traumatized by the violence.

One day, perhaps, on the strength of its experience, the ICRC will play a more active role in this field. For the time being, it willingly considers the matter and takes measured action. The next step may be to make the public more aware of the issue and to mobilize organizations that are in a better position to act.

Lastly, meeting the victims' need for recognition is also to ensure that their culture is respected. When statues have been destroyed, libraries burnt to the ground, museums looted, it is not the objects they held that are affected, but the identity of a people and the pride of the individuals it consists of. This is why the ICRC reminds the authorities concerned of the rules governing the protection of cultural property. It encourages them to adopt national measures for the implementation of those rules. When necessary, its delegations make representations to ensure compliance with the rules. This activity will probably become increasingly important as the psychological components of warfare become an integral part of strategy and cultural property is targeted. The process of globalization, which is leading to growing uniformity in thought and lifestyles and thereby prompting people to react by falling back on their identities and rejecting those who are different, lends urgency to the task. If humanity wants to preserve the entire wealth of its heritage and not tear itself apart on what is left of devastated religious sites or the ruins of the world's wonders that should have been preserved for future generations, the time has come to mobilize for that purpose.

### **Partnership**

In order to deal with the humanitarian problems that arise in periods of transition and gradually to withdraw, the ICRC wishes to work in partnership with others.

The National Red Cross and Red Crescent Societies and their International Federation are obviously its first partners of choice. A National Society naturally bears primary responsibility for its development, but it can, if it needs outside help to build its capacities, turn to the International Federation or its sister Societies and to the ICRC in respect of its fields of competence. Sometimes a society has to be founded or rebuilt with the help of active volunteers, as in the case of a territory, such as East Timor, that becomes an independent State. The establishment of a National Society can be a long process of unification, as demonstrated by the story of the Red Cross Society of Bosnia and Herzegovina following the Dayton Peace Agreements of 1995. Lastly, when a National Society has been too closely associated with the authorities, their fall from power is the starting point of a fresh beginning. Each case presents a different challenge to the International Federation, whose efforts the ICRC supports. For its part, the ICRC is gradually narrowing its assistance to the National Societies to four areas: legal support (in particular concerning their statutes), staff preparedness for situations of conflict (should the hostilities be renewed), the dissemination of international humanitarian law and of the Movement's Fundamental Principles, and training in tracing work aimed at renewing contact between and reuniting the members of families separated by war. With the support, not only of the International Federation and the ICRC but also of other, sometimes more powerful National Societies acting in a spirit of fellowship, there is room to hope that the National Society in a country in transition will rapidly acquire the ability to take charge of certain pre-existing ICRC programmes and to develop its own.

The ICRC has another responsibility in periods of transition, and that is to continue acting as the lead agency for the Movement's international relief operations. Under the Movement's Statutes, the ICRC's role is to protect and assist the military and civilian victims of armed conflicts and internal strife "and of their direct results".<sup>28</sup> In addition, by virtue of the 1997 Seville Agreement,<sup>29</sup> which organizes international cooperation among the Movement's components, the ICRC is the lead agency in situations of armed

<sup>28</sup> Article 5(2)(d) of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25<sup>th</sup> International Conference of the Red Cross in Geneva in 1986.

<sup>29</sup> "Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement of 26 November 1997, Council of Delegates, Seville, 25-27 November 1997", *International Review of the Red Cross*, March 1998, No. 322, pp. 159-177 (hereinafter the Seville Agreement).

conflict, internal strife and their direct results, such situations applying, according to the Agreement, beyond the cessation of hostilities.<sup>30</sup> It is only when a general restoration of peace has been achieved and the presence of a specifically neutral and independent institution and intermediary is no longer required that the ICRC ceases to play the role of lead agency. That role implies numerous responsibilities, *inter alia* defining the operation's general objectives, coordinating all actions within the relief operation, acting as a spokesman and sharing its analysis of the security situation.

Outside the Movement, there are many national and international players with whom the ICRC wishes to develop or pursue its cooperation, in particular the authorities, the United Nations system, non-governmental organizations and, in some contexts, the World Bank.<sup>31</sup> Those involved must coordinate in order to harmonize their responses to the needs they have together identified and manage conflicts of interest. In one example, concern for justice requires that people suspected of having committed war crimes be arrested, at the risk of prompting acts of violence on the part of their community, which considers them to be heroes and intends to defend them. That concern is thus in conflict with the quest for greater security. Finding the means of rendering justice without placing lives in danger is worth at the very least coordination between the players involved.

This being said, it is not always easy to coordinate, for a number of reasons. First, transition contexts vary widely. When a ceasefire or peace agreement is imposed or when the national authorities that set themselves up receive external support from a source contested within the country concerned, and of course in cases of occupation, most humanitarian agents will endeavour to maintain their independence, in order to be accepted by all those who have fought and could again resort to force. No humanitarian agency wants to appear as the implementing agent of a policy that has been dictated by one or several third States and that is viewed with hostility in some quarters. This is also a security issue. What is more, where are the limits to cooperation with the armed forces of third States that yesterday were shelling the country, today are distributing relief supplies in camps for displaced

<sup>30</sup> Seville Agreement, Article 5.1(A)(b) and (c).

<sup>31</sup> On the role of the World Bank in such situations, see *Post-Conflict Reconstruction, The role of the World Bank*, The International Bank for Reconstruction and Development, Washington, 1998, p. 69, and a book that describes how the social fabric is affected by armed conflict: Nat J. Colletta and Michelle L. Cullen, *Violent Conflict and the Transformation of Social Capital, Lessons from Cambodia, Rwanda, Guatemala and Somalia*, The International Bank for Reconstruction and Development, Washington, 2000.

persons, and may resume fighting tomorrow? No matter how useful the humanitarian work of the armed forces, whose presence is sometimes welcome because of their logistical capacities, there is a major risk that the beneficiaries will confuse and apply the same nametag to the troops and the ICRC's delegates and UNHCR or MSF staff members. Such confusion can limit the acceptability of a neutral and independent humanitarian operation that is supposed to last. The main challenge is to coordinate, in the interests of the victims, while taking care to remain independent. Lastly, to each his own role. The United Nations' commitment to ensure collective security will inevitably lead the organization to take political stands. A specifically neutral and independent organization such as the ICRC is obliged to keep its distance from those positions, even if they reflect the point of view of the international community, because it never takes a stand on the legitimacy of recourse to force. The humanitarian agencies of the United Nations system sometimes find themselves caught between a rock and a hard wall; they belong to a political organization, yet find themselves working in places where tension runs high because of past hostilities. It remains to be seen to what extent the population is able to distinguish between the political and humanitarian facets of United Nations work, which are very different.

Hence the importance, in every country that is in a period of transition, of having a balanced relationship with others, so that that relationship can foster mutual understanding of what is at stake and of potential synergies while respecting the independence of the ICRC and not undermining its neutrality.

### **Conclusion**

The aim of this article was to make the reader aware of the tragic plight of the victims of armed conflicts long after the guns have fallen silent, and to describe why, how and on what basis the International Committee of the Red Cross deploys its humanitarian activities in such situations. The ICRC has a mandate for this, longstanding experience, something extra to contribute. It has above all an ambition: to be close to the victims of armed violence, to understand their suffering, to meet their needs, to uphold their rights. But that is not all. Those who cannot make themselves heard, who have been displaced, detained, ill-treated, at long last, during the period of transition, have the opportunity to pick up the threads of their lives. Staying in the background and eventually withdrawing to allow them to dream and work towards their future is the best proof of success of humanitarian work.

In short, humanitarian action helps foster peace, although this is an assertion that the players make in a whisper, for fear that their work will appear, mistakenly, to be politicized. By reuniting the members of separated families, by repatriating prisoners, by helping to shed light on the fate of the missing, the ICRC alleviates the suffering in which may lie the seeds of future conflicts. It must also give careful consideration to the repercussions of what it does on the construction of peace, starting with the economic impact, in order not to complicate the process of recovery everyone craves. It must consider the political fallout, so that its activities do not exacerbate social tensions or unwittingly strengthen the hand of bellicose factions. Last but not least, it must give thought to the social impact, and take care that its activities promote, or at least do not hinder, the steps taken, in terms of human rights, by certain social groups (women in particular) because of the responsibilities they shouldered during the fighting.

The construction of peace, or, more modestly, concern to facilitate the co-existence of communities that have been torn apart, is not the primary objective of humanitarian practitioners, but to lose all interest in the matter, on the pretext that this responsibility lies first and foremost with others, is tantamount to an abdication. As the discussions on human security have shown, peace is a courageous and stubborn step forward on the road to sharing, solidarity and justice. It concerns all of us from all points of view: the fight to prevent disease, poverty, oppression, discrimination. It may be modest and discreet, but humanitarian action nonetheless makes a vital contribution to mending, at the local level, the threads of a torn social fabric. As one woman, a victim of conflict in the Caucasus, told us one day in her bombed out apartment with a balcony hanging by a thread: "What good does it do us to be free of material worries if we still live in fear of what tomorrow will bring?"

**Africa: the methods used to deal with emergencies are inadequate for devising operational policy in situations where systems for meeting fundamental needs (security, health, etc.) do not work**

“(…) recent developments in certain conflicts in Africa have had the following consequences: fewer war-disabled and fewer displaced groups, in short, fewer direct and immediate victims of war (the Democratic Republic of Congo and Sierra Leone are examples of this, as are Angola and the Sudan to a lesser extent). On the other hand, however, (…) entire populations are living in virtually total destitution as the result of the destruction caused by the war, underdevelopment and poverty caused by the pillage of their countries, and the continent’s disastrous economic situation.

For all intents and purposes, there are virtually no — or no longer any — war-disabled in the Democratic Republic of Congo, but tens of thousands of people are deprived of access to care since the health system is inexistent or no longer functions for the reasons mentioned above. The same is true of Sierra Leone, southern Sudan, Angola, and so on.

In other words, the emergency criterion is a very inadequate means of devising an ICRC operational policy which will make sense in a growing number of African situations of underdevelopment compounded by economic disaster and chronic low-intensity conflict.”

*Internal source: Introduction to the Africa objectives for 2002*

### **Mexico: the ICRC facilitates dialogue**

The ICRC has opened a forum for dialogue in Chiapas. In the period from June 1999 to July 2000, some 30 meetings were organized in the San Cristobal sub-delegation between displaced people and the authorities of a *municipio* where a massacre had taken place. The ICRC played the role of “facilitator”. It had the status of silent observer while those involved discussed the issues amongst themselves. Initially, the discussions concerned minor incidents (for example, the cutting of young coffee plants), the important thing being to establish communication and build trust. Little by little the parties started to exchange views on thornier issues, such as the tragic events which had befallen the community and the role of those involved, going beyond the humanitarian field and entering the political sphere. The participants decided on the agenda of the discussions themselves and took responsibility for the topics debated.

The ICRC considered that it was right to get involved because of the tension existing between the authorities and the displaced persons; it was able to offer a platform for dialogue. By stopping rumours and enabling the two parties to get to know each other better and to talk to each other, it fostered better mutual understanding. Since the ICRC enjoyed a high degree of credibility with both the displaced persons and the authorities, it was able to play a role which it considered no one else was in a position to play at that time. This was a very worthwhile aspect of the ICRC’s work in Chiapas.

### **Mali: promoting the peace process (1995-1999)**

The operation in Mali is different in that it was launched when the country was already in a period of transition marked by tension, which continued until 1997 (the ICRC having been absent during the acute phase of the conflict from 1993 to 1995). Peace was so fragile and the population's socio-economic vulnerability so great that as soon as the ICRC "returned" in 1995 it became convinced of the need to implement programmes aimed first and foremost at meeting people's vital needs and secondly at restoring an acceptable level of economic self-sufficiency and access to basic health-care services. It also felt it had a role to play in developing activities that fostered an environment conducive to peace. The emphasis was on building local capacities. This initiative was regarded as a pilot project designed to facilitate the ICRC's exit strategy.

An outside evaluation of the project confirmed that it had successfully achieved sustainable results, in particular by facilitating inter-community exchanges:

- for the very first time, communities discovered how to manage assets collectively;
- the vaccination programme helped groups that had been traumatized by the violence to regain confidence and hope;
- setting up health-care services in regions where there had previously been none at all and rebuilding wells helped to allay tensions between factions;
- the organization of meetings between livestock farmers from the north and shopkeepers and livestock farmers in Mopti opened up promising markets in the south, and it is well known that economic interdependence is a factor that promotes peace;
- according to the faction leaders interviewed by the outside evaluators, the support provided for — and participation in — traditional annual ancestral reconciliation festivals and the activities carried out to introduce the spirit of humanitarian law into these events (by organizing group discussions and theatre productions) definitely helped to assuage tensions between nomadic tribes;
- the inter-community meetings which were organized until 1998 on health-related topics facilitated mutual understanding.

All in all, through its humanitarian action the ICRC can add to the momentum for lasting peace, it being understood that each context has its own specific features and dangers and that what works in one situation will not necessarily work in another.

### **Croatia: what a neutral stance during the conflict can help achieve in the transition period**

In 1997, the territory of eastern Slavonia, which had been part of the self-proclaimed "Republika Srpska Krajina" since 1991, was reintegrated into Croatia. The situation was very volatile at the time: over 100,000 displaced Croats were returning to a region where a similar number of Serbs lived. The fact that two ethnic groups which had so recently been at war with each other were now living side by side considerably heightened the tension in the region; renewed violence could not be ruled out.

The ICRC and the local Red Cross organizations — both Serb and Croat — were in a particularly suitable position to respond during this transition period, which constituted something of an emergency, at least to begin with. Having been active on both sides of the front throughout the conflict, the ICRC had developed contacts and working relations with the most influential groups in eastern Slavonia: military personnel, the police, the civilian authorities, associations of displaced persons and of the mothers of missing persons.

This complementarity was used to advantage in order to take in-depth action in the form of education projects targeting the man in the street. Teachers — Red Cross volunteers — always served as the medium for implementing the projects. One of these illustrates what a neutral stance can help achieve in a situation of this kind.

This education project targeted young people. In 1997 — more than a year after the end of the war — mutual fear and distrust between Serbs and Croats were as strong as ever. Young people in particular still had the 'war mentality', which was liable to involve them in new clashes at any moment. In order to counter this way of thinking, the "*Red Cross ideas and activities*" project promoted social action on a large scale. The basic idea was simple: mutual assistance can change people's attitudes. A whole series of publicly beneficial activities, which were both worthwhile in themselves and at the same time enhanced the confidence of those carrying them out, were organized by the Red Cross Youth with the teachers' help: books, clothes and money were collected for the needy, travelling exhibitions of art and poetry were organized on Red Cross action and the principle of humanity, rubbish was collected, and sick and elderly people were visited in their homes. By acting in this way, the young people set an example for reconciliation between their respective communities.

## Résumé

### ***La guerre a-t-elle jamais une fin ? L'action du Comité international de la Croix-Rouge lorsque les armes se taisent***

*Marion Harroff-Tavel*

Lorsque dans le cadre d'un conflit armé les armes se taisent, suite à un accord de paix ou un cessez-le-feu, débute une délicate période de transition. La situation se détériore, bien souvent, gravement pour les plus vulnérables, alors que d'autres, qui ne veulent plus être qualifiés de « victimes », luttent pour retrouver leur autonomie et défendre leurs droits. Les besoins des individus sont multiples : besoin de sécurité face aux menaces posées par les ex-combattants, la criminalité et les mines, besoin de protection contre les abus de pouvoir de l'autorité ou la vindicte d'une population hostile, besoins matériels en eau, nourriture, habitat et santé, besoin de vérité et de justice, de reconnaissance enfin.

Faire en sorte que des réponses soient apportées à ces besoins, si possible par ceux qui les éprouvent ou en collaboration avec eux, est le défi auquel le CICR est confronté. La politique dont l'institution vient de se doter pour la conduite de son activité humanitaire en période de transition est le fruit d'une réflexion approfondie menée à Genève, mais aussi dans les Balkans, au Caucase, en Amérique centrale et en Afrique. Quelles sont les obligations des anciens belligérants en vertu du droit humanitaire ? Comment assurer un fondu-enchaîné entre urgence et développement ? Où se situent les limites de la politique d'assistance d'une organisation humanitaire ? Quelles sont les potentialités du partenariat avec l'État, la société civile et d'autres acteurs de la communauté internationale, dans le respect de l'identité de chacun ? Telles sont quelques-unes des questions qui ont été au cœur de cette réflexion.

## Remedies for victims of violations of international humanitarian law

LIESBETH ZEGVELD\*

International humanitarian law (“IHL”) has never been confined to the level of relations between States.<sup>1</sup> On the contrary, the initiators of the nineteenth century conventions already believed that human persons had inviolable rights even during armed conflicts.<sup>2</sup> However, recognition of rights is one thing, the right to claim those rights is another. So far, States have been reluctant to entitle, explicitly and in general, victims of violations of international humanitarian law to claim reparation. As humanitarian law treaties do not expressly envisage causes of action for victims in national or international law, they are hardly able to exercise their rights.

On this point international humanitarian law sharply contrasts with tendencies in international law. In spite of the gap in the International Law Commission’s Articles on State Responsibility, which were finally adopted in 2001<sup>3</sup> but fail to mention rights of individuals in the regime of secondary rights,<sup>4</sup> it is generally known that human rights treaties provide a remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by State authorities. For example, Article 13 of the European Convention on Human Rights stipulates that individuals whose rights as set forth in that Convention are violated shall have “an effective remedy before a national authority”. And Article 50 of the same Convention mandates the European Court of Human Rights to afford just satisfaction to victims. Human rights treaties also provide for specific provisions on compensation, for example to victims of unlawful arrest or detention.<sup>5</sup> Most recently, the Rome Statute of the International Criminal Court<sup>6</sup> authorizes the Court to determine any damage, loss or injury to victims and order reparations to them.

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While the punishment of individuals for war crimes has received much greater attention over the past decade, shifting some inter-State aspects of IHL to individual criminal responsibility, the position of the victims of these crimes has not been equally addressed. Their rights and interests have largely been overlooked. Yet redress and reparation for victims of violations of IHL is an imperative demand of justice. The relevance of rights under IHL is questionable if victims have no legal capacity to enforce their rights, before either a national or an international tribunal, once they claim to have become a victim. As pointed out by Lord Denning: “a right without a remedy is no right at all”.<sup>7</sup>

The United Nations Commission on Human Rights has recognized the interests of victims of IHL violations. The “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law” (hereinafter “UN Principles on the Right to a Remedy”), adopted by the United Nations Commission on Human Rights at its 56th session in 2000,<sup>8</sup> aim to provide

<sup>1</sup> As one commentator put it, the purpose of international humanitarian law is to go “beyond the inter-state levels and [to reach] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals”, G. Abi-Saab, “The specificities of humanitarian law”, in C. Swinarski (ed.), *Studies and Essays of International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva/The Hague, 1984, p. 269; similarly, T. Meron, “The humanization of humanitarian law”, *American Journal of International Law*, Vol. 94, 2000, pp. 239-278.

<sup>2</sup> J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, reprinted 1994, p. 77.

<sup>3</sup> International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, adopted on second reading by the International Law Commission (“ILC”) at its 53rd Session (UN Doc. A/CN.4/L.569, 9 August 2001) and by the General Assembly on 12 December 2001, Res. 56/83, text available at <<http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm>>.

<sup>4</sup> Art. 33(2) of these Articles, *ibid.*, contains a saving clause, stipulating that the Articles are “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. This provision underlines that the Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States; it merely recognizes the possibility that individuals may be entitled to claim reparation for violations of primary norms of international humanitarian law by States. See J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 210.

<sup>5</sup> See for example Art. 5(9) of the International Covenant of Civil and Political Rights of 1969.

<sup>6</sup> Of 17 July 1998, UN doc. A/CONF.183/9, Art. 75.

<sup>7</sup> Lord Denning in *Gouriet v. Union of Post Office Workers*, AC, 1978, p. 435, cited in R. Higgins, “The role of domestic courts in the enforcement of international human rights: The United Kingdom”, in B. Conforti and F. Franciani (eds.), *Enforcing International Human Rights in Domestic Courts*, Martinus Nijhoff Publishers, The Hague, 1997, p. 38.

<sup>8</sup> E/CN.4/2000/62, 18 January 2000. Pursuant to its resolution 1989/13, the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Mr. Theo van Boven with the task of

victims of violations of human rights and IHL with a right to a remedy. The content of this right includes access to justice, reparation for harm suffered and access to factual information concerning the violations.<sup>9</sup> It distinguishes between five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>10</sup>

These UN Principles have been corroborated by several other initiatives. In 1998, in the Hague Agenda for Peace and Justice, the Hague Appeal for Peace and Justice for the 21st Century defined implementation of IHL as its overriding theme and made the following recommendation: "The Hague Appeal will advocate changes in the development and implementation of the laws in both these fields [IHL and human rights law], in order to close critical gaps in protection and to harmonize these vital areas in international law".<sup>11</sup> In 2003, building on these initiatives, the Amsterdam Centre for International Law ("ACIL") of the University of Amsterdam and the Netherlands Institute of Human Rights of the University of Utrecht organized two expert meetings to discuss the need for and feasibility of new procedures that provide remedies for victims of violations of IHL. The meeting in May 2003 discussed whether existing international mechanisms can provide victims of violations of international humanitarian law with a remedy and provide reparation. On the basis of its findings, the follow-up meeting in October 2003 will examine different options for filling gaps in existing procedures or for developing new

undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8). Mr. Theo van Boven prepared three versions of the basic principles and guidelines on the right to reparation for victims. The first version is found in document E/CN.4/Sub.2/1993/8 of 2 July 1993, section IX. The second version is found in document E/CN.4/Sub.2/1996/17 of 24 May 1996. The third version is found in document E/CN.4/1997/104 of 16 January 1997. The Commission on Human Rights, in its resolution 1996/35, regarded the proposed draft basic principles elaborated by Mr. Theo van Boven as a useful basis for giving priority to the question of restitution, compensation and rehabilitation; in resolution 1998/43, it requested its Chairman to appoint an independent expert to prepare a revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven with a view to their adoption by the General Assembly. Pursuant to paragraph 2 of resolution 1998/43, the Chairman of the Commission on Human Rights appointed Mr. M. Cherif Bassiouni to perform this task. These Principles were preceded by the Declaration of Basic Principles for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 on 29 November 1985. Attention is also drawn to the resolution adopted by the Committee of Ministers of the Council of Europe on 28 September 1977, which aimed at harmonizing national laws in the field of compensation for victims of crime, Resolution (77) 27, adopted during its 275th meeting.

<sup>9</sup> Principle 11, UN Principles on the Right to a Remedy, *op. cit.* (note 8).

<sup>10</sup> Principle 21, *ibid.*

<sup>11</sup> Recommendation 13, The Agenda for Peace, UN Doc. A/54/98.

procedures. Lastly, the International Law Association (“ILA”) recently initiated a project on “compensation for the victims of war”.<sup>12</sup> Noting that civilians are left without any remedy if they are killed or wounded or suffer property or other losses, the project aims “to systematically review the law of war and human rights with a view to focusing on the rights of victims of war to compensation”. The proposed project has as its goal the preparation and adoption of a Draft Declaration of International Law Principles on Compensation to Victims of War.<sup>13</sup>

Against the background of the above ideas and proposals, the present paper examines the legal ways and means currently available under domestic and international law to victims of violations of IHL to have their primary rights respected.<sup>14</sup> It explores whether victims have the right to a remedy and the extent to which this right can be enforced, if at all. On the basis of a brief survey of national and international practice, it will be argued that although there is little doubt that victims enjoy rights under IHL, their rights appear to be hardly justiciable and hence difficult to transform into a right to a remedy or reparation.

This paper is restricted to an examination of victims of violations of IHL. While they have a lot in common with victims of other crimes, national and international, as well as with victims of human rights violations, attention has already been devoted to these latter kinds of victims.<sup>15</sup> There has, however, been little specific consideration of remedies of victims

<sup>12</sup> International Law Association, Newsletter, 17 May 2003.

<sup>13</sup> This is considered to be a logical sequel to three ILA declarations already adopted, namely on Mass Expulsion (Seoul, 1986), Compensation to Refugees (Cairo, 1992), and Internally Displaced Persons (London, 2000). Underlying all these declarations is the principle that compensation must, under international law, be paid to victims of human rights abuses.

<sup>14</sup> This paper is based and enlarges on an earlier article by the author and J. K. Kleffner, “Establishing an individual complaints procedure for violations of international humanitarian law”, *Yearbook of International Humanitarian Law*, Vol. 3, 2000, and on the background reports compiled for the Expert Meeting on Remedies for Victims of Violations of International Humanitarian Law at the Amsterdam Centre for International Law, 9-10 May 2003, and reproduced in *Collection of Documents*, Amsterdam Centre for International Law, May 2003.

<sup>15</sup> On remedies for victims under general international law, see A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Martinus Nijhoff Publishers, The Hague, 1999; C. A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, 1962. On remedies for victims of human rights violations, see for example D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999; Netherlands Institute of Human Rights, *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht 11-15 March 1992, SIM Special No. 12.

of IHL violations.<sup>16</sup> Furthermore, this paper focuses on the legal right to a remedy. Various obstacles may hamper effective implementation of this right, such as immunities, amnesties, and statutes of limitation, but space limitations preclude consideration of them. For the same reason attention here is centred on the right to compensation and the procedural right to enforce compensation, while recognizing that these are not the only rights victims seek – they have a broad range of needs and seek a variety of remedies, including for example restitution, rehabilitation, and satisfaction.

### **The notion of “victim”**

The right to a remedy presupposes a victim whose primary rights have been violated. Before elaborating on the issue of remedies, the notion of “victim” under IHL must therefore be clarified. Although the word itself does not appear in the Geneva Conventions or other humanitarian law treaties,<sup>17</sup> victims obviously are the primary concern of IHL. Such victims may then be defined as those who suffer because they are affected by an armed conflict; they are termed “war victims”. This definition potentially refers to an entire population that has been caught up in an armed conflict. However, the occurrence of the armed conflict as such falls outside the scope of IHL, as this law does not deal with the conflict’s legality or illegality. Hence war victims have no individual right to peace under IHL. This does not mean that war victims are left without rights, their supreme right being the right to protection.<sup>18</sup> Indeed, the main purpose of IHL is to protect war victims.<sup>19</sup>

To contend that violation of the right to protection entails a claim to reparation would, however, be absurd, since every member of the population affected by the armed conflict is a victim. The Supreme Court of the Netherlands made

<sup>16</sup> The first thorough analysis of the subject is by A. McDonald, “Rights to legal remedies for victims of serious violations of international humanitarian law”, Ph.D. thesis, The Queen’s University of Belfast (unpublished).

<sup>17</sup> The word “victim” does, however, appear in the title of the two Protocols Additional to the Geneva Conventions of 1949: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter “Additional Protocol I”) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (hereinafter “Additional Protocol II”).

<sup>18</sup> Although the different conventions are limited in scope, the Law of Geneva serves to provide protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged is against the arbitrary power which one party acquires, in the course of an armed conflict, over persons belonging to the other party.

<sup>19</sup> The right to protection entails, among other things, the right to humanitarian assistance.

clear that for the beneficiaries of the right to protection, notions such as legal remedies and compensation are not workable. In a judgment of 29 November 2002, the Supreme Court decided that rules of IHL do not protect persons against stresses and tensions that are consequences of air strikes as such and do not protect persons with regard to whom the rules and norms have not been violated *in concreto*. The right to invoke the rules of IHL is therefore confined to those who personally were the victims of violations of IHL.<sup>20</sup>

The wider category of war victims is to be distinguished from what is hopefully a smaller category: victims of violations of IHL, i.e. those who are injured by such violations. This category of victims is defined by the legal restraints placed by IHL on the conduct of war. While the key object of IHL is to protect war victims, it is silent on this second category of victims of IHL violations. The IHL regime focuses solely on persons to be protected against the dangers of war, leaving open the question of action required when protection fails.

The UN Principles on the Right to a Remedy are intended to fill this gap, concentrating on victims of violations of IHL. They define a victim in the following terms: "A person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights."<sup>21</sup>

<sup>20</sup> Para. 3.2. The Supreme Court dismissed a claim first brought in interlocutory proceedings (*kort geding*) against the Dutch State to order the latter to immediately stop its (participation in) hostilities against the Federal Republic of Yugoslavia (FRY). From 24 March to 10 June 1999, the Netherlands participated in NATO military operations against the FRY. These operations consisted of air attacks. At the time of the hostilities the claimants were mobilized soldiers in active military service of the FRY. One of the legal questions to be determined by the Supreme Court was whether the air attacks could be qualified as violations of IHL. Arguably such a claim would fall under Article 2(4) of the UN Charter prohibiting the use of force. However, this provision is generally denied direct effect in domestic courts; see for example Amsterdam Court of Appeal (Netherlands), *Vierde meervoudige burgerlijke kamer, Dedovic v. Kok et al.*, judgment of 6 July 2000, para. 5.3.6. Similarly: Gerechtshof Amsterdam, *Vierde meervoudige burgerlijke kamer, Dedovic v. Kok et al.*, judgment of 6 July 2000, para. 5.3.23 ("*De regels en normen van dit humanitaire recht strekken ... niet tot de bescherming van personen tegen spanningen of angsten die het gevolg zijn van de luchtacties als zodanig en evenmin tot bescherming van personen jegens wie die regels en normen niet in concreto zijn overtreden. Het komt er dus op aan of ieder van appellanten persoonlijk het slachtoffer is geworden van een gebeurtenis die als schending van humanitair (oorlogs)recht moet worden aangemerkt*"). A distinction is sometimes made in this regard between direct victims and indirect victims of IHL (compare Gerechtshof Amsterdam, *Vierde meervoudige burgerlijke kamer, Dedovic v. Kok et al.*, judgment of 6 July 2000).

<sup>21</sup> Principle 8, UN Principles on the Right to a Remedy, *op. cit.* (note 8): "A 'victim may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm'".

### The victim's rights

The victim's right to a remedy and reparation depends in the first place on his/her rights under IHL being violated. The right to a remedy is a secondary right, deriving from a primary substantive right that has been breached. So if there is no primary right, there can be no secondary right. Recognition of victims of violations of IHL therefore presupposes rights of victims in IHL. Whether individuals possess rights under this regime depends on whether they are the beneficiaries of IHL rules, or, in other words, whether the persons' interests are directly laid down and protected by IHL.<sup>22</sup>

At the outset, the treatment which IHL prescribed to be accorded to protected persons was not presented, nor indeed clearly conceived, as constituting a body of "rights" to which they were entitled. The humanitarian law norms were generally understood as applicable to States vis-à-vis each other and are commonly worded in terms of prohibitions applicable to the parties to a conflict. However, in 1929, the principle of rights was more clearly defined, the word "right" appearing in several provisions of the 1929 Prisoners of War Convention.<sup>23</sup> And in the 1949 Geneva Conventions the existence of rights conferred on protected persons was explicitly affirmed.<sup>24</sup> An empirical investigation into these Conventions shows that a number of rules refer explicitly to concepts such as "rights", "entitlements" or "benefits".

In the context of international conflicts, Article 78 of the Third Geneva Convention serves as an example. It gives prisoners of war the right to make known their requests regarding the conditions of captivity to which they are subjected and to complain about such conditions. Similarly, Article 30 of the Fourth Geneva Convention provides all protected persons with the right to file a complaint with the Protecting Powers, the ICRC and the National Red Cross about an infringement of the Convention. These and other provisions create rights of individuals or presuppose the existence of rights.<sup>25</sup>

<sup>22</sup> Tomuschat, *op. cit.* (note 15), p. 7; Norgaard, *op. cit.* (note 15), p. 48.

<sup>23</sup> See for example Arts 42 and 62, Convention relative to the Treatment of Prisoners of War, of 27 July 1929.

<sup>24</sup> In particular, Arts 7 and 8 common to the four Geneva Conventions of 12 August 1949.

<sup>25</sup> Other examples of such (often indirect) references are contained in Article 7 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (First Geneva Convention); Articles 6 and 7 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Geneva Convention); Articles 7, 14, 84, 105 and 130 of the Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention); Articles 5, 7, 8, 27, 38, 80 and 146 of the Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention); Articles 44(5), 45(3), 75 and 85(4) of 1977 Additional Protocol I; and Article 6(2) of 1977 Additional Protocol II.

From case law it may be inferred that the Law of The Hague also endows individuals with rights. In its judgment of 6 July 2000, the Amsterdam District Court (Netherlands) implicitly recognized the notion of individual rights in this branch of law. The appellants sought to invoke alleged violations of Additional Protocol I's Article 52, which sets forth rules on the protection of civilian objects, during NATO's bombing of the FRY as a basis for compensatory claims against members of the Dutch government. The court rejected this claim because, in its view, such violations had not occurred. But, while confining the right to invoke the rules to those who personally were the victims of violations of IHL, the court recognized the possibility of deriving individual rights from IHL rules.<sup>26</sup>

Apart from clear-cut examples of rules that can be conceptualized as "individual humanitarian rights", and with the purposes of IHL in mind, it is possible to identify many more rules that contain elements of individual benefits. For example, the grave breaches provisions could be construed as conferring individual humanitarian rights against acts such as willful killing, torture or inhuman treatment willfully causing great suffering or serious injury to body and health. The same holds true for norms applicable in non-international armed conflicts, such as the prohibition of violence to life, outrages upon personal dignity, and humiliating and degrading treatment, stipulated in Article 3 common to the Geneva Conventions and in Article 4 of Additional Protocol II.

The possible interpretation of other provisions is more doubtful. For example, while Article 15 of the First Geneva Convention<sup>27</sup> can be construed as conferring individual rights on wounded and sick persons to be searched for and to be collected, it is less clear whether the same provision could also confer a further right to have armistices or a suspension of fire arranged or local arrangements made, whenever circumstances allow, so as to permit their removal, exchange and transport.

<sup>26</sup> Gerechtshof Amsterdam, *Vierde meervoudige burgerlijke kamer, Dedovic v. Kok et al.*, Judgment of 6 July 2000, para. 5.3.22.

<sup>27</sup> This provision reads: "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield. Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area."

It may nevertheless be concluded that individuals do have rights under at least some provisions of IHL, a supposition that finds support in the long-standing cross-fertilization of IHL and human rights law. Indeed, the drafting of the Geneva Conventions was already under the influence of the trends, which also resulted in the Universal Declaration of Human Rights.<sup>28</sup> Additional Protocol II applicable to non-international conflicts likewise underscores in its preamble the close relationship between human rights and IHL: “[r]ecalling (...) that international instruments relating to human rights offer a basic protection to the human person” and “[e]mphasizing the need to ensure a better protection for the victims of those armed conflicts”. The Protocol has also copied a number of human rights provisions into its text.<sup>29</sup> The UN Principles on the Right to a Remedy built upon this apparent close relationship between IHL and human rights law, recognizing in IHL both an undefined set of primary rights and the secondary right to a remedy and reparation outside the human rights regime.<sup>30</sup> The instrument takes victims of violations of IHL forward in a process of legal empowerment, which started long ago in the human rights sphere.

### Right to a remedy

A question different from, albeit related to, the notion of “rights” is whether these rights can also provide the basis for individual claims brought by victims of violations of them. The position of victims of humanitarian law violations must ultimately be assessed on the basis of their right to claim

<sup>28</sup> Y. Sandoz, C. Swinarski, and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (hereinafter “*Commentary on the Additional Protocols*”), p. 1369.

<sup>29</sup> Examples are provided in (parts of) Articles 4 and 6 of Additional Protocol II. See *ibid.*, pp. 1399-1400 and p. 1344.

<sup>30</sup> The UN Principles on the Right to a Remedy, *op. cit.* (note 8) also assume that rights exist under IHL, as a right to a remedy undoubtedly presupposes substantive rights. Principle 1 refers to IHL norms that are contained in *inter alia* treaties and customary law. The Principles refrain from defining the treaties and customary rules in question, leaving the question which primary rights individuals enjoy under IHL unanswered. In fact, all instruments enumerated by the UN Commission on Human Rights in its resolution adopting the UN Principles are human rights treaties, except arguably the Convention on the Rights of the Child, dealing in Article 39 with child victims of armed conflict (which stipulates: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of (...) armed conflict”). In his final report the Special Rapporteur explains that the UN Principles were drafted with a view to their being applied “in light of future developments in international law”. For this reason, the terms “violations” and “IHL” were not defined, as “their specific content and meaning are likely to evolve over time” (Final Report, *op. cit.* (note 8), para. 9). The Special Rapporteur may have had in mind here the long-standing cross-fertilization of humanitarian law and human rights law.

reparation, which includes procedural capacity, i.e. their capacity to go directly themselves to a national or international organ and to claim reparation. As the Diplomatic Conference in 1949 emphasized:

“It is not enough to grant rights to protected persons and to lay responsibilities on the States; protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are.”<sup>31</sup>

Support for the assertion that rights provide the basis for claims brought by victims of violations of these rights could arguably be found in Article 3 of the 1907 Hague Convention IV respecting the Laws and Customs of War, which reads:

“a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

Article 91 of Additional Protocol I contains a rule very similar to Article 3 of 1907,<sup>32</sup> the substance of which is generally accepted as customary international law.<sup>33</sup> The liability of parties to a conflict to pay compensation for violations of IHL committed by persons forming part of their armed forces could entail an obligation to compensate not only States but also individual victims.<sup>34</sup> The obligations of States and other warring parties under IHL could thus be construed as being mirrored by victims’ rights for which IHL envisages a cause of action if they are violated. Several experts have taken the view that the very purpose of the article has been to confer rights directly on individuals.<sup>35</sup>

<sup>31</sup> Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II – A, p. 822. This statement was made in the context of Article 30 of the Fourth Geneva Convention of 1949, entitling protected persons in the territories of the parties to the conflict and in occupied territories to apply, among others, to protecting powers and the ICRC to assist them.

<sup>32</sup> The Conference in 1977 accepted Article 91 without much discussion and without dissent, reflecting the general acceptance of the article’s contents as established customary law. See expert opinion by F. Kalshoven, “Article 3 of the Convention (IV), respecting the laws and customs of war on land”, in H. Fujita, I. Suzuki, K. Nagano (eds), *War and Rights of Individuals*, Nippon Hyoron-sha Co, Ltd. Publishers, Tokyo, 1999, p. 37.

<sup>33</sup> *Commentary on the Additional Protocols*, *op. cit.* (note 28), Commentary on Article 91, p. 1053, para. 3645. Note should also be taken of Articles 51/52/131/148 respectively of the four Geneva Conventions of 1949 which state: “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [enumerating the grave breaches].”

<sup>34</sup> *Commentary on the Additional Protocols*, *op. cit.* (note 28), pp. 1056-1057, paras 3656-3657.

<sup>35</sup> Expert opinions by F. Kalshoven, E. David and C. Greenwood, in *War and Rights of Individuals*, *op. cit.* (note 33).

According to Kalshoven, the word “compensation” instead of, for example, “reparation” should be understood as referring especially to individuals as beneficiaries of the rule.<sup>36</sup> The UN Principles on the Right to a Remedy are also based on the assumption that violation of IHL gives rise to a right to reparation for victims.

However, while Article 3 of the 1907 Convention, Article 91 of Protocol I and customary law arguably confer rights upon individuals in the event of a violation, including a right to compensation, the question arises whether an individual can assert his/her right against the State or the wrongdoer. Article 3 of the 1907 Convention and Article 91 Protocol I are silent in this regard, leaving it to customary international or domestic law to empower international organs or domestic courts to give effect to that right. A sketchy survey of the available practice shows that primary rights in IHL do not necessarily translate into secondary rights as a consequence of their breach. Victims of violations of IHL can hardly claim compensation through national courts on the basis of Article 3 of the 1907 Hague Convention IV or other provisions. At the international level, more channels are available to victims to claim compensation. But a general remedy does not exist.

### Domestic remedies

Neither humanitarian law as a whole nor any specific article imposes an obligation on States to give direct effect in their national legal systems to the provisions of IHL, in that IHL norms could be invoked by individuals before national courts in the same way as national norms. Where a State does choose to do so, the precise article may be invoked directly before national courts. For other States there is the possibility of integrating the substance, if not the actual articles, of IHL into domestic law. But where neither course is adopted, victims are left empty-handed. This seems to be the more common situation worldwide.

Despite indications to the contrary in the drafting history of Article 3 of the 1907 Hague Convention IV,<sup>37</sup> national courts have thus far regularly rejected individual claims for compensation based on that provision.<sup>38</sup> Courts have found most of the IHL rules to be public law norms applying to States only, and not applicable in litigation between injured individuals and the State. For

<sup>36</sup> *Ibid.* p. 39. See also F. Kalshoven, “State responsibility for warlike acts of the armed forces: from Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond”, *International and Comparative Law Quarterly*, Vol. 40, 1991, pp. 827-858.

<sup>37</sup> Kalshoven, *op. cit.* (note 36), pp. 830-833.

<sup>38</sup> *Ibid.*, pp. 835-837.

instance, Japanese courts have continuously dismissed such individual claims in cases relating to violations of IHL during World War II. These cases include the so-called “comfort women” cases.<sup>39</sup> The plaintiffs, women survivors of military sexual slavery all claiming legal State compensations and apology from the government, argued that individual victims have a right to claim compensation under international customary law and under Article 3 of the Hague Convention applicable at the time of World War II. The Japanese courts denied the existence of such a right both under the said Article 3, and under customary international law.

Likewise, in the case of *Leo Handel et al v. Andrija Artukovic*,<sup>40</sup> a US District Court rejected a claim for compensatory and punitive damages based on the 1907 Hague Convention IV and the 1929 Geneva POW Convention. The defendant, the Commissioner of Public Security and Internal Administration and subsequent Minister of the Interior for the Independent State of Croatia, a puppet State of the German Reich, was allegedly responsible for the deprivations of life and property suffered by the Jews in Yugoslavia during World War II. In his official capacity, he oversaw and implemented Croatia’s solution to “the Jewish question”. As one of the four causes of action, the plaintiffs stated violations of the 1907 Hague Convention and the 1929 Geneva POW Convention.<sup>41</sup> The decision provides interesting insight into the arguments of national courts to reject such claims. After having set forth the conditions for treaty provisions to be self-executing and to provide a private right of action,<sup>42</sup> the Court rejected the self-executing character of the invoked provisions. In so doing, it referred among

<sup>39</sup> Two out of the ten comfort women claims made against the government of Japan in Japanese courts, seeking an apology and State compensation, were dismissed by the Supreme Court of Japan. The eight other cases have been dismissed by the Lower Court. Other such cases are those of English and Dutch prisoners of war. See the correspondents’ reports in the Yearbook of International Humanitarian Law: Hideyuki Kasutani and Seigo Iwamoto, “Japan” in *Yearbook of International Humanitarian Law*, Vol. 3, 2000, p. 543; Hideyuki Kasutani, “Japan” in *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 389-390

<sup>40</sup> *Leo Handel et al. v. Andrija Artukovic* on behalf of himself and as representative of the Independent Government of the State of Croatia, US District Court for the Central District of California US 601 f. Supp. 1421 judgment of 31 January 1985, reproduced in M. Sassoli and A. Bouvier (eds), *How Does Law Protect in War*, ICRC, Geneva, 1999, pp. 713-719.

<sup>41</sup> Jurisdiction for the cause of action was based on 28 USC at 1331, which gives the Court jurisdiction over actions “arising under” the “Constitution, laws or treaties” of the United States.

<sup>42</sup> The Court held: “The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: 1. the purposes of the treaty and the objectives of its creators, 2. the existence of domestic procedures and institutions appropriate for direct implementation, 3. the availability and feasibility of alternative enforcement methods, and 4. the immediate and long-range social consequences of self- or non-self-execution.”

other things to the fact that Article 129 of the Third Geneva Convention that revised and replaced the 1929 Geneva Convention expressly requires implementation through municipal law. According to the Court:

“[a] treaty which provides that signatory States will take measures through their own laws to enforce its provisions evinces an intent that the treaty not be self-executing. (...) As a result, the Geneva Convention does not offer plaintiffs a private right of action...”.

The Court then turned to the Hague Convention and held that, although there is no provision in the Hague Convention for implementation into national law, other obstacles would necessitate a rejection of the provision's self-executing power:

“the consequences of implying self-execution compel the conclusion that the treaty is not a source of rights enforceable by an individual litigant in a domestic court. Recognition of a private remedy under the Convention would create insurmountable problems for the legal system that attempted it; would potentially interfere with foreign relations; and would pose serious problems of fairness in enforcement...”.

The District Court subsequently addressed the immediate and long-range social consequences of self- or non-self-execution as an additional contextual factor. In its view, self-execution would create a number of practical and political problems that would warrant the rejection of self-execution of the invoked provisions. The relevant passage reads:

“[t]he code of behaviour the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Convention violated in the course of large-scale war. Those lawsuits might go far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation of the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations.”

This position of US courts towards the self-executing character of IHL was recently confirmed in *Hamdi v. Rumsfeld*.<sup>43</sup> Hamdi was seized in

43 US Court of Appeals for the Fourth Circuit, 8 January 2003, *International Legal Materials*, Vol. 42, 2003, p.197.

Afghanistan during military hostilities. Hamdi and *amici curiae* argued that Article 5 of the Third Geneva Convention of 1949 applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal".<sup>44</sup> In its decision of 8 January 2003, the US Court of Appeals for the Fourth Circuit ruled that the argument failed, *inter alia*, because:

"the Geneva Convention is not self-executing. (...) Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action. (...) The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a 'meeting of their representatives' with the aid of diplomats from other countries, 'with a view to settle the disagreement.' (...) Similarly, Article 132 states that 'any alleged violation of the Convention' is to be resolved by a joint transnational effort 'in a manner to be decided between the interested Parties'. (...) We therefore agree with other courts of appeal that the language in the Geneva Convention is not 'self-executing' and does not 'create private rights of action in the domestic courts of the signatory countries'."<sup>45</sup>

The Court assumed that a treaty must provide a private cause of action to be self-executing. However, it is questionable whether this test is correct. It would seem that when a treaty provides individual rights, it should be self-enforcing. And, as we have seen, the Geneva Conventions expressly recognize private rights. Moreover, as Paust pointed out, "the Fourth Circuit panel's reasoning missed the point that a treaty can be partly non-self-executing for one purpose but still be directly operative for another, such as for use defensively or for habeas corpus purposes".<sup>46</sup>

Cases brought before US courts on the basis of universal civil jurisdiction show more potential. Victims of human rights and IHL violations have sought remedies before US courts under the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA). The ATCA, originating

<sup>44</sup> *Ibid.* p. 208, Part III, under B.

<sup>45</sup> *Ibid.*

<sup>46</sup> J. Paust, "Judicial power to determine the status and rights of persons detained without trial", *Harvard International Law Journal*, Vol. 44, No. 2, 2003, p. 515.

from the federal Judiciary Act of 1789, provides the district courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violations of the law of nations or a treaty of the United States”.<sup>47</sup> In *Filartiga v. Pena Irala*,<sup>48</sup> relatives of a victim of State torture and murder in Paraguay sued the alleged perpetrator for damages in a federal district court in New York. The district court dismissed for lack of jurisdiction, but on appeal the Second Circuit found federal court jurisdiction under the ATCA, allowing US courts to provide foreigners with a remedy for violations of international law wherever they took place. Pursuant to the *Filartiga* case, several US courts have held that there is universal jurisdiction over certain international crimes, including war crimes, and that this also applies when the conduct complained of occurred outside the United States.

The *Filartiga* case has been strongly opposed. In *Tel-Oren v. Libyan Arab Republic*,<sup>49</sup> the US Court of Appeals for the DC Circuit rejected the *Filartiga* interpretation of the ATCA. The Court found that this statute is merely jurisdictional and does not itself provide plaintiffs with a private cause of action for relief. Victims of a terrorist bombing in Israel sued the various alleged perpetrators, among others alleged agents of Libya, under the ATCA in federal district court in Washington D.C. As judge Bork stated in a concurring opinion: “as a general rule, international law does not provide a private right of action, and an exception to that rule would have to be demonstrated by clear evidence that civilized nations had generally given their assent to the exception”.<sup>50</sup>

The cases of *Kadic v. Karadzic* and *Doe I and II v. Karadzic* were a turning point in the ATCA proceedings. The plaintiffs in these cases complained that they had been victims of deportation, forced imprisonment, starvation and systematic torture, rape and forced impregnation. The accused, Radovan Karadzic, in his capacity as Bosnian Serb leader, was charged with genocide, war crimes, and torture. In these cases, on 13 October 1995, the US Second Circuit Court of Appeals found that Karadzic’s acts, even though they were private, were proscribed by international law and that international law generally, and genocide and war crimes specifically, do not demand State action.

<sup>47</sup> Currently codified at 28 U.S.C. § 1350.

<sup>48</sup> 630 F.2d 876 (2d Cir.1980) ILR 77, p. 169.

<sup>49</sup> 726 F.2d, 774 (D.C. Circuit, 1984, Nos. 81-1870, 81-1871.

<sup>50</sup> *Ibid.*, p. 817. Similarly, see J. M. Rogers, *International Law and United States Law*, Ashgate Publishing Company, Dartmouth, 1999, pp. 113-123.

In the subsequent case of *Humberto Alvarez-Machain et al. v. USA*, the Court of Appeals for the Ninth Circuit rejected the defendants' allegation that the ATCA only confers jurisdictional authority, finding that it also confers substantive legal rights.<sup>51</sup>

In 1992, the US Torture Victim Protection Act codified the holding in the *Filartiga* case. The Act creates causes of action against individuals who, acting under colour of foreign law, subject a person to torture or extrajudicial killing.<sup>52</sup> It provides victims of torture, both foreigners and American citizens, with a legal remedy.

Finally, mention should be made of the US Foreign Sovereign Immunities Act of 1976 (FSIA). This Act grants federal district courts concurrent jurisdiction over civil actions against foreign State and related entities.<sup>53</sup> Some plaintiffs have collected awards under the FSIA, for example in the *Letelier*<sup>54</sup> and *Siderman*<sup>55</sup> cases.

While recognizing that some cases before Dutch courts as well as US courts' judgments exercising universal civil jurisdiction are promising, the overall conclusion is justified that national courts show, by their reasoning, that their present practice with respect to individual compensatory claims based on rules of international humanitarian law is characterized by judicial timidity and the use of avoidance doctrines.<sup>56</sup> Insofar as domestic courts have denied individuals rights under IHL, their decisions should be discarded. Not only do the Geneva Conventions expressly recognize primary rights, but IHL also contains the possibility of private rights to compensation, i.e. in Article 3 of the 1907 Hague Convention IV and Article 91 of Protocol I.

A more liberal approach in this regard by the courts in Japan, the United States and elsewhere appears desirable. Whether they will move in that direction is uncertain. In terms of domestic remedies the prospects for a shift under IHL to responsibility vis-à-vis individuals depend largely on national and international legislative developments. At the national level, a State should have in place a legal framework incorporating IHL. An

<sup>51</sup> No. 95-55464; No. 95-55768; No. 95-56121. US Court of Appeals for the Ninth Circuit. 107F. 3d. 696, 1996 US App. LEXIS 37014, 24 September 1996, as amended 19 February 1997.

<sup>52</sup> G. B. Born, *International Civil Litigation in United States Courts: Commentary & Materials*, 3rd ed., Kluwer Law International, The Hague, 1996, pp. 37-39.

<sup>53</sup> *Ibid.*, p. 35.

<sup>54</sup> *Letelier v. Chile*, 488 F. Supp. 665 (D.D.C.1980).

<sup>55</sup> *Siderman v. Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. Denied, 507 U.S. 1017 (1993).

<sup>56</sup> Several commentators have considered national case law denying direct rights of individuals under IHL to be wrong. See Greenwood, *op. cit.* (note 35), p. 68; David, *op. cit.* (note 35), pp. 54-55.

obligation to enact such legislation could arguably be derived from Article 1 common to the 1949 Geneva Conventions, which stipulates that contracting States must ensure respect for those Conventions at all times. A number of humanitarian law treaties, such as the Ottawa Convention on Land Mines, Amended Protocol 2 on Prohibitions and Restrictions on the Use of Mines, Booby Traps and other Devices, and the Second Protocol on Cultural Property explicitly oblige the State to adopt appropriate legislation.<sup>57</sup> Furthermore, the obligation to implement the humanitarian standards through domestic legislation can be inferred from the State's obligation to prosecute violations thereof. In order to be able to prosecute grave breaches and other serious violations of IHL, a State must have the necessary laws in place. The obligation to prosecute can only be implemented through some kind of criminal law statute.<sup>58</sup>

The UN Principles on the Right to a Remedy may prove an important incentive for domestic legislative activities. These Principles are first and foremost concerned with domestic remedies. Principle 2 reads: "States shall ensure that domestic law is consistent with international legal obligations by (...) [i]ncorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system". As the Principles require States to transform IHL into national law, the question of direct effect of IHL rights does not arise. Alternatively, a private right of action before domestic courts could be recognized under international law entitling victims to directly invoke their IHL rights before domestic courts. The UN Principles on the Right to a Remedy provide for this, saying that States must afford appropriate remedies to victims of violations of IHL, including access to justice.<sup>59</sup>

<sup>57</sup> Art. 9 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997; Art. 14 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996); Arts 15-2 and 16-1 of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999.

<sup>58</sup> As Meron argued: "As regards the national State of the perpetrators of non-grave breaches, its obligations go further. Given the purposes and objects of the Geneva Conventions and the normative content of their provisions, any State that does not have the necessary laws in place, or is otherwise unwilling to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character, calls into serious question its good faith compliance with its treaty obligations." T. Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, 1995, p. 570.

<sup>59</sup> Principles 8(d) and 10(a), UN Principles on the Right to a Remedy, *op. cit.* (note 8).

### International remedies

At the international level, too, victims of violations of IHL are hardly able to exercise their rights under that law. There is no general international mechanism allowing them to assert those rights. The UN Principles on the Right to a Remedy state that the right to an adequate remedy against a violation of IHL includes "all available international processes in which an individual may have legal standing".<sup>60</sup> But although the Geneva Conventions and their Additional Protocols contain many provisions for the punishment of individuals who have committed grave breaches, they do not provide for any remedy for the victims of these crimes. As the law now stands, the only compulsory procedure for ascertaining violations is the enquiry procedure established by Article 90 of Protocol I.<sup>61</sup> However, apart from the fact that as yet the International Fact-Finding Commission has not dealt with any case, the procedures set forth in Article 90 and in the Rules adopted by the Commission do not allow individual victims of violations of IHL to bring cases.

In practice, all existing procedures under IHL are subject to the agreement of the parties to the conflict concerned and none provide individual victims with a general right to a remedy for violations of the law. Without claiming to be exhaustive, I shall deal with a number of examples.<sup>62</sup>

#### International Committee of the Red Cross

The ICRC claims to be the primary international body for the protection of war victims. It is broadly mandated to protect and assist war victims and to act as promoter and guardian of IHL. It is specifically empowered "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law".<sup>63</sup> Demonstrating how this may work out in practice, a former head of the ICRC delegation in Colombia reports:

<sup>60</sup> Principle 12, *ibid.* This should be without prejudice to any other domestic remedies.

<sup>61</sup> The International Fact-Finding Commission is a creation of Article 90 of Additional Protocol I. It was established in 1991, once the conditions set forth in Article 90(1)(b) were fulfilled.

<sup>62</sup> Not examined are the United Nations organs. For the application of humanitarian law by the United Nations, see H-P. Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations", in H. Fox & M. A. Meyer (eds), *Effecting Compliance*, British Institute of International and Comparative Law, London, 1993, pp. 15-49.

<sup>63</sup> Statutes of the International Red Cross and Red Crescent Movement, adopted by the International Conference of the Red Cross (1986, amended 1995), Art. 5(2)(c). Text unchanged in Statutes of the ICRC (1998) Art. 4(1)(c).

“[i]n addition to the hostage cases and complaints registered from persons in detention, the ICRC annually registers over 1,500 individual complaints from victims of breaches of IHL committed by the various actors of the armed conflict. These complaints may concern extrajudicial executions, non-restitution of bodies, and threats against life and property. In many instances, ICRC delegates transmitting such complaints can help to establish authorship of the violations, demand and sometimes obtain reparation, clarify the seriousness of threats and at times obtain the retraction thereof, identify location of graves, and negotiate the restitution of corpses. The ICRC also regularly submits confidential reports on such complaints and reminders of prevailing provisions of IHL to the government, the insurgents, and the *autodefensas* [which is a rightist paramilitary grouping]”.<sup>64</sup>

While the ICRC’s entire focus is on seeing that IHL is applied, it has no official implementation procedures at its disposal and its mandate and activities certainly do not provide victims with a right to a remedy. It does not have the means to make enforceable determinations with regard to claims of individuals who allege that they are victims of such violations, nor is that its purpose. Instead, it operates mainly through confidential discussions with governments.

### Human rights bodies

The best prospects seem to exist where human rights law and international humanitarian law overlap. Although the human rights courts are not humanitarian law courts and are not in any respect explicitly related to the field of IHL, they do provide a forum for victims of violations of IHL.

The Inter-American Commission and Court on Human Rights have adopted the most liberal attitude, applying IHL directly in the context of the individual complaints procedure. The Commission stated its view that it should apply IHL because it would enhance its ability to respond to situations of armed conflict. It found that the American Convention on Human Rights, although formally applicable in times of armed conflict, is not designed to regulate situations of war. In particular, the Commission noted

<sup>64</sup> P. Gassmann, “Colombia: Persuading belligerents to comply with international norms”, in S. Chesterman (ed.), *Civilians in War*, Lynne Rienner Publishers, London, 2001, p. 90, footnote 16, cited in F. Kalshoven, “The International Humanitarian Fact-Finding Commission established by the First Additional Protocol to the Geneva Conventions”, in *Collection of Documents, op. cit.* (note 14), pp. 9-30.

that the American Convention does not contain rules governing the means and methods of warfare.<sup>65</sup>

In the so-called *Tablada* case (1997),<sup>66</sup> the Commission developed an extensive set of arguments in support of its decision to include humanitarian law in its mandate. In brief, it argued that, although an explicit legal basis was absent, several articles of the American Convention should be read as indirectly mandating it to apply IHL. The finding of the Inter-American Commission that it is competent to apply humanitarian law is not unproblematic. For lack of space, those arguments cannot be examined in detail here.<sup>67</sup> However, a closer analysis of them shows that it is highly questionable whether the American Convention gives the Commission a legal basis to apply humanitarian law.

It is therefore not surprising that its practice was challenged in the *Las Palmeras* case that concerned a complaint against Colombia lodged with the Commission on 27 January 1994. The complaint led to the adoption by the Commission of a report on the case on 20 February 1998, in which it confirmed its approach in earlier cases of directly applying IHL. Colombia was held to have violated the right to life in Article 4 of the American Convention and Article 3 common to the Geneva Conventions. After the Commission had submitted the case to the Court, the Colombian government entered five preliminary objections in September 1998. With the second and third preliminary objections, Colombia challenged the competence of the Commission and the Court to hold a State responsible for a violation of the right to life under Article 3 common to the Geneva Conventions. In its judgment of 4 February 2000,<sup>68</sup> the Court

<sup>65</sup> It gave the following example: “[B]oth Common Article 3 [of the Geneva Conventions] and Article 4 of the American Convention protect the right to life and thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.” *IACHR Report No. 55/97*, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, p. 44, para. 161.

<sup>66</sup> *Ibid.*

<sup>67</sup> For an analysis of the arguments presented by the Commission, see L. Zegveld, “The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* case” in *International Review of the Red Cross*, Vol. 324, 1998, pp. 505-511.

<sup>68</sup> *Caso Las Palmeras, Excepciones Preliminares, Sentencia de 04 de Febrero de 2000, Serie C, No. 66*. On this case, see F. Kalshoven, “State sovereignty versus international concern in some recent cases of the Inter-American Court of Human Rights”, in G. Kreijen (ed.), *State, Sovereignty, and International Governance*, Oxford University Press, Oxford, 2002, pp. 259-280.

admitted these two objections<sup>69</sup> and found that it was not competent to apply the Geneva Conventions, while being competent to interpret the Geneva Conventions whenever necessary to interpret a rule of the American Convention.<sup>70</sup> The Inter-American Court held that:

“[a]lthough the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the State, confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons.”<sup>71</sup>

It remained for the Inter-American Commission and Court to use international humanitarian law as a standard of reference. In the *Bamaca Velasquez* case against Guatemala (judgment of 25 November 2000), dealing with ill-treatment in detention, the Court found that there had been a violation of Article 1(1) of the American Convention on Human Rights that stipulates the duty to ensure respect for the rights in the American Convention, in relation to Article 3 common to the Geneva Conventions. The Court stated:

“Article 1(1) of the Convention provides that the States Parties undertake ‘to ensure’ to all persons subject to their jurisdiction the free and full exercise of the rights of the ACHR. (...) The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala. As has previously been stated, instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavourable distinctions.

<sup>69</sup> *Ibid.* para. 43.

<sup>70</sup> *Ibid.* paras. 32-33.

<sup>71</sup> *Ibid.* para. 34.

In particular, IHL prohibits attempts against the life and personal integrity of those mentioned above, at any place and time. (...) Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that the Court does have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3. (...) Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras* Case (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.”<sup>72</sup>

The Inter-American Court found that there had been a violation of Article 1(1) of the American Convention in relation to common Article 3 of the 1949 Geneva Conventions; it did not find an independent violation of common Article 3 of the 1949 Geneva Conventions.

Even the Court’s mere observation as to violation of IHL would be a step too far for the United States. On 12 March 2002, the US government rejected the Inter-American Commission’s request of the same date “to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal”.<sup>73</sup> Recognizing that its specific mandate is to secure respect for human rights, the Commission noted that in the past it had “looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration [on the Rights and Duties of Man] and other Inter-American human rights instruments in situations of armed conflicts”. The US government maintained that “the Commission does not have the requisite jurisdictional competence to apply international humanitarian law, including the 1949 Geneva Convention on Prisoners of War” and cited the Inter-American Court’s judgment in the

<sup>72</sup> Paras. 205-210.

<sup>73</sup> Letter of the US government of 12 March 2002, available at: <[http://www.photius.com/rogue\\_nations/guantanamo.html](http://www.photius.com/rogue_nations/guantanamo.html)>.

*Las Palmeras* case. However, the Court's finding in the latter case on the Commission's and Court's competence to apply IHL is limited to a contentious case, which may end up in a binding decision of the Court. The Commission, on the other hand, based its request for precautionary measures on behalf of the Guantanamo Bay detainees on its broad powers under the OAS Charter and the American Declaration. Be this as it may, clearly the US government sees the Inter-American human rights instruments and IHL as two entirely separate bodies of law, and thereby denying the Inter-American Commission the competence to use IHL either for direct application or as a yardstick for interpretation.<sup>74</sup>

The ever-increasing number of States party to the European Convention on Human Rights means that many cases involve issues which call for consideration of IHL. Although the European Court of Human Rights is still reluctant to involve the law of armed conflict explicitly, it appears to use it as a tool for analysis. On several occasions, humanitarian law seems to have served as a source of guidance in the practice of the European Court.<sup>75</sup>

The African Commission on Human and Peoples' Rights has taken a somewhat different, more flexible, approach. It has discerned a close relationship between humanitarian and human rights law and the consequences which violation of the one has on the other, and sees a need for promoting both together.<sup>76</sup> In its resolution on Sudan, the African Commission recalled

<sup>74</sup> On this case, see F. Kalshoven, "Enemy combatants in American hands: Are there limits to the President's discretion?", typescript on file with author, text expected to be published in December 2003.

<sup>75</sup> Humanitarian law has been applied in the context of the following ECHR rights: Article 2 (right to life), Article 3 (prohibition of torture/inhuman treatment), Article 8 (right to family life), and Article 1 of Protocol 1 (right to property). The relevant practice may be categorized under the following headings: destruction of property and displacement of the civilian population, detention and treatment of detainees, conduct of military operations and unlawful killings. Humanitarian law has also surfaced in the practice of other human rights bodies. For instance, in an inter-State complaint against Turkey, Cyprus invoked IHL rules before the European Commission on Human Rights (4 EHRR 482 at 552, 553 (1976) Commission Report). However, the European Commission did not examine this point. See on this subject Ch.M. Cerna, "Human rights in armed conflict: Implementation of international humanitarian law norms by regional intergovernmental human rights bodies", in F. Kalshoven & Y. Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 31-67.

<sup>76</sup> From its Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, it appears that the African Commission regards both sets of laws as being based on the same principles: "Considering that human rights and IHL have always, even in different situations, aimed at protecting human beings and their fundamental rights...". In *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993-94*, ACHPR/RPT17th at Annex XI.

In the same resolution, the Commission combines considerations of humanitarian and human rights law in a number of ways. It sees a need for promoting both together: "Emphasizing the importance of propagating the principle of human rights law as well as IHL", Resolution on Human and Peoples' Rights Education, *Ibid.*, at Annex X.

that "Sudan is legally bound to comply with international human rights and humanitarian law treaties and has ratified (...) the four Geneva Conventions of 1949".<sup>77</sup> While there is thus an implication that the African Commission is holding itself up as supervisor of the implementation of IHL instruments, hitherto no individual complaint has, as far as I am aware, been decided directly on the basis of IHL.

In sum, all regional human rights bodies have become adept at examining human rights questions in a humanitarian law context. This practice encouraged Christopher Greenwood, in his Report on International Humanitarian Law presented for the Centennial of the 1899 Hague Peace Conference, to suggest that the lack of implementation mechanisms for humanitarian law may be remedied by human rights instruments.<sup>78</sup> More specifically, he suggested that "the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts".<sup>79</sup> In contrast to humanitarian law, human rights treaties are commonly equipped with committees, commissions or courts that are competent to receive complaints from individuals,<sup>80</sup> and which provide victims of human rights, or indeed IHL violations, with a remedy.

<sup>77</sup> Resolution on Sudan, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994-95, ACHPR/RPT/8th, Annex VII.

<sup>78</sup> C. Greenwood, "International humanitarian law" in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions*, Kluwer Law International, The Hague, 2000, pp. 240-241 and 251-252.

<sup>79</sup> *Ibid.* at 240.

<sup>80</sup> "Committees" competent to receive complaints of individuals have been set up under the following human rights treaties: 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination); First Optional Protocol to the 1966 International Covenant on Civil and Political Rights (Human Rights Committee); 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture); 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families); Optional Protocol to the Convention on the Elimination of Discrimination against Women (Committee on the Elimination of Discrimination against Women), adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999 (not yet in force).

"Commissions" and/or "Courts" have been established in Europe (European Court of Human Rights since the entry into force of the 11th Protocol), Africa (African Commission on Human and Peoples' Rights until the entry into force of the Charter adopted on June 1998, and thereafter Commission and Court on Human and Peoples' Rights), the Americas (Inter-American Commission on Human Rights and the Inter-American Court of Human Rights).

## Claims commissions

In recent years, there has been a proliferation of tribunals and commissions that have been set up as a result of international or internal armed conflicts to provide remedies for claims from victims of violations of IHL.<sup>81</sup>

Two known examples are the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims Commission (EECC), whose jurisdictional bases include specific references to violations of IHL.<sup>82</sup> The UNCC was established in 1991 by the UN Security Council to implement Iraq's liability, "under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" in 1990/1991.<sup>83</sup> The Security Council thus considered this liability to exist not only between States, but also vis-à-vis individuals and corporations. The vast majority of the 2.6 million claims received are from individuals.<sup>84</sup> The UNCC's decisions recognize the right of individual civilian victims of IHL violations to claim.<sup>85</sup>

The EECC was established in 2000 by the Eritrea-Ethiopia Peace Agreement "to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict (...), and (b) result from violations of IHL, including the 1949 Geneva Conventions, or other violations of international law".<sup>86</sup>

<sup>81</sup> See N. Wühler, "The role of ad hoc claims commissions", in *Collection of Documents, op. cit.* (note 14), pp. 50-58; K. Oellers-Frahm & A. Zimmermann (eds), *Dispute Settlement in Public International Law: Texts and Materials*, 2nd completely revised and updated edition, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 2001; P. Sands, R. Mackenzie & Y. Shany (eds.), *Manual on International Courts and Tribunals*, Butterworths, London, 1999.

The use of international claims mechanisms to deal with the consequences of international or internal conflicts is steadily increasing. This trend is expected to continue. Proposals have been submitted, for instance, in relation to Cyprus, Palestine and most recently Iraq.

<sup>82</sup> Other examples are the mixed arbitral tribunals set up under the rules of peace treaties after the First World War and similar tribunals set up after the Second World War. These tribunals had the purpose of giving compensation to individuals for losses suffered during the wars.

<sup>83</sup> SC Resolution 687 (1991) of 8 April 1991, para. 16.

<sup>84</sup> Approximately 7,000 claims have been filed by corporations, and around 300 by governments. See the UNCC's website: <[www.uncc.ch](http://www.uncc.ch)>.

<sup>85</sup> See e.g., Decision No. 7, UN Doc. S/AC.26/1991/7, para. 6.

<sup>86</sup> Peace Agreement, Art. 5, para. 1.

It is estimated that approximately 400,000 claims have been submitted by individuals of each of the two States. On 1 July 2003, the EECC issued its first decisions on claims filed by Ethiopia and Eritrea relating to the treatment of prisoners of war.<sup>87</sup>

Typically, claims commissions provide for restitution of or return into property, or monetary compensation. In a number of programmes the individual claimants have the right to initiate proceedings. The claimants either submit their claims directly to the respective commissions or — in the case of the UNCC and the EECC — to their government, which in turn submits the claims to the respective commission. The reason that in the latter cases the governments file the claims is administrative rather than a legal conclusion that individuals have no rights of their own to compensation.<sup>88</sup>

Arguably, mass claims mechanisms are the most appropriate for victims of mass crimes committed in settings where it is difficult to resolve claims on a case-by-case basis and where usually limited resources are available.<sup>89</sup> In view of the specific nature of IHL, compensatory measures in particular are likely to be problematic. By individualizing claims of reparation for violations of IHL that occur in the midst of armed conflict and are sometimes committed on a large scale, possibly as part of a plan or policy, the capacities of an international body may be overwhelmed.<sup>90</sup> The more extensive the violations of humanitarian law and the greater the number of potential complainants, the more likely that body is to be confronted with a breakdown of law and order within the State concerned. In such situations the need for claims commissions will be greatest, as domestic remedies are not effective. These commissions will be better equipped to deal with practical problems such as implementation of monetary compensation to all victims that is proportionate to the gravity of the violation.

<sup>87</sup> EECC, Partial Award Prisoners of War, Ethiopia's claim 6 between the Federal Democratic Republic of Ethiopia and the State of Eritrea, The Hague, July 1, 2003; EECC Partial Award Prisoners of War, Eritrea's claim 17 between the State of Eritrea and the Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003.

<sup>88</sup> See, for example, Report of the Secretary-General on the Establishment of the UNCC, UN Doc. S/22559, para. 21.

<sup>89</sup> N. Wühler, *op. cit.* (note 81), pp. 56-57.

<sup>90</sup> For corresponding considerations with regard to grave human rights violations, see C. Tomuschat, *op. cit.* (note 15), pp. 1-25. See also *Leo Handel v. Andrija Artukovic*, US Distr. Cal. (1985), *op. cit.* (note 40) and accompanying text.

At the same time, in all mass claims systems the involvement of the individual victims in the procedure is limited. They submit the claims but take no further part in the proceedings unless so requested by the commission in question. There is thus no individualized resolution of a case in a judicial or arbitral process. Another problem is of course that this type of procedures are *ad hoc*, their establishment being dependent upon political feasibility. It is necessary that victims be allowed to claim the protection of the Geneva Conventions and other IHL instruments, not as a favour, but as a right. In case of violation, international procedures should be available to demand respect for IHL. The prospect of a wholly discretionary response by the international community to the question of setting up a claims commission will not be enough to satisfy the need for remedial effectiveness. Some element of enforceability is required.

#### International criminal tribunals

Similar problems are inherent in remedies for victims of war crimes provided by international criminal tribunals. The primary emphasis of such tribunals is on punishment of criminals, and the focus on victims and their remedies is limited. While the prosecutor is expected to represent the interests of the international community, including those of the victims, the prosecutor's concerns do not necessarily match those of the victims.

Nonetheless, some measure of attention is given to victims and their remedies. In its Resolution 827 (1993) of 25 May 1993 adopting the Statute of the International Criminal Tribunal for the former Yugoslavia, the Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law". Both the ICTY and ICTR Statutes and Rules provide for the restitution of property or the proceeds thereof to victims, and in this context a Trial Chamber may determine the rightful owner of the property at issue. Thus there is a mechanism in place which provides a remedy for minor crimes. However, for more serious forms of damage — harm to life or person — there is no remedy under the said Statutes. Indeed, Rule 106 of the Rules of both Tribunals stipulates that victims seeking compensation must apply to a national court or other competent body; in these domestic proceedings the victims may, however, avail themselves of judgments of the ICTY or ICTR.

The Rules of Procedure and Evidence of the Special Court for Sierra Leone<sup>91</sup> contain a similar provision. Rule 105 on compensation to victims states:

- (a) "The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
- (b) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.
- (c) For the purposes of a claim made under sub-rule (b) the judgement of the Special Court shall be final and binding as to the criminal responsibility of the convicted person for such injury."

Under these rules, the victims once again depend on national remedies which, as we have seen, are often lacking. In the absence of a national court with the power and the will to award reparations, victims are left without an important means of recourse.<sup>92</sup> The UN Principles on the Right to a Remedy aim to fill the domestic gap. Principles 4 and 5 deal with "violations of (...) international humanitarian law that constitute crimes under international law". Read together with the other Principles, this means that States are obliged to afford appropriate remedies to victims of war crimes. Furthermore, Principle 7 provides that statutes of limitations for "pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of (...) international humanitarian law norms".

The International Criminal Court was established with similar goals in mind, i.e. punishment and deterrence. However, concerned by the lack of attention given to victims by the provisions setting up the ICTR and ICTY,<sup>93</sup>

<sup>91</sup> For the Statute of the Special Court, see Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), as amended on 16 January 2002. See also SC Resolution 1315 (2000).

<sup>92</sup> Judge F. Pocar, "The international criminal tribunals", in *Collection of Documents, op. cit.* (note 14).

<sup>93</sup> As the French Minister of Justice pointed out: "We must (...) stop, once and for all, regarding victims merely as witnesses (...) [V]ictims are not simply witnesses whose participation in proceedings should be limited to gathering the information which they are able to provide. They have a separate role to play, and this must be recognised by the International Criminal Court, as is expressly provided for, moreover, by the Rome Statute. A victim's primary status is that of a person who has suffered; he may also have the secondary status of a person who has seen or heard things. The one does not exclude the other, but the injury suffered is enough in itself fully to justify the entitlement of such a person to express his concerns and complaints to the Court.", E. Guigou, Address by the Ministry of Justice at the International Colloquium on "L'Accès des victimes à la Cour pénale internationale" (27 April 1999) (unofficial translation).

the Rome Statute incorporates more avenues of redress for victims. Article 75 of the Rome Statute of the International Criminal Court obliges the Court to “establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation”. Article 79 calls for the establishment of a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and Article 69 mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”. The ICC Statute thus goes well beyond the treatment of victims under the ICTY and ICTR Statutes and Rules, as it gives the victim standing in his or her own right.<sup>94</sup>

### Conclusion

On the basis of these fragmentary considerations, the conclusion is justified that few examples exist where victims are endowed with a right of their own to a remedy for violations of international humanitarian law. While developments at the national level in the Netherlands and in the United States under the Alien Tort Claims Act and the Torture Victims Protection Act are promising, many cases in which individuals have brought claims under Article 3 of the 1907 Hague Convention before national courts have failed because the courts did not recognize that individuals have standing against the State. They regarded the right in that article as one that only States can exercise on behalf of individuals. At the international level, there has been some progress in the means open to victims for the defence of their rights before international bodies, but the practice of international bodies providing remedies to victims of violations of IHL is *ad hoc* and is not organized. There is no general mechanism that would allow victims to assert their rights under IHL.

<sup>94</sup> Jorda and De Hemptinne comment that these advances leave some difficulties unresolved. They draw attention *inter alia* to the fact that the ICC Statute does not explain how the victim's intervention in the proceedings can be accommodated with the right of the accused to be tried fairly. Also they stress that the Statute does not deal with the difficult issue of settling the right of reparation without compromising the expeditious conduct of trials, as victims of violations of humanitarian law are generally numerous, see C. Jorda and J. de Hemptinne, “The status and role of the victim”, in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1388-1389. But these are practical issues to which the Court will have to find a solution.

At the same time, to say that victims have no individual legal standing in IHL would not be a correct description of the actual state of affairs. Although States are still the traditional subjects of IHL, victims have also, in an increasing number of cases, achieved recognition as subjects of IHL. In the years to come, the UN Principles on the Right to a Remedy will undoubtedly lead to greater attention to application of IHL in domestic and international courts, and thus to an injection of IHL norms in the approach to individual remedies. The UN document is a welcome move towards bringing about remedies for victims of violations of IHL. It still has non-binding status. However, this does not necessarily negate its potential influence, for there are many examples of similar documents exerting influence in litigation.

## Résumé

### ***Remèdes des victimes en droit international humanitaire***

*Liesbeth Zegveld*

*Le droit international humanitaire garantit la protection et l'assistance aux victimes de conflits armés. Cependant, lorsque des personnes deviennent victimes de violations du droit humanitaire, la protection conférée par cette branche du droit cesse de fait. En particulier, a priori elle offre aux victimes de violations graves peu de possibilités d'obtenir réparation, voire aucune.*

*Le droit international humanitaire diffère nettement sur ce point des tendances en droit international en la matière. Les droits de l'homme, branche de droit analogue mais distincte, définissent clairement le droit des victimes d'obtenir réparation en cas de violation des droits fondamentaux. Depuis peu, le Statut de Rome de la Cour pénale internationale autorise la Cour à déterminer dans sa décision l'ampleur du dommage, de la perte ou du préjudice causé aux victimes et à leur accorder une réparation. En revanche, le droit humanitaire ne garantit pas expressément le droit à un remède juridique aux victimes de violations.*

*Cet article examine les moyens juridiques mis à la disposition des victimes de violations du droit international humanitaire par le droit interne et le droit international pour qu'elles fassent respecter leurs droits fondamentaux. Il étudie la question de savoir si les victimes ont droit à un remède et dans quelle mesure elles peuvent faire valoir ce droit. Une brève étude des pratiques nationale et internationale tendrait ainsi à prouver que, s'il n'y a guère de doute sur le fait que les victimes jouissent de droits au titre du droit international humanitaire, ces droits ne semblent toutefois pas justiciable et ne peuvent donc que difficilement donner lieu à un remède.*



## Reparation for violations of international humanitarian law

EMANUELA-CHIARA GILLARD\*

The latter half of the twentieth century witnessed unprecedented development and codification of international legal standards for the protection of individuals. These include numerous universal and regional human rights instruments, the 1949 Geneva Conventions and their Additional Protocols of 1977 and the various instruments of refugee law.

Despite this indispensable step forward in the protection of the individual, the reality today is that individuals continue to suffer at the hands of abusive governments and in situations of armed conflict.

There is general agreement that the challenge today lies in ensuring respect for these rights and laws. In response, a number of significant initiatives have been undertaken in recent years to improve compliance with human rights law and international humanitarian law. In addition to the creation of various international human rights tribunals, we have seen the establishment of two *ad hoc* tribunals to try persons accused of serious violations of international humanitarian law in the former Yugoslavia and in Rwanda, as well as the permanent International Criminal Court. Alongside these developments at the international level, there has been a marked increase of activity by national courts in prosecuting persons accused of serious violations of human rights and international humanitarian law.

Against this background a review of current law and practice relating to reparation for violations of international humanitarian law is timely. At first sight, it may legitimately be asked why reparations which,

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by definition, become relevant only once a violation of the law has occurred, can enhance compliance with a body of law.

While in each individual case reparation can only address the consequences of a violation, at a more general level a body of law is strengthened if a breach thereof gives rise to an entitlement to reparation. Reparation is an important part of enforcement and can play a significant role in deterring future violations.

Of course, the making of reparation is also extremely important *per se* for very practical reasons, particularly for individuals who have been victims of violations of international humanitarian law. Even once the immediate consequences of the violation have been dealt with, such persons remain extremely vulnerable. They may need long-term medical care, may no longer be able to earn an income and are likely to have lost home and belongings. It would be callous and naive to think that an award of compensation, for example, would restore victims to the situation they were in prior to the violation — re-establish the *status quo ante* as required by international law. Nevertheless, the receipt of timely and adequate compensation is an important element in enabling victims to try to rebuild their lives.

Between States the principle that every violation of international obligations gives rise to a duty to make reparation is well established in law and functions reasonably well in practice. However, with regard to individual victims of violations of human rights law and international humanitarian law the position remains more uncertain.

The present article briefly sets out the rules of public international law on reparation and outlines their application to international humanitarian law. It then reviews current law and practice relating to compensation, focusing more specifically on the position of individual victims. Though relevant, the practice of human rights tribunals is not addressed, as many violations of human rights take place in situations of non-international armed conflict and may therefore also constitute violations of international humanitarian law. Similarly, the question of claims valuation is also beyond the scope of this review. The final section of the article raises a number of broader policy questions on the subject.

### **General principles**

It is a general principle of public international law that any wrongful act — i.e. any violation of an obligation under international law — gives

rise to an obligation to make reparation.<sup>1</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.

Reparation can take various forms, including restitution, compensation or satisfaction. These remedies can be applied either singly or in combination in response to a particular violation.<sup>2</sup>

The aim of restitution is to restore the situation that existed before the wrongful act was committed. Examples include the release of wrongly detained persons, the return of wrongly seized property and the revocation of an unlawful judicial measure.<sup>3</sup> There may obviously be circumstances in which restitution is materially impossible, for example, if the property in question has been destroyed. Restitution may also not be an appropriate remedy if the benefit to be gained from it by the victim is wholly disproportionate to its cost to the violator.

Compensation is a monetary payment for financially assessable damage arising from the violation. It covers material and moral injury.<sup>4</sup>

Satisfaction covers non-material injury that amounts to an affront to the injured State or person. Examples include an acknowledgement of the breach, an expression of regret or an official apology or assurances of non-repetition of the violation. Satisfaction can also include the undertaking of

1 Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (hereinafter "ILC Articles on State Responsibility").

2 See Articles 31 to 34 ILC Articles on State Responsibility, *op. cit.* (note 1). See also the 2000 draft of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62, 18 January 2001, (hereinafter "draft Basic Principles and Guidelines"). These draft principles, elaborated by two independent experts pursuant to a request by the Commission on Human Rights, have not yet been finalized or adopted.

3 See Article 35, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 22 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) gives the following examples of restitution: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

4 See Article 36, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 23 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) states that compensation should be provided for any economically assessable damage and gives the following examples of such damage: physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

disciplinary or penal action against the persons whose acts caused the wrongful act.<sup>5</sup>

### Reparation for violations of international humanitarian law

These same general principles apply to violations of international humanitarian law.<sup>6</sup> This was expressly laid down as long ago as 1907 in the Hague Convention (IV) respecting the Laws and Customs of War on Land, Article 3 of which stipulates that:

“[a] belligerent Party which violates the provisions of the (...) Regulations [respecting the Laws and Customs of War on Land] shall, if the case demands, be liable to pay compensation...”

A similar requirement to pay compensation for violations of international humanitarian law is expressly reiterated in Article 91 of Additional Protocol I.<sup>7</sup>

Despite this explicit language, it should be noted that the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions.

5 See Article 37, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 25 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) sets out an extensive list of possible forms of satisfaction and guarantees of non-repetition. These include the cessation of continuing violations; the verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; the search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; the inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels; as well as measures for the prevention of the recurrence of violations.

The draft Basic Principles and Guidelines (*op. cit.* note 2) include an additional form of reparation: rehabilitation. Principle 24 provides that rehabilitation should include medical and psychological care as well as legal and social services.

6 For an excellent and exhaustive study of law and practice on violations of international humanitarian law, and indeed on “war reparation” more generally, see P. d’Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des Etats à l’épreuve de la guerre*, Bruylant, Brussels, 2002 and references therein.

7 Other instruments also expressly refer to an obligation to make reparation. For example, Article 19 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances provides that the victims of acts of enforced disappearance and their family have the right to adequate compensation, including the means for as complete a rehabilitation as possible. It further stipulates that “in the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation”, UN Doc. A/47/49, 18 December 1992.

Although the Hague Convention and Additional Protocol I speak only of compensation, reparation for violations of international humanitarian law can take various forms. The most relevant are restitution, such as the return of unlawfully taken property, as envisaged by the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>8</sup> and, more commonly, compensation, including instances when restitution is impossible or inappropriate.

Acceptance of a duty to make reparation is also often found in treaties concluded between belligerents at the end of hostilities.<sup>9</sup> However, this obligation is frequently not expressly related to violations of international humanitarian law but rather to violations of the prohibition of the use of force, or treaties merely speak even more vaguely of “claims arising out of the

<sup>8</sup> See, for example Article 3 of the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, which provides that:

“each Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the [prohibition on exporting cultural property from occupied territory during an armed conflict].”

Similarly, the peace treaty concluded in 1955 between Austria and France, the Soviet Union, the UK and the US contains extensive provisions on restitution of property, (Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, France and Austria: State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), 15 May 1955, *United Nations Treaty Series*, Vol. 217, No. 2949).

<sup>9</sup> By way of example, see the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and Germany in which, *inter alia*, Germany acknowledged:

“the obligation to assure ... adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.”

(Article 1(1), Chapter Four) (*United Nations Treaty Series*, Vol. 219, No. 4762)

See also the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), between France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Austria, and acceded to by Australia, Brazil, Canada, Czechoslovakia, Mexico, New Zealand, Poland and Yugoslavia, Article 26(1) of which provides that:

“1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be

war".<sup>10</sup> While many of the losses and claims may, in practice, arise from violations of international humanitarian law, there is no need for a determination of a violation to be made.

One recent and notable exception in this respect is the peace agreement of December 2000 between Ethiopia and Eritrea.<sup>11</sup> *Inter alia*, this establishes a neutral Claims Commission charged with deciding, through binding arbitration, all claims between the two governments and between private entities for loss, damage or injury related to the conflict and resulting from violations of international humanitarian law or other violations of international law. This Commission is an exception inasmuch as it is expressly tasked with awarding compensation for violations of international humanitarian law.

It should be noted that violations of *all* rules of international humanitarian law give rise to an obligation to make reparation, and not only violations of the grave breaches provisions for which there is individual criminal responsibility.<sup>12</sup>

Finally, it should also be pointed out that the law and practice referred to above relate to international armed conflicts. Neither common Article 3 of the Geneva Conventions nor their Additional Protocol II mention compensation or any other form of reparation, and there have been virtually no instances where organized armed groups have undertaken to make

granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage."

(*United Nations Treaty Series*, Vol. 217, No. 2949)

In the 1959 Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution between the Federal Republic of Germany and Norway, the Federal Republic of Germany agreed to:

"pay the Kingdom of Norway 60 million Deutsche Mark on behalf of Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution."

(Article 1(1)) (*United Nations Treaty Series*, Vol. 222, No. 5136)

<sup>10</sup> See, for example, Article 14(a) of the 1951 Treaty of Peace between the Allied Powers and Japan, San Francisco, 8 September 1951, in which Japan undertook to "pay reparations to the Allied Powers for the damage and suffering caused by it during the war" (*American Journal of International Law, Supplement: Official Documents*, Vol. 46, 1952, p. 71).

<sup>11</sup> Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Article 5, *International Legal Materials*, Vol. 40, 2001, p. 260.

<sup>12</sup> Investigation of alleged violations and access to justice for the victims are remedies for the violations. According to Principle 11 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) remedies for violations of international human rights and humanitarian law include the victim's right to access justice; reparation for harm suffered; and access to factual information concerning the violations.

reparations for violations of international humanitarian law or have made such reparations in practice.<sup>13</sup> Although a responsibility to make reparation would be a natural consequence of the fact that organized armed groups are bound by international humanitarian law, to date such responsibility has taken the form of individual criminal responsibility of violators, for example before the International Criminal Tribunal for Rwanda.

**Do individuals have a right to reparation for violations of international humanitarian law? Can it be enforced before national courts?**

While the obligation to make reparation for violations of international humanitarian law is well established, the challenge lies in determining, first, *who* is entitled to the reparation — only States or also individual victims? — and secondly, the mechanisms for its award: can individuals claim reparation for violations of international humanitarian law directly before national courts or must they have recourse to special international fora and mechanisms?

The principles discussed so far relate to the obligation of one State to make reparation to another State for violations of international humanitarian law committed by that State and its agents. The payment received can cover both the losses suffered by the State itself and those of its nationals. This is the approach traditionally adopted by peace treaties, which often include, for individuals who have suffered losses, lump-sum payments that the recipient State is responsible for distributing.

For example, at the end of the Second World War, Japan concluded a peace treaty with the Allies in which it made funds available to “indemnify members of the armed forces of the Allied Powers who suffered undue hardships

<sup>13</sup> Organized armed groups have undertaken to make reparations for violations of international humanitarian law in very few cases. One example is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, concluded in 1998 between the government of the Philippines and the National Democratic Front of the Philippines, which expressly provides for indemnification of the victims of violations of international humanitarian law by both parties to the conflict. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines of 16 March 1998 available at [www.incore.ulst.ac.uk/cds/agreements/pdf/phil8.pdf](http://www.incore.ulst.ac.uk/cds/agreements/pdf/phil8.pdf)

Also, although it did not actually pay any compensation, in 2001 a provincial arm of the *Ejército de Liberación Nacional* (ELN) in Colombia publicly apologized for the death of three children and the destruction of civilian houses as a result of an armed attack. The ELN expressed its deep and sincere condolences to all those who had been affected by the explosion and expressed its willingness to collaborate in the recuperation of the remaining objects. (ELN, Head Office, Area Industrial, Communiqué relative to the events of 9 August 2001).

while prisoners of war in Japan". Under the terms of the treaty this was intended to be a full and final settlement precluding claims from individual victims.<sup>14</sup>

International humanitarian law instruments are silent as to who are the beneficiaries of reparation for violations of international humanitarian law. They only address the *responsibility* to compensate.

There is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims.<sup>15</sup> This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award "just satisfaction" or "fair compensation",<sup>16</sup> but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts.<sup>17</sup>

The position of individual victims of violations of international humanitarian law is more problematic. While there is general consensus that there is no reason for limiting the right to compensation referred to in the Hague Convention and Additional Protocol I to States and that individual victims should also benefit, problems have arisen when such persons have attempted to enforce this right to reparations — usually compensation — directly before national courts.<sup>18</sup>

These difficulties are principally due to the fact that the traditional position under international law is that only States are subjects of international law with full rights and obligations. Individuals are merely

<sup>14</sup> Article 16 of the 1951 Treaty of Peace between the Allied Powers and Japan, San Francisco, *op. cit.* (note 8). The same approach was adopted in the Yoshido-Stikker Accord of 1956 between Japan and the Netherlands in respect of the former's occupation of Dutch East India.

<sup>15</sup> See, also Principle 15, draft Basic Principles and Guidelines, *op. cit.* (note 2).

<sup>16</sup> See, for example, Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11 and Article 63(1) of the American Convention on Human Rights. Such awards have included material losses (e.g. loss of earnings and medical expenses) and non-material damage (e.g. pain, suffering and humiliation). See, generally, D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999.

<sup>17</sup> See, for example, Article 2(3) of the International Covenant on Civil and Political Rights and more specifically Articles 9(5) and 14(6), which expressly provide that anyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation, Article 14 of the Convention against Torture and Article 6 of the Convention on the Elimination of Racial Discrimination.

<sup>18</sup> See, for example, Expert Opinion by Professor Frits Kalshoven, "Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907", Expert Opinion by Professor Eric David, "The direct effect of Article 3 of the Fourth Hague Convention of 18th October 1907 respecting the Laws and Customs of War on Land" and Expert Opinion by Professor Christopher Greenwood, "Rights to compensation of former prisoners of war and civilian internees under Article 3 of the Hague Convention No. IV, 1907", all in H. Fujita, I. Suzuki and K. Nagano (eds.), *War and the Rights of Individuals: Renaissance of Individual Compensation*, Nippon Hyoron-sha, Tokyo, 1999.

beneficiaries and must claim their rights via their State of nationality. While it is now accepted that individuals have rights under international law, this traditional view is still at the base of many of the hurdles faced by individuals when attempting to directly enforce their rights under international law.

The courts of various States have considered claims by individual victims of violations of international humanitarian law on a number of occasions and the results of such cases have been far from uniform. Although a small number of claims have been successful, most have failed on one or more of the following three grounds: the fact that individual claims were precluded by a peace settlement; sovereign immunity; or the non-self-executing nature of the right to reparations under international law.

For instance, on a number of occasions in recent years, claims by individuals for compensation from Japan for violations of international humanitarian law have been rejected by the courts of Japan on the ground that the lump-sum payments made under the above-mentioned 1951 peace treaty absolved Japan from any further responsibility.<sup>19</sup>

Similarly, certain States, most notably Japan and the US, have rejected claims brought against States, either on the ground that sovereign immunity protected the respondent State from scrutiny by national courts<sup>20</sup> or that the relevant provisions of international humanitarian law instruments did not give individuals the necessary standing to pursue their claims directly before domestic courts — i.e. were not self-executing.<sup>21</sup>

<sup>19</sup> *International Herald Tribune*, November 1998, p. 4. In debates in the parliaments of the Netherlands and the UK, government officials have upheld Japan's position.

<sup>20</sup> Since hierarchically all States are equal, the courts of one State cannot stand in judgment on the actions of another State and traditionally national courts have been reluctant to deviate from this principle, which is the basis of sovereign immunity, even in cases relating to serious violations of human rights and international humanitarian law. The position of international tribunals is different, as States have either agreed to their jurisdiction or it has been imposed upon them by a Security Council resolution.

<sup>21</sup> *Shimoda et al. v. The State*, District Court of Tokyo, Judgment of 7 December 1963, *International Law Reports*, Vol. 32, 1964, p.626.

For a recent application of this approach see *X et al. v. the State of Japan*, Tokyo High Court, Judgment of 7 August 1996, *Japanese Annual of International Law*, Vol. 40, 1996, pp. 117 and 188 (claims by former civilian internees from the Netherlands and the UK and by Filipino "comfort women"). See also *Goldstar (Panama) SA v. United States*, US Court of Appeals, Fourth Circuit, 16 June 1992, *International Law Reports*, Vol. 96, 1992, p. 55, where the court held that Article 3 of the 1907 Hague Convention does not explicitly provide for a privately enforceable cause of action for victims of violations of international humanitarian law) and *Prinz v. Federal Republic of Germany*, US District Court for the District of Columbia, 813, F. Supp. 22 (1992) and US Court of Appeals for the District of Columbia, 307 US App DC 102, 26 F.3d 1166 (1994).

A case in point is the 1963 decision of the District Court of Tokyo in *Shimoda et al. v. The State*. Here the District Court ruled that, even though there had been a violation of international humanitarian law, individuals could be considered the subjects of rights under international law only insofar as they had been recognized as such in specific instances, for example in cases of mixed arbitral tribunals. In view of this, the court concluded that there was no way open to an individual who suffered injuries from an act of hostilities contrary to international law to claim damages at the level of international law. It was also of the opinion that considerations of sovereign immunity prevented the claimants from seeking compensation before the municipal courts of either the US or Japan.

It is important to note, however, that none of the courts denied the underlying right to compensation.

This restrictive approach to direct enforcement of the right to compensation before national courts should be contrasted with that adopted by a German Court of Appeal in 1952 and by the Greek courts in a case in 2000 against Germany in which jurisdiction was upheld and the claims of individuals considered.<sup>22</sup>

Subsequent developments in the latter case, however, highlight the further difficulties that may be encountered by victims when they try to

<sup>22</sup> *Personal Injuries (Occupied Germany) case*, Administrative Court of Appeal of Münster, 9 April 1952, *International Law Reports*, Vol. 20, 1952, p. 632; *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997; Court of First Instance of Leivadia, 30 October 1997, *American Journal of International Law*, Vol. 92, 1997, p. 765; Case No.11/2000, Hellenic Supreme Court, 4 May 2000.

Subsequent developments in the latter case highlight the further difficulties that may be encountered by victims when they try to enforce a successful claim. The Greek Supreme Court rendered a default judgment against Germany and awarded damages. However, according to Greek law, the authorization of the government is required for such a judgment to be enforced by the seizure of the assets of a foreign State and in this instance the Greek government refused to give the necessary authorization.

The plaintiffs then tried to enforce their judgment before the German courts on the basis of a bilateral agreement for the enforcement and recognition of judgments. In June 2003 the German Supreme Court refused to recognize the Greek judgment on the ground that the Greek courts did not have jurisdiction, as the acts in question – reprisals against civilians during the Nazi occupation of Greece – were sovereign acts and were thus covered by sovereign immunity.

The Supreme Court went on to consider an agreement concluded between Greece and Germany in September 1990. While this constituted a final settlement of reparations claims arising from the Second World War the Court ruled that it did not preclude legal claims by individual citizens. However, it then held that in reviewing any such claims it had to apply international law as it was in 1944. In view of this, the Court concluded that the plaintiffs did not have a cause of action for damage resulting from Nazi Germany's violation of the laws of war because in 1944 international law did not provide individuals with a cause of action but conferred it exclusively upon States by means of the right of diplomatic protection.

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In addition to these more legal challenges, the numerous hurdles of a more procedural and practical nature that victims must overcome should not be forgotten or under-estimated: the fact that victims — and often lawyers — are unlikely to be aware of the existence of the relevant rights and procedures; problems of time limitations for bringing claims and of enforcement of judgments; and the very real risk, particularly in the immediate post-conflict period, that victims may be reluctant to bring proceedings for fear of reprisals.

### **Individuals' claims for compensation before international fora**

Individuals have been more successful in asserting and enforcing their rights against States for violations of international law before international fora. Until recently these commonly took the form of "mixed claims commissions". These are special arbitral tribunals established by treaty — usually bilateral — where individuals and corporations are "exceptionally" given the opportunity to claim against governments.

<sup>23</sup> German Supreme Court, *Distomo Massacre case*, BGH – III ZR 245/98, 26 June 2003.

Numerous mixed claims commissions have been established since the end of the nineteenth century, often after revolutions and other disturbances of public order marked by the destruction and taking — including expropriation — of private property. They have different bases for jurisdiction and compensation, i.e. the grounds on which losses can be claimed.<sup>24</sup> None refer expressly to violations of international humanitarian law. These commissions are nonetheless relevant to the question of compensation of individual victims of such violations. Some of the situations to which they relate amounted to non-international armed conflict and some of the losses for which compensation was claimed and awarded could constitute violations of international humanitarian law. For example, claims for personal injury losses could have resulted from wrongful death or deprivation of liberty in violation of international humanitarian law, and claims for real or personal property losses, could have resulted from pillage or unlawful destruction of civilian property.

In recent years a number of quasi-judicial bodies have been set up — either by the Security Council or by peace treaty or unilaterally by States or corporations — to review the claims of victims and to award, usually but not exclusively, compensation.<sup>25</sup>

The novelty is that individuals and, in some cases, corporations have been given extensive procedural rights before these bodies: they can file claims directly, participate to varying degrees in the claims review process and receive compensation directly.

The precise basis on which these bodies award compensation varies. Some, like the Eritrea-Ethiopia Claims Commission, are required to make a finding of violation of international humanitarian law, while others adopt a

<sup>24</sup> One recent example of a mixed claims commission is the Iran-US Claims Tribunal established as part of a series of treaties — the so-called Algiers Accords — concluded by Iran and the US in 1981. The tribunal has jurisdiction over the claims of US nationals against Iran and of Iranian nationals against the US outstanding at the date of the accords and arising out of debts, contracts, expropriations or other measures affecting property rights. It also has jurisdiction over the claims of the two governments against each other arising out of contractual agreements for the purchase and sale of goods and services. (Article II(1) and (2), Claims Settlement Declaration, 19 January 1981.)

<sup>25</sup> No mechanisms have been established to deal specifically with the restitution of property taken in violation of international humanitarian law. The issue has been addressed, however, mainly with regard to art confiscated by the Nazi regime and States have recognized the need to reach a fair and just solution. See, for example, the principles adopted by the 44 States participating in the Washington Conference on Holocaust-Era Assets of December 1998, available at <[www.lootedartcommission.com/lootedart\\_washingtonprinciples.htm](http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm)>.

more flexible test, like the United Nations Compensation Commission (UNCC)<sup>26</sup> which compensates losses arising as a direct result of Iraq's invasion and occupation of Kuwait, regardless of whether or not they were caused by a violation of this law.

The UNCC is perhaps the first example of these new mechanisms. Established by the Security Council in 1991, it is a quasi-judicial body entrusted with adjudicating claims against Iraq for "any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait."<sup>27</sup> In addition to governments and international organizations, individuals and corporations could file claims directly and receive compensation without the construct of diplomatic protection by their State of nationality.<sup>28</sup>

Decision 1 of the UNCC's Governing Council in August 1991 stressed Iraq's responsibility for five particular causes for loss:

"(a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991; (b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period; (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation; (d) the breakdown of civil order in Kuwait or Iraq during that period; and (e) hostage-taking or other illegal detention."<sup>29</sup>

The criterion for compensation is that the loss must arise as a direct result of Iraq's invasion and occupation of Kuwait — i.e. although this is not expressly spelled out it means losses arising out of Iraq's violation of *jus ad bellum*. The UNCC therefore does not look at whether a loss was caused by a violation of international humanitarian law. It is probable, however, given

<sup>26</sup> For an account of the UNCC's work see elsewhere in this Review: F. Wooldridge and O. Elias, "Humanitarian considerations in the work of the United Nations Compensation Commission". See also: Heiskanen, V. "The United Nations Compensation Commission" in *The Hague Academy of International Law, Collected Courses*, Vol.296, 2002, pp.259 ff.

<sup>27</sup> UN Security Council resolution 687, 3 April 1991, para. 16.

<sup>28</sup> Strictly speaking, individuals do not file their claims directly with the UNCC but are required to submit them to their State of nationality, which then files them with the Commission. Unlike in cases of diplomatic protection, however, States do not espouse the claims of their nationals. Instead, the role of the State is purely administrative.

<sup>29</sup> UNCC, UN Doc. S/AC.26/1991/1, Governing Council Decision 1, Criteria for expedited processing of urgent claims, 2 August 1991, para. 18.

the circumstances of the invasion and occupation, that many of the claims for which compensation is awarded, such as death, torture, personal injury, mental pain and anguish, hostage-taking, and loss and damage to real and personal property, are factually based on violations of international humanitarian law.

Although the claims of members of the Allied Coalition armed forces are expressly excluded from the UNCC's jurisdiction, an exception is made for the claims of persons who were held prisoner of war as a consequence of their involvement in the operations against Iraq and whose loss or injury resulted from mistreatment in violation of international humanitarian law.<sup>30</sup>

Specific mention should also be made of the Eritrea-Ethiopia Claims Commission. As stated above, this was established by the Peace Treaty of December 2000 and has jurisdiction to award compensation for the claims of individuals, corporations and the governments of Eritrea and Ethiopia for loss, damage or injury between the two governments and between private entities that are related to the conflict and result from violations of international humanitarian law or other violations of international law. To date, the Claims Commission has issued two partial awards, relating to the treatment of prisoners of war by the two governments.<sup>31</sup>

In terms of forms of reparation, the December 2000 peace treaty only expressly authorized the Commission to award compensation and Commission Decision No. 3 of 24 July 2001 established that the appropriate remedy for claims was in principle monetary compensation. However, the decision expressly did not foreclose the possibility of other forms of reparation, if the particular remedy can be shown to be in accordance with international practice and would be reasonable and appropriate in the circumstances.<sup>32</sup> In its claim on behalf of prisoners of war Eritrea requested the Claims Commission to order the return of the prisoners' unlawfully seized

<sup>30</sup> UNCC, UN Doc. S/AC.26/1992/11, Governing Council Decision 11, "Eligibility for Compensation of Members of the Allied Coalition Armed Forces", 26 June 1992. In view of this decision, in its second report the "category B" panel of commissioners awarded compensation *inter alia* to members of the Allied Coalition Forces who had been taken prisoner of war by Iraq and who had been subjected to beatings to obtain information, in violation of the Third Geneva Convention (Report and Recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims), 15 December 1994, UN Doc S/AC.26/1999/4, para. 14.

<sup>31</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Prisoners of War, Eritrea's Claim 17*, 1 July 2003 and Partial Award, *Prisoners of War, Ethiopia's Claim 4*, 1 July 2003.

<sup>32</sup> Eritrea-Ethiopia Claims Commission, Decision Number 3: Remedies, 24 July 2001.

and retained personal property. The Commission referred to Decision No. 3 but held that in the circumstances no evidence had been put before it that such an order would have been in accordance with international practice or appropriate or likely to be effective.<sup>33</sup>

Since the end of the Second World War, Germany has passed several laws and concluded numerous treaties to indemnify victims of the war and the Holocaust.<sup>34</sup> In recent years a number of governments and groups of private corporations have voluntarily established funds and claims review mechanisms to compensate victims of violations of international humanitarian law committed during the Second World War. For example, in December 1999, the German government and a group of 65 German corporations agreed to commit DM 10 billion to a fund to compensate individuals who had been compelled to work for those corporations as forced and slave labourers during the Nazi era. In July 2000, the German Bundesrat (Upper House of Parliament) adopted a law establishing a foundation to provide financial compensation to these former forced and slave labourers and certain other victims of Nazi injustice.<sup>35</sup>

In addition to these more traditional judicial and quasi-judicial mechanisms for compensation, mention should also be made of recent initiatives for addressing the problem of title to real property, which is often associated with the mass displacement of civilians caused by conflicts. The General

<sup>33</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Prisoners of War, Eritrea's Claim 17*, *op. cit.* (note 32), para. 78.

<sup>34</sup> See, for example, the 1952 Law on the Equalization of Burdens as amended; the 1953 Law for the Compensation of the Victims of National Socialist Persecution as amended; the 1957 Federal Restitution Law as amended; the 1969 Law on the Reparation of Losses as amended; the 1990 Law on the Settlement of Open Property Matters as amended; and the 1994 Law on Indemnification of Victims of Nazism as amended.

<sup>35</sup> *The Law on the Creation of a Foundation "Remembrance, Responsibility and Future"*, Germany, 2 August 2000. Other examples include the programme established in Canada in 1988 to compensate Canadian nationals of Japanese descent for their forced removal and internment during the Second World War. As "symbolic redress" the Canadian government offered CAN\$ 21,000 for each person of Japanese ancestry who was subjected to internment, relocation, deportation, loss of property or otherwise deprived of full enjoyment of fundamental rights and freedom solely on the basis of his/her Japanese ancestry. (Agreement between the Government of Canada and National Association of Japanese Canadians, Japanese Canadian Redress Agreement, 22 September 1988.) In the same year, the US passed a law with the similar aim of acknowledging the fundamental injustice of the evacuation, relocation and internment of US citizens and permanent resident aliens of Japanese ancestry during the Second World War; of officially apologizing for such treatment and of making restitution to the internees. Under the Act each eligible individual was entitled to US\$20,000; the restitution of any position, status, or entitlement lost because of any discriminatory act by the government and the review of any conviction based on wartime legislation (Civil Liberties Act (1988), 10 August 1988, Public Law 100-383, [H.R.442], paras 1, 102-104, 108).

Framework Agreement for Peace in Bosnia and Herzegovina concluded between Croatia, Bosnia-Herzegovina and the FRY in Dayton in November 1995 expressly addressed the plight of civilians who, as a result of hostilities and wartime legislation, suffered widespread loss of property rights. Article I of Annex 7 to the agreement provided that:

“all refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”<sup>36</sup>

The agreement established an innovative mechanism for the return of real property. It is very wide in scope, focusing on the fact of dispossession rather than only on property taken pursuant to a violation of international humanitarian law. Article VII of the agreement set up a commission entrusted with receiving and deciding the claims in respect of real property rights to property in Bosnia and Herzegovina by displaced persons and refugees. Claimants who did not enjoy possession of the property in question could file claims for the restitution of the property or for just compensation in lieu of return. The Commission for Real Property Claims of Displaced Persons and Refugees has the authority to make final and legally binding decisions on claims for real property and occupancy rights which must be respected by both entities in Bosnia and Herzegovina. It is important to note that the Commission does not actually award compensation but merely makes findings as to the ownership of property. Among the decisions it can take is the setting aside of contracts for transfer of property concluded under duress during the hostilities.<sup>37</sup>

A similar impartial and independent mechanism for resolving property claims was established in Kosovo. In 1999, UNMIK adopted Regulation 1999/23 setting up the Housing and Property Directorate and the Housing and Property Claims Commission to regularize housing and property rights

<sup>36</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton, initialled on 21 November 1995 and Paris, signed on 14 December 1995, Annex 7, Agreement on Refugees and Displaced Persons, Article 1.

<sup>37</sup> H. van Houtte, “Mass property claim resolution in a post-war society: the Commission for Real Property Claims in Bosnia and Herzegovina”, *International and Comparative Law Quarterly*, Vol. 48, 1999, p. 632. In the period from the beginning of its operations in March 1996 to the end of February 1999 the commission had registered over 126,000 claims relating to almost 160,000 properties. It is expected that up to 500,000 claims may be submitted.

in Kosovo and to resolve disputes over residential property. To date some 30,000 claims have been filed and some 7,000 have been resolved.<sup>38</sup>

### **Are individuals under a duty to make reparation to victims of their violations of international humanitarian law?**

Increasingly, the question of *who* is responsible for making reparation has also been raised. The principle of individual criminal responsibility for violations of international humanitarian law has long been established, but traditionally it was only States that made reparation. However, in recent years there have been instances in which *individual* violators have also made reparation.

None of the international humanitarian law instruments specifically address the question of individuals' responsibility to make reparation to their victims. This obligation can, however, be inferred from the provisions on individual responsibility for violations of international humanitarian law more generally.<sup>39</sup>

The question of individuals' duty to make reparation has been addressed in the statutes of the three international criminal tribunals. Although the provisions of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) on penalties only refer to restitution, the Rules of Procedure address the question of reparations more generally. Thus, Article 24(3) of the Statute provides that "in addition to imprisonment, the Trial

<sup>38</sup> A. Dodson & A. Heiskanen, "Housing and Property Restitution in Kosovo" in S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights and Internally Displaced Persons*, Transnational Publishers, New York, 2003. Further information and statistics are available on the website of the Housing and Property Directorate: <<http://www.hpdkosovo.org>>.

<sup>39</sup> The four Geneva Conventions and Additional Protocol I establish a system of individual *criminal* responsibility for persons suspected of war crimes (GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147; and PI, Article 85). The focus is on persecution by national courts. States are required to criminalize, under national law, certain violations of international humanitarian law and to prosecute or extradite persons suspected of these crimes. Although the treaties are silent about the possibility of requiring violators to make reparation to their victims, in the context of these national prosecutions there is nothing to prevent the ordinary national law procedures and rights – such as the concept of *partie civile* discussed below – from applying. While ordinarily an obligation to make reparation would require a finding of criminal responsibility, there may be other mechanisms at national law under which victims may obtain redress from violators, such as, for example, the US Alien Tort Claims Act, which is a civil remedy. As discussed below, at the international level the Statute of the International Criminal Court expressly foresees the possibility of violators being ordered to pay compensation.

See also Principle 17 of the draft Basic Principles and Guidelines, *op. cit.* (note 2), which envisages the possibility of compensation being paid by a party other than a State.

Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” Rule 105 of the Tribunal’s Rules of Procedure and Evidence establishes procedures for the restitution of property, according to which the ICTY and national courts will cooperate in determining the rightful owners of the property. To date, however, no such orders have been made and no fines have been imposed.

More interesting is Rule 106, which deals with compensation to victims. Although the Statute is silent on the question of compensation, this Rule establishes a system of cooperation between the Tribunal and national authorities whereby a finding of guilt by the ICTY can enable a victim to institute proceedings under national law.<sup>40</sup> The ICTY itself does not recommend the award of compensation and the existence of such a remedy is still entirely dependent on the provisions of the relevant national laws.

The relevant provisions of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and of its Rules of Procedure and evidence mirror those of the ICTY.<sup>41</sup>

The Statute of the Special Court for Sierra Leone adopts the Rules of Procedure and Evidence of the ICTR.<sup>42</sup> Furthermore, the provision on penalties specifically points out that, in addition to imprisonment, the Court may also order the forfeiture of any property, proceeds and assets acquired unlawfully and order their return to their rightful owner or the State of Sierra Leone.<sup>43</sup>

The Statute of the International Criminal Court (ICC) adopts a fundamentally different approach, granting the Court itself the power to make awards of compensation. Thus, Article 75 of the Statute, which deals with reparations to victims, provides that:

“1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

<sup>40</sup> Rule 105B of the ICTY Rules of Procedure and Evidence provides that “pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation”.

<sup>41</sup> Article 23(3) of the Statute of the ICTR repeats verbatim the provisions of Article 24 of the Statute of the ICTY, and Rules 105 and 106 of its Rules and Procedure and Evidence.

<sup>42</sup> Statute of the Special Court for Sierra Leone (2002), Article 14.

<sup>43</sup> *Ibid.*, Article 19.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.”

The Trust Fund referred to is to be established by a decision of the Assembly of States Parties for the benefit of victims of crimes within the Court’s jurisdiction and will be financed, *inter alia*, by money or other property collected through fines or forfeiture, which the Court may order to be transferred to the fund.<sup>44</sup>

The ICC’s Rules of Procedure and Evidence deal with the issue of reparation in detail. *Inter alia*, the Rules provide that victims of violations can lodge requests for compensation directly before the Court;<sup>45</sup> they grant the Court the power to proceed with regard to the award of compensation on its own motion;<sup>46</sup> and provide that reparation can be awarded on an individualized or collective basis, taking into account the scope and extent of any damage, loss and injury.<sup>47</sup>

At the national level there are two principal ways in which victims of violations of international humanitarian law can receive compensation from national courts. First, in civil law systems, they can become parties to the criminal proceedings (*partie civile*) and claim compensation in them. A disadvantage of this process is that their claim for compensation is dependent on a conviction, thus subject to the higher standards of criminal law as well as to any defences and other general limitations under criminal law.

Secondly, in States that have adopted appropriate legislation, victims may bring civil actions for compensation based on violations of the relevant norms of international law. A notable example of such legislation is the US 1789 Alien Tort Claims Act and the more recent 1991 Torture Victim Protection Act.<sup>48</sup>

The 1789 Alien Tort Claims Act gives US courts jurisdiction over civil claims brought by non-US nationals in respect of torts committed in viola-

<sup>44</sup> ICC Statute (1998), Article 75.

<sup>45</sup> UN, Report of the Preparatory Commission for the International Criminal Court, Addendum, finalized draft text of the Rules of Procedure and Evidence, PCNICC/2000/INF/3/Add.1, (hereinafter “Rules of Procedure”) Rule 94.

<sup>46</sup> Rules of Procedure, Rule 95.

<sup>47</sup> Rules of Procedure, Rule 97.

<sup>48</sup> US, 1789 Alien Tort Claims Act; 1991 Torture Victim Protection Act.

tion of international law or treaties to which the US is a party and entitles them to award compensation for losses suffered.<sup>49</sup> The 1991 Torture Victim Protection Act is more specific and is limited to claims of torture or extrajudicial killing. These acts have been the basis for numerous cases linked with armed conflict.

For example, both Acts were invoked in proceedings brought by a group of Bosnian nationals who sought redress from Radovan Karadzic for violations committed during the conflict in the former Yugoslavia, including genocide, rape, forced prostitution, torture and other cruel, inhuman and degrading treatment, summary executions and disappearances.<sup>50</sup>

In a decision of 1995 the US Court of Appeal, which at that stage was only ruling over the question of jurisdiction, concluded that the 1789 Alien Tort Claims Act gave the US courts jurisdiction over claims based on genocide, war crimes — which it considered included violations of Article 3 common to the Geneva Conventions — and torture and summary execution.<sup>51</sup> In August 2001 the court ordered Karadzic to pay US\$ 745 million to the victims of his atrocities as compensatory and punitive damages.

The Alien Torts Claim Act is an important tool for establishing the responsibility of violators to compensate their victims and for fighting impunity. In practice, however, very few of the awards based upon it have ever actually been enforced — leaving victims with a Pyrrhic victory. For such procedures to actually benefit victims in a tangible manner, in addition to the significant psychological benefit of a finding of violation and responsibility, mechanisms for the recognition and, more importantly, for the enforcement of such judgments must be improved.<sup>52</sup>

<sup>49</sup> Proceedings brought under this act include the 1980 landmark case of *Filartiga v. Peña-Irala* (630 F.2d 876 (2d Cir. 1980)) in which the family of a Paraguayan national who had been tortured to death brought a successful civil action against the alleged perpetrator while he was physically present in the US.

<sup>50</sup> *Kadic v. Karadzic*, 70 F.3d 232 (1995), *International Legal Materials*, Vol. 34, 1995, p. 1592.

<sup>51</sup> *Kadic v. Karadzic*, 70 F.3d 232, at 240 (2d Cir. 1995), *International Legal Materials*, Vol. 34, 1995, pp. 1602-1606.

<sup>52</sup> There have also been cases in the US in which victims have attempted to obtain compensation from the perpetrators of violations of international humanitarian law on other legal bases, but these were thwarted by findings by the courts that the rules of international law which had been violated were not self-executing. See, for example, the *Handel et al. v. Artukovic* case, where the US District Court for the Central District of California held that it lacked subject-matter jurisdiction under Section 1331 of 28 U.S.C. to consider violations of the 1907 Hague Regulations and the 1929 Prisoner of War Convention, as these treaties were not self-executing. The court also held that customary international law did not grant individuals a right to bring proceedings before national courts. (*Handel v. Artukovic*, US District Court, Central District, California, 601 F Supp. 1421 (1985)).

## Outlook

Progress has been made in recent years via a multitude of different avenues. There appears to be a greater acceptance by States of the idea of individual victims' right to reparation and some willingness to make awards. However, while some victims of violations of international humanitarian law have actually received compensation, the reality remains that the majority remain without redress.

The position could have been different if, at the time the Geneva Conventions or the Additional Protocols were drafted, specific mechanisms had been adopted enabling victims of violations of these instruments to obtain reparation. However, no such proposals were on the negotiating table and the same complex practical considerations that belie the question today would have had to be addressed. For example, would it be possible to make reparation to *all* victims of violations? Where would the funding come from? It is difficult to imagine that these issues could have been resolved in a satisfactory manner without any prior practical experience to build upon.

In the absence of such a universal treaty-based mechanism, progress has been made in a piecemeal fashion on many different fronts: diplomatic protection, mixed claims tribunals, proceedings before national courts, *ad hoc* international quasi-judicial mechanisms and claims against individual violators.

The various approaches that have been developed are valuable contributions. None, however, appears to be a perfect model for the future. The absence of such a perfect solution may be due to the different, and sometimes conflicting, policy issues and practical considerations underlying this subject.

For example, even if it were generally accepted that individuals have a directly enforceable right to reparation before national courts, it is not realistic to believe that this would mean that *all* victims would receive compensation. In conflicts marked by serious and widespread violations of international humanitarian law, victims are too numerous for such a system to work.<sup>53</sup> National courts are likely to award very large sums of money to a

<sup>53</sup> This issue was specifically addressed by the US District Court for the Central District of California in the *Handel v. Artukovic* case in its reasoning as to why it did not consider the 1907 Hague Convention and the 1929 Prisoner of War Convention to be self-executing. According to the court, recognition of a private remedy under these instruments would create insurmountable problems for the legal system that attempted to use it

very small number of victims — usually the most educated and well informed.

This problem has been addressed to some extent in the US, where a large number of the claims for compensation have been made by means of class actions. Litigation has resulted in a number of settlements that have given a wide group of victims the opportunity to obtain redress.<sup>54</sup>

With regard to international mechanisms, the UNCC has been a major experiment with an impressive record. Since its establishment in 1991 it has reviewed nearly 2.6 million claims and awarded some US\$ 46 billion in compensation, over US\$ 17.5 billion of which has been paid out to claimants. It is expected to finish reviewing claims by the end of 2004.

This being said, it is important to realize that the UNCC model will probably not be repeated. It is unlikely that there will be the necessary consensus within the Security Council to establish such a body again. Even if

as a source of rights enforceable by individual litigants in domestic courts and would pose serious problems of fairness in enforcement. It held that

“[t]he code of behaviour the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by many individuals, including prisoners of war, who may think their rights under the Hague Convention violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly ...”

District Court, Central District, California, *Handel v. Artukovic*, Judgement of 31 January 1985, Case No. 84-1411, *International Law Reports*, Vol. 79, 1989, p. 397.

54 In July 1999, Barclays Bank, having been sued before a US District Court along with various other banks with branches, operations or predecessors in France during the Second World War by families of Jewish customers in France who had lost their assets during the Nazi occupation, agreed to the “Barclays French Bank Settlement” which provided for the establishment of a US\$ 3,612,500 fund to compensate the victims. (District Court, Eastern District, New York, *Barclays French Bank Settlement case*, Settlement Agreement, 8 July 1999).

In 2000, J. P. Morgan agreed to settle compensation claims by the establishment of a settlement fund of US\$ 2,750,000 to compensate Jewish victims of the Holocaust whose bank accounts had been seized in France during the Second World War (District Court, Eastern District, New York, *J. P. Morgan French Bank Settlement case*, Settlement Agreement, 29 September 2000).

While the previous settlements related to unlawful and discriminatory seizures of private property during the conflict, the settlement in the *Holocaust Victims Assets case* in 2000 concerned the “dormant” bank accounts of persons who had become the victims of violations of international humanitarian law and genocide. There was no allegation that the banks had committed a violation of international humanitarian law; instead it was a question of “re-establishment” of title to the accounts. In this case a US District Court approved a class-action Settlement Agreement between Holocaust victims and Swiss banks. The Agreement set up a US\$ 1.25 billion fund for victims and released, subject to a few exceptions, the Swiss Confederation, the Swiss National Bank, all other Swiss banks, and “other members of Swiss industry” from any further claims. (District Court, Eastern District, New York, *Holocaust Victims Assets case*, Memorandum and Order, 26 July 2000; Final Order and Judgement approving the Settlement Agreement, 9 August 2000.)

this were to happen, the exceptional circumstances of the UNCC's funding (one third of the revenue of the Oil-for-Food Programme — the mechanism established by the Security Council to enable Iraq to sell some oil to purchase humanitarian goods — is used to fund the awards and the costs of running the Commission) are unlikely to recur.

The Eritrea-Ethiopia Claims Commission, for example, is funded by the two States and is thus dependent on their goodwill to continue to operate and make awards.

Continuing on the subject of reparation funding, the Trust Fund of the ICC is an innovative approach and it will be interesting to see how it will operate.

Another issue, among many others that could be highlighted, relates to who is entitled to reparation. The mere use of the terms "reparation" and "compensation" presupposes a violation of international law. While in strict legal terms an obligation to make reparation only arises once there has been a violation of the law, applying such a legalistic approach may give rise to injustices in practice. Insistence on the need for a violation would mean that a civilian whose house was targeted would be compensated, but that his neighbour, whose dwelling was destroyed as the result of permissible collateral damage, would not. This is hardly a satisfactory outcome from the point of view of the victims, who are equally in need.

Such problems may be avoided by having recourse to a wide definition of victims so as to include all persons adversely affected by a conflict, or applying a wide or different test for entitlement to compensation. This is the approach adopted by the UNCC which, by compensating for all losses arising as a direct result of Iraq's invasion and occupation of Kuwait, focuses on the initial violation of *jus ad bellum* or Article VII of the Dayton Accord, which deals with restoration of title to real property lost in the course of hostilities. The national legislation of some States also operates in this manner, and entitles persons who have suffered losses as a result of hostilities to *ex gratia* payments.<sup>55</sup> On the other hand, as mentioned earlier, the Eritrea-Ethiopia Claims Commission takes a different approach and requires a violation of international humanitarian law.

<sup>55</sup> See, for example, Israel's 1961 Property Tax and Compensation Fund Law. This establishes a programme and fund for payment of real and personal property damage to persons and property in Israel arising from *inter alia* war damage, which it defines as "damage caused (...) as a result of warlike operations by the regular armies of the enemy or as a result of other hostile acts against Israel or as a result of warlike operations by the Israel Defence Forces". The system is funded by annual property taxes levied on real property owners.

Finally, while claims against individual violators are also a possibility — especially in situations of non-international armed conflict where, until now, it has not been possible to hold organized armed groups accountable — they do have significant limitations and in many cases are unlikely to be a satisfactory solution. As already pointed out, there are problems in enforcing judgments, and not all violators are likely to have the resources to pay the awards. Also, from a wider policy point of view responsibility to pay damages must go hand in hand with, if not indeed follow, investigation and prosecution of violators. Otherwise, as Professor Philip Allot pointed out at the University of Cambridge's Lauterpacht Research Centre for International Law at a seminar in 1999 on torture, torturers could merely take out professional insurance and continue to commit atrocities.

In the foreseeable future it is likely that reparation to individual victims of violations of international humanitarian law will continue to be made in an *ad hoc* manner, conflict by conflict and even possibly issue by issue — e.g. by dealing with real property claims only. Probably at the present stage this is not a bad approach provided that each new mechanism builds upon the experience of the past and reparation is made in a timely manner.

## Résumé

### *Réparations pour violations du droit international humanitaire*

*Emanuela-Chiara Gillard*

*La dernière moitié du XX<sup>e</sup> siècle a été marquée par une augmentation et une codification sans précédent des normes du droit international ayant pour objet la protection de la personne humaine. Il s'agit aujourd'hui de veiller au respect de ces règles. Les réparations pour violations du droit international humanitaire peuvent largement contribuer à mieux le faire respecter et à prévenir toute violation future.*

*Une branche du droit est renforcée si, en cas d'infraction, des réparations peuvent être obtenues ; celles-ci constituent un aspect important de l'application du droit et peuvent avoir un important effet dissuasif. À un niveau plus personnel, les victimes de violations du droit international humanitaire sont extrêmement vulnérables. Des réparations adéquates et reçues au moment opportun peuvent jouer un rôle important pour aider les victimes à reconstruire leur vie. Cet article examine le droit en vigueur et la pratique actuelle en matière de réparations pour violations du droit international humanitaire, en insistant plus particulièrement sur la situation juridique des victimes.*

*Cet examen des lois et des mécanismes nationaux et internationaux révèle que, si le droit aux réparations est universellement reconnu, en l'absence de mécanismes spécifiques – qui existent généralement au niveau international – les victimes sont incapables de faire valoir leurs droits sur le plan individuel et, en conséquence, n'obtiennent aucune réparation. L'article conclut par des questions plus politiques que posent les différents mécanismes existants et la façon dont les compensations à accorder aux victimes de violations du droit international humanitaires sont envisagées.*



# Humanitarian considerations in the work of the United Nations Compensation Commission

FRED WOOLDRIDGE AND OLUFEMI ELIAS\*

## Introduction and overview of the Commission

The United Nations Compensation Commission (the “UNCC” or “the Commission”) is a subsidiary organ of the United Nations Security Council, and is the first claims commission of its kind to be created by the Security Council. It was established in 1991 to process claims and pay compensation where appropriate for losses resulting from Iraq’s invasion and occupation of Kuwait (1990-91). The aim of this paper is to examine and demonstrate the extent to which humanitarian considerations inform the various aspects of the work of the Commission, as well as the extent to which this feature of the Commission’s work could serve as a model for war reparations institutions in the future.

In paragraph 16 of Security Council Resolution 687 (1991)<sup>1</sup>, the Security Council reaffirmed that

“... Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”

The Security Council decided to create a fund from which compensation will be paid for such losses, damage and injury, as well as a commission to administer that fund.<sup>2</sup> Pursuant to a request by the Security Council,<sup>3</sup> the Secretary-General recommended the establishment of a claims resolution

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body that, under the authority of the Security Council, would verify and value claims and administer the payment of compensation.<sup>4</sup> In Resolution 692 (1991),<sup>5</sup> the Security Council established the Commission and the United Nations Compensation Fund (“the Fund”) in accordance with Part I of the Secretary-General’s report.

As recommended by the Secretary-General, the UNCC is composed of three bodies, namely, the Governing Council, the commissioners and the secretariat. The Governing Council is the main policy-making organ of the Commission. Its membership is the same as that of the Security Council at any given time. It is responsible for the establishment of the criteria for the compensability of claims, the rules and procedures for processing the claims, the guidelines for the administration and financing of the Compensation Fund and the procedures for the payment of compensation. In addition, the Governing Council is charged with taking decisions on the reports and recommendations made by the panels of commissioners concerning claims reviewed by the latter. The commissioners, who sit in panels of three, work in their personal capacities and are chosen for their integrity and expertise in fields relevant to the work of the UNCC, such as law, accounting, loss adjustment and insurance. Within the guidelines established by the Governing Council, they are responsible for reviewing claims to determine whether the alleged losses or injury arose as a direct result of Iraq’s invasion and occupation of Kuwait. They also assess the value of

1 UN Doc. S/RES/687 (1991), para. 33.

2 The literature on the Commission’s creation and working methods is extensive. See, e.g., D. Caron, “The legitimacy of the collective authority of the Security Council”, *American Journal of International Law*, Vol. 87, 1993, pp. 352 ff; F.L. Kirgis, “Claims settlement and the United Nations legal structure” in R.B. Lillich (ed.), *The United Nations Compensation Commission* (Thirteenth Sokol Colloquium), Transnational Publishers, New York, 1995, p. 103 ff; R.C. O’Brien, “The challenge of verifying corporate and government claims at the United Nations Compensation Commission”, *Cornell International Law Journal*, Vol. 31, 1998, p. 1 ff; P. Malanczuk, «International business and new rules of State responsibility? – The law applied by the United Nations (Security Council) Compensation Commission for claims against Iraq” in K.-H. Böckstiegel (ed.), *Perspectives of Air Law, Space Law and International Business Law for the Next Century*, 1995, pp. 117 ff; M.E. Schneider, “How fair and efficient is the United Nations Compensation Commission system?”, *Journal of International Arbitration*, Vol. 15, 1998, pp. 15 ff; Ch.L. Lim, “On the law, procedures and politics of United Nations Gulf war reparations”, *Singapore Journal of International and Comparative Law*, 2000, pp. 435 ff. See the Commission’s website <[www.uncc.ch](http://www.uncc.ch)> for a full bibliography and for other information and documentation on the Commission.

3 *Op. cit.* (note 1), paras. 18 and 19.

4 *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, UN Doc. S/22559 (1991).

5 UN Doc. S/RES/692 (1991).

compensable losses and make written recommendations to the Governing Council as to compensation. Where appropriate, the commissioners are assisted by expert consultants.<sup>6</sup> The secretariat services the Governing Council and the panels of commissioners,<sup>7</sup> and is also responsible for the administration of the Compensation Fund.

The specific and unique mandate of the Commission, as well the circumstances surrounding its creation, have dictated, to a large extent, the way it was set up and the way it functions. Two considerations are significant. On the one hand, there was a need to process an extraordinarily large number of claims with the maximum objectivity, transparency and fairness. At the same time, however, it was important that the claims be processed promptly and efficiently in order to fulfil properly the mandate of the Commission in providing compensation to deserving claimants.<sup>8</sup> In addition to the need for procedures created with a view to the achievement of these twin aims, other aspects of the nature of the Commission as an institution also reflect these concerns. The Secretary-General, in his recommendations to the Security Council, stated as follows:

“The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved”.<sup>9</sup>

This recommendation is reflected in the work of the Commission. The proceedings before the Commission are inquisitorial rather than adversarial in nature, given the need to avoid excessive delays in the processing of the claims. The panels of commissioners perform the tasks of fact-finding and evaluation of the claims. This has meant that the Commission’s rules of

6 On the role of the commissioners, see R.C. O’Brien, *op. cit.* (note 2), pp. 14-31.

7 For further description of the role played by the secretariat, see R.C. O’Brien, *ibid.*, pp. 9-13. See also N. Wühler, “The United Nations Compensation Commission: A new contribution to the process of international claims resolution”, *Journal of International Economic Law*, Vol. 2, 1999, pp. 249-272.

8 It has been written that “[w]hile it is the Commission’s aim to exert maximum objectivity, transparency and fairness in reviewing claims and providing compensation to claimants, the exigencies of processing such a large number of claims within a reasonable time period (...) imposed certain restrictions on the procedures applied by the Commission”; M. Kazazi, “An overview of evidence before the United Nations Compensation Commission”, *International Law Forum*, Vol. 1, 1999, p. 219, pp. 219-220.

9 *Op. cit.* (note 4), para. 20.

procedure for claims processing<sup>10</sup> allow for comparatively limited participation in the proceedings by both the claimants and Iraq than is the case in traditional courts and tribunals.

The role of humanitarian considerations in various aspects of the work of the Commission will now be considered against this background. Before looking at the Commission's claims review and payment processes, the next section will clarify the position of the Commission as one of a number of separate but related organs and programmes that were established in response to Iraq's invasion and occupation of Kuwait

### **Distinguishing the United Nations Compensation Fund, the "Oil-for-Food" programme and the sanctions regime**

Resolution 687 (1991) directed the Secretary-General to recommend an appropriate level of financial contribution by Iraq to the Compensation Fund "taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy".<sup>11</sup> Pursuant to this request and further to Resolution 692 (1991) the Secretary-General, in a note to the Council dated 30 May 1991,<sup>12</sup> recommended that Iraq's contribution to the Compensation Fund should not exceed 30 per cent of the annual value of petroleum and petroleum products from Iraq.

On 15 August 1991 the Security Council adopted Resolution 705 (1991)<sup>13</sup> endorsing the Secretary-General's recommendation and, on the same day, adopted Resolution 706 (1991)<sup>14</sup> authorising the import of Iraqi oil products for a six-month period in order to finance this recommendation and other operations mandated by the Council in Resolution 687 (1991).

<sup>10</sup> Provisional Rules for Claims Procedure ("the Rules"), annexed to Governing Council Decision 10, UN Doc. S/AC.26/1992/10. In many instances claimants are generally permitted only one submission in which to prove their claims. See also: R.C. O'Brien, *op. cit.* (note 2), and "Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of 'E3' Claims", UN Doc. S/AC.26/1999/14, paras. 61-62. More generally, see articles 16 and 36-39 of the Rules. See also the changes introduced to the Commission's rules of procedure by Governing Council Decisions 114 (2000) and 124 (2001), discussed in Ch. L. Lim, *op. cit.* (note 2).

<sup>11</sup> *Op. cit.* (note 1), para. 19.

<sup>12</sup> Letter dated 30 May 1991 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/22661 (1991). The note sets out the calculations used by the Secretary-General in order to arrive at this percentage, including the expectation that oil exports would reach US\$21 billion by 1993.

<sup>13</sup> UN Doc. S/RES/705 (1991).

<sup>14</sup> UN Doc. S/RES/706 (1991).

Resolution 706 (1991) makes particular reference to growing concern over the humanitarian situation in Iraq and the risk of further deterioration. Much of the revenue that was to be realised from the sales of Iraq's oil products pursuant to resolution 706 (1991) was to be used for the purchase of foodstuffs, medicines and materials and supplies for essential civilian needs. These arrangements were reaffirmed by the Council in Resolution 712 (1991)<sup>15</sup> following a report of the Secretary-General recommending procedures for the sale of Iraqi oil and transmitting estimates of humanitarian requirements in Iraq. The Government of Iraq declined to avail itself of the measures provided in resolution 706 (1991) and 712 (1991), which had been put in place to alleviate the humanitarian situation of the Iraqi people while the sanctions imposed under Resolution 661 (1990)<sup>16</sup> following Iraq's invasion of Kuwait remained in place.

On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 986 (1995) establishing the "Oil-for-Food" Programme, which was another mechanism for Iraq to sell oil to finance the purchase of humanitarian goods, and various mandated United Nations activities concerning Iraq. The "Oil-for-Food" Programme was intended to be a "temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfillment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991". The Programme was not implemented until eight months after the 20 May 1996 signing of the Memorandum of Understanding between the United Nations and the Government of Iraq when, in December 1996, the first oil was exported. The revenue derived from Iraq's oil sales was deposited in a specially-created United Nations escrow account. The funds in the escrow account were used to meet the humanitarian needs of the Iraqi population, the costs of the United Nations Special Commission (UNSCOM)<sup>17</sup>, the costs of the United Nations Iraq-Kuwait Observer Mission and to provide income into the Compensation Fund. The first shipment of humanitarian supplies paid for by the "Oil-for-Food" Programme, which was administered by the UN Office of the Iraq Programme, arrived in Iraq in March 1997.<sup>18</sup>

<sup>15</sup> UN Doc. S/RES/712 (1991).

<sup>16</sup> UN Doc. S/RES/661 (1990).

<sup>17</sup> UNSCOM was replaced by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), upon the adoption of Security Council Resolution 1284 on 17 December 1999, UN Doc. S/RES/1284 (1999).

<sup>18</sup> See the website of the Office of the Iraq Programme for further information: <[www.un.org/Depts/oip](http://www.un.org/Depts/oip)>.

The arrangements in Security Council Resolution 986 (1995) were extended and modified several times by further resolutions.<sup>19</sup> Most important among these were Resolution 1153 (1998),<sup>20</sup> which raised to US\$5.256 billion the ceiling on total revenues that Iraq was authorised to generate through the sale of oil during a six-month period. Its provisions came into effect on 30 May 1998 with the Secretary-General's approval of the enhanced plan submitted by the Government of Iraq for the distribution of humanitarian supplies to the Iraqi people. Resolution 1284 (1999)<sup>21</sup> removed completely the ceiling on total revenues that Iraq was authorised to generate through the sale of oil. Resolution 1330 (2000)<sup>22</sup> reduced the percentage of such revenue paid into the UNCC Compensation Fund from 30 per cent to 25 per cent.

It is important to emphasise that the administration and allocation of the use of the balance of the proceeds of Iraqi oil sales, after the relevant percentage was paid into the Compensation Fund, falls under the other programmes and institutions established by the Security Council following Iraq's invasion and occupation of Kuwait, especially the sanctions regime established pursuant to Security Council Resolution 661.<sup>23</sup> The Commission is not involved with the work of these programmes and institutions.

In May 2003, following the recent conflict in Iraq, the Security Council adopted Resolution 1483 (2003),<sup>24</sup> which, *inter alia*, lifted the civilian sanctions on Iraq, provided for the termination of the Oil-for-Food Programme within six months and reduced the percentage of the revenue paid into the Compensation Fund to five per cent. Since the removal of President Saddam Hussein's regime, the United Nations is no longer responsible for the monitoring of Iraq's oil sales. The requirement of the payment of the five per cent into the Fund, which "shall be binding on a properly constituted, internationally recognized, representative government

<sup>19</sup> See the Commission's website, *op. cit.* (note 2) (via the link named "Payment Procedure") for further information on these Security Council resolutions.

<sup>20</sup> UN Doc. S/RES/1153 (1998).

<sup>21</sup> UN Doc. S/RES/1284 (1999).

<sup>22</sup> UN Doc. S/RES/1330 (2000).

<sup>23</sup> See the website of the Security Council Committee established pursuant to Resolution 661 (1990) concerning the situation between Iraq and Kuwait: <[www.un.org/Docs/sc/committees/IraqKuwait/IraqSanctionsCommEng.htm](http://www.un.org/Docs/sc/committees/IraqKuwait/IraqSanctionsCommEng.htm)>.

<sup>24</sup> UN Doc. S/RES/1483 (2003).

of Iraq and any successor thereto”, is currently made by the Coalition Provisional Authority (CPA), until such time as “an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise”, in accordance with paragraph 21 of Resolution 1483 (2003). The use of the balance of Iraq’s oil sales is also no longer a responsibility of the United Nations and, at the time of writing it is intended that the Oil-for-Food Programme be transferred to the CPA.<sup>25</sup>

As mentioned earlier, even after the removal of sanctions against Iraq pursuant to Resolution 1483 (2003), the mandate of the Commission remains unaffected, as the work of the UNCC (particularly the transference of a portion of Iraq’s oil income into the Compensation Fund and the need to provide compensation to the victims of Iraq’s invasion and occupation of Kuwait) is not a part of, and does not depend on, the sanctions regime. Indeed, in 1991, when it had been expected that the process of destroying Iraqi weapons of mass destruction would be accomplished within a short period of time and consequently that sanctions would be lifted sooner rather than later, the Governing Council set out arrangements to ensure continuing payments into the Compensation Fund upon the removal of sanctions.<sup>26</sup> Had sanctions been lifted, these arrangements would have provided for the Executive Secretary of the UNCC, while reporting to the Governing Council, to oversee the monitoring of Iraqi oil sales and to ensure that the appropriate percentage of the revenue derived was deposited into the Fund.<sup>27</sup> Thus, while the humanitarian needs of the Iraqi population have always been at the forefront of the considerations taken into account in all aspects of the various mechanisms for the provision of funds into the Compensation Fund, the Commission’s mandate is limited to the payment of appropriate compensation to the victims of Iraq’s invasion and occupation of Kuwait and is distinct from the administration of the sanctions regime.

<sup>25</sup> For further details on the modalities of the transfer and the proposed future role of the United Nations in Iraq see *Report of the Secretary-General pursuant to paragraph 24 of Security Council Resolution 1483 (2003)*, UN Doc. S/2003/715.

<sup>26</sup> See Governing Council Decision 6, “Arrangements for Ensuring Payments into the Compensation Fund”, UN Doc. S/AC.26/1991/6.

<sup>27</sup> Various forms of these arrangements were later incorporated into the operations of the Oil-for-Food Programme; see note 18 above.

### **Humanitarian considerations in the Commission's claims review process and payment mechanism**

The Commission has received over 2.64 million claims seeking compensation with a total asserted value in excess of US\$340 billion. Ninety-six Governments submitted claims on behalf of their nationals, corporations and/or themselves, while thirteen offices of the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) have also submitted claims for individuals who were not in a position to have their claims filed by Governments. For the purposes of processing of claims and payment of compensation, the Governing Council has grouped the claims submitted to it into six categories, categories "A" to "F". As will be seen below, the humanitarian aspect of the work of the Commission is most clearly illustrated in its treatment of the smaller claims in categories "A", "B" and "C".

Category "A" claims are claims of individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion of Kuwait (2 August 1990) and the date upon which the Security Council adopted Resolution 686 (1991) which took note of the suspension of combat operations by Kuwaiti forces and the Member States co-operating with Kuwait (2 March 1991). The Governing Council fixed the amount of compensation for successful claims in this category at US\$2,500 for individual claimants and US\$5,000 for families. These figures were later raised to US\$8,000 for families in situations where the claimant(s) agreed not to file claims in any of the other individual claims categories (i.e. categories "B", "C" or "D"). The Commission received approximately 920,000 category "A" claims submitted by 77 Governments and 13 offices of the three international organizations, seeking a total of approximately US\$3.6 billion in compensation.

Category "B" claims are claims of individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq's invasion and occupation of Kuwait. The Governing Council fixed the amount of compensation for successful claims in this category at US\$2,500 for individual claimants and up to US\$10,000 for family claims. Approximately 6,000 category "B" claims were submitted to the Commission by 47 Governments and seven offices of the three international organisations, seeking a total of approximately US\$21 million in compensation.

Category "C" claims are claims of individuals for damages up to US\$100,000 each, and are mainly claims arising from death or personal injury, hostage-taking

and other illegal detention, loss of income, support, housing or personal property, medical expenses and costs of departure, as a result of Iraq's unlawful invasion and occupation of Kuwait. Eighty-five governments and eight offices of the three international organisations submitted approximately 1.7 million category "C" claims, with a total asserted value of approximately US\$9 billion.

Category "D" claims are the approximately 13,000 claims of individuals for damages above US\$100,000 each. Category "E" claims are the approximately 5,900 claims submitted by or on behalf of corporations and other private legal entities, as well as public-sector enterprises. Category "F" claims are the approximately 600 claims filed by Governments and international organizations for losses incurred, *inter alia*, in evacuating citizens and providing relief to citizens, damage to diplomatic premises and loss of, and damage to, other government property and damage to the environment, submitted by 43 governments and six international organisations.<sup>28</sup>

#### Claims in categories "A", "B" and "C" and the priority accorded to their processing and payment

In its first decision, entitled "Criteria for the Expedited Processing of Urgent Claims",<sup>29</sup> the Governing Council, for humanitarian reasons, classified claims in categories "A", "B" and "C" as "urgent" claims, and accorded priority to their processing and payment over larger individual claims and claims of corporations and Governments. Paragraph 1 of that decision provides as follows:

"The following criteria will govern the submission of the most urgent claims pursuant to resolution '687'(1991) for the first categories to be considered by the Commission. It provides for simple and expedited procedures by which Governments may submit consolidated claims and receive payments on behalf of the many individuals who suffered personal losses as a result of the invasion and occupation of Kuwait. For a great many persons these procedures would provide prompt compensation in full; for others they will provide substantial interim relief while their larger or more complex claims are being processed (...)"

As pointed out earlier, the overwhelming majority of the claims submitted to the UNCC fall into these categories. The importance of the

<sup>28</sup> See further: <<http://www.unog.ch/uncc/status.htm>>.

<sup>29</sup> UN Doc. S/AC.26/1991/1.

humanitarian concerns in the work of the Commission can be seen in the following quotation, relating to claims in category “A”:

“For the first time in the history of international compensation institutions and procedures, the interest of the individual was given priority over that of businesses or even governments. There is, indeed, a distressing problem here, which affects more than a million people, mostly workers from Egypt, Jordan, Pakistan, India, Sri Lanka, Bangladesh and the Philippines, who had to leave Iraq or Kuwait precipitately, losing all they possessed – personal belongings, savings, work and hope for a better life – and return to their countries of origin, further aggravating those countries’ economic and social problems”.<sup>30</sup>

This urgency is reflected in the Commission’s Rules, which were designed to allow for the provision of prompt compensation to successful claimants in categories “A”, “B” and “C”.<sup>31</sup> The Commission had recourse to a variety of mass claims processing techniques for the resolution of these claims, since their individual review (the total number of which exceeds two and a half million) would not have been feasible.<sup>32</sup> Such mass-processing

<sup>30</sup> C. Alzamora, “The UN Compensation Commission: An overview” in R.B. Lillich (ed.), *op. cit.* (note 2), p. 6. He went on to state, regarding the fixed amounts in categories “A” and “B”, that “[t]hese fixed amounts might appear very small to Western eyes, but may make all the difference when a person has lost everything and has to start from nothing in a small town in Sri Lanka or Bangladesh”.

<sup>31</sup> Article 28(2) of the Rules (*op. cit.* (note 10)) provides that “[p]riority is to be given to the establishment of panels of commissioners to deal with claims in categories A, B and C”.

<sup>32</sup> These procedures, which, in article 37 of the Rules (*ibid.*) the Governing Council urged the panels to use, include sampling, computerised matching and statistical modelling, drawing on the experience in various international and national fora on these matters. See, e.g., on sampling methodologies and statistical methods, the review undertaken in the “Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait”, UN Doc. S/AC.26/1995/4, paras. 9-34. At paragraph 9, the panel stated that: “[f]aced with situations of mass claims and other situations where a large number of cases involving common issues of law and fact arise, courts, tribunals and commissions have adopted methodologies, including that of sampling, recognizing that the traditional method of individualised adjudication if applied to such cases would not be appropriate as it would result in unacceptable delays and substantially increase the burden of costs for such claimants and more so for the respondents. The legal principle involved may be stated as follows: in situations involving mass claims or analogous situations raising common factual and legal issues, it is permissible in the interest of effective justice to apply methodologies and procedures which provide for an examination and determination of a representative sample of these claims”. See also M. Raboin, “The provisional rules for claims procedure of the United Nations Compensation Commission: A practical approach to mass claims processing”, and C. Gibson, “Mass claims processing. Techniques for processing over 400,000 claims for individual loss at the United Nations Compensation Commission”, both in R.B. Lillich (ed.), *op. cit.* (note 2), pp. 119 and 155 respectively.

techniques were used wherever appropriate, but by no means in all cases that fell under these categories. For example, the relatively small number of claims in category “B” permitted the Commission to review the vast majority on a case-by-case basis. Also, the panels of commissioners were allowed a shorter period of time (four months for each instalment) in which to complete the review of urgent claims than is the case for other claims. Furthermore, the evidentiary standard applicable to these claims also reflects the urgency with they were treated. For claims in categories “A” and “B”, simple documentation of the fact and date of departure, serious personal injury or death is all that was required, and given that the claims were for fixed amounts, there was no need to prove the actual amount of loss. If, however, a claimant wished to claim for a higher amount in categories “C” or “D”, the payment of US\$2,500 would be treated as interim relief, and claims for additional amounts could be submitted in other categories which required a greater burden of proof and documentation of the loss.<sup>33</sup> With respect to claims in category “C”, which were for larger amounts that were not generally fixed, the evidentiary requirements were accordingly more elaborate, but not to the extent that would affect the urgency of the review of the claims. Paragraph 15 of Decision 1 provides that these claims must be “documented by appropriate evidence of the circumstances and the amount of the claimed loss. The evidence required will be the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below \$20,000”.

The Commission also gave an early priority to the “urgent” claims for hostage-taking, forced hiding and other illegal detention, death and personal injury. These types of claims reflect the importance attached by the Commission to the physical and psychological well-being of individuals affected by Iraq’s invasion and occupation of Kuwait. The panels of Commissioners, in reviewing these claims, identified the principal causes of claimants’ injury and death as the following: military operations or actions; executions; arbitrary arrests and detentions; torture, assault, maltreatment and oppression; sexual assault; lack of medical care especially in Kuwait, arising from reduction in the number of healthcare providers, the closing, dismantling and pillaging of healthcare facilities, and deliberate denial of access to medical care by the occupying Iraqi authorities, and injuries suffered as a

<sup>33</sup> Decision 1, *op. cit.* (note 30), paras. 11 and 12. See also article 35(2) of the Rules, *op. cit.* (note 10).

result of the chaos arising from the invasion and occupation and attempts to flee the war zone across desert areas.<sup>34</sup> The Governing Council adopted, at a very early stage in its work, further rules and guidelines on the compensability of claims for hostage-taking and detention, death and personal injury, especially regarding claims for “mental pain and anguish” related to these events.<sup>35</sup> With respect to mental pain and anguish arising from hostage-taking and other illegal detention, a claimant could be compensated for mental pain and anguish resulting from being taken hostage or illegally detained for more than three days; for being taken hostage or illegally detained for a period of three days or less in circumstances indicating an imminent threat to the claimant’s life; and for being forced to hide on account of a manifestly well-founded fear for his or her life, or of being taken hostage or illegally detained.<sup>36</sup> Decision 8 sets out the ceiling amounts that apply to the compensation of mental pain and anguish. With respect to personal injury, the Governing Council, in adopting the Report of the Panels of Commissioners for the first category “C” instalment, in which the Panel was assisted by expert consultants in fields such as disaster medicine, mass litigation, the psychosocial aspects of health and development, public health aspects of neurology and psychiatry and cross-cultural psychiatry,<sup>37</sup> set the limits as

<sup>34</sup> See, e.g. the “Report and Recommendations of the Panel of Commissioners Concerning Individual Claims for Damages up to US\$100,000”, UN Doc. S/AC.26/1994/3 (“the First “C” Report”), pp. 82-128. That panel, like other panels, relied on the following United Nations reports documenting the situation following the liberation of Kuwait in 1991 (see p. 270 of the First “C” Report): *Report on the Situation of Human Rights in Kuwait Under Iraqi Occupation, Prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67*, UN Doc. E/CN.4/1992/26, 16 January 1992; *Report to the Secretary-General by a United Nations Mission, led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Scope and Nature of Damage Inflicted on Kuwait’s Infrastructure During the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991*, UN Doc. S/22535, 29 April 1991; *Study Concerning the Right to Restitution, Compensation and Rehabilitation of Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, UN Doc. UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993; and *Report to the Secretary-General on Humanitarian Needs in Kuwait in the Immediate Post-Crisis Environment by a Mission to the Area led by Mr. Marti Ahtisaari, Under-Secretary-General for Administration and Management*, UN Doc. S/22409, 28 March 1991.

<sup>35</sup> See Governing Council Decisions 3 (“Personal Injury and Mental Pain and Anguish”, UN Doc. S/AC.26/1991/3) and 8 (“Determination of Ceilings for Compensation for Mental Pain and Anguish”, UN Doc S/AC.26/1992/8).

<sup>36</sup> See the discussion in the First “C” Report, pp. 82-96. See also the “Report and Recommendations of the Panel of Commissioners Concerning the Seventh Instalment of Individual Claims for Damages up to US\$100,000”, UN Doc. S/AC.26/1999/11 (the Seventh “C” Report), paras. 94-110.

<sup>37</sup> See the First “C” Report, *op. cit.* (note 35), pp. 271-272.

follows: US\$15,000 for dismemberment, permanent significant disfigurement, or permanent loss of use or permanent limitation of use of a body organ, member, function or system; US\$5,000 for temporary significant disfigurement or temporary significant loss of use or limitation of use of a body organ, member, function or system, as well as for each incident of sexual assault, aggravated assault, or torture; US\$2,500 for witnessing the intentional infliction of the aforementioned types of injury on the claimant's spouse, child, or parent, with a ceiling of US\$5,000 per family unit. Regarding mental pain and anguish related to claims for death, Decision 8 set the following limits: US\$15,000 for the death of the spouse, child or parent, with a ceiling of US\$30,000 per family unit, and US\$2,500 for witnessing the intentional infliction of events leading to the death of the family member, with a ceiling of US\$5,000 per family unit.<sup>38</sup>

Between 1993 and 1996 the Commission resolved all category "A" and "B" claims. It also finalized its review of the category "C" claims by June 1999, save for a number of category "C" claims filed by the Palestinian Authority and a number of claims for which filing deadlines were extended, which are discussed in the next sub-section. Claims in categories "D", "E" and "F", in contrast, being larger and more complex, are governed by a different set of rules that do not accord priority to their processing and payment.<sup>39</sup> The Rules contain more elaborate procedures, including the provision of a longer time period for the review of these claims by the panels and the discretionary power of the Commissioners to ask for additional written submissions and to hold oral proceedings where it is considered appropriate. The Rules provide also that these claims "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss".<sup>40</sup> A higher evidentiary standard therefore has to be met by the claimants in these categories,<sup>41</sup> and this is particularly

<sup>38</sup> The processing methodologies and further details of the circumstances of these claims are discussed in the First "C" Report, *op. cit.* (note 35), pp. 97-128. See also the Seventh "C" Report, *op. cit.* (note 37), paras. 113-177, and pp. 241-270 of the First "C" Report ("Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental pain and Anguish"), for discussion of further considerations that went into determining the appropriate level of compensation for claims for mental pain and anguish.

<sup>39</sup> See Governing Council Decision 7, "Criteria for Additional Categories of Claims", UN Doc. S/AC.26/1991/7/Rev.1, and article 38 of the Rules, *op. cit.* (note 10).

<sup>40</sup> See article 35(3) of the Rules, *ibid.*

<sup>41</sup> See Governing Council Decision 46, UN Doc. S/AC.26/Dec.46 (1998).

evident in some of the panels' reports and recommendations concerning corporate claims.<sup>42</sup>

As stated earlier, priority was also accorded to the payment of compensation to claimants in categories "A", "B" and "C". In its Decision 17, the Governing Council established basic principles for the distribution of compensation payments to successful claimants.<sup>43</sup> As noted in the Secretary-General's recommendation to the Security Council, it was anticipated that the value of approved awards would far exceed the resources available in the Compensation Fund at any given time. The Governing Council therefore devised a mechanism for the allocation of available funds to successful claimants that gave priority to the three urgent categories of claims. Only when each successful claimant in categories "A", "B" and "C" had been paid an initial amount of US\$2,500 did payments commence for claims in other categories. Accordingly, the first phase of payment involved an initial payment of US\$2,500 to each successful individual claimant in categories "A", "B" and "C". All successful category "B" claims, the processing of which had been completed in early 1996, were paid in full by the end of 1996. It should be pointed out that, in view of the urgent humanitarian needs of the category "B" claimants, and since no income had been received from Iraq at that stage, the secretariat had requested the Governing Council to use a large part of the Commission's budget in order to make these payments, and the Council agreed.<sup>44</sup>

<sup>42</sup> See, for example, the "Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of 'E3' Claims", UN Doc. S/AC.26/1999/14, paras. 58-60:

"... in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making. (...) Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes. But the fact that offices on the ground in Kuwait, for example, were looted and/or destroyed would not explain why claimants have not produced documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries (...) The Panel has approached the claims in the light of the general and specific requirements to produce documents noted above. Where there has been a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part the Panel has had no opportunity or basis upon which to make a recommendation".

See generally paragraphs 40 and 46-60, as well as articles 35, 36 and 38 of the Rules, *op. cit.* (note 10).

<sup>43</sup> "Priority of Payment and Payment Mechanism (Guiding Principles)", UN Doc. S/AC.26/Dec.17 (1994).

<sup>44</sup> However, later in 1996, the secretariat found itself perilously close to running out of operational funds until income received under Resolution 986 (1995) became available.

A total of US\$3,252,337,997.09 was made available to Governments for distribution to 1,498,119 successful individual claimants in categories “A”, “B” and “C” under the first phase of payments which ended in 1999. In its decision 73,<sup>45</sup> the Governing Council adopted the mechanism for the second phase of payments. It determined that priority of payment would continue to be provided to the remaining successful claimants in categories “A” and “C”, while “meaningful” compensation would also be provided to claimants in categories “D”, “E” and “F”. The payment of compensation in respect of claims in categories “A” and “C” was completed in this second phase, which came to an end in September 2000.

The Governing Council also established rules and procedures to ensure that the payments were received by the claimants. Pursuant to Governing Council Decision 18<sup>46</sup> Governments and international organisations may offset their costs of the handling of claims they submitted on behalf of individuals by deducting a small fee from payments made to claimants. In the case of awards payable to claimants in categories “A”, “B” and “C”, the maximum amount deductible was not to exceed 1.5 per cent of the amount awarded. In addition, Governing Council Decision 48<sup>47</sup> requires that money that is not distributed to a claimant within twelve months, for example where a Government is unable to locate a claimant, be returned to the Commission. Further payments to Governments and international organizations are suspended where Governments and international organizations fail to comply with their reporting obligations to the Commission on the distribution of funds or fail to return undistributed funds on time. Funds returned to the Commission are held until the claimant is located, at which time the money is returned to the Government for payment to the claimant.

The priority accorded to the processing and payment of compensation for urgent claims illustrates the primary humanitarian aspect of the Commission’s work. It has been written that:

“[g]iven the traditional emphasis in previous claims resolution processes on the losses suffered by governments and corporations, this humanitarian decision to focus first on urgent individual claims marked a significant step in the evolution of international claims practice”.<sup>48</sup>

45 “Priority of Payment and Payment Mechanism (Phase II)”, UN Doc. S/AC.26/Dec.73 (1999).

46 “Distribution of Payments and Transparency”, UN Doc. S/AC.26/Dec. 18 (1994).

47 “Return of Undistributed Funds”, UN Doc. S/AC.26/Dec. 48 (1998).

48 N. Wühler, *op. cit.* (note 7).

### Extension on humanitarian grounds of deadlines for the submission of claims

Final deadlines were established for the filing of the various categories of claims. All of the filing deadlines have now expired with the exception of claims put forward on behalf of missing persons and claims for damage and losses resulting from injuries sustained as a result of landmine or ordnance explosions. However, the Governing Council has, on occasion, exceptionally authorised the submission of claims after the expiration of these final deadlines. The Governing Council established strict criteria for the acceptance of such claims, which further illustrate the humanitarian aspect of the Commission's work. The criteria are (i) that the delay in the submission of the claims had to have been caused by war or a situation of civil disorder, such as the absence of governmental authority, and (ii) there must be evidence of a prior unsuccessful attempt to file the claims within the relevant established deadlines. The claims that have been accepted for filing on the basis of these criteria have been claims of individuals.<sup>49</sup> One example of the application of these criteria was the decision of the Governing Council to accept the late filing of 223 category "A" claims of individuals in Bosnia and Herzegovina, which it determined to satisfy the above-mentioned criteria.<sup>50</sup> Another more recent illustration of the role of humanitarian considerations in deciding whether to allow the filing of late claims was the decision of the Governing Council in December 2001 to accept a number of claims of Palestinian individuals who, in the opinion of the Governing Council, may not have had a full and effective opportunity to file their claims within the relevant established deadlines given the conditions prevailing in the relevant areas. As a norm, however, the Governing Council has rarely allowed the filing of late claims, with several thousand requests for late filing having been rejected. Only in exceptional cases such as those mentioned above have humanitarian considerations prevailed in favour of late filing.

<sup>49</sup> On 15 October 1996, the Governing Council decided that all requests for the acceptance of the submission of late claims in categories "E" and "F" "have to be submitted to the UNCC before 1 January 1997, after which no late claims may be accepted under any circumstances", and directed the secretariat to return any claims received thereafter to the relevant submitting entity upon receipt. See *Documents of the United Nations Compensation Commission*, UN Doc. S/AC.26/Ser.A/1, p. 179. In February of the same year, the Governing Council, while considering a request for the submission of late claims, had stated that its "case-by-case consideration of claims in categories "E" and "F"...would be very strict, considering that most of the claims involved corporations and State entities and were therefore difficult to justify"; *ibid.*, p. 177.

<sup>50</sup> See Decision 101, UN Doc. S/AC.26/Dec. 101(2000).

In addition, deadlines for filing were extended for certain kinds of claims. Pursuant to Governing Council Decision 12,<sup>51</sup> these include the following: (i) claims for losses and personal injuries resulting from public health and safety risks (such as injuries caused by landmines) that occur after the expiration of the established filing deadlines; (ii) claims of individuals who have been detained in Iraq until after the expiration of the established filing deadlines. Again, the role of humanitarian considerations is clear from the nature of these types of claim.<sup>52</sup>

### The treatment of prisoners of war

The Commission has also upheld principles of international humanitarian law as laid down in the Geneva Conventions of 1949. In Decision 11, the Governing Council decided that members of the Allied Coalition Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except where (a) the compensation is awarded in accordance with the general criteria already adopted for compensability by the Commission, and (b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).<sup>53</sup> In its second report, the category “B” panel of commissioners considered claims submitted by members of the Allied Coalition Forces who were taken as prisoners of war during coalition military operations against Iraq. As stated by the panel, “[t]hese claims were supported by extensive medical documentation explaining the torture and injuries that were inflicted upon them by Iraqi authorities during their captivity. Many of the personal statements attached to the claim forms explain that beatings were administered to members of the Allied Forces so as to coerce them into releasing information.”<sup>54</sup> The panel accordingly recommended that these

<sup>51</sup> “Claims for which Established Filing Deadlines are Extended”, UN Doc. S/AC.26/1992/12.

<sup>52</sup> See, e.g., the final report and recommendations made by the category “C” panel of commissioners, UN Doc. S/AC.26/1999/11, paras. 17-19.

<sup>53</sup> “Eligibility for Compensation of the Members of the Allied Coalition Armed Forces”, UN Doc. S/AC.26/1992/11.

<sup>54</sup> “Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Installment of Claims for Serious Personal Injury or Death (Category ‘B’ Claims)”, UN Doc. S/AC.26/1999/4, para. 14.

claims be awarded compensation, as they involved, *inter alia*, breaches of international humanitarian law.

The Commission has also upheld and applied international humanitarian law with respect to the obligations of States concerning the treatment of prisoners of war. The Government of Saudi Arabia submitted a claim for expenses incurred in the provision of support to approximately 70,000 Iraqi prisoners of war who were captured by the Allied Coalition Forces, including French, British, American and Saudi Arabian forces, and transferred into Saudi Arabian custody in February 1991.<sup>55</sup> The claimant government asserted that it detained the prisoners in a camp especially constructed for them, and provided support to them in accordance with articles 12 and 15 of the Geneva Convention relative to the Treatment of Prisoners of War (1949) (the Third Geneva Convention). The prisoners of war remained at the camp until they were repatriated in August 1991. Those prisoners of war (approximately 13,000) who refused to be repatriated became civilians entitled to the protection accorded by Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) (the Fourth Geneva Convention) and were accorded refugee status by Saudi Arabia in August 1991. They remained at the camp until 1992, when the camp was closed and the remaining inmates were transferred to another refugee camp. Iraq argued that the costs of caring for prisoners of war should be borne by the "detention" state in accordance with the terms of the Third Geneva Convention.

In responding to the claims, the panel had to apply the jurisprudence developed by the Commission based on Governing Council Decision 19,<sup>56</sup> pursuant to which the costs of preparation for, participation in or provision of support in relation to the activities of the Allied Coalition Forces and their military response to Iraq's invasion and occupation of Kuwait are not eligible for compensation. The panel found that the detention and repatriation of the Iraqi prisoners by the Claimant formed part of Saudi Arabia's participation in the activities of the Allied Coalition Forces and their military response to the invasion and occupation of Kuwait, and were therefore not eligible for compensation in accordance with the application of Governing Council decision 19.

The part of the panel's ruling that is significant for present purposes relates to the discussion of the legal position under the Geneva Conventions.

<sup>55</sup> "Report and Recommendations Concerning the Third Instalment of 'F2' Claims, UN Doc. S/AC.26/2002/7, paras. 215-224.

<sup>56</sup> "Military Costs", UN Doc. S/AC.26/Dec.19 (1994).

The panel continued and noted that, with a few specific and limited exceptions, the Third Geneva Convention is silent as to the issue of compensation for costs incurred by a detaining power in the maintenance of prisoners of war. It considered that, although the operation of Governing Council Decision 19 excluded the possibility of compensation for all costs incurred in the conduct of military operations against Iraq, including those incurred in complying with the terms of the Geneva Conventions,<sup>57</sup> this application of the Governing Council Decision 19 did not alter the humanitarian nature of the legal obligation of Saudi Arabia under articles 12 and 15 of the Third Geneva Convention to provide support to the prisoners of war in its care. The panel, however, noted that in cases of other armed conflicts where there is no equivalent of Governing Council Decision 19, “there may be a need for bodies responsible for the implementation of the Geneva Conventions to clarify, as a matter of general interpretation, who is to bear the final cost for complying with the obligations to provide support to prisoners of war established under the Third Geneva Convention, in the light of the nature and purpose of the expenditures made and whether ultimately a claim for reimbursement might be appropriate”.<sup>58</sup>

The panel made a number of other findings in this regard. It found that its analysis applied regardless of the party that captured the prisoners, noting that article 12 of the Third Geneva Convention provides that where custody of the prisoners of war has been transferred by the capturing party to a third party, ultimate responsibility for the treatment of the prisoners of war remains with the party or parties by whom the prisoners of war were captured in the event that the party accepting custody of the prisoners of war fails to carry out the provisions of the Third Geneva Convention in any important respect. The Panel concluded by emphasising that the application of Governing Council Decision 19 to the claim “does not derogate from the humanitarian concerns underlying the Third Geneva Convention as the obligations established in the Convention are to be complied with by both the capturing power and the

<sup>57</sup> Article 31 of the Rules, *op. cit.* (note 10), on the Commission’s applicable law, provides that the Commissioners “will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law”. Accordingly, it is only where an issue has not been covered in any resolution of the Security Council or in any decision of the Governing Council that the commissioners are to have recourse to “other relevant rules of international law”.

<sup>58</sup> *Op. cit.* (note 49), para. 220.

power responsible for providing the appropriate treatment of prisoners of war, in both cases independently of the question of eventual compensation”.<sup>59</sup>

### Compensability of the costs of provision of humanitarian relief to individuals

As in the case of the Saudi Arabian Government claim discussed in the previous subsection, the Commission’s applicable law provides for compensability of claims for payments made or relief provided to others, and as may be expected, such claims have been submitted primarily by Governments, international organizations and corporations.<sup>60</sup>

Jordan’s situation as the main transit point for individuals who fled from Iraq and Kuwait is well-documented,<sup>61</sup> and its response in providing emergency humanitarian relief to refugees can be taken as an illustration of the Commission’s approach to treatment of claims for the costs incurred in providing such relief. Jordan mounted a massive humanitarian relief effort, which involved the preparation and operation of refugee camps, including the provision of food and clothing, health services, transportation and evacuation of individuals and other costs such as the provision of security and administrative services. The panel of commissioners responsible for the review of claims of the Government of Jordan considered that expenditures incurred by the Government of Jordan in respect of emergency humanitarian relief provided to evacuees (foreign nationals who fled from Iraq or Kuwait and passed through Jordan on the way to their countries) during the period from 2 August 1990 to 2 March 1991 were compensable in principle.<sup>62</sup>

<sup>59</sup> Concerning the part of the claim for the costs of support that the Saudi Government continued to provide to those Iraqi prisoners of war who refused to be repatriated to Iraq upon the cessation of hostilities, the panel found that the decision by those prisoners of war not to return to Iraq, as well as the decision by Saudi Arabia to continue to provide support to those prisoners after they refused to be repatriated, were independent decisions on the part of the prisoners of war and Saudi Arabia that broke the chain of causation between the costs of support incurred, on the one hand, and the invasion and occupation of Kuwait on the other. Accordingly, this part of the claim was also found not to be compensable; *ibid.*, para. 223.

<sup>60</sup> See Governing Council Decision 7, *op. cit.* (note 40), paragraphs 22 and 36. The latter paragraph provides that compensation payments will be provided for, *inter alia* “losses and costs incurred by a Government in evacuating its nationals from Iraq or Kuwait. These payments are also available to reimburse payments made or relief provided by Governments or international organizations to others – for example to nationals, residents or employees or to others pursuant to contractual obligations – for losses covered by any of the criteria adopted by the Council”.

<sup>61</sup> See, e.g. “The Report and Recommendation of the Panel of Commissioners Concerning the First Instalment of ‘F2’ Claims”, UN Doc. S/AC.26/1999/23, paras. 7-12.

<sup>62</sup> *Ibid.*, paras. 29-31.

However, certain limits were placed on the availability of compensation for relief provided to evacuees. One important limitation was the requirement that such expenditures be “temporary and extraordinary in nature”, as expenditures that do not satisfy this requirement do not result directly from Iraq’s invasion and occupation of Kuwait. For example, while the panel in one claim recommended compensation for the costs of the actual relief provided, it did not recommend compensation for the costs of salaries of regular government employees who were assigned to work on the humanitarian relief effort, because the claimant did not provide any evidence to contradict the panel’s view that such employees were performing their ordinary functions, and therefore that the costs were not “temporary and extraordinary”.<sup>63</sup>

The panel distinguished between those evacuees who were non-Jordanian nationals, and *returnees*, namely, Jordanian passport holders who had lived in Iraq or Kuwait or other Gulf States and settled in Jordan following Iraq’s invasion of Kuwait.<sup>64</sup> A number of the claims submitted in respect of returnees related to the provision of services, including health, social, police, housing, electricity, water and sewerage and education services, to them. The Panel also found that these claims were compensable in principle to the extent that the costs incurred were temporary and extraordinary in nature. However, the Panel noted that unlike evacuees, who were repatriated to their home countries following relatively brief stays in Jordan, the returnees resettled in Jordan. Therefore, in addition to the normal jurisdictional period of 2 August 1990 to 2 March 1991, the Panel found that for a six-month transition period thereafter, i.e., 2 March 1991 to 1 September 1991, expenditures incurred in the provision of humanitarian relief to returnees continued to be temporary and extraordinary in nature. The Panel also found that this six-month transition period was a reasonable length of time to enable returnees to resettle and recommence a normal life after the tremendous upheaval that they sustained as a result of Iraq’s invasion and occupation of Kuwait. Thereafter, the panel considered that the obligation to provide for returnees shifted fully to the Government of Jordan; Government expenditures ceased to be temporary and extraordinary in nature and were not losses directly resulting from

<sup>63</sup> *Ibid.*, paras. 100-105.

<sup>64</sup> *Ibid.*, paras. 32-37.

Iraq's invasion and occupation of Kuwait.<sup>65</sup> In all cases, the need to compensate for the humanitarian relief provided to evacuees and returnees is always circumscribed by the need to limit the extent of Iraq's liability.<sup>66</sup>

Another illustration of the Commission's need to balance out the competing humanitarian concerns is illustrated by the treatment of claims for the costs of providing humanitarian relief by charitable organizations. The category "F1" Panel of Commissioners had determined, in the context of government claims for contributions to relief organizations, that the requirement that the loss suffered be a direct result of the invasion and occupation of Kuwait under paragraph 16 of Resolution 687 (1991) is satisfied under three conditions, namely that a): the purpose of the contribution responds to a "specific and urgent need" that resulted directly from Iraq's invasion and occupation of Kuwait, for example, by an appeal from an international organization for contributions for such a specific purpose; b) the contribution was for losses covered by any of the criteria adopted by the Governing

<sup>65</sup> See also the treatment of claims of Jordan for the environmental damage and depletion of natural resources (mainly water) alleged to have been caused by the influx of refugees; "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'F4' Claims", UN Doc. S/AC.26/2001/16, para. 297 ff.

<sup>66</sup> See also, for example, the treatment by the Commission of claims for the costs of humanitarian relief provided to Kurdish refugees. In one such claim, the Iranian Ministry of Interior sought compensation for costs it allegedly incurred in providing assistance from March 1991 to December 1993 to approximately 1.4 million Iraqi nationals, mostly of Kurdish origin, who began arriving in Iran after 15 March 1991. The claimant stated that the majority of the refugees stayed in Iran for several months before returning to Iraq, while some of them stayed in Iran for "several years". The claimant stated that it established reception centers and camps in Iran to accommodate the refugees, and that it provided them with food, shelter, clothing, medicine and other basic necessities "on an emergency basis". It should be borne in mind that the Commission's previous jurisprudence established that alleged losses occurring outside the period of Iraq's invasion and occupation of Kuwait (i.e., 2 August 1990 to 2 March 1991) required a claimant to discharge an extra burden of proof to provide an explanation as to why such loss should be considered a direct result of Iraq's invasion and occupation of Kuwait; see, e.g. "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.2000/13, para. 70. The claimant specifically argued that "the Allied Coalition Forces encouraged civil unrest and rebellion in Iraq as part of their military strategy against Iraq and that they undertook military operations that inevitably led to the breakdown of civil order in Iraq. It alleges that the exodus of the (...) refugees from Iraq to Iran was, therefore, part of a natural sequence of events that was started by Iraq's invasion and occupation of Kuwait and that resulted in a foreseeable manner in the losses claimed in respect of the (...) refugees". The panel ruled as follows: "[t]he Panel recognizes that a considerable effort was exerted by Iran to provide humanitarian relief to the Iraqi nationals. However, the Panel finds that the claim for costs incurred in providing assistance to the (...) refugees is not compensable in principle, as the presence of those refugees in Iran was not a direct result of Iraq's invasion and occupation of Kuwait. Rather, the evidence demonstrates that the (...) refugees arrived in Iran as a direct

Council; and c) the contribution was actually used to respond to such a need.<sup>67</sup> Again, Iraq's liability for the costs of humanitarian relief was limited by these conditions.

A related issue arose before another panel in the context of the review of a claim by a non-profit organization for the costs of charitable relief provided to refugees. Guided by the precedents established in the Jordanian Government claims and the government claims for donations to charitable organizations just considered, the panel found that the claims were compensable.<sup>68</sup> The fact that the claimant was established after the invasion of Kuwait did not, in the opinion of the panel, preclude an award of compensation. Furthermore, the claimant's decision to organise and establish a relief facility to assist refugees does not break the chain of causation as it was a reasonable and foreseeable response to Iraq's invasion and occupation of Kuwait. In contrast, the same panel in the same report declined to recommend compensation in respect of a claim by a corporation for compensation for donations of food made to a local chamber of commerce to aid Kuwaiti refugees in Saudi Arabia.<sup>69</sup> The panel distinguished between charitable organizations, "whose principal mission is to assist people in need such as refugees", and corporate enterprises who "make charitable donations on the basis of independent business decisions for reasons only incidentally related

result of Iraq's suppression of uprisings involving Kurdish people in the north of Iraq, and the Shia population in the south. The Panel does not consider that either the suppression of uprisings or the subsequent exodus of refugees from Iraq was a natural and foreseeable consequence of Iraq's invasion and occupation of Kuwait"; "Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of 'F1' Claims", UN Doc. S/AC.2002/6, paras. 154-174. Another reason for the non-compensability of such claims is the fact that many of the Kurdish refugees had Iraqi nationality. As the same panel stated in another report in the context of a claim that also involved Kurdish refugees, "[t]he Panel recognizes that the Governing Council in decision 7, para. 11, stated that '[c]laims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State'. The Panel therefore considers that compensation [is] not be awarded to a Government to reimburse contributions made to persons who would not be eligible to seek compensation from the Commission in their own capacity. Accordingly, the Panel finds that relief contributions made by the Government of Canada to assist Iraqi nationals who do not have bona fide nationality of any other State are not compensable"; "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.2000/13, para. 72.

<sup>67</sup> "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.26/2000/13, para. 21.

<sup>68</sup> "Report and Recommendations Made by the Panel of Commissioners Concerning the Ninth Instalment of 'E2' Claims", UN Doc. S/AC.26/2001/17, paras. 155-165.

<sup>69</sup> *Ibid.*

to the business objectives of the corporation". The same panel had previously recommended compensation for corporations for relief payments in the context of the claimants' contractual relationship with its employees and in the case of transport carriers (airlines and railways) where the relief services had been provided by the claimant in a quasi-governmental capacity or as a public service. In the current case, the panel found no such factors that would have enabled it to rule that that the payments constituted a "direct" loss resulting from Iraq's invasion and occupation of Kuwait within the meaning of Security Council Resolution 687 (1991).

### **Conclusion and outlook**

The suffering among the civilian population of Iraq since the imposition of sanctions by the Security Council in 1990 has been commented upon widely. As stated in section 2 above, the mandate of the Commission is to provide compensation to the innocent victims of Iraq's unlawful invasion and occupation of Kuwait (1990-1991), and this mandate is distinct from and independent of the sanctions regime. Within the Commission, the Governing Council, which sets its policy within the framework of relevant Security Council resolutions, has considered carefully the humanitarian impact of their decisions towards both the victims of the conflict and Iraq itself. Humanitarian considerations, which were built into the mandate of the Commission by the Security Council, have been further developed by the Governing Council in setting up the working procedures of the Commission and its claims review process. As was stated by one panel, the "direct loss" limitation on the Commission's jurisdiction in Resolution 687 (1991) is "understandable in view of the magnitude of liability that would result from providing compensation for any detriment wherever felt, by any person, which somehow can be related to the invasion and occupation of Kuwait".<sup>70</sup>

The importance attached to humanitarian considerations can be further illustrated by comparing the success rates for claimants in categories "A", "B" and "C", which were classified as "urgent claims" on the basis of humanitarian considerations, with those of claims of governments and corporations. Claims in categories "A", "B" and "C" have been awarded 93, 67 and 57 percent of the amount claimed, respectively, while the average

<sup>70</sup> "Report and Recommendations Made by the Panels of Commissioners Concerning the Second Instalment of 'E2' Claims", UN Doc. S/AC.26/1999/6, para. 55.

success rate for corporate and governments claims is 16 percent. In some of the “E” and “F” categories, the success rate is as low as three percent, and the average figure of 16 percent is due to the more successful claims in these categories that had been put forward by Kuwaiti companies. The overall success rate for all categories of claims presently stands at 18 percent, though it is anticipated that this ratio will fall further as the remaining claims are resolved. These success rates bear testimony to the fact that the Commission has not wavered from its primary objective of awarding compensation only for losses caused as a direct result of Iraq’s invasion and occupation of Iraq. Indeed, the Commission has been very conscious to avoid being a punitive body while on the other hand balancing the very serious humanitarian situations that victims of the conflict found themselves in as a result of Iraq’s illegal action. In this sense, the work of the Commission can be considered to have paved the way for the allocation of a central role to humanitarian considerations in future war reparations processes; as noted above, the importance attached to humanitarian considerations by the Commission is a significant departure from previous war reparations practice.<sup>71</sup> The conclusion of the review of claims by the Commission will bring an end to this programme to compensate innocent victims of conflict, a programme which is all the more significant because it is the first of its kind to be established by the United Nations Security Council.

The Commission has faced a number of challenges since it started its work, and its experience indicates a number of factors that should be taken into account for the smooth functioning of a future war reparations regime. One essential issue is that of funding – the political will on the part of the international community and the practical means of securing the funds are prerequisites, as evidenced by the difficulties faced in this respect by the Commission in the earlier part of its existence.<sup>72</sup> Also, if compensation is to reach all deserving victims of war, it will be necessary to ensure that the existence of any war reparations programme is publicized as widely as possible, as that would facilitate planning and establishment of deadlines, which would in turn enhance fairness with respect to claimants and the compensating party and contribute to the minimization of the need to consider (and create where appropriate) exceptions. In addition, depending on the magnitude of the project, the use of mass claims processing techniques should be consid-

<sup>71</sup> See N. Wühler, *op. cit.* (note 7), and C. Alzamora, *op. cit.* (note 31).

<sup>72</sup> See text accompanying notes 13-16 above.

ered, with all the resource implications for the procedures for the submission of claims in electronic form.<sup>73</sup> Simplicity is also essential in the rules and procedures that govern the submission of claims, given the widely different backgrounds and circumstances of individual claimants. It will be apparent that, particularly in the case of war reparations programmes involving nationals of several countries, the close co-operation with Governments and other authorities is necessary to address these concerns. Again, depending on its workload, any war reparations regime should consider appropriate procedures that will enable it to strike the right balance between the two objectives of speed and accuracy, particularly regarding its rules on the participation of both the claimants and of the compensating party/entity, and distinctions may usefully be drawn between claims on the basis of their size and complexity as was the case at the Commission.<sup>74</sup> Furthermore, the assistance of experts in the relevant fields is important in order to ensure the appropriateness of compensation particularly with regard to claims related to the physical and psychological well-being of the claimants, as illustrated by the role of the panel of experts assisting the Commission in its review of claims for mental pain and anguish.<sup>75</sup> Each war reparations programme will have its own specific issues which will have to be addressed on a case-by-case basis, but given the unprecedented magnitude of the Commission's project, lessons such as those mentioned here will almost certainly be of relevance to other programmes.

The Commission has entered the final phase of its mandate and it is scheduled that all remaining claims will be resolved by the panels of Commissioners by the end of 2004. As at 25 July 2003 the Commission had resolved nearly 2.6 million claims totaling over US\$250 billion in asserted value, approximately 98 percent of the total number of claims submitted, and awarded US\$46 billion in compensation. Of the amount awarded over US\$17 billion has been paid to claimants. Only 50,000 claims remain to be resolved, of which 46,000 are claims of individuals (the late-filed Palestinian claims mentioned in section 3.2 above) and the remainder are claims for damage to the environment. When it finishes its review of the last claims the Commission will be last UN programme established under Resolution 687 (1991) to conclude its mandate.

<sup>73</sup> See note 32 above.

<sup>74</sup> See text accompanying notes 8-10 (section 1) and 29-42 (section 3) above.

<sup>75</sup> See text accompanying notes 37 and 38 above.

## Résumé

### ***Les considérations d'ordre humanitaire dans les travaux de la Commission d'indemnisation des Nations Unies***

*Fred Wooldridge et Olufemi Elias*

*La Commission d'indemnisation des Nations Unies a été créée par le Conseil de sécurité pour examiner les demandes d'indemnisation et verser des indemnités aux victimes de l'invasion et de l'occupation illicites du Koweït par l'Irak (1990-1991). Cet article examine l'importance que les considérations d'ordre humanitaire revêtent dans le cadre des travaux de la Commission, notamment dans la procédure d'examen des demandes d'indemnisation et dans les mécanismes pour la répartition des indemnités accordées aux requérants dont la réclamation a abouti. L'article examine également les sources des contributions versées au Fonds d'indemnisation des Nations Unies (à partir duquel les indemnités sont versées) dans le contexte de la situation humanitaire qui prévaut en Irak, et il établit une distinction entre le mandat de la Commission et les autres institutions et processus mis en place par le Conseil de sécurité après l'invasion du Koweït en 1990. Finalement, l'article explore brièvement comment les considérations d'ordre humanitaire peuvent jouer un rôle dans des futures procédures de réparation des dommages de guerre.*



## Amnesty for war crimes: Defining the limits of international recognition

YASMIN NAQVI\*

Criminal prosecution of those accused of committing war crimes is a fundamental aspect of a victim's right to justice. However, in armed conflicts where serious violations of the laws of war have been committed on a massive scale, the notion of remedial or retributive justice<sup>1</sup> for victims of war crimes often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence. In these circumstances a restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law, may be the more appropriate model.<sup>2</sup>

The complex issue of the legality of amnesties<sup>3</sup> for war crimes<sup>4</sup> under international law and the related question of whether amnesty laws, agreements or practices may be given *de jure* or *de facto* recognition<sup>5</sup> by foreign or international courts is coming to a head. Amnesties designed to preclude the prosecution of persons suspected or accused of war crimes usually take the form of legislative or constitutional acts of States, or are contained in treaties or political agreements. However, other State practice may also prevent domestic or international courts from adjudicating war crimes cases, such as decisions not to exercise jurisdiction and Security Council exemptions. In addition, certain principles of international law may bar prosecutions for war crimes, such as immunities for State officials.

As a case in point, at the height of the recent crisis in Liberia former Liberian President Charles Taylor, indicted for war crimes by the United Nations-sponsored Special Court for Sierra Leone, was asking for the

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indictment to be removed as a condition for leaving the presidency.<sup>6</sup> Had this deal been accepted, the removal of the indictment would not strictly speaking constitute an amnesty in the sense of a national law or negotiated agreement barring prosecution, but its object and effect (dropping war crimes charges to secure a peace deal) would essentially be the same. Liberia has since applied to the International Court of Justice (ICJ),<sup>7</sup> claiming that the arrest warrant should be voided on the basis of the customary rule of immunity of foreign heads of State.<sup>8</sup> In addition, by granting asylum to Taylor, Nigeria appears to be contravening the widely accepted principle

1 Remedial justice may be characterized as the legal means to recover a right or to prevent or obtain redress for a wrong. Retributive justice focuses on the need to punish the wrongdoer for illegal acts committed. For a discussion thereof, see K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", *The Online Journal of Peace and Conflict Resolution*, Vol. 4.2, 2002, pp. 34-76.

2 See generally, R. Teitel, "Transitional jurisprudence: The role of law in political transformation", *Yale Law Journal*, Vol. 106. No. 7, 1997, p. 2009, esp. p. 2037. A contextual approach should also take into account the fact that notions of justice, truth, forgiveness, reconciliation and accountability are socially constructed and culturally constituted.

3 Amnesty literally means "[f]orgetfulness, oblivion; an intentional overlooking". *Oxford English Dictionary*, 2nd ed., 1989. Legally, it means foreclosing criminal prosecution for past offences. This pre-conviction measure may be distinguished from a pardon, which officially recognizes the guilt of the offender but foregoes the sentence. The word "amnesty" is derived from the Greek "*amnestia*" meaning oblivion or not remembering.

4 For reasons of subject and space limitation, this article will not deal directly with the recognition of amnesties for other serious international crimes, such as torture, genocide, or crimes against humanity.

5 In this article, the word "recognition" is taken to mean the acknowledgement of legal validity under international law by States or courts.

6 Charles Taylor left the presidency and the territory of Liberia on 11 August 2003 following strong international pressure and the intervention of a Nigerian-led ECOWAS peacekeeping force. The indictment for war crimes of the Sierra Leone Special Court, originally issued on 7 March 2003 and then re-issued on 4 June 2003, remains in force. The Security Council, in Res. 1478 (2003), UN Doc. S/RES/1478, 6 May 2003, has shown support for the indictment, calling on "all States, in particular the Government of Liberia, to cooperate fully with the Special Court for Sierra Leone" (preamble para. 10).

7 "Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President", International Court of Justice Press Release 2003/26, 5 August 2003.

8 In a judgment that has sparked criticism, the International Court of Justice (ICJ) has recently upheld the absolute immunity of an incumbent Minister of Foreign Affairs under customary law. In the *Arrest Warrant of April 11th 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Merits, 41 ILM 536 (2002), the Court held that the issue and circulation, by a Belgium magistrate, of an arrest warrant against an incumbent Minister of Foreign Affairs of the Democratic Republic of Congo failed "to respect the immunity from criminal jurisdiction and the inviolability [of] the incumbent Minister (...) under international law" (para. 78). On the future agenda of the ICJ is the case of *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, which concerns

that States may not give asylum to persons accused of international crimes such as war crimes.<sup>9</sup>

In other developments in recent months, the United States of America has effectively prevented the International Criminal Court (ICC) from prosecuting its nationals and the nationals of other States not party to the Rome Statute of the International Criminal Court<sup>10</sup> for war crimes (and other serious international crimes) by pressuring the Security Council to approve another one-year exemption from the jurisdiction of the ICC for peacekeepers who are nationals of non-party States.<sup>11</sup> This condition was also attached to the Security Council resolution allowing a multinational force to intervene in the Liberian civil war in order to enforce the 17 June 2003 ceasefire agreement.<sup>12</sup> A series of bilateral agreements (so-called Article 98 agreements) between the US and some 53 States ensure the non-surrender to the

the Republic of Congo's complaint against France that, *inter alia*, "by attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country", France violated "the principle that a State may not, in breach of the principle of sovereign equality (...) exercise its authority on the territory of another State". It is further asserted by the Republic of Congo that, in issuing an arrest warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France violated "the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court". International Court of Justice Press Release 2003/21, 16 July 2003.

<sup>9</sup> Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, General Assembly Res. 3074 (XXVIII), 3 December 1973, para. 7. Art. 14(2) of the Universal Declaration of Human Rights, General Assembly Res. 217 A (III), 10 December 1948, states that individuals have no right to seek asylum from "prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

<sup>10</sup> Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) [hereinafter "Rome Statute"].

<sup>11</sup> The first resolution of this kind was passed on 12 July 2002 in United Nations Security Council Res. 1422 (2002), UN Doc. S/RES/1422 (2002). This resolution requested the International Criminal Court (ICC) to refrain from initiating investigations or proceedings to peacekeepers of States not party to the Rome Statute, while reaffirming its intention to "renew the request (...) under the same conditions each 1 July for further 12 month periods...". On 12 June 2003, the Security Council approved (12-0, with 3 abstentions from France, Germany and Syria) another one-year exemption for peacekeepers who are nationals of non-party States. United Nations Security Council Res. 1487 (2003), UN Doc. S/RES/1497, 12 June 2003.

<sup>12</sup> United Nations Security Council Res. 1497 (2003), UN Doc. S/RES/1497, 1 August 2003. Para. 7 of the resolution provides that "...current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State".

ICC of US nationals and contractors accused of war crimes who find themselves on the territories of those States.<sup>13</sup>

These recent examples of State practice barring the prosecution of war crimes not only shed light on the contextual background of the amnesty issue, but also highlight the interconnections between the international legal principles impacting upon the emerging system of international criminal law. The present article examines the main international legal rules and principles which determine or affect a foreign or international court's ability to recognize an amnesty for war crimes. This examination, together with a survey of recent practice, provides a broad analytical framework which could facilitate an assessment by domestic and international courts of the validity of such an amnesty.

### **International recognition of amnesties for war crimes: framing the issue**

Amnesties for war crimes and other international crimes come into being mainly when States are going through periods of transition, often from war to peace, and of extreme political upheaval, for example, the handing over of power from military regimes to democratic civilian governments. During such turbulent and politically sensitive times, international law needs to be able to reconcile the competing needs of the territorial State (to move on from the past and not to upset the delicate political process towards peace or democratic consolidation) and those of the international community (to prosecute those accused of international crimes).<sup>14</sup> Over the last few decades, with the emergence of an international criminal prosecution system, a general

<sup>13</sup> A list of the States who have entered into these bi-lateral agreements with the US is available on the website of the Coalition for the International Criminal Court, <<http://www.iccnw.org/documents/otherissuesimpunityagreem.html>>. 25 of these States are party and 10 are signatories to the Rome Statute.

<sup>14</sup> On the theory of transitional justice and how it may accommodate the peculiar needs of transitional societies, see generally D. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *The Yale Law Journal*, Vol. 100, No. 8, 1991, p. 2537; D. Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", *Law and Contemporary Problems*, Vol. 59, 1996, p. 225; N. J. Kritz, (ed.), *Transitional Justice*, Vol. 1, Institute of Peace Press, Washington, 1995; N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995; Teitel, *op. cit.* (note 2), p. 2009; J. Dugard, "Dealing with crimes of a past regime. Is amnesty still an option?", *Leiden Journal of International Law*, Vol. 12, No. 4, 1999, p. 1009; P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001; S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed., Oxford University Press, Oxford, 2001.

presumption of illegality of amnesties for international crimes has developed.<sup>15</sup> However, if all amnesties for war crimes in all circumstances were to be considered as invalid and never to be accorded international recognition, this might seriously blunt a useful tool for ending or preventing civil wars,<sup>16</sup> facilitating the transition to democratic civilian regimes<sup>17</sup> or aiding the process of reconciliation.<sup>18</sup> Other policy reasons for the international recognition of amnesties include the fact that mechanisms for discovering the truth might be compromised if a person subject to a domestic amnesty (on condition of full disclosure of his or her involvement in the international crime) fears prosecution if he or she crosses a border.<sup>19</sup> By generally obliging governments to

15 Voicing a widely agreed statement, the Princeton Principles on Universal Jurisdiction, adopted by a group of international law experts in 2001, proposed that "Amnesties are generally inconsistent with the obligation on states to provide accountability for serious crimes under international law"; Principle 7, Princeton Principles on Universal Jurisdiction 28 (2001), Princeton University Program in Law and Public Affairs, Princeton University, Princeton, 2001. Human rights bodies have come to the same conclusion: Inter-American Court of Human Rights, *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)* 14 March 2001; *Rodriguez v. Uruguay*, Communication No. 322/1988, UN Human Rights Committee, 19 July 1994; Human Rights Committee General Comment No. 20 on Art. 7 (replacing General Comment 7 concerning prohibition of torture and cruel treatment or punishment, 10 March 1992).

16 For example, amnesties have been negotiated as part of peace deals in Sudan (Sudan Peace Agreement of 21 April 1997), the Democratic Republic of Congo (1999 Lusaka Ceasefire Agreement) and Sierra Leone (Lome Peace Agreement of 8 July 1999), among others, as measures to stop the bloodshed. More recently, the Russian Duma has enacted new amnesty laws as a means to help resolve the conflict in Chechnya: "Total 126 people have applied for amnesty in Chechnya", Relief Web (source: government of the Russian Federation), 1 July 2003. President Joseph Kabila of the Democratic Republic of Congo has recently signed amnesty laws for Congolese rebels, though war crimes are reportedly not covered. M. Durmnett, "Amnesty for Congolese rebels", BBC News, <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/2953621.stm>>, 16 April 2003.

17 During the past several years, Argentina, Cambodia, El Salvador, Guatemala, Haiti and Uruguay among others have each granted amnesty, as part of the peace arrangement, to members of the former regime that committed international crimes. N. Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law", *California Law Review*, Vol. 78, 1990, p. 451, pp. 458-61; US Delegation Draft "State practice regarding amnesties and pardons", presented to the Preparatory Committee for the Establishment of an International Criminal Court, 4th Sess., August 1997.

18 The most clear example is that of South Africa, where the Promotion of National Unity and Reconciliation Act 34 of 1995 sets up a mechanism to grant a broad amnesty for those who had committed politically motivated crimes during the apartheid regime. See *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and ors.*, Case CCT 17/96, (South Africa), 1996 (hereinafter the AZAPO case), para. 22.

19 The "amnesty for truth" argument was also used by the Constitutional Court of South Africa in the AZAPO case to justify the Promotion of National Unity and Reconciliation Act 34 of 1995, *ibid.*, pp. 683-685. See also Dugard, *op. cit.* (note 14), p. 1009; A. O'Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International, The Hague, p. 310.

prosecute and punish those accused of international crimes, international law is able to some extent to de-politicize trials of former leaders or members of military regimes.<sup>20</sup> At the same time, by not requiring governments to risk provoking or maintaining a civil war and by recognizing the importance of other objectives such as reconciliation, international law is able, through the mechanism of principled and limited amnesties, to accommodate the transitional process.<sup>21</sup>

As international crimes are the concern of the entire international community, it is extremely important to broadly define the parameters of the internationally acceptable amnesty for war crimes. Moreover, by internationally acknowledging the validity of certain types of amnesties in appropriate circumstances and, by inference, by acknowledging that amnesties outside these boundaries are invalid, States are more clearly constrained to enact laws or enter into agreements which fall within these acceptable parameters. The chances for broad-brush impunity are thereby narrowed,<sup>22</sup> this being a central objective of the emerging system of international criminal justice.<sup>23</sup>

Most commentators point out that even limited and principled amnesties normally have no extraterritorial effect, as they do not affect treaty obligations or entitlements under customary law to prosecute persons accused of war crimes.<sup>24</sup>

20 Although, as the ongoing trial of the former Yugoslav President Slobodan Milosovic at the ICTY demonstrates, accused persons will still argue that trials for serious violations of human rights, even at the level of international criminal courts, are motivated by political factors rather than by legal considerations. The establishment of the ICC may go some way to removing these types of objections, since it will have jurisdiction over international crimes committed on the territory of any States Parties or over persons who are nationals of States Parties. See Rome Statute, Art. 12.

21 For a thorough analysis of this theory, see generally Orentlicher, *op. cit.* (note 14) and Teitel, *op. cit.* (note 2).

22 "Impunity" has been defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to them being accused, arrested, tried and if found guilty, convicted". Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights), Final Report prepared by Mr. Joinet pursuant to Sub-Commission Resolution 1996/119, E.C.N.4/Sub.2/1997/20, 26 June 1997 [hereinafter "Joinet Report"].

23 Thus, the preamble to the Rome Statute of the International Criminal Court declares at para. 5 that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] (...) and thus to contribute to the prevention of such crimes".

24 For example, R. Boed, "The effect of a domestic amnesty on the ability of foreign States to prosecute alleged perpetrators of serious human rights violations", *Cornell International Law Journal*, Vol. 33, No. 2, 2000, pp. 297 and 323. Some domestic courts have come to the same conclusion. In several cases involving the forcible disappearance of Spanish citizens in Argentina it has been held that Argentina's domestic amnesty is not binding on Spanish courts. For example, *Fortunata Galtieri Case*, Judgement of March 1997, available at: <<http://www.derechos.org/nizkor/arg/espana/authgalt.html>>.

This may be true, but a closer examination of the principles and rules influencing the decision-making of domestic and international fora in this regard suggests that this conclusion does not necessarily preclude the international recognition of all amnesties in all circumstances. To arrive at a complete answer, the following questions need to be addressed. Are foreign or international courts bound by amnesties for war crimes? If they are not, may they nonetheless recognize or give effect to an amnesty for war crimes under international law? If foreign or international courts are able to recognize certain amnesties for war crimes, what limits does international law impose on their ability to do so?

### **Are foreign or international courts bound by amnesties for war crimes?**

In principle, States are bound only by their internal law, by treaty obligations which they have entered into, and by rules of customary international law.<sup>25</sup> Amnesties which are purely internal to a State, for example, those agreed in a peace deal between the government and rebel groups or between such groups ending a civil war, or which have been negotiated between an outgoing and incoming regime during a period of political transition, are not formally binding on other States.<sup>26</sup> Amnesties which are brokered between two or more States, for example, in the context of a peace agreement ending an international armed conflict, would as a matter of treaty law be binding on those States only: third States would not be so bound.<sup>27</sup>

In treaties regulating the transfer of proceedings in criminal matters, States Parties are often under an obligation to bar prosecution where a person is the subject of a pardon or amnesty in another contracting State, owing to the principle of

<sup>25</sup> As Brownlie writes: "...the state must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law." I. Brownlie, *Principles of Public International Law*, 5th ed., Clarendon Press, Oxford, 1998, p. 72.

<sup>26</sup> Under the principle of the sovereign independence of States, States are not obliged to give effect to the internal laws of other States as this would be an encroachment on their own sovereign independence. See Brownlie, *ibid.*, p. 72. An example of the same reasoning can be found in the French case of *Abetz*, where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offences against the community of nations and as such any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs"; quoted in J. Paust *et. al.* (eds), *International Criminal Law: Cases and Materials*, Carolina Academic Press, Durham, 1996 [hereinafter *International Criminal Law*], p. 78.

<sup>27</sup> Art. 31 of the Vienna Convention on the Law of Treaties, of 23 May 1969.

*ne bis in idem*.<sup>28</sup> However, the *ne bis in idem* principle creates international obligations only between the signatories; it is generally not considered part of customary international law.<sup>29</sup> Although the principle could be considered a general principle of law recognized by civilized nations,<sup>30</sup> this should be distinguished from the situation under customary international law, which is that no double jeopardy attaches to prosecutions by different sovereign States.<sup>31</sup> During the negotiations in Rome on the Statute of the International Criminal Court, both amnesty and pardon were rejected in the context of the defence of *ne bis in idem*.<sup>32</sup>

There are a wide variety of legal sources supporting the principle that domestic laws or judicial decisions cannot exempt a person accused of international crimes from individual criminal responsibility or prevent a foreign or international court from prosecuting. For example, as early as 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that “no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.” The Allied Control Council Law No. 10 of 1946 similarly provided that no statute, pardon, grant of immunity or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.<sup>33</sup>

28 For example, Art. 35 of the European Convention on Transfer of Proceedings in Criminal Matters, of 15 May 1972. The UN Model Treaty on Extradition, UN Doc. A/RES/45/116 of 14 December 1990, provides that a request for extradition for a person may be refused if that person has become immune from prosecution or punishment, including by reason of amnesty (Art. 3(e)); see also Articles 10(3), 12(1), and 53 (1)(b)(ii) of the European Convention on the International Validity of Criminal Judgments, of 28 May 1970; and Art. 62(2) of the Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders.

29 *International Criminal Law*, *op. cit.* (note 26), p. 574.

30 Art. 38(1)(c) of the 1945 Statute of the International Court of Justice.

31 Art. 14(7) of the International Covenant of Civil and Political Rights, of 16 December 1966 (which reiterates the *ne bis in idem* principle) does not prevent the prosecution, in another State, of a defendant who has benefited from an amnesty in the territorial State, because the procedure for an amnesty does not amount to an “acquittal” within the meaning of that provision. Moreover, the Human Rights Committee has decided that Art. 14(7) does not prohibit trial for the same offence in another State. *A.P. v. Italy*, Comm. No. 204/1986, 2 November 1987, UN Doc. A/43/40, at 242.

32 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, p. 40, para. 174 (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Sess. Supp. No. 22, UN Doc. A/51/22; UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19.

33 Allied Control Council Law No. 10, 31 Jan. 1946, Art. II.5. The Principles of the Nuremberg Charter and Judgement recognized that even though domestic law “does not impose a penalty for an act which constitutes a crime under international law it does not relieve the person who committed the act from responsibility under international law.”

In 1968, the United Nations General Assembly stated that no statutory limitation would apply to war crimes, crimes against humanity, or genocide.<sup>34</sup> Moreover, recognition of an amnesty covering a person for war crimes may constitute a violation of a State's duties under the Geneva Conventions and Additional Protocol I to prosecute or extradite persons accused of grave breaches thereof.<sup>35</sup> Customary doctrines of exception such as necessity, distress and *force majeure* which preclude the wrongfulness of a State's failure to comply with its international obligations in exceptional circumstances do not easily accommodate amnesties.<sup>36</sup>

The only conceivable situation in which a third State could be considered legally bound by an amnesty is where the amnesty deal is brokered (or given approval) by the United Nations Security Council for the purpose of maintaining international peace and security. Where non-recognition of the amnesty would require that State to act in contravention of its obligations under the Charter of the United Nations – for example, thereby threatening international peace and security – it will be constrained to give effect to the amnesty.<sup>37</sup> Clearly, this sets a very high threshold for an amnesty binding on

<sup>34</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, 26 November 1968.

<sup>35</sup> See text accompanying notes 49-56. On arguments against the international recognition of amnesties for war crimes, see J. Paust, "My Lai and Vietnam: Norms, myths and leader responsibility", *Military Law Review*, Vol. 57, 1972, pp. 118-23.

<sup>36</sup> The doctrine of necessity would not provide a State with justification to avoid its obligations, unless it could show that prosecution would entail a grave and imminent peril for the State and that the State's sole means to safeguard an essential interest is not to abide by its international legal duty to prosecute. Furthermore, necessity cannot be invoked unless to do so does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Arguably, the duty to prosecute those accused of war crimes is an essential interest of the international community. See Art. 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission on 29-31 August 2001, ILC, Report on the work of its fifty-third session, 23 April - 1 June - 10 August 2001, GAOR Fifty-fifth Sess. Supp. No. 10 (A/56/10) (hereinafter ILC Articles on State Responsibility). The General Assembly took note of the Articles on 12 December 2001 in GA Res. 56/83. To invoke *force majeure*, a State would need to show that the failure to prosecute arose from the occurrence of an irresistible force or an unforeseen event beyond the control of the State, making it materially impossible to perform the obligation (see ILC Articles, Art. 23, *ibid.*). Distress could be invoked only if the failure to prosecute was the only reasonable way, in a situation of distress, of saving the perpetrator's life or the lives of other persons entrusted to the perpetrator's care (see ILC Articles, Art. 24, *ibid.*).

<sup>37</sup> This argument derives from the principle established in Art. 103 of the Charter of the United Nations which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

third States. There would have to be evidence that going ahead with prosecution would undermine the peace agreement and ultimately threaten international peace and security. This is a fairly difficult calculation to prove, but is not beyond reasoned contemplation.

Indeed, the inclusion of Article 16 in the Rome Statute of the International Court,<sup>38</sup> which gives the Security Council the power to defer proceedings before the Court for twelve months by passing a resolution (which may be renewed) under Chapter VII of the UN Charter, is a clear acknowledgement by States that unlimited prosecution for international crimes may amount to a threat to peace and security.<sup>39</sup> This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail.<sup>40</sup>

The Security Council's recent renewal of its resolution requesting the ICC to refrain from exercising jurisdiction over nationals of non-party States gives some insight into the scope of the Security Council's power of deferral under Article 16. On the face of it, these Security Council resolutions are not about recognizing amnesties for war crimes, nor are they arguably binding on the ICC, given that they are framed in terms of a "request". Nevertheless, the wide interpretation by the Security Council of its obligation to identify a "threat to the peace"<sup>41</sup> and its rather liberal and repeated

<sup>38</sup> Art. 16 of the Rome Statute provides: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

<sup>39</sup> The point has been made that the time limit of the deferral (notwithstanding the possibility of renewal) suggests that this is a delaying mechanism only and not a means to achieve a permanent recognition of a domestic amnesty. J. Gavron, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51, Pt. 1, Jan. 2002, p. 110.

<sup>40</sup> See generally V. Gowlland-Debbas, "The role of the Security Council in the new International Criminal Court from a systemic perspective", in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality*, Liber-Americorum Georges Abi-Saab, Martinus Nijhoff Publishers, Kluwer Law International, 2001, pp. 629-650.

<sup>41</sup> The resolutions fail to positively identify a "threat to the peace, breach of the peace, or act of aggression" which is a prerequisite for action under Chapter VII of the Charter, merely stating that "it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". Security Council Res. 1487 (2003), *op. cit.* (note 11), preambular para. 7. See UN Charter, Art. 39.

use of Article 16<sup>42</sup> indicate that political pressure may well compel the ICC to refrain from exercising jurisdiction over war crimes cases. Since the ICC assumes jurisdiction under the complementarity principle only when States are unable or unwilling to prosecute perpetrators – which could arguably include situations where States have given amnesties for war crimes – this type of Security Council action under Article 16 would in such circumstances give effect to amnesties for war crimes for as long as the deferral lasted.

It is therefore crucial to stress that although the Security Council has a wide measure of discretion in the way it chooses to carry out its functions and is normally its own judge when it interprets its powers under the Charter, it nonetheless remains bound by the purposes and principles of the Charter.<sup>43</sup> It also remains bound by certain fundamental principles of international law, in particular peremptory norms of international law from which no derogation by any subject of international law, including the Security Council, is ever permitted.<sup>44</sup> Moreover, at a procedural level, a determination of the existence of a “threat to the peace, breach of the peace, or act of aggression” is a *sine qua non* for action under Chapter VII; this condition must therefore be fulfilled before the Security Council can request the ICC for deferral of a case under Article 16.<sup>45</sup>

From the foregoing, it may be concluded that domestic courts and international courts are not normally bound by amnesties for war crimes, save in the extreme case where prosecution of an accused who is subject to an amnesty as part of a peace deal brokered by the United Nations could threaten international peace and security. However, even in these

<sup>42</sup> The drafting history of Art. 16 suggests that the provision was not meant to be applied prospectively to groups of people, nor to provide for permanent deferral. Rather, it was intended to be applied on a case-by-case basis to specific situations where proceedings before the Court might hamper efforts to restore or maintain peace. At least 116 States expressed criticisms of the resolution during the drafting stages. See Amnesty International, “The International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice”, May 2003, AI Index: IOR 40/006/2003. See also K. Ambos, “International criminal law has lost its innocence”, *German Law Journal*, Vol. 3, No. 10, 1 October 2002; B. MacPherson, “Authority of the Security Council to exempt peacekeepers from International Criminal Court proceedings”, *ASIL Insights*, July 2002, p. 2.

<sup>43</sup> UN Charter, Art. 24(2).

<sup>44</sup> 1969 Vienna Convention on the Law of Treaties, Art. 53. See also D. Schweigmann, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, Kluwer Law International, The Hague, 2001, p. 197.

<sup>45</sup> UN Charter, Art. 39.

circumstances, the amnesty must be consistent with fundamental principles of international law in order to render it valid and internationally acceptable.

### **May foreign or international courts recognize or give effect to an amnesty for war crimes?**

The answer to this question depends largely on whether States are under a positive obligation to prosecute persons accused of war crimes. If States have such a duty, then third States' courts or international courts would not be able to recognize an amnesty for these types of crimes unless that duty could be derogated from under international law. On the other hand, if States are merely *entitled* to prosecute or extradite persons accused of certain war crimes, then a State would be able to give effect to an amnesty law covering these crimes by choosing not to exercise jurisdiction. Notwithstanding any other possible jurisdictional bases connected with territory or nationality, it is increasingly accepted that customary international law entitles all States to exercise universal jurisdiction over war crimes.<sup>46</sup> Several countries have enacted legislation allowing them to try war crimes perpetrators under the universality principle,<sup>47</sup> and in recent years many

<sup>46</sup> W. Cowles, "Universal jurisdiction over war crimes", *California Law Review*, Vol. 33, 1945, p. 177. See generally, A. Segall, *Punishing Violations of International Humanitarian Law at the National Level*, ICRC, Geneva, 2001, especially pp. 30-38. But see also Brownlie, who argues that the legal consequences of breaches of the laws of war (especially of the Hague Convention of 1907 and the Geneva Conventions of 1949) are not correctly expressed as an acceptance of the principle of universality, since what is punished is the breach of international law. This, he claims, is different from "the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal." Brownlie, *op. cit.* (note 25), p. 308. In the *Tadic* case, Judge Cassese declared in relation to the principle of universal jurisdiction: "This is all the more so [justified] in view of the nature of the offences alleged against the Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind. As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held: '...The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognize borders, punishing criminals wherever they may be...Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lese-humanite* (reati di lesa umanita) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one.' (13 March 1950, in *Rivista Penale* 753, 757 (Sup. Mil. Trib., Italy 1959; unofficial translation)", *The Prosecutor v. Dusko Tadic*, International Tribunal for the Former Yugoslavia, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, 2 October 1995), p. 57.

<sup>47</sup> See for example, in Canada, the Crimes against Humanity and War Crimes Act (2000); in Germany, the International Crimes Act (2002); in Switzerland, the Code pénal militaire 1968; in Nicaragua, the Criminal Code 1974.

domestic courts have prosecuted persons (non-nationals or without any other territorial connection) accused of war crimes and other serious international crimes committed in third States.<sup>48</sup> The following sections assess which war crimes entail a duty to prosecute and those which merely entail an entitlement under customary law to do so.

### Grave breaches regime

Conventional law imposes a mandatory system of universal jurisdiction over “grave breaches”<sup>49</sup> of the Geneva Conventions of 1949 and Additional Protocol I.<sup>50</sup> The ICRC Commentary on the Geneva Conventions states that this obligation is “absolute”.<sup>51</sup> This conclusion is supported by the fact that States Parties are unable to absolve themselves or any other State Party of any

<sup>48</sup> See for example, *Prosecution v. Refik Saric*, Third Chamber of the Eastern Division of the Danish High Court, 25 November 1994; *Prosecution v. Refik Saric*, Supreme Court of Denmark, 15 August 1995, *Ugeskrift for Retsvaesen*, p. 838; *En la cause Fulgence Niyonteze*, Tribunal militaire de division 2, Lausanne, 30 April 1999; *En la cause Fulgence Niyonteze*, Tribunal militaire d'appel 1a, Geneva, 26 May 2000; Tribunal militaire de cassation, Yverdon-les-Bains, 27 April 2001.

<sup>49</sup> Articles 50/51/130/147 common to the four Geneva Conventions define the conduct constituting grave breaches of the Conventions. Offences amounting to grave breaches include wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health. Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter Additional Protocol I) expands the list of grave breaches to include serious violations of the laws and customs of war (sometimes referred to as “Hague Law”), when committed wilfully, in violation of the relevant provisions of Protocol I, and causing death or serious injury to body or health.

<sup>50</sup> Articles 49/50/129/146 common to the four Geneva Conventions of 1949 provide: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. (...) Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” Art. 85(1) of Additional Protocol I states that the provisions of the Geneva Conventions relating to the repression of breaches and grave breaches, supplemented by Protocol I, apply equally to the repression of breaches and grave breaches of Protocol I. Art. 86 of Protocol I reaffirms the obligation of States Parties to repress grave breaches, and adds that States must take measures necessary to suppress all other breaches, of the Conventions or of Protocol I which result from a failure to act when under a duty to do so.

<sup>51</sup> J. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention* (hereinafter *Commentary on Geneva Convention IV*), ICRC, Geneva, 1960, p. 602. Furthermore, the Commentary states that: “The universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment.” *Ibid.*, p. 587.

liability incurred in respect of grave breaches.<sup>52</sup> While in the Commentary's view, the latter provision is "intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor",<sup>53</sup> this provision may also be interpreted as preventing States from avoiding their obligation to prosecute those accused of grave breaches, insofar as this may form part of war reparations.<sup>54</sup> States party to the aforesaid instruments must also suppress all other violations. Although the obligation to *suppress* violations does not require the adoption of criminal legislation, States are able to take whatever legislative, administrative or disciplinary measures are deemed appropriate.<sup>55</sup>

Thus, if a person is suspected of grave breaches, wherever the commission of the crimes occurred and whatever his or her nationality, States party to either or both the Geneva Conventions and Additional Protocol I are formally obliged to prosecute or extradite that person. This would logically mean that any amnesty covering a person accused of grave breaches could not ordinarily have any legal effect in the State promulgating the amnesty,<sup>56</sup> nor could it be given recognition in other States.

#### Customary duty to prosecute grave breaches and other serious violations of the laws and customs of war

By virtue of the almost universal ratification of the Geneva Conventions<sup>57</sup> and the widespread occurrence of implementing legislation

<sup>52</sup> Articles 51/52/131/148 common to the four Geneva Conventions of 1949.

<sup>53</sup> *Commentary on Geneva Convention IV, op. cit.* (note 51), p. 603.

<sup>54</sup> The *Commentary, ibid.*, continues, "As the law stands today (...) [o]nly a State can make such claims on another State, and they form part, in general, of what is called 'war reparations'." Principle 15 in a UN text on the right to reparation proposes that judicial or administrative sanctions or "a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim" may constitute satisfaction as part of reparations. Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Mr. Theo van Boven pursuant to decision 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

<sup>55</sup> See Segall, *op. cit.* (note 46), especially pp. 30-38.

<sup>56</sup> As Oppenheim writes, "If a State (...) possess[es] such rules of Municipal Law as it is prohibited from having by the Law of Nations, it violates an international legal duty." L. Oppenheim in H. Lauterpacht (ed.), *International Law*, 8th ed., 1955, p. 45; 1969 Vienna Convention on the Law of Treaties, Art. 27; *Polish Nationals in Danzig*, 1931 PCIJ (ser. A/B) No. 44, p. 24; *Fisheries (United Kingdom v. Norway)*, ICJ Reports 1951, 116 at 132; *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955, 4 at 20-21.

<sup>57</sup> At 25 August 2003 there were 203 States party to the Geneva Conventions of 1949.

enacted by States around the world,<sup>58</sup> it can confidently be stated that the obligation to prosecute or extradite persons accused of grave breaches, as enumerated in the Geneva Conventions, is a customary rule of international law. Whether the other serious violations of the laws and customs of war (mostly deriving from the 1907 Hague Convention IV and its annexed Regulations), included in the extended list of grave breaches in Article 85 of Additional Protocol I, also entail mandatory universal jurisdiction under customary international law remains a question of debate.<sup>59</sup>

The Hague Conventions and Regulations themselves contain no provision dealing with individual responsibility for violations of the rules contained therein, nor do they specify a duty for States Parties to prosecute those who have breached even the most serious of the laws.<sup>60</sup> However, the Nuremberg International Military Tribunal in 1945 held that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”.<sup>61</sup> The Statute of the International Criminal Tribunal for the former Yugoslavia provides for jurisdiction over “violations of the laws and customs of war”.<sup>62</sup> The adoption of the Rome Statute is significant in this respect, since it was a guiding principle during negotiations that definitions of war crimes should reflect customary international law.<sup>63</sup> The inclusion of the large majority of serious violations of the laws and customs of war in the authoritative list of “war crimes”

<sup>58</sup> See the ICRC Advisory Service compilation of national implementation mechanisms of international humanitarian law, available at: <<http://www.gva.icrc.org/ihl-nat>>.

<sup>59</sup> During the negotiations in Rome on the list of war crimes to be included in the Statute of the International Criminal Court, States strongly disagreed on the customary status of the rules in Additional Protocol I. See 1995 Ad Hoc Committee Report, para. 74, and 1996 PrepCom Report, Vol. I, para. 81.

<sup>60</sup> Art. 3 of the 1907 Hague Convention IV concerning the Laws and Customs of War does, however, specify a duty for the State to pay compensation for violations committed by persons in its armed forces.

<sup>61</sup> International Military Tribunal, *Trial of the Major War Criminals*, 14 November 1945, 1 October 1946, Vol. 1, Nuremberg, 1947, p. 254. The International Military Tribunal also pointed out that: “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *Ibid.*, reproduced in the *American Journal of International Law*, Vol. 41, 1947, pp. 220-221.

<sup>62</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Security Council Res. 827 (1993), UN Doc. S/RES/827, 25 May 1993 (hereinafter ICTY Statute), Art. 3.

<sup>63</sup> H. von Hebel and D. Robinson, “Crimes within the jurisdiction of the Court”, in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issue, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 122.

under the jurisdiction of the International Criminal Court<sup>64</sup> now definitively attests to the fact that States are entitled to prosecute persons accused of those crimes under customary international law.<sup>65</sup>

However, whether the criminalization of serious violations of the laws and customs of war under customary international law entails the *mandatory* prosecution of violators is another matter. It could tentatively be argued that the complementarity principle enshrined in the Rome Statute implies a definite duty for States to prosecute persons accused of crimes within the jurisdiction of the Court. According to that principle, if they are unable or unwilling to fulfil this duty, the ICC will assume jurisdiction.<sup>66</sup> If States party to the Rome Statute wish to take advantage of the principle of complementarity, they must pass appropriate criminal legislation and actively prosecute those accused of the relevant crimes who are found on their territory. The formulation of the complementarity rule in negative terms, i.e. when States are deemed *unable*<sup>67</sup> or *unwilling*<sup>68</sup> to prosecute such crimes, seems to suggest that normally States should be able and willing to prosecute persons accused of international crimes, and that the ICC has to take jurisdiction over the

<sup>64</sup> Some norms were deleted from the Statute on the ground that a violation of the rule was not serious enough to come before the Court. For example, the prohibition of “unjustifiable delay in the repatriation of prisoners of war or civilians”, which is a grave breach under Art. 84(4)(b) of Additional Protocol I. See 1995 Ad Hoc Committee Report, para. 72, and 1996 PrepCom Report, Vol. I, para. 74.

<sup>65</sup> During the negotiations in Rome on war crimes for the Statute of the International Criminal Court, there was no disagreement that the norms laid down in the Hague Conventions and Regulations gave rise to individual criminal responsibility under customary international law. See 1995 Ad Hoc Committee Report, para. 74, and 1996 PrepCom Report, Vol. I, para. 81.

<sup>66</sup> Art. 17(1)(a) of the Rome Statute provides: “...the Court shall determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”

<sup>67</sup> According to Art. 17(3) of the Rome Statute, in order to determine inability in a particular case, “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

<sup>68</sup> According to Art. 17(2) of the Rome Statute, in order to determine unwillingness, the Court “shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

case only as an exception. This could imply that a general duty to prosecute international crimes exists. On the other hand, the fact of setting up a mechanism for an international court to take over cases where States choose not to prosecute, or are unable to do so, could be construed as an implicit acknowledgement within the Rome Statute that an absolute duty to prosecute does not attach to all international crimes within the ICC's jurisdiction.<sup>69</sup> It is submitted that the attempt to reach a definite conclusion as to whether there is indeed a customary duty to prosecute international crimes on the basis of the complementarity principle infers too much from what is essentially a mechanism to establish which court is competent to try a case.

The preamble to the Rome Statute seems to assume that there exists a duty to prosecute all serious international crimes under customary law, recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".<sup>70</sup> By using the words "recalling", "duty", and "every State" the preamble seems to imply that all States have a legal obligation to ensure the prosecution of serious international crimes under customary international law. If this assertion is correct, this means that even non-party States not subject to the complementarity principle of the Rome Statute are under the positive duty, under customary international law, to prosecute persons accused of serious international crimes.<sup>71</sup> It is beyond the scope of this article to assess the existence or non-existence of a customary duty to prosecute all serious international crimes.<sup>72</sup> Suffice it to say at this point that for all other serious violations of the law of armed conflict, apart from grave breaches of the Geneva Conventions, the question whether there exists a duty under customary law to prosecute or extradite perpetrators thereof remains an exercise in interpretation.

<sup>69</sup> Admittedly, this argument can be fairly easily refuted by the objectives of the Rome Statute as expressed in the preamble, which states in para. 4 that "serious crimes of concern to the international community as a whole must not go unpunished". Even so, care must be taken not to overstretch the interpretation of the legal obligations contained in treaties by too much deference to the non-binding preamble.

<sup>70</sup> Rome Statute of the International Criminal Court, preambular para. 6.

<sup>71</sup> The assertion of a general duty to prosecute for serious international crimes has been made in a host of United Nations resolutions, reports of Special Rapporteurs and other UN texts. See for example, UN Commission on Human Rights Res. 2002/79 on Impunity in which the Commission explicitly recognizes that "amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take actions in accordance with their obligations". Furthermore, "crimes such as (...) war crimes (...) are violations of international law and (...) perpetrators of such crimes should be prosecuted or extradited by States, (...) all States [are urged] to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes". *Ibid.*, para. 2.

<sup>72</sup> For a comprehensive analysis, see Roht-Arriaza, *op. cit.* (note 14), esp. pp. 28-40.

Nonetheless, it is significant that during the deliberations in Rome concerning the list of war crimes to be included in the jurisdiction of the International Criminal Court, disagreements over the customary character of Additional Protocol I did not centre on whether the grave breaches regime could be extended to serious violations of the laws and customs of war, but on *which* of the expanded list of grave breaches in Article 85 of Additional Protocol I did in fact represent customary international law.<sup>73</sup> This could indirectly indicate that States accepted that these crimes entailed mandatory universal jurisdiction. However, the purpose of the Rome negotiations concerning the list of war crimes was simply to identify serious war crimes under customary law, therefore the question of whether these crimes were attached to a customary duty (not just the right) to prosecute did not have to be decided. This would seem the more realistic interpretation, given that several of the “other serious violations” in Article 8(2)(b) of the Rome Statute reflect rules in Additional Protocol I, violations of which are not even listed as grave breaches in that instrument.<sup>74</sup> Other crimes listed in Article 8(2)(b) of the Rome Statute have never been explicitly contained in a humanitarian law treaty.<sup>75</sup> As States are normally reticent to assume any additional obligations under customary law by implication of their ratification of a new legal instrument, the final list of war crimes is much more likely to represent simply the serious violations of international humanitarian law to which individual criminal responsibility is attached under customary

<sup>73</sup> See von Hebel and Robinson, *op. cit.* (note 63), pp. 109-118. A few acts defined as grave breaches in Additional Protocol I were not included in the Statute, such as Art. 85(3)(c) on attacks against works or installations containing dangerous forces and Art. 85(4)(b) on unjustifiable delay in the repatriation of prisoners of war or civilians.

<sup>74</sup> For example, Art. 8(2)(b)(i) (attacks against civilians) is a mix of Art. 85(3)(a) and Art. 52(1) and (3) of Additional Protocol I; Art. 8(2)(b)(ii) (attacks against civilian objects) is based on Art. 52(1) of Additional Protocol I; Art. 8(2)(b)(iii) (attacks against humanitarian or peacekeeping missions) is based on Art. 85(3)(b) together with Arts 35(3) and 55(1) of Additional Protocol I; Art. 57 of Additional Protocol I was largely used to define proportionality in Art. 8(2)(b)(iv); Art. 8(2)(b)(xxvi) (conscription of children under 15) is based on Art. 77(2) of Additional Protocol I and Art. 38 of the Convention on the Rights of the Child of 1975.

<sup>75</sup> For example, Art. 8(2)(b)(iii) prohibiting intentionally directing attacks against United Nations personnel and material involved in a humanitarian assistance or peacekeeping mission “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict” and Art. 8(2)(b)(xxii) prohibiting crimes of sexual violence “also constituting a grave breach of the Geneva Conventions”. The latter phrase has the purpose of affirming that sexual violence can constitute a grave breach. It should be noted that both types of violations, although never listed as war crimes in treaties prior to the Rome Statute, are already covered by customary prohibitions and therefore are not new crimes as such.

international law, rather than a list of crimes which entail mandatory universal jurisdiction. If there is no customary duty to prosecute persons accused of these violations, then States might be able to give effect to an amnesty law by choosing not to exercise jurisdiction over perpetrators of such crimes.

#### War crimes committed as part of a plan or policy

An observation may also be made in relation to the introductory paragraph of the war crimes article in the Rome Statute, the so-called jurisdictional threshold clause, which provides: "The Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (emphasis added). The threshold clause was included largely to allay the misgivings of States which felt that the Court should have jurisdiction only over systematic or large-scale instances of war crimes, as only these crimes would be of concern to the international community.<sup>76</sup> Other States opposed such a clause, contending that such a threshold would create different categories of war crimes, that the complementarity principle already provided a safeguard against the Court taking up isolated occurrences of war crimes, and that a threshold clause might have the effect of deterring national courts from prosecuting sporadic cases.<sup>77</sup>

Essentially, this article directs the Court to focus on the most heinous occurrences of war crimes which have a destabilizing effect at the international level. Although Article 8(1) strictly-speaking relates only to a jurisdictional aspect of the ICC, in view of the purported customary law character of the definitions of crimes in the Statute, due consideration should be given to the possible import of such limiting clauses for the duty to prosecute war crimes under customary international law. The emphasis on prosecuting mainly perpetrators of war crimes committed on a large scale and in an organized manner would seem to indicate that no amnesty could be valid for those persons. It also indirectly implies that the Court should concentrate on

<sup>76</sup> The threshold was first proposed by the United States in 1997. A particular concern of the United States, among other States, was that the Court should not have jurisdiction over isolated cases of war crimes which might be committed, for example, by American peacekeepers during an operation mandated by the United Nations.

<sup>77</sup> Von Hebel and Robinson, *op. cit.* (note 63), p. 108. The original proposal which provided that the Court shall have jurisdiction over war crimes "only when committed as part of a plan or policy or as part of a large-scale commission of such crimes" was then replaced by "only when committed..." before being watered down to "in particular when committed...". As von Hebel and Robinson point out, this language implies that "Article 8(1) may be best described as a (...) guideline rather than a threshold", *ibid.*, p. 124.

the authors of the plans and policies to commit war crimes, rather than on those who are ordered to take part in such plans. Article 8(1) could therefore be construed as supporting international recognition of amnesties for war crimes which are not committed as part of a plan or policy. Conversely, those persons who commit war crimes on such a scale as to merit international adjudication must be prosecuted without exception (subject to possible Security Council deferral). This interpretation is consistent with recent practice in the prosecution of persons accused of international crimes in special courts set up to deal with these crimes, which have jurisdiction only over those “most responsible” for the commission thereof.<sup>78</sup>

Serious violations of Article 3 common to the four Geneva Conventions of 1949 and other serious violations of the laws and customs of war committed in non-international armed conflicts

Serious violations of this nature have traditionally not been considered criminal offences attracting universal jurisdiction or a duty to prosecute and punish under international law.<sup>79</sup> Neither common Article 3 nor Additional Protocol II contains provisions on grave breaches or enforcement. However, recent developments in the law have increasingly challenged this position,<sup>80</sup> largely in response to the atrocities committed in the former Yugoslavia and Rwanda during the armed conflicts of the early 1990s. The International Criminal Tribunal for Rwanda (ICTR) was specifically given subject matter jurisdiction over serious violations of common Article 3 and Additional Protocol II.<sup>81</sup> Although the ICTY was not given the same specific competence, the Tribunal decided in the *Tadic* case that customary international law imposes criminal liability for serious violations of common Article 3 and that it had jurisdiction over such violations.<sup>82</sup>

<sup>78</sup> See notes 166-174 and accompanying text.

<sup>79</sup> D. Plattner, “The penal repression of violations of international humanitarian law applicable in non-international armed conflict”, *International Review of the Red Cross*, Vol. 30, 1990, p. 414.

<sup>80</sup> T. Graditzky, “Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts”, *International Review of the Red Cross*, Vol. 322, 1998, pp. 29-56; T. Meron, “International criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89, 1995, p. 554. The ICJ in the *Nicaragua* case in 1986 noted the customary character of common Art. 3 of the Geneva Conventions: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports* 1986, pp. 113-114, para. 218.

<sup>81</sup> ICTR Statute, Art. 4, Annex to Security Council Res. 955 (1994), S/RES/955 (1994), 8 Nov. 1994.

<sup>82</sup> *Prosecutor v. Dusko Tadic*, Appeals Chamber of the ICTY, 2 October 1995, para. 137, 35 I.L.M. 32 (1996).

The Rome Statute provides for jurisdiction over serious violations of the rules applicable in internal armed conflicts.<sup>83</sup> These rules are derived from a range of sources, including the Hague Regulations, the Geneva Conventions and Additional Protocol II. Given the complementarity principle enshrined in the Rome Statute, it could be argued that domestic courts would also have jurisdiction over these offences once enabling legislation providing for domestic jurisdiction over war crimes in the Rome Statute has been passed. On this basis one could go a step further and assume that a duty to prosecute under international law attaches to such offences,<sup>84</sup> with the corollary that amnesties for such crimes could not normally be recognized. However, the reservations already expressed as to assuming such a customary duty to prosecute on the basis of the complementarity principle of the Rome Statute apply equally to serious violations of humanitarian law committed in non-international armed conflicts. In fact, given the historic reluctance of States to assume precise duties in relation to the law of armed conflict in internal conflicts, there is more reason to be hesitant about inferring a mandatory system of enforcement from the negotiations of the Rome Statute and their results.<sup>85</sup>

#### Amnesty exception in internal armed conflicts? Article 6(5) of Additional Protocol II

Article 6(5) of Additional Protocol II is sometimes invoked to justify the granting of amnesties for war crimes. It stipulates that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest

<sup>83</sup> Rome Statute, Art. 8(2)(c) and (e).

<sup>84</sup> See Y. Dinstein, “The universality Principle and war crimes”, in M. Schmitt and L. Green (eds), *The Law of Armed Conflict: Into the Next Millenium*, International Law Studies, Vol. 71, Naval War College, Newport, R.I., 1998, pp. 17 and 21. See also the 1999 resolution of the United Nations Commission on Human Rights on Sierra Leone which “[r]eminds all factions and forces in Sierra Leone that in any armed conflict, *including an armed conflict not of an international character*, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts.” UN Commission on Human Rights Res. 1999/1, 6 April 1999 (emphasis added).

<sup>85</sup> Most commentators on the negotiations of the Rome Statute note that the list of crimes relating to internal armed conflicts was among the most controversial issues to be decided on. While the inclusion of common Article 3 was eventually able to achieve general acceptance at the Rome Conference, there was continued opposition to the inclusion of most of the other norms. See von Hebel and Robinson, *op. cit.* (note 63), p. 125.

possible amnesty to persons who have participated in the armed conflict". The exact scope of this provision has been the subject of debate.<sup>86</sup> Several courts have used it to support their findings that amnesties are valid under international law. Their conclusions are bolstered by stressing the need for reconstruction after violent civil wars, which is interpreted as the rationale behind Article 6(5).<sup>87</sup>

However, there are strong arguments countering the applicability of Article 6(5) of Protocol II to war crimes. First, if one applies the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties, which directs States Parties to interpret in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,<sup>88</sup> it is difficult to conclude that Article 6(5) covers amnesties for war crimes. Additional Protocol II was designed to ensure greater protection for the victims of non-international armed conflicts by developing and supplementing Article 3 common to the Geneva Conventions.<sup>89</sup> If Article 6(5) were to allow amnesties which prevent prosecution for the most egregious human rights abuses during armed conflict, the provision would be inconsistent with the primary objective of the Protocol. The words "shall endeavour to grant the broadest possible amnesty" can be interpreted in the sense that Article 6(5) should be employed only when it can be implemented without infringing other binding international treaties or customary international law.<sup>90</sup>

Secondly, the International Committee of the Red Cross (ICRC) has interpreted Article 6(5) of the Protocol narrowly. In an official letter dated

<sup>86</sup> The ICRC commentary on this article states that "[a]mnesty is a matter within the competence of the authorities" and that "[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided". ICRC Commentary on Protocol II of 1977 to the Geneva Conventions of 1949, paras 4617 and 4618, available at: <<http://www.icrc.org>>.

<sup>87</sup> For example, *Guevara Portillo Case*, Salade lo Penal de la Corte Suprema de Justicia, San Salvador (16 August 1995), p. 11; *AZAPO case*, *op. cit.* (note 18), p. 53; *Romo Mena Case*, Corte Suprema de Chile (26 October 1995), p. 12.

<sup>88</sup> 1969 Vienna Convention on the Law of Treaties, Art. 31(1).

<sup>89</sup> Additional Protocol II, Art. 1 and preambular para. 1.

<sup>90</sup> Roht-Arriaza and Gibson also argue that the phrase could be interpreted as meaning "the broadest possible amnesty' without destroying victims' hopes and needs for retribution and denunciation, or 'the broadest possible amnesty' without causing social unrest because of the injustice in letting these criminals go free". See N. Roht-Arriaza and L. Gibson, "The developing jurisprudence on amnesty", *Human Rights Quarterly*, Vol. 20, 1998, p. 866.

1995 from the head of the Legal Division to the ICTY Prosecutor, it stated that Article 6(5) essentially provides for “combatant immunity”, which ensures that a combatant cannot be punished for the mere fact of taking part in hostilities, “including killing enemy combatants, as long as he respected international humanitarian law...”.<sup>91</sup> The provision is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law. This conclusion was based partly on the drafting history of Article 6(5), which indicates that “the provision aims at encouraging amnesty, i.e. a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.”<sup>92</sup> This interpretation has subsequently been affirmed by the Inter-American Commission of Human Rights and the UN Human Rights<sup>93</sup> Committee.<sup>94</sup> Such a rationale was applied in much earlier decisions in the United States not recognizing amnesties for serious violations in internal conflicts.<sup>95</sup>

### The duty to “respect and ensure respect” for the Geneva Conventions

Article 1 common to the Geneva Conventions of 1949 and reiterated in Article 1(4) of Additional Protocol I states that: “The High Contracting

<sup>91</sup> Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997.

<sup>92</sup> *Ibid.* During the debate at the Diplomatic Conference negotiating Protocol II, the delegate for the Soviet Union stated that draft Article 10 (which became Article 6) of Protocol II “could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.” *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, Vol. 9. Federal Political Department, Berne, 1978, p. 319.

<sup>93</sup> Inter-American Commission on Human Rights, Report No. 199, Case 10,480, *Lucio Parada Cea and ors.* (El Salvador), 27 January 1999, para. 115.

<sup>94</sup> UN Doc. CCPR/C/79/Add.78, para. 12 (concerning the amnesty for human rights violations committed against civilians during the civil war in Lebanon).

<sup>95</sup> *Ex parte Mudd*, manuscript opinion of Judge Boynton, 9 Sept. 1868, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9, 899), (concerning petition for *habeas corpus* for civilians convicted by military commission for complicity in assassination of President Lincoln). In response to the petitioners’ contention concerning the presidential proclamation of amnesty of 4 July 1868, the court stated, “But that proclamation plainly excludes (...) petitioners, whether they have been convicted or not. It pardons the crime of treason (...) but it pardons no person who has transgressed the laws of war – no spy, no assassin, no person who has been guilty of barbarous treatment to prisoners (...). Such a provision would refer to those prisoners who had made open and honorable war and transgressed the fearfully wide rules which war allows to be legal.” Quoted in *International Criminal Law, op. cit.* (note 26), p. 252.

Parties undertake to respect and to ensure respect for the present Convention in all circumstances."<sup>96</sup> Since one of the most effective ways of ensuring respect for the Convention or Protocol is to have a system of enforcement, including penal sanctions, for serious violations of the rules contained therein, a certain expectation of criminal repression arises. It should be noted that common Article 1 also applies to non-international armed conflicts, as it includes ensuring respect for common Article 3 of the Geneva Conventions. Additional Protocol II, which develops and supplements common Article 3, could also indirectly be covered by the principle.<sup>97</sup>

The ICJ in the *Nicaragua* case found that the obligation to "respect and ensure respect" forms part of customary international law.<sup>98</sup> This finding was reaffirmed in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>99</sup> Moreover, the ICJ found that such rules were "intransgressible principles of international customary law",<sup>100</sup> implying that "no circumstance may justify a 'transgression' of such rules".<sup>101</sup> In the *Tadic Appeals* case, it was stressed in the ICTY's ruling that a State's armed forces abroad must respect humanitarian rules (including the obligation to search for persons accused of war crimes and the duty to prosecute or extradite).<sup>102</sup> Although the extent to which common Article 1 can be rendered operational to bolster the duty to prosecute those accused of war crimes remains uncertain, it is clear that this "quasi-constitutional"<sup>103</sup> provision raises the community expectation of the enforcement of humanitarian norms.<sup>104</sup>

<sup>96</sup> On the legal value and consequences of common Art. 1 of the Geneva Conventions, see generally L. Boisson de Chazournes and L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective interests", *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 67-86.

<sup>97</sup> *Ibid.*, p. 69.

<sup>98</sup> *Nicaragua case*, *op. cit.* (note 80), para. 220.

<sup>99</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, para. 79.

<sup>100</sup> *Ibid.*

<sup>101</sup> Boisson de Chazournes and Condorelli, *op. cit.* (note 96), p. 75.

<sup>102</sup> *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Judgment, The Hague, 15 July 1999, Case No. IT-94-1.

<sup>103</sup> Boisson de Chazournes and Condorelli, *op. cit.* (note 96), p. 85.

<sup>104</sup> Paust, in "My Lai" *op. cit.* (note 35) has made the salient point that: "[i]nternational law is based upon common expectations of the human community and does not solely become operative when in conformity with one state's notions of 'just wars' or other political conclusions of a nation (...). This is due to the fact that international legal norms have a universal character or value content, and these human expectations cannot be ignored on the basis of local self interest. (...). Today, as the human society is forced to exist on the basis of the sovereign state system it can be argued that it is the duty of the sovereign to execute community legal expectations."

An analogy may be drawn between Article 1 of the Geneva Conventions and the obligation in human rights treaties to ensure respect for the rights contained therein. Although comprehensive human rights treaties are silent as to a duty to prosecute and punish those accused of violations of fundamental rights, authoritative sources have interpreted the obligation to ensure the rights guaranteed by the treaties<sup>105</sup> as entailing the duty to investigate abuses and to put those alleged to have committed such abuses on trial. For example, the Human Rights Committee has stated in relation to the crime of torture that “States must ensure an effective protection through some machinery of control (...). Those found guilty must be held responsible.”<sup>106</sup> In the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights held that as a consequence of the obligation to ensure the rights in the American Convention on Human Rights, States must prevent, investigate, and punish any violation of the rights recognized by the Convention.<sup>107</sup> The European Court of Human Rights has interpreted Article 1, which obliges the parties to “secure to everyone within their jurisdiction the rights and freedoms defined” in the European Convention on Human Rights, as including an affirmative obligation to prevent or remedy breaches of that Convention.<sup>108</sup> The European Commission interpreted this obligation as including criminal prosecution where appropriate.<sup>109</sup>

On the basis of such interpretations of the treaty obligation to ensure rights, it could be argued that the obligation in the Geneva Conventions “to respect and ensure respect for the Conventions” should entail the mandatory prosecution of a person accused of violating any of the fundamental provisions thereof and of their Additional Protocols. A distinction should be made, however, between the obligation to ensure the fundamental rights of individuals and the duty to respect and ensure respect for humanitarian rules during a situation of armed conflict. Clearly the latter obligation of ensuring “respect” is both much broader and more vague than the aforesaid duty of

<sup>105</sup> Art. 2(1) of the International Covenant on Civil and Political Rights, 16 December 1966; Art. 1(1) of the American Convention on Human Rights, 7 January 1970; Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

<sup>106</sup> Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40) Annex V, general comment 7 (16), para. 1, UN Doc. E/CN.4/Sub.2/Add.1/963 (1992).

<sup>107</sup> Inter-American Court of Human Rights, Case *Velasquez Rodriguez*, Judgment of 29 July 1988, Series C, No. 4, para. 166.

<sup>108</sup> *Ireland v. U.K.*, 25 Eur. Ct. H.R., para. 239 (ser. A) (1978).

<sup>109</sup> *Mrs. W. v. United Kingdom*, 32 Collection of Decisions 190, 200 (Feb. 28, 1983).

ensuring “rights”. It is conceivable, for example, that a limited amnesty law covering those “least responsible” for the commission of war crimes, coupled with a truth commission and enacted for the purpose of ending a civil war, could still be consistent with a State’s obligation to “respect and ensure respect” for the Geneva Conventions. On the other hand, the obligation to ensure inalienable rights in the human rights conventions necessitates a legal mechanism to guarantee enforceable rights.

A series of UN General Assembly resolutions also testify to an international expectation that States will prosecute those accused of war crimes. For example, a 1973 resolution on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity affirmed that:

“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”<sup>110</sup>

It has also been reiterated in other resolutions that a refusal “to cooperate in the arrest, extradition, trial and punishment” of such persons is contrary to the United Nations Charter “and to generally recognized norms of international law.”<sup>111</sup> While these resolutions are not conclusive in themselves of a customary duty to prosecute all war crimes (particularly as the scope of “war crimes” was not commonly agreed at the time), they do provide evidence that the international community generally expects States to enforce norms prohibiting war crimes by instituting criminal proceedings. This expectation means that States could legitimately prosecute persons accused of war crimes even if they are not under an obligation to do so. At the same time, an expectation of enforcement that does not amount to an obligation does not preclude giving effect to certain amnesties which do not, in the circumstances, contravene the duty to respect and ensure respect for the Geneva Conventions or other “non-derogable” principles of international law.

<sup>110</sup> Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, *op. cit.* (note 6), para. 1.

<sup>111</sup> Quoted in J. Paust, “Universality and the responsibility to enforce international criminal law: No sanctuary for alleged Nazi war criminals”, *Houston Journal of International Law*, Vol. 11, 1989, pp. 337-40, reproduced in *International Criminal Law*, *op. cit.* (note 26), p. 75.

## Consequences of the *jus cogens* nature of war crimes

In recent years, the notion has emerged that certain overriding principles of international law exist, forming a body of *jus cogens* norms from which no derogation is permitted.<sup>112</sup> Clearly accepted and recognized *jus cogens* norms include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity, and torture.<sup>113</sup> It is now increasingly accepted that war crimes may be included in this category.<sup>114</sup> If this contention is accepted, the following questions then arise: what are the consequences of violating a *jus cogens* norm and is any derogation from them also precluded?

**112** Art. 53 of the 1969 Vienna Convention on the Law of Treaties provides a definition of a *jus cogens* or peremptory norm of international law: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In the *Barcelona Traction* case (Second Phase), the ICJ drew the distinction between obligations of a State arising vis-a-vis another State and obligations "towards the international community as a whole", saying: "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". ICJ Reports 1970, 3 at p. 32. See also *East Timor Case (Portugal v. Australia)*, ICJ Reports 1995, 90 at p. 102.

**113** The International Law Commission gave the following examples of treaties which would violate Art. 53 of the Vienna Convention on the Law of Treaties: "(a) a treaty contemplating an unlawful use of force contrary to the principles of the [UN] Charter; (b) a treaty contemplating the performance of any other act criminal under international law; and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate (...) treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples": *Yearbook of the ILC 1966*, Vol. II. p. 248.

**114** In the *Nicaragua* case, the ICJ found that Article 3 common to the Geneva Conventions represented a customary rule of international law, adding that the rules reflect "elementary considerations of humanity" *Nicaragua* case, *op. cit.* (note 80), p. 104. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that the "fundamental rules [of humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary law." *op. cit.* (note 99), p. 257, para. 79. Some judges went further and clearly stated in separate opinions that the rules of war have acquired the status of *jus cogens*; see Weeramantry J, p. 496, President Bedjaoui, p. 273, Koroma J, p. 574. In the *Haas and Priebke* cases, Military Court of Appeal of Rome/Supreme Court of Cassation, 7 March 1998/16 November 1998, the judgments describe the principle of the non-applicability of statutory limitations to war crimes as a peremptory norm of general international law, necessarily implying that war crimes also have a *jus cogens* nature. See also, A. Cassese, "On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law", *European Journal of International Law*, Vol. 9, No. 1; H-P. Gasser, "International humanitarian law", in H. Haug (ed.), *Humanity for All*, Henry Dunant Institute, Paul Haupt Publishers, Berne, 1993, at p. 556; C. Bassiouni, "International crimes *jus cogens* and *obligatio erga omnes*", in C. Joyner and C. Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Rights*, Association Internationale de Droit Pénal, Ramonville-St.-Agne, 1998, at p. 267.

The ICTY elaborated on the consequences of breaching a *jus cogens* norm in the *Furundzija* case<sup>115</sup> concerning the crime of torture. In terms of criminal liability, the Tribunal found that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that “every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”<sup>116</sup> This seems to suggest that the non-derogable character of the norm attaches only to the norm itself and not necessarily to its consequences. According to the ICTY, States have the “right” to prosecute those accused of *jus cogens* crimes,<sup>117</sup> implying that this is not a mandatory obligation.

The ICTY’s characterization of the consequences of *jus cogens* norms as merely giving States the right to prosecute or extradite may be contrasted with the assertion of other commentators that both the norm prohibiting the commission of war crimes and the resulting obligation to prosecute or extradite persons accused of these crimes have a peremptory character.<sup>118</sup> Were this conclusion to be correct, it would mean that States could never under any circumstances derogate from their duty to prosecute such persons and would also rule out the possibility of any international recognition of amnesties for war crimes. The argument commonly used by advocates of this position is that “the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law.”<sup>119</sup> Support for the view that a peremptory character may attach to the “prosecute or extradite” rule may be found to some extent in the ICRC Commentary on the Geneva Conventions, which notes that “repression of grave breaches was to be universal (...) [with those

<sup>115</sup> *Prosecutor v. Anto Furundzija*, Judgement, IT-95-17/1-T, 10 December 1998.

<sup>116</sup> *Ibid.*, paras 153-157. The Court also found that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption. *Ibid.*, para. 153.

<sup>117</sup> *Ibid.*, para. 156, citing the Supreme Court in *Eichmann* and the USA Court in *Demjanjuk. Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 298; In the Matter of the Extradition of John Demjanjuk, 612 F. Supp.544, 558 (N.D. Ohio 1985). The Court also refers to *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. Denied, 475 U.S. 1016 S. Ct. 1198, 89 L. Ed. 2d 312 (1986) for a discussion of the universality principle as applied to the commission of war crimes.

<sup>118</sup> Bassiouni, “International Crimes”, *op. cit.* (note 114), writes at p. 265: “Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite (...)”; see also Cassese, *op. cit.* (note 114); Paust, “Universality”, *op. cit.* (note 111), at pp. 337-40.

<sup>119</sup> Bassiouni, “International Crimes”, *op. cit.* (note 114), p. 266.

reasonably accused] sought for in all countries,” adding that “the obligation to prosecute and punish (...) [is] absolute.”<sup>120</sup>

Similar arguments have been used by human rights bodies to argue the extension of non-derogability to normally derogable rights (such as the right to *habeas corpus*) which are necessary in order to uphold non-derogable rights (such as the prohibition of torture).<sup>121</sup> But their reasoning may be distinguished from the “prosecute or extradite” rule: in the case of human rights it is argued that the crime (violation of the non-derogable right) could not have occurred if the other right had been of a non-derogable nature;<sup>122</sup> conversely, the duty to prosecute or extradite does not arise until *after* the war crime has been committed. It is therefore much more difficult to argue that the duty to prosecute or extradite actually prevents the violation of peremptory norms. The only feasible argument along these lines is that of the theory of deterrence, but it is limited, as there is little evidence that criminal sanctions have a direct impact on the behaviour of future perpetrators of international crimes.<sup>123</sup>

Furthermore, it is difficult to prove that the duty to prosecute every case of war crimes is “a norm accepted and recognized by the international

<sup>120</sup> *Commentary to Geneva Convention VI, op. cit.* (note 51), pp. 587-602.

<sup>121</sup> For example, the Inter-American Court of Human Rights has held that the “essential” guarantees which are not subject to derogation under the American Convention on Human Rights include *habeas corpus*, *amparo*, and any other effective remedy which is designed to guarantee respect for the non-derogable rights and freedoms in the Convention. *Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87 of 6 October 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987)* at 41. In the *Case of Barrios Altos*, the Court stated, “it is unacceptable to use amnesty provisions (...) as a means of preventing the investigation and punishment of those responsible for gross violations of human rights (...) all of which are prohibited as breaches of non-derogable rights recognized under International Human Rights Law.” *Barrios Altos case, op. cit.* (note 15), para. 41.

<sup>122</sup> The classic example is that of torture of detainees inside police stations, which would be much less likely to occur if *habeas corpus* was a non-derogable right, because judges would have the chance to see the detainee in person soon after the arrest and would be able to tell if he or she had been incorrectly treated while in custody.

<sup>123</sup> The International Law Association has pointed out that the deterrent effect should not be overstated, noting that serious crimes on a massive scale continued to be committed in Kosovo after the Chief Prosecutor of the ICTY had announced her intention of investigating and prosecuting these crimes in a letter addressed to President Milosevic and other senior officers. Letter from Justice Louise Arbour to President Milosevic and other senior officials, ICTY press release JL/PIU/389, 26 March 1999, quoted in International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference 2000, p. 4, available at: <<http://www.ila-hq.org>>. During the Second World War, atrocities by German soldiers continued to be committed after the Allies had announced their intention to pursue the perpetrators “to the uttermost ends of the earth”. “Declaration of German Atrocities”, 1 November 1943, *Dept St. Bull.*, Vol. 9, 1943, pp. 310 - 311.

community of States as a whole as a norm from which no derogation is permitted". The historical – and continuing – practice of States of enacting amnesties at the end of armed conflicts,<sup>124</sup> the fact that the duty to prosecute grave breaches under the Geneva Conventions may be derogated from if it conflicts with an obligation under the UN Charter,<sup>125</sup> and the more recent State practice in the form of special courts in transitional societies prosecuting only those "most responsible" for serious violations where mass war crimes have been committed, all lead to conclude that the international community does not at the present time consider that this rule has a non-derogable character.

A distinction must be drawn, as the ICTY did in the *Furundzija* case, between the non-derogable nature of the *jus cogens* norm (the ban on commission of the crime) and the *erga omnes* consequences (the method of enforcement) deriving from the breach of such a norm.<sup>126</sup> The latter obligation concerns the means of compliance with the peremptory norm.<sup>127</sup> Because *erga omnes* obligations are "[by] their very nature (...) the concern of all States [and] all States can be held to have a legal interest in their protection..."<sup>128</sup> under customary law, any State regardless of injury may invoke the responsibility of another State if the obligation breached is owed to the

<sup>124</sup> See O'Shea, *op. cit.* (note 19), for the historical use of amnesties, at pp. 5-23.

<sup>125</sup> UN Charter, Art. 103. It could be argued, however, that the customary status of the "prosecute or extradite" rule for grave breaches of the Geneva Conventions is not subject to the same hierarchy of rules under treaty law.

<sup>126</sup> The ICTY identified the rationale behind these consequences as follows: "While the *erga omnes* nature (...) appertains to the area of international enforcement (*lato sensu*), the *other* major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order [*jus cogens*]". *Furundzija* case, *op. cit.* (note 115), para. 153 (emphasis added). This implies that the non-derogable nature applies only to the norm prohibiting torture.

<sup>127</sup> Examples of obligations *erga omnes* given by the ICJ are rules deriving from the outlawing of acts of aggression and genocide, and the rules and principles concerning the basic rights of the human person, including protection from slavery and racial discrimination. *Barcelona Traction*, *op. cit.* (note 112), p. 32; *East Timor* case, *op. cit.* (note 112), *ICJ Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 99), p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia)*, *Preliminary Objections*, *ICJ Reports 1996*, p. 595, at pp. 615-616, paras 31-32. In the *Pinochet* litigation in the United Kingdom, Lord Hope made the point that the fact that an act has acquired the status of *jus cogens* under international law "compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct." *Pinochet No. 3*, House of Lords 24 March 1999, reproduced in R. Brody and M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, Kluwer Law International, The Hague, 2000, pp. 253-4.

<sup>128</sup> *Barcelona Traction*, *op. cit.* (note 112).

international community as a whole.<sup>129</sup> However, the fact that a State has a legal interest in ensuring that an obligation is complied with does not necessarily translate into a positive duty to prosecute every instance of war crimes. This would mean that domestic or international courts could legitimately recognize a limited amnesty for war crimes where the failure to prosecute does not conflict with the particular consequences attached to a serious breach of *jus cogens*. Under customary law, there are two additional consequences for all States when serious breaches of peremptory norms have been committed.<sup>130</sup> The first is that States must cooperate to bring any serious breach to an end through lawful means. The second is that no State may recognize as lawful a situation created by a serious breach or render aid or assistance in maintaining that situation.<sup>131</sup> In the *Furundzija* case, the ICTY also commented on the effects of a peremptory norm at the inter-State level. According to the Tribunal:

“it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State, say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international recognition.”<sup>132</sup>

Care should be taken not to interpret the Tribunal’s words as ruling out any possibility of international recognition of amnesties for *jus cogens* crimes. Only where recognition of the amnesty law is tantamount to authorizing, condoning or recognizing as lawful the situation created by the illegal act

<sup>129</sup> ILC Articles on State Responsibility, Art. 48, *op. cit.* (note 36).

<sup>130</sup> According to the ILC Articles, a serious breach involves a “gross or systematic” failure by the responsible State to fulfil the obligation. ILC Articles on State Responsibility, Art. 40(2), *op. cit.* (note 36).

<sup>131</sup> The customary “particular consequences” of serious breaches of peremptory norms are articulated in the ILC Articles on State Responsibility, Art. 41, paras 1 and 2. Art. 41 is without prejudice to the other consequences that a breach may entail under international law (Art. 41(3)). See *Nicaragua case, op. cit.* (note 80), p. 100, para. 188; *Legal Consequences for States in the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports, 1971, p. 16 at p. 56, para. 126.

<sup>132</sup> *Furundzija case, op. cit.* (note 115), para. 155.

does the amnesty law lose all legal validity and the responsibility of the State is incurred.<sup>133</sup> Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States* adopts the view that a complete failure to punish repeated or notorious violations of rights protected by customary law renders a government sufficiently complicit to generate State responsibility.<sup>134</sup> While a third State's recognition of a blanket amnesty for war crimes self-proclaimed by an outgoing regime in another State would probably contravene both the "non-recognition" and *Restatement* principles, the international recognition of a principled and limited amnesty for war crimes brokered by the United Nations, for example, for the purposes of securing peace in a State or region and coupled with a truth commission would not amount to "condoning" or "authorizing the situation created by the breach of the *jus cogens* norm, nor indeed its recognition as lawful. Prosecutions that focus on those most responsible for devising and implementing a past system of war crimes, and are combined with a limited amnesty for persons not within this category, would still be consistent with the obligations to terminate the serious breach and not to recognize as lawful a situation created by a serious breach. By recognizing the limited amnesty, the courts of third States would likewise be in keeping with the *Restatement* approach, under which customary law would be violated by complete impunity for *jus cogens* crimes, but which would not require prosecution of every person who committed such an offence.<sup>135</sup>

### International and "quasi-international" criminal courts: the possibility of recognizing amnesties for war crimes

In terms of the possibility for international or quasi-international courts to recognize amnesties for war crimes, the same legal principles

<sup>133</sup> For example, this principle was enunciated in relation to any acquisition of territory brought about by force in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, General Assembly Res. 2625 (XXV), para. 10. The validity of the rule was affirmed by the ICJ in the *Nicaragua* case, *op. cit.* (note 80), p. 100, para. 188. The ICJ's advisory opinion in the *Namibia (South West Africa)* case also called for a non-recognition of the situation created by the denial by a State of the right to self-determination, *op. cit.* (note 131), p. 56, para. 126.

<sup>134</sup> *Restatement (Third) of the Foreign Relations Law of the United States* (1987), para. 702. In *Henfield's Case* and 1 Op. Att'y Gen. 68, 69 (1797), the Court found that if a State did not initiate prosecution of one reasonably accused of international crime, it was recognized that the State could become an "accomplice" to illegality and be subject to various international sanctions.

<sup>135</sup> Orentlicher, *op. cit.* (note 14), p. 2599.

discussed above generally apply. However, the statutes of courts will often specify whether or not amnesties for certain crimes will or will not be recognized. In terms of the Rome Statute of the International Criminal Court, commentators have argued that an “amnesty exception” may be inferred from several of its provisions: (1) on the basis of Article 17(1)(b), which provides that the ICC will declare a case inadmissible where the State which has jurisdiction over the case decides not to prosecute the accused, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (2) on the basis of Article 53(2)(c), which allows the Prosecutor to refuse prosecution where he or she concludes that “a prosecution is not in the interests of justice, taking into account all circumstances”,<sup>136</sup> (3) on the basis of Article 16 giving the Security Council the power to defer proceedings; and (4) under Article 15, which gives the Prosecutor discretion to decline to prosecute *proprio moto*.<sup>137</sup>

The Statutes of both the ICTY and the ICTR are silent on the possibility for the Tribunals to recognize amnesties, but given the fact that these tribunals were established by Security Council resolutions which identified a need to prosecute persons accused of serious international crimes in order to facilitate the restoration and maintenance of peace in those regions,<sup>138</sup> it would be contrary to their very purpose to exempt an accused from prosecution on the basis of an amnesty in these particular contexts. As for other international or quasi-international courts set up in recent years to deal with war

<sup>136</sup> The problem lies in interpreting what is meant by “interests of justice”. The term is undefined. The provision itself states that in making the decision the Prosecutor should take into account the gravity of the offence, the interests of the victims, the age or infirmity of the perpetrator and the role he or she played. However, this list is not exhaustive. Gavron makes the point that while it is potentially arguable that a prosecution that is likely to spark further atrocities is not in the interests of justice, this involves speculating about future events and contradicts the deterrence argument. Gavron, *op. cit.* (note 39), p. 111.

<sup>137</sup> On a discussion of these possible ways to accommodate amnesties within the Rome Statute, see also generally, M. Scharf, “The amnesty exception to the jurisdiction of the International Criminal Court”, *Cornell International Law Journal*, Vol. 32, 1999, p. 507; R. Wedgwood, “The International Criminal Court: An American view”, *European Journal of International Law*, Vol. 10, 1999, p. 97; G. Hafner, K. Boon, A. Rübesame and J. Huston, “A response to the American view as presented by Ruth Wedgwood”, *European Journal of International Law*, Vol. 10, 1999, p. 107.

<sup>138</sup> Security Council resolutions 827, S/RES/827 (1993), 27 May 1993, and 955, (1994) respectively. In Security Council resolution 827 (1993) which established the ICTY, the Security Council stated that it was “[c]onvinced that (...) the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim [of putting an end to such crimes] to be achieved and would contribute to the restoration and maintenance of peace.” Security Council resolution 827, preambular para. 6.

crimes (and other international crimes), the statutes establishing the courts generally reject any possibility of recognition of amnesties for international crimes. The Statute of the Special Court for Sierra Leone expressly prohibits recognizing amnesties for serious international crimes within the jurisdiction of the Court,<sup>139</sup> as does the regulation establishing a Commission for Reception, Truth and Reconciliation in East Timor<sup>140</sup> and the Law on the Extraordinary Chambers in Cambodia.<sup>141</sup> It could be argued that this rejection of amnesties for international crimes in the statutes of these courts is evidence of their illegality under international law and the impossibility for courts to give them recognition. However, the fact that these instruments needed to explicitly rule out recognizing amnesties for international crimes suggests that in the absence of a clause directing a court to disregard such amnesties, the courts would normally be able to recognize an amnesty for international crimes insofar as this was in accordance with international law.

### **Limits which international law imposes on a domestic or international court's ability to recognize an amnesty for war crimes**

International law as a legal regime needs to accord with political realities in order to remain relevant, but should always be interpreted in a manner consistent with its rationale. If credence is given to the notion of transitional or restorative justice which secures the principle of legal adjudication of violations and consequently the basic tenets of democratic order and fundamental human rights, while not requiring unlimited prosecution, then limited amnesties within internationally accepted parameters can be considered consistent with the fundamental principles of international law as well as with the purposes and principles of the UN Charter.

It is thus necessary to determine whether or not an amnesty law is justified under international law. It is possible to glean from State practice and the decisions of national and international courts the elements which would seem to point towards an acceptable form of amnesty. In summary these would appear to be the following cumulative criteria: (1) the amnesty

<sup>139</sup> Statute of the Special Court for Sierra Leone, Art. 10, 16 January 2002.

<sup>140</sup> Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Schedule 1(4) and Section 22.2, UNTAET/REG/2001/10, 13 July 2001.

<sup>141</sup> Art. 40 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 15 January 2001.

is prescribed and limited to achieving certain objectives, in particular, the objectives of securing peace and initiating or furthering reconciliation; (2) the amnesty is accompanied by other accountability measures such as truth commissions, investigatory bodies, or lustration; (3) the amnesty is not self-proclaimed, i.e., it is the result of negotiation between the outgoing and incoming regimes or of a peace deal brokered by international parties, such as the United Nations; and (4) the amnesty only applies to lower ranking members of armed forces or groups or those considered "least responsible" for the perpetration of international crimes. Attempts to exonerate persons accused of war crimes which do not fit into the above criteria, or which otherwise fail to conform to the fundamental principles of international law, should not in principle be accorded recognition by domestic or international courts.

#### Validity on the basis of the purpose of the amnesty

This basis for validity is founded on the argument that *but for* the recognition of a limited amnesty for war crimes it will be impossible, or at least much more difficult, to secure peace or to initiate or further the process of reconciliation which may be in conflict with a policy of unlimited prosecution. This argumentation was used by the Constitutional Court of South Africa to justify the broad amnesties granted under the Promotion of National Unity and Reconciliation Act 34 of 1995.<sup>142</sup> While this judgment may be criticized for failing to thoroughly examine conventional and customary rules that require prosecution of international crimes and the question whether the Interim Constitution intended (or was able) to overrule these,<sup>143</sup> there is considerable evidence on the other hand that the "amnesty for truth" deal negotiated between the outgoing *apartheid* regime and the new government prevented the outbreak of a civil war.<sup>144</sup>

<sup>142</sup> Judge Mahomed found that "but for a mechanism for amnesty, the 'historic bridge' [the negotiated transition to democratic rule] itself might never have been erected." *AZAPO case, op. cit.* (note 18), para. 19.

<sup>143</sup> The Court only considered the question of whether the provisions of the 1949 Geneva Conventions requiring prosecution for "grave breaches" were applicable (which it held were not), but made no attempt to examine rules relating to genocide, torture, war crimes or crimes against humanity. Given that *apartheid* has been deemed a crime against humanity by the General Assembly and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of those who commit this crime.

<sup>144</sup> See Scharf, "The amnesty exception", *op. cit.* (note 138), p. 510.

The UN has also shown support for amnesty agreements covering international crimes that appear necessary to end military stand-offs.<sup>145</sup> In recent years, however, there has been a tendency for it to reject the possibility of amnesties for international crimes in peace agreements.<sup>146</sup> Nonetheless, this practice does not foreclose all possibility of recognition of such amnesties, but merely puts the legal threshold and justification requirements for the recognition of amnesties for war crimes extremely high. In order to recognize an amnesty for war crimes, a domestic or international court would have to demonstrate that the amnesty is justified under the “but for” test as enunciated above. It may be noted that such a test stands in contrast to the Security Council’s resolutions requesting the ICC to refrain from exercising jurisdiction over nationals of non-party States to the Rome Statute which fail to positively identify a threat to the peace to justify the non-prosecution of such nationals accused of international crimes.<sup>147</sup>

#### Validity on the basis that the amnesty is accompanied by other accountability measures

This justification stems from the idea that there are significant nuances to the concept of justice in transitional societies.<sup>148</sup> A “restorative justice” approach suggests that targeted prosecution together with a range of other accountability mechanisms fulfil a State’s duty to address accountability and put an end to impunity. Mr Joinet, in his “Final Report on the question of

<sup>145</sup> For example, in 1993 the United Nations gave its full support to the Governors Island Agreement which granted full amnesty to members of General Cedras’ and Brigadier General Biambly’s military regime accused of committing crimes against humanity in Haiti from 1990-1994. The Security Council described the Agreement as “the only valid framework for resolving the crisis in Haiti”. Statement of the President of the Security Council, UN SCOR, 48th Sess., 329th metg., at 26, UN Doc. S/INF/49 (1993). See M. Scharf, “Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?”, *Texas International Law Journal*, Vol. 31, No. 1, 1996, pp. 1-42.

<sup>146</sup> For example, although the UN endorsed the 1999 Lomé Peace Agreement ending the civil war in Sierra Leone, which included a broad amnesty, UN Special Representative for Sierra Leone Francis Okelo made an oral disclaimer that the amnesty does not apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. UN Doc. S/1999/836, p. 2, para. 1. See generally, C. Stahn, “United Nations peace-building, amnesties and alternative forms of justice: A change in practice?”, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 191.

<sup>147</sup> See text accompanying notes 38-45.

<sup>148</sup> Teitel explains that transitions imply a paradigm shift in the conception of justice: while in normal times the law maintains law and order, in periods of political upheaval, the legal responses create a “sui generis paradigm of transformative law”. Teitel, *op. cit.* (note 2), p. 2014.

the impunity of perpetrators of violations of human rights”, proposed under Principle 19 – Purpose of the Right to Justice – that:

“There can be no just and lasting reconciliation (...) without an effective response to the need for justice; the prerequisite for any reconciliation is forgiveness which is a private act that implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance. Over and above any verdict, that is the essential purpose of the right to justice.”<sup>149</sup>

This conception of justice implies that a limited amnesty combined with an effective truth commission could satisfy “the essential purpose of the right to justice”.<sup>150</sup> Whereas in the past truth commissions have been set up as a substitute for trials, authoritative sources have made it clear that they are insufficient in themselves to constitute an adequate response by States to serious violations.<sup>151</sup> However, there has been a concerted move, headed by the United Nations, towards establishing truth commissions as a *complementary* mechanism for trials, together with a restricted amnesty limited to those “least responsible” for perpetrating the least serious crimes. This development can be seen in the post-conflict measures adopted in Sierra Leone<sup>152</sup> and East Timor<sup>153</sup> and may well also be applied to Cambodia,<sup>154</sup> Afghanistan<sup>155</sup> and Iraq.<sup>156</sup>

<sup>149</sup> Joinet Report, *op. cit.* (note 22), Principle 19.

<sup>150</sup> Gavron, *op. cit.* (note 39), p. 111.

<sup>151</sup> See, for example, *Garay Hermonsilla et al. v. Chile*, Case 10.843, Report No. 36/96, Inter-Am, C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997); Inter-American Commission on Human Rights, Report No. 26/92 (El Salvador), 82nd Sess., OEA/ser. L/V/II/82 (24 September 1992); Report No. 29/92 (Uruguay), 82nd Sess. OEA/ser. L/V/II.82, Doc. 25 (2 October 1992); Report No. 24/92 (Argentina), 82nd Sess. OEA/ser. L/V/II.82, Doc. 24 (2 October 1992).

<sup>152</sup> See Truth and Reconciliation Commission Act 2000 of 22 February 2000 (Sierra Leone) and Art. XXVI of the 1999 Lomé Peace Agreement. See also *Briefing Paper on the Relationship between the Special Court and the Truth and Reconciliation Commission*, Office of the Attorney General and Ministry of Justice Special Court Task Force, Planning Mission 7-18 January 2002, p. 8.

<sup>153</sup> Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001.

<sup>154</sup> S. Linton, “KR trials are vital, but won’t solve everything”, *Phnom Penh Post*, Issue 11/26, 20 December 2002 – 2 January 2003.

<sup>155</sup> President Karzai of Afghanistan has pledged to set up a truth commission which would seek to uncover the atrocities committed over two decades of war and to seek accountability for perpetrators of past abuses of human rights. See statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the opening of the 58th Session of the Commission on Human Rights, Geneva, 18 March 2002.

<sup>156</sup> A. Boraine, “Let the UN put Saddam on trial”, *International Herald Tribune*, 21 April 2003.

The introduction of the *gacaca*<sup>157</sup> trials in Rwanda as a way to relieve the overcrowding in jails of those accused of participating in the 1994 genocide and awaiting trial at the ICTR also reflects this approach of combining prosecution with other accountability measures dealing with less serious offences.<sup>158</sup>

### Validity on the basis of how the amnesty deal is achieved

Where amnesties are granted through non-legitimate means, for example, through a decree of a *de facto* government or a law passed by a non-democratically elected legislature, they may be denied legal force owing to their irregular means of promulgation and may be summarily overturned.<sup>159</sup> In Spain, for example, amnesty laws passed for political reasons by military regimes in Chile and Argentina are not considered to be a bar to the exercise of universal jurisdiction.<sup>160</sup> Furthermore, amnesties which cover crimes committed by the State or its agents allow the State to judge its own case. This result violates the general principle of law forbidding self-judging.<sup>161</sup> Self-proclaimed amnesties are therefore unlikely to be considered valid under international law.<sup>162</sup>

<sup>157</sup> *Gacaca* is a Kinyarwanda term for the grass on which traditional village assemblies used to be held. In practice, it means that individuals from the communities act as “people’s judges”. The law instituting the *gacaca* was adopted on 12 October 2000 by the National Assembly of Transition. See L. Olson, “Mechanisms complementing prosecution”, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 186.

<sup>158</sup> There are approximately 120,000 individuals detained in connection with the 1994 genocide in Rwanda. It has been estimated that Rwandan national courts and the ICTR would need at least 100 years to try all of them. *Ibid.*

<sup>159</sup> See for example *Garay Hermonsilla et al. v. Chile*, *op. cit.* (note 152): “A *de facto* government lacks legal legitimacy (...). It is not juridically acceptable that such a regime should be able to restrict the actions of the constitutional government succeeding it as it tries to consolidate the democratic system, nor is it acceptable that the acts of a *de facto* power should enjoy all those attributes that accrue to the legitimate acts of a *de jure* power.” See also L. Joinet and E. Guisse, “Study on the question of the impunity of perpetrators of human rights violations”, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1993/6, 19 July 1993; W. Burke-White, “Reframing impunity: Applying liberal international law theory to an analysis of amnesty legislation”, *Harvard International Law Journal*, Vol. 42, No. 2, 2001, p. 479.

<sup>160</sup> See V. Buck, “Droit espagnol”, in A. Cassese and M. Delmas-Marty (eds), *Juridictions nationales et crimes internationaux*, Presses Universitaires de France, Paris, 2002, pp. 154-155.

<sup>161</sup> The Permanent Court of International Justice referred to the “well-known rule that no one can be judge in his own suit” in the 1925 *Frontier between Iraq and Turkey* case. Art. 3, para. 2 of the Treaty of Lausanne (frontiers between Turkey and Iraq), 1925 PCIJ (ser. B), No. 12, p. 32 (Nov. 21, 1925).

<sup>162</sup> See Inter-American Commission on Human Rights, Report No. 133/99, Case 11,725 *Carmelo Soria Espinoza* (Chile), 19 November 1999, para. 76; *Case of Barrios Altos*, *op. cit.* (note 15), para. 41: “States parties to the Convention who adopt (...) self-amnesty laws, are in breach of articles 8 and 25 of the Convention. Self-amnesty laws leave victims defenceless and perpetuate impunity and are therefore clearly incompatible with the letter and spirit of the American Convention.”

On the other hand, amnesties negotiated by incoming and outgoing regimes to facilitate the transition, as in the case of South Africa, or those brokered or approved by the United Nations, are more likely to be recognized by foreign or international courts. It is instructive to note, for example, that during the *apartheid* regime the UN General Assembly strongly condemned *apartheid* as a gross violation of human rights and a crime against humanity and called on States to prosecute offenders under the *Apartheid Convention*.<sup>163</sup> Since the proclamation of the new Constitution containing the amnesty clause in its final section, the General Assembly has adopted resolutions that welcome the transition to democracy and are silent on the duty to prosecute.<sup>164</sup>

#### Validity on the basis of who receives an amnesty

This basis for the validity of limited amnesties derives from the view that amnesties should be applicable only to subordinates, and that those “most responsible” should not be able to benefit from them. Where large-scale violations of the laws of war have been committed, the prosecution of all alleged offenders is neither capable of preventing such crimes in the future, nor would it necessarily have been effective as a deterrent.<sup>165</sup> Furthermore, a requirement that a government should attempt to prosecute everyone who may be criminally liable could be hugely destabilizing for the social structure, as well as placing impossible demands on the judicial system, which is usually weak in transitional societies. It has been strongly argued by a number of commentators that in this situation a limited programme of exemplary punishment could have a significant deterrent effect and thereby achieve the aim justifying the general duty to punish atrocious crimes.<sup>166</sup> This principled/exemplary approach has been adopted in the Statute of the Special Court for Sierra Leone and the Law Establishing the Extraordinary Court of Cambodia, both of which only have jurisdiction over those bearing the most

163 E.g. UNGA Res/36/13, 28 October 1981, and A/Res/37/47, 3 December 1982.

164 E.g. UNGA Res/48/159, 20 December 1993.

165 See Ratner and Adams, *op. cit.* (note 14), p. 338.

166 See Orentlicher, *op. cit.* (note 14), p. 2601. Campbell, on the other hand, has argued that since exemplary trials mean only a small number of trials, individual violators will know that the chances of being punished are remote, and the deterrent value will be correspondingly low. C. Campbell, “Peace and the laws of war: The role of international humanitarian law in the post-conflict environment”, *International Review of the Red Cross*, No. 839, 2000, p. 630.

responsibility for crimes committed on their territories.<sup>167</sup> The “jurisdictional threshold” clause in Article 8 of the Rome Statute directing the ICC to focus on war crimes committed as part of a plan or policy could also suggest that the ICC will concentrate mostly on persons responsible for devising and implementing plans for the commission of such crimes. This indicates that amnesties for war crimes could be recognized for persons considered “least responsible”, whereas those in positions of authority should not be covered.

Prosecution of persons who were most responsible for designing and implementing a policy or plan to commit war crimes, together with a limited amnesty for those considered “least responsible”, would fulfil a State’s duty not to condone such violations or recognize as lawful a situation created by the breach of *jus cogens*.<sup>168</sup> This theory is also consistent with the *Restatement* view, according to which customary law would be violated by complete impunity for repeated or notorious instances of human rights violations, but would not require prosecution of every person who committed such an offence.<sup>169</sup>

This conclusion has significant ramifications with regard to the international principle of immunity for foreign heads of State and other high-ranking officials. Almost all the special courts set up to deal with war crimes and other serious international crimes exclude immunity for State officials. However, in the light of the ICJ decision in the *Arrest Warrant* case, in which the Court upheld the absolute immunity of incumbent ministers of foreign affairs under customary law,<sup>170</sup> domestic and quasi-international courts may face a further legal obstacle in prosecuting persons most responsible for the commission of war crimes. In some domestic cases dealing with the immunity of foreign States the *jus cogens* nature of war crimes has been used to

<sup>167</sup> Art. 1 of the Statute of the Special Court for Sierra Leone, *op. cit.* (note 140); Art. 1 of the Law on the Establishment of Extraordinary Courts of Cambodia, *op. cit.* (note 142). With regard to the phrase “those bearing the greatest responsibility” in the Statute of the Special Court for Sierra Leone, the UN Secretary-General has stated that it “does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term ‘persons who bear the greatest responsibility’ in any given case falls initially to the Prosecutor and ultimately to the Special Court itself.” Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40. This clarification is important, as it avoids the criticism that selective prosecutions which elevate official status over traditional understandings of criminal liability vitiate the principle that the level of fault should determine criminal responsibility. See Teitel, *op. cit.* (note 38), p. 2041.

<sup>168</sup> See notes 112-136 above and accompanying text.

<sup>169</sup> See notes 135-136 above and accompanying text. Orentlicher, *op. cit.* (note 14), p. 2599.

<sup>170</sup> See note 8.

argue the denial of sovereign immunity, mainly on the ground that conduct which is a criminal offence under international law cannot simultaneously be protected by international law.<sup>171</sup> This is a cogent argument for denying immunity to authorities or officials of foreign States who are responsible for plans or policies for the commission of war crimes. The consequences of the *jus cogens* nature of war crimes in regard to the principle of immunity was an issue not touched upon in the *Arrest Warrant* case.<sup>172</sup>

It is submitted that there are strong arguments for denying the immunity of former high-ranking State officials on the basis of the *jus cogens* nature of the prohibition of war crimes, which supersedes any other principle of international law, including immunities of foreign heads of State.<sup>173</sup> Furthermore, to uphold the immunity of a person accused of ordering the commission of large-scale war crimes would arguably amount to recognizing a situation created by the serious breach of a peremptory norm as lawful, a result clearly prohibited under customary international law. Considering that immunities for foreign officials are a privilege deriving from the sovereign independence of States, it is illogical that international law would give protection to State officials for acts deemed so serious that they are prohibited in all circumstances by that same international legal system.

<sup>171</sup> For example, Lord Brown-Wilkinson in *Pinochet No. 3*, *op. cit.* (note 127), said: "A former head of state cannot show that to commit an international crime is to perform a function which international law protects by giving immunity." In the Greek case of *Prefecture of Voiotia v. Federal Republic of Germany*, dealing with violations of Articles 43 and 46 of the Hague Regulations which the Court found to be *jus cogens* crimes, the court of first instance found that when a State breaches a *jus cogens* crime, there is a tacit waiver of sovereign immunity. Furthermore, recognition of immunity would amount to collaboration in the crimes. Thirdly, violations of *jus cogens* norms cannot be a source of legal rights. Case No. 11/2000, *Areios Pagos* (Hellenic Supreme Court), 4 May 2000, reported by Gavouneli and Banktekas in the *American Journal of International Law*, Vol. 95, 2001, p. 198.

<sup>172</sup> In the possible upcoming case before the ICJ concerning the international arrest warrant issued by the Special Court for Sierra Leone against former Liberian President Charles Taylor, the ICJ will first have to decide whether the nature of the Special Court, based on an agreement between the government of Sierra Leone and the United Nations, is equivalent to that of an international criminal court. According to the ICJ in the *Arrest Warrant* case, "certain international criminal courts" may constitute an exception to the principle of immunity of incumbent high-ranking State officials. *Arrest Warrant* case, *op. cit.* (note 8), para. 61. If the ICJ finds that the Special Court is binding only on Sierra Leone and the United Nations, in spite of the Security Council's support for the Court, the ICJ will then have the opportunity to assess the import of the *jus cogens* nature of the crimes of which Taylor is accused for his possible immunity under customary international law.

<sup>173</sup> The fact that the ICJ listed a number of exceptions to the immunities principle in the *Arrest Warrant* case indicates that this customary principle is not a peremptory norm of *jus cogens* and should therefore be derogated from when in conflict with a peremptory norm of *jus cogens*.

This may be contrasted with the argument that certain limited amnesties for *jus cogens* crimes such as war crimes may be recognized because they do not constitute a recognition of the situation created by the breach of the peremptory norm as lawful. In the case of an internationally acceptable amnesty, this bar to prosecution of war crimes is motivated by the need to facilitate the most effective progress towards peace; its purpose is certainly not to protect those most responsible for such crimes. In addition, other accountability measures instituted in conjunction with the amnesty would ensure that the truth about the violations is documented, thereby enabling victims to have some sense of justice being done.

### Conclusion

Obligations incumbent on States with regard to the enforcement of rules prohibiting war crimes do not preclude international recognition of restricted amnesties for war crimes which nonetheless enable societies to acknowledge and condemn offences committed during conflict or repressive rule.

Under customary international law, States may be either entitled or obliged to prosecute those accused of war crimes depending on the nature of the offence. The trend towards a customary duty to prosecute all war crimes should not be equated with a total invalidation of amnesties for such offences. What has been rejected by the international community is the culture of impunity, which was seen as an impediment to peace and the antithesis of all notions of justice. Amnesties covering war crimes may be recognized in the limited circumstances where their non-recognition would amount to a threat to peace and security, for example, by undermining a peace agreement or provoking the overthrow of a newly established civilian government. Even in these circumstances, only those amnesties which are limited to internationally acceptable parameters and which are not inconsistent with the fundamental obligations of States under customary law should be accorded international validity.

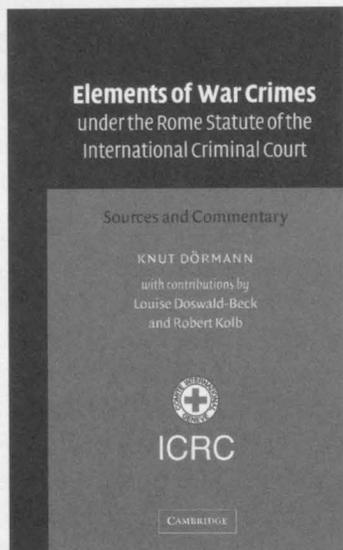
## Résumé

### ***Amnistie pour crimes de guerre: définir les limites de la reconnaissance internationale***

*Yasmin Naqvi*

*L'action pénale contre les personnes accusées d'avoir commis des crimes de guerre est un aspect fondamental du droit d'une victime à la justice. Toutefois, dans les conflits armés où des violations graves du droit international ont été perpétrées massivement, il est souvent nécessaire d'établir un équilibre entre le droit des victimes à obtenir justice de manière tangible et le besoin, pour l'État territorial, de traiter les atrocités passées de façon à ne pas engendrer de nouvelles violences et à stimuler le processus de réconciliation. Dans de telles circonstances, une justice réparatrice associant des amnisties limitées à d'autres mécanismes de responsabilité peut constituer un moyen d'assurer l'État de droit tout en tenant compte de la complexité du processus de transition. Quand des États vivant une situation de transition proclament de telles amnisties, il est important d'établir si celles-ci seront reconnues par la communauté internationale.*

*Cet article analyse les règles et les principes internationaux qui fondent ou étayent la décision que prend un tribunal national ou international de reconnaître ou non une amnistie couvrant les crimes de guerre. L'auteur s'attache d'abord à déterminer s'il existe un devoir coutumier de traduire en justice les personnes accusées de crimes de guerre, quels qu'ils soient. Les effets du caractère de jus cogens de l'interdiction de commettre des crimes de guerres sont également examinés, tout comme la pratique plus récente des États d'établir des tribunaux spéciaux pour juger les personnes accusées de crimes de guerre. L'article fait valoir que le droit international n'interdit pas aux tribunaux nationaux et internationaux d'accorder une amnistie limitée à ceux qui sont considérés comme « les moins responsables » de la commission des crimes de guerre, lorsque l'amnistie est associée à des mesures de contrôle et vise à faciliter l'instauration d'une paix durable.*



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## Affaires courantes et commentaires Current issues and comments

### Time limitation under the United States Alien Tort Claims Act

J. ROMESH WEERAMANTRY\*

Victims of international law violations may bring civil actions for damages against the perpetrators under the United States Alien Tort Claims Act<sup>1</sup> (hereafter ATCA). Lawsuits instituted pursuant to the ATCA may include claims based on violations of international humanitarian law<sup>2</sup> but such claims are completely independent of prosecutions for war crimes or crimes against humanity that might arise from the same factual circumstances. Actions under the ATCA are not aimed at imposing penal sanctions but seek payment of monetary compensation by the defendant for the damage suffered by the victim.

Many difficult and complex problems are encountered when seeking damages under the ATCA. Problem areas include establishing that the circumstances fall within the scope of the ATCA and obtaining the evidence to prove that the defendant was responsible for the violation. Even if a plaintiff is successful in court, the execution of the resulting decision is rarely achieved as defendants are usually not resident in the United States and do not have assets located in a place where the judgment can be enforced.<sup>3</sup>

Additionally, a requirement of utmost importance is the need to file the action within the limitations period that applies to the ATCA. However, for some time this requirement posed additional problems due to inconsistent case law as to what limitations period did apply. For example, in *Forti, et al. v. Suarez-Mason*<sup>4</sup> (hereafter *Forti*), the Federal District Court for the Northern District of California adopted the one-year Californian statute of limitations for personal injury actions. In contrast, in *Estate of Winston Cabello v. Fernandez-Lorios*,<sup>5</sup> the Federal District Court for the Southern District of Florida applied the ten-year period contained in the Torture

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Victim Protection Act of 1991<sup>6</sup> (hereafter TVPA). The United States Court of Appeals decision in *Wesley Papa, et al. v. United States and the U.S. Immigration & Naturalization Service*<sup>7</sup> (hereafter *Papa*) appears to provide an approach that should lead to more harmony in future decisions on this issue. The purpose of the present article is to examine this aspect of the *Papa* decision.

### The Alien Tort Claims Act

The ATCA is an important mechanism through which damages for violations of international law may be sought in civil proceedings in the United States. An action brought under this statute must be filed by a foreign national and may be brought in respect of a violation committed anywhere in the world. The ATCA provides:

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>8</sup>

<sup>1</sup> 28 U.S.C. § 1350 (1982). Unless stated otherwise, cited legislation is that of United States federal jurisdiction.

<sup>2</sup> A good illustration of a violation of international humanitarian law held to be within the scope of the ATCA is found in *Kadic v. Karadzic*, 70 F.3d 232 (2<sup>nd</sup> Cir. 1995) (holding that the former Bosnian Serb leader may be liable under the ATCA for genocide, war crimes and crimes against humanity in his private capacity). See also *Iwanowa v. Ford Motor Company and Ford Werke A.G.*, 67 F. Supp. 2d 424, p. 440 (D.C.N.J.) (holding that enslavement and deportation of civilian populations during World War II constitute a crime against humanity and as such is within the scope of the ATCA); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, p. 1180 (D.C. Cir. 1994) (acknowledging that forced labour of civilians during World War II violated international law); and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, p. 715 (9<sup>th</sup> Cir. 1992) (finding that “the universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts... are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*” and as such they come within the ATCA).

<sup>3</sup> See, for example, note 11 below.

<sup>4</sup> 672 F. Supp. 1531, p. 1549 (District Court, Northern District of California, 1987).

<sup>5</sup> 157 F. Supp. 2d 1345, p. 1363 (District Court, Southern District of Florida, 2000).

<sup>6</sup> 28 U.S.C § 1350.

<sup>7</sup> 281 F.3d 1004 (Court of Appeals, 9<sup>th</sup> Circuit, 2002). The decision in *Papa* was reaffirmed recently in the consolidated cases of *Deutsch v. Turner Corporation, et al.* and *In re World War II Era Japanese Forced Labour Litigation*, 317 F.3d 1005, p. 1028, n. 18 (Court of Appeals, 9<sup>th</sup> Circuit, 2003).

<sup>8</sup> The current version of the ATCA came into force in 1982. It was originally adopted as part of the Judiciary Act of 1789. Although the statute as now formulated consists of a text different from the 1789 statute to reflect changes in judicial structure and procedural modifications, there has been little substantive change between the two versions, which are separated in time by almost two hundred years. See Pryor, K.L., “Does the Torture Victim Protection Act signal the demise of the Alien Tort Claims Act?”, *Virginia Journal of*

In the first 191 years of its existence, the ATCA lay dormant to a large extent.<sup>9</sup> It was only after the 1980 landmark case of *Filártiga v. Peña-Irala*<sup>10</sup> (hereafter *Filártiga*) that there commenced an unprecedented resort to the ATCA by foreign victims of human rights violations.<sup>11</sup> However, many of the post-*Filártiga* cases have been denied federal jurisdiction, and the incumbent United States administration has currently made it clear that it opposes much of the *Filártiga*-based case law in favour of plaintiffs.<sup>12</sup> Nonetheless, there have been notable examples of success that should continue to generate interest in the ATCA as an important form of redress for violations of international law, including international humanitarian law.<sup>13</sup>

In addition to the ATCA, the TVPA was passed by the United States legislature specifically in respect of damages for torture and extrajudicial

*International Law*, Vol. 29, 1989, p. 970. The original version provided: "And be it further enacted, that the district courts (c)... shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States.", Judiciary Act of 1789, Chapter 20, § 9, 1 Stat. 73, 77 (1789).

9 It was asserted 21 times during this period and only in two cases did a federal court accept jurisdiction over the claims brought pursuant to the ATCA. Randall, K.C., "Federal jurisdiction over international law claims: inquiries into the Alien Tort Statute", *New York Journal of International Law and Politics*, Vol. 18, 1985, p. 4 and Pryor, K.L., *op. cit.* (note 8), p. 974. One of the most frequent reasons for denial of asserted jurisdiction under the ATCA has been that the alleged conduct was insufficient to constitute a violation of international law as required by the statute. See Pryor, K.L., *op.cit.* (note 8), p. 989.

10 630 F.2d 876 (Court of Appeals, 2<sup>nd</sup> Circuit, 1980).

11 The Court of Appeals in *Filártiga* held that the ATCA provided jurisdiction for a tort claim to be brought by two Paraguayan nationals against a former Paraguayan chief of police in respect of the torture to death of a family member in Paraguay. In finding jurisdiction, the court found that:

"deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."

*Filártiga v. Peña-Irala*, *ibid.* p. 878. On remand, the defendant took no further part in the proceedings and a default judgment of over USD 10.4 million was awarded against the defendant; 577 F. Supp. 860, p. 866. As is frequently the case with ATCA judgments, no enforcement of this award has been made. See Human Rights Watch, "Defend the Alien Tort Claims Act", 29 July 2003, available at: <[www.hrw.org/campaigns/atca](http://www.hrw.org/campaigns/atca)>.

12 For example, in an *amicus* brief filed before the Federal Court of Appeals for the Ninth Circuit on 8 May 2003 in *John Doe I, et al. v. Unocal Corporation, et al.*, Nos. 00-56603 and 00-56628, an appeal from the District Court for the Central District of California, the Department of Justice asserts that the ATCA "cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law" and seeks a much more restricted construction of the ATCA than adopted in *Filártiga*; see brief pp. 4-5, reprinted at <[www.uscib.org/docs/unocal\\_us\\_amicus.pdf](http://www.uscib.org/docs/unocal_us_amicus.pdf)>. Such a position does not appear to have been taken by previous administrations.

13 See, for example, the decisions in *Kadic v. Karadzic*, *op. cit.* (note 2) and *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (Court of Appeals, 9<sup>th</sup> Circuit, 1996) (relating to torture and other abuses by the former President of the Philippines).

killing.<sup>14</sup> An examination of the practical differences between the ATCA and the TVPA is beyond the scope of this article. For present purposes, it is important simply to note that the TVPA has an express ten-year statute of limitations period, whereas the ATCA contains no limitations period.

### ***Papa v. United States***

The relevant facts of *Papa* are as follows: Mauricio *Papa*, a Brazilian national, died in 1991 while in the custody of the Immigration and Naturalization Service. His family filed suit in 1999 on various grounds, including claims based on the ATCA, which the District Court for the Central District of California dismissed. One reason for the dismissal of those claims was that they were statute-barred under the law of California.<sup>15</sup> Apparently, the lower court applied a one-year limitations period under the Californian statute of limitations for death caused by a tort.<sup>16</sup> The Court of Appeals rejected the District Court's adoption of the California statute of limitations and held that the proper statute of limitations period to be adopted was found in the TVPA. In applying the latter period, the ATCA claims were found to be timely. The Court of Appeals stated the federal law governing the adoption of a statute of limitations as follows:

“The ATCA specifies no statute of limitations. In such situations, courts apply the limitations periods provided by the jurisdiction in which they sit unless ‘a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking’.”<sup>17</sup>

<sup>14</sup> Section 2 of the TVPA states:

“(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or  
(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(...)

(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.”

<sup>15</sup> *Papa, op. cit.* (note 7), p. 1013.

<sup>16</sup> See Stern, P.J., “Ninth Circuit finds 10-year statute of limitations applies to Alien Tort Claims Act”, April 2002, available at: <[www.mofo.com/news/general](http://www.mofo.com/news/general)>.

<sup>17</sup> *Papa, op. cit.* (note 7), pp. 1011-1012, quoting *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995).

On this basis, the Court held:

“The TVPA, like the ATCA, furthers the protection of human rights and helps ‘carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights’. Moreover, it employs a similar mechanism for carrying out these goals: civil actions. The provisions of the TVPA were added to the ATCA, further indicating the close relationship between the two statutes. All these factors point towards borrowing the TVPA’s statute of limitations for the ATCA.”<sup>18</sup>

The decision in *Papa* should serve as a basis to harmonize the limitations period to be used in ATCA actions and has the potential to bring to an end the inconsistent decisions as to the applicable time period. If *Papa* gains general acceptance by other federal courts of appeal, plaintiffs and defendants will be able to determine with greater accuracy when their unfiled ATCA claim will become time-barred.

Of benefit particularly for plaintiffs is the length of the period chosen by the Court of Appeals. Ten years is considerably longer than the municipal statutory limitations periods that some courts have applied to the ATCA.<sup>19</sup> The longer period adopted gives plaintiffs much needed time to prepare their case, especially when they reside in a distant country from which their departure is difficult, do not understand English (the language in which the case needs to be filed), fear retaliation for bringing the claim. Further, evidence would usually have to be collected in the jurisdiction in which the defendant might have political, military or other influence to interfere further with the rights of the victim.<sup>20</sup> Concerns of this type were hinted at by the Court in *Papa* when it stated that:

“... the realities of litigating claims brought under the ATCA, and the federal interest in providing a remedy, also point towards adopting a uniform — and a generous — statute of limitations. The nature of the violations suffered by

<sup>18</sup> *Papa*, *op. cit.* (note 7), p. 1012, quoting Pub. L. No. 102-256, 106 Stat. 73 (1992). It should be mentioned that in cases decided prior to 1991, courts did not have the benefit of utilizing the requisite “closer analogy” of the TVPA because it did not then exist.

<sup>19</sup> For example, in *Forti*, *op. cit.* (note 4), p. 1549, the court adopted California’s one-year statute of limitations for personal injury actions.

<sup>20</sup> See: Collingsworth, T., “The key human rights challenge: developing enforcement mechanisms” in *Harvard Human Rights Journal*, Vol. 15, 2002, p. 202, where Collingsworth states that in *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1999), “the plaintiff’s lawyers were not able to travel to Burma to interview witnesses because they could not get visas. Even if they could have travelled to Burma, they would have risked arrest or physical harm.”

those the ATCA, like the TVPA, was designed to protect will tend to preclude filings in United States courts within a short time."<sup>21</sup>

Having said this, it is of interest to survey briefly rules as to time limitation in the sphere of international law to which no reference was made in *Papa*. It may validly be asked, if the basis of the claim under the ATCA is a violation of international law, why the limitations period should not also be governed by international law.<sup>22</sup>

Under international law, no limitations period exists for the prosecution of war crimes and crimes against humanity.<sup>23</sup> The recognition by States of the gravity of these crimes and the need for their punishment and prevention in the future have led to the formulation of this principle. In the context of civil actions under the ATCA, the violations in respect of which claims under that statute are based might also amount to war crimes and crimes against humanity.<sup>24</sup> On this basis — and together with the absence of an express limitations period in the ATCA — it could be argued that no limitations period should apply to ATCA claims that overlap with such crimes.

However, the case law demonstrates that United States courts have not entertained seriously a view that any claim under the ATCA is free from a limitations period. That the threat of civil litigation must come to an end at some stage is a long-established rule of public policy and a practical necessity.<sup>25</sup> In this regard, international law recognizes that in matters of a non-criminal nature the limitation of actions is a general principle of international law.<sup>26</sup> This notion finds expression in international law through the principle of extinctive prescription, sometimes known as *laches*.

<sup>21</sup> *Papa*, *op. cit.* (note 7), p. 1012.

<sup>22</sup> See generally, Stern, P.J., *op. cit.* (note 16).

<sup>23</sup> See, for example, Article 1 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 25 November 1968, entered into force on 11 November 1970; Article 1 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, 25 January 1974, entered into force on 27 June 2003; and Article 29 of the Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002. Despite the absence of the United States as a signatory to these instruments, they appear to evidence a rule of customary international law that statutory limitations periods are not applicable to war crimes and crimes against humanity. As regards recent State practice, it is noteworthy that on 21 August 2003, Argentina's Senate unanimously approved a bill to eliminate Argentina's statute of limitations concerning war crimes and crimes against humanity. Noted in American Society of International Law, *International Law in Brief*, 26 August 2003.

<sup>24</sup> See note 2 above.

<sup>25</sup> See, for example, the legal maxim *interest republica ut sit finis litium* (it concerns the interest of the State that there be an end to lawsuits).

<sup>26</sup> For example, as far back as 1925, the Institute of International Law studied the subject of limitation of

No standard definition of extinctive prescription exists in international law. The International Court of Justice referred to it in the following manner (though not by name):

“The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.”<sup>27</sup>

actions and concluded that: “Practical considerations of order, of stability and of peace, long accepted in arbitral jurisprudence, should include the limitations of actions for obligations between states among the general principles of law recognized by civilized nations, which international tribunals are called upon to apply.” Institute of International Law, “Limitations of actions in public international law”, reprinted in *American Journal of International Law*, Vol. 19, 1925, p. 760. In this context, reference should be made to the mechanisms established for individuals to complain against States under three important United Nations human rights treaties in respect of which no express time limit within which to make a complaint is provided. Nonetheless, there are provisions in these treaties whereby communications may be inadmissible for unreasonable delay in submission if they are considered to be an “abuse of right”. See Article 3 of the 1966 Optional Protocol to the International Covenant on Civil and Political Rights, 18 December 1966; Article 4 of the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999; and Article 22(2) of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984. Under the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, 21 December 1965, exceptional circumstances aside, a communication of a violation of the Convention must be submitted within six months after all available domestic remedies have been exhausted pursuant to Rule 91(f) of the Rules of Procedure of the Committee on the Elimination of Racial Discrimination. Outside the UN human rights treaty system, the Eleventh Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, enables States or individuals to apply to the European Court of Human Rights. However, this application must be filed within six months from the date when the relevant final decision was taken.

<sup>27</sup> International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections)*, Judgment of 26 June 1992, ICJ Reports 1992 p. 240, para. 32. Extinctive prescription applies not just to inter-State disputes but also to claims by individuals against a State brought through means of diplomatic espousal. The principle is flexible and leaves much discretion with the adjudicator as to how it should be applied. Concerns as to the respondent’s inability to collect sufficient evidence supporting a claim — evidence that may be lost or destroyed during the time that has elapsed — underlie the principle. Additionally, issues such as whether the delay was attributable to the claimant or whether it was beyond the claimant’s control are also considered. Under the principle of extinctive prescription, the length of time after which a claim is deemed time-barred may be much longer than ten years. For example, in the Italian-Venezuelan Commission of 1903, the *Tagliaferro* decision allowed the presentation of a claim after a delay of 31 years, apparently because of notification of the claim to authorities of the respondent State immediately after the event in dispute; decision reprinted in Ralston, J.H., *Venezuelan Arbitrations of 1903*, Government Printing Office, Washington, 1904, p. 764. Similarly, see the *Giacopini* decision, where for similar reasons the same Commission accepted a claim that was 32 years old;

In the United States, resort to international law to determine the limitations period under the ATCA was rejected in the *Forti* decision.<sup>28</sup> This decision appears to imply that the case-by-case approach as is required by the principle of extinctive prescription “would be tantamount to permitting the federal claim to be brought at any time. Such a rule has repeatedly been rejected by the United States Supreme Court as ‘utterly repugnant to the genius of our laws’.”<sup>29</sup> This is an inaccurate if not unjustified assessment of the principle. On the contrary, under international law the claimants cannot bring a claim any time they please. The risk always exists that extinctive prescription will be pleaded and may operate to render an entire claim inadmissible. In any case the principle is based on notions of equity and fairness, which are intended to ensure that the respondents are protected from any injustice that may result from the delayed filing of the claim.

One valid criticism of the flexibility inherent in the principle of extinctive prescription is that it leaves claimants and respondents uncertain as to whether a claim is time-barred until a tribunal uses its discretion to determine that issue. This criticism is to some extent offset by the benefits of the system in providing justice to claimants, in allowing them to file a delayed claim in justifying circumstances, and also protecting respondents from the adverse consequences of the delay.

Regardless of the uncertainties that might be involved with adopting international law rules on time limitation, considerations of fairness and equity also permeate the 10-year statutory limitations period as it applies to the ATCA. Such considerations, admittedly for the benefit of plaintiffs, arise under US federal principles of equitable tolling. Under these principles, the running of time under a given statute of limitation is deemed to have stopped for a period during which certain circumstances are present.

decision reprinted in Ralston, J., *Ibid.*, p. 765. Indeed, there have been international law cases where circumstances have demanded that delayed claims be disallowed for a period of delay much shorter than 10 years. See, for example, the Davis decision where the British-Venezuelan Commission of 1903 rejected the case for a delay in notice of two years; decision also reprinted in Ralston, J. *Ibid.*, p. 406. See generally, King, B.E., “Prescription of claims in international law”, *British Year Book of International Law*, Vol. 15, 1934, p. 82; Ibrahim, A.R., “The doctrine of Laches in international law”, *Virginia Law Review*, Vol. 83, 1997, p. 647; and Weeramantry, J.R., “Extinctive prescription and delay in the presentation of international claims”, forthcoming article.

<sup>28</sup> *Forti*, *op. cit.* (note 4), p. 1547.

<sup>29</sup> *Ibid.*, quoting *Wilson v. Garcia*, 471 U.S.C. 261, p. 271, 105 S.Ct. 1938, p. 1944.

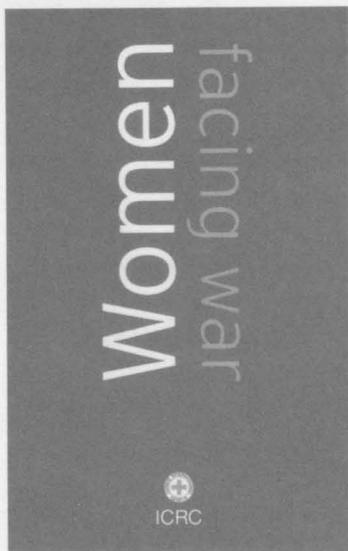
In *Forti*, the court observed that equitable tolling occurred

“(1) where defendant’s wrongful conduct prevented the plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff’s control make it impossible for plaintiff to timely assert his claim.”<sup>30</sup>

Such criteria offer a degree of discretion to a court and inject equitable notions into its analysis not uncommon in the application of time limitation principles as found in international law.

In conclusion, while the decision in *Papa* did not refer to any principles of international law when it determined what time limitation period should apply to the ATCA, equitable tolling rules under United States federal law afford a flexibility that has some similarities with the system of time limitation as it operates in international law. The tolling rules, coupled with the adoption of a ten-year limitations period in *Papa*, appear to give plaintiffs a reasonable opportunity to file timely claims. However, whether plaintiffs may file outside of the ten-year period for understandable and legitimate reasons will depend on the discretion of the court. It will be of interest to see how courts use that discretion in applying the tolling rules in light of the limitations period of ten years as adopted in *Papa* and also in view of the restrictive approach to the ATCA strongly advocated by the present United States administration.

<sup>30</sup> *Ibid.*, p. 1549.



## Women facing war

*by Charlotte Lindsey*

The ICRC study *Women facing war* is an extensive reference document on the impact of armed conflict on the lives of women. Taking as its premise the needs of women, e.g. physical safety, access to health care, food and shelter, in situations of armed conflict, the study explores the problems faced

by women in wartime and the coping mechanisms that they employ. A thorough analysis of international humanitarian law, and to a lesser extent human rights and refugee law, was carried out as a means to assess the protection afforded to women through these bodies of response to the needs of women as victims of armed conflict.

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# Reflections on humanitarianism: David Rieff's *A Bed for the Night*

ANDRAS VAILIN\*

In *A Bed for the Night*<sup>1</sup>, David Rieff<sup>2</sup> explains his frustration at the limitations and shortcomings of contemporary humanitarianism. He investigates the gap between the admirable norms of the human rights movement and the unpleasant facts of the humanitarian crises in Bosnia, Rwanda, Kosovo and Afghanistan. He urges us to revise our assumptions about the reach of the human rights revolution and the workings of the international community. He concludes that, however much one might wish it otherwise, independent humanitarianism is not capable, on its own, of advancing the cause of human rights, contributing to stopping wars, or furthering social justice. Humanitarianism only makes sense as part of a larger international response to human rights crises. It is a “saving idea that cannot save”. And, for the humanitarian enterprise, the risks of collaborating in such a wider response are considerable.

Over the last fifteen years, several international human rights instruments have been signed or ratified. But there is no reason to believe that the world has changed as a result. In the words of Bertold Brecht, giving a few needy people a bed for the night does not reduce exploitation. One cannot halt a massacre with medicines or respond to ethnic cleansing with reception centres for the displaced. It is often necessary to use force to stop violations of human rights.

Rieff frequently gives in to his penchant for extreme positions. He dismisses media coverage of humanitarian crises on the grounds that it does not help people understand situations where rights violations are going on. And he wonders what relief agencies have actually accomplished for people in

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<sup>1</sup> New York, Simon & Schuster, 2002, 367 pages.

<sup>2</sup> David Rieff is a freelance author for and a member of the Board of Directors of the Crimes of War Project.

need of “justice, mercy, bread or aid”. He believes that international law was no better respected at the end of the Bosnian war than it was at its beginning. And he argues that humanitarians remained as helpless to affect the outcome of the Rwandan tragedy at its conclusion as they had been at its inception.

For all its failings, however, Rieff believes the core assumptions of humanitarianism — sympathy for victims and antipathy for oppressors and exploiters — represent the best side of the human spirit. In the 1990s, humanitarian agencies believed they could combine altruism and philanthropy with action to defend the human rights of humanitarian victims. This meant collaborating with the political, humanitarian and sometimes military wings of powerful donor governments. While learning to work with these new partners, relief agencies lost their innocence. The donors were keen to show that generosity and altruism underlay their relationship with the rest of the world. By collaborating with humanitarian NGOs, they could claim that their actions had a humanitarian rationale.

Donors offered significant monetary inducements and logistical support to agencies that implemented programmes of political or strategic interest to them. The danger was not that humanitarianism was being used for political purposes. It was that the political ends for which it was being used were bad. In many instances, relief agencies either took the place of states that did not want to get involved in human rights crises, or unwittingly served as logisticians or doctors for some local warlord. Powerful governments were increasingly choosing to co-opt the prestige of humanitarian agencies to justify their failure to react to human rights abuses.

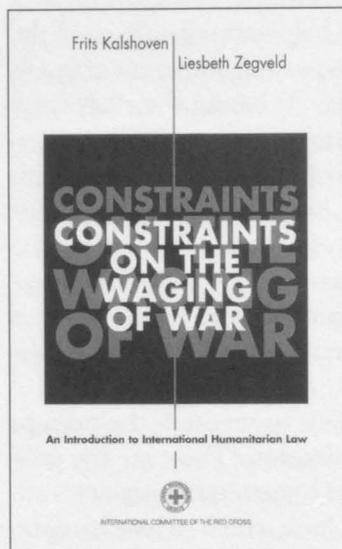
Rieff contrasts the neutral approach of the International Committee of the Red Cross with the self-conscious political engagement of the “Sans-Frontières” movement. He concludes that it is not possible to remain committed to the impartial alleviation of suffering while also taking policy positions to address the underlying causes of egregious human rights violations. In Afghanistan, serious commitments to both humanitarian relief and human rights could not co-exist as long as the Taliban remained in power. Humanitarianism could only alleviate. It could not save until the military intervened.

Rieff is critical of many aspects of the humanitarian enterprise *per se*. He denounces the unseemly rush to deploy, the cut-throat competition for funding, and the advertising campaigns insisting that generous donations will make the lives of victims whole again. Agency advocacy materials often attempt to transport the public to a “humanitarian tragedy-land” — a world of “wicked warlords, innocent victims and noble aid workers”. It is these images

that stick in the mind, not the political dynamic of the crises in Afghanistan, Cambodia or Biafra. There are no real individuals in the scenario, only victims, victimisers and relief workers who want to help and urgently need the means to do so. Rieff believes that the packaging of humanitarian crises in this way acts as an impediment to understanding. By basing their advocacy and fund-raising almost exclusively on needs, humanitarian agencies encourage their benefactors to believe that their principal concern should be with the suffering of populations and not the political, human rights reality underlying any particular crisis. It may be that pictures of suffering children are the best way of getting people to give money. Compassion sells. But Rieff believes the approach of most humanitarian agencies infantilises the beneficiaries of humanitarian intervention and insulates the agencies from the political consequences of their actions.

Rieff's conclusions are disappointing. He fails to mention the perceptions and actions of the victims of human rights disasters. These are the people who bear the brunt of disasters, whether or not humanitarian agencies are present. He chooses a very narrow sample of NGOs on which to base his case. And he proposes a double standard whereby he believes the promotion of human rights is possible in societies that have the means to make them realities, but not feasible in the context of societies that are too poor, too convulsed by ethnic or political strife, to do so.

He ends up contradicting himself and coming out in favour of "letting humanitarianism be humanitarianism". Whatever the compromises involved, relief agencies should attempt to save some lives, tend to victims and remind those lucky enough to have escaped misery and grief of the incalculable suffering misery and grief that billions of people feel every day. This 'charitable' approach would and does leave the poor and the weak dependent on the unpredictable support of the rich and powerful. It leaves humanitarian programmes vulnerable to the vagaries of short-term funding. It replaces concerted social, economic and political commitment and action for common welfare with isolated and often random acts of generosity. And it allows charity to mask moral and political agendas that often remain unexposed to public examination and debate. In the words of the ICRC Country Director for Rwanda, the humanitarian enterprise should continue to bring a measure of humanity, always insufficient, into situations that should not exist. Rieff believes that coping with a dishonourable world honourably and a cruel world with kindness is enough. In the end, one has to wonder how many victims of human rights abuses would agree with the case he makes in *A Bed for the Night*.



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# La Croix-Rouge entre Genève et Paris

FRANÇOIS BUGNION\*

Au moment de la fondation de la Croix-Rouge et de l'adoption de la première Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne du 22 août 1864, la France est encore perçue comme la Puissance dominante sur le continent. Le Second Empire brille de tous ses feux et c'est à Paris, où tous les pays sont représentés, que se traite une large part des affaires internationales.

Quelle sera l'attitude de la France vis-à-vis de la nouvelle institution? Quelle sera celle de la Troisième République, qui succédera bientôt à l'Empire, entraîné dans le naufrage de Sedan? Quelle sera enfin l'attitude de la France belligérante lors de la guerre franco-allemande de 1870-71 et lors de la Première Guerre mondiale? Telles sont les questions auxquelles Véronique Harouel, docteur en droit et historienne, s'est proposé de répondre dans le cadre d'un ouvrage<sup>1</sup> dense et fouillé qui analyse les relations entre la France et le Comité international de la Croix-Rouge (CICR), de la fondation de ce dernier, en 1863, à la fin de la Première Guerre mondiale. Cet ouvrage vient d'être publié par la Société Henry Dunant, avec le concours du CICR et de la Croix-Rouge française.

S'il fallait caractériser par un mot l'attitude de la France vis-à-vis du CICR, c'est celui d'ambivalence qu'il faudrait retenir. Les Anglo-Saxons parleraient d'une « *love-hate relationship* ».

Ainsi, la France de Napoléon III, n'hésitant pas à engager tout le poids de sa diplomatie, a contribué de façon décisive au succès de la Conférence diplomatique d'août 1864, qui devait adopter la première Convention de Genève. En proclamant son soutien au projet du Comité, nul doute que le gouvernement français a convaincu bon nombre de gouvernements de prendre part à la Conférence diplomatique. De même, les comptes rendus des

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<sup>1</sup> Véronique Harouel, *Genève – Paris 1863 – 1918, Le droit humanitaire en construction*, Société Henry Dunant, Comité international de la Croix-Rouge, Croix-Rouge française, Genève, 2003.

délibérations mettent en évidence l'engagement et l'efficacité des négociateurs français, les seuls à être venus à Genève munis d'un mandat de négociation précis. En même temps, toutefois, la France adopte une attitude essentiellement négative vis-à-vis de la Croix-Rouge naissante, critiquant vertement les propositions de Dunant et s'opposant farouchement à toute mention des Sociétés de secours dans la nouvelle Convention de Genève. Lors de la Conférence d'octobre 1863, qui donne naissance à la Croix-Rouge, le docteur Boudier et l'intendant de Préval seront les adversaires les plus déterminés du projet de Dunant, mettant en garde contre toute présence de civils sur le champ de bataille et n'hésitant pas à déclarer que des mulets seraient plus utiles pour recueillir et évacuer les blessés que les infirmiers volontaires que Dunant appelle de ses vœux : « *Des mulets, des mulets, c'est le nœud gordien de la question* », s'est exclamé le Dr Boudier, dans un élan d'éloquence digne d'un meilleur but.

Même ambivalence dans la perception du CICR. Sans doute par respect filial pour le général Dufour, dont il avait été l'élève à l'école militaire de Thoune, et qui fut le premier président du CICR, Napoléon III promet son soutien personnel à la nouvelle institution, n'hésitant pas à forcer la main du ministère de la Guerre qui ne pardonne pas à Dunant d'avoir dénoncé l'incurie de l'Intendance après la bataille de Solferino. Mais la France du Second Empire se méfie aussi de tout ce qui peut venir de la « Rome protestante ». Jalouse du prestige que la création de la Croix-Rouge assure à Genève, la Croix-Rouge française propose de transférer à Paris le siège de la nouvelle institution, qui passerait ainsi sous son autorité, avant de devenir le servile auxiliaire de la diplomatie impériale. Comme on le sait, la première Conférence des Sociétés de secours rejette cette proposition. Toutefois, lorsque, quelques années plus tard, la Croix-Rouge russe mène l'attaque contre le CICR, proposant de le remplacer par un organe multinational au sein duquel chaque pays aurait une voix, la Croix-Rouge française apporte au CICR l'appui décisif qui permettra d'écarter la menace que le projet russe faisait planer sur son indépendance et sur son avenir.

Même ambivalence, enfin, en ce qui concerne le respect par la France de la Convention de Genève. Quand éclate la Guerre franco-allemande de 1870-71, la France est prise au dépourvu. L'armée ignore tout de la nouvelle Convention de Genève, que la France s'est pourtant fait un point d'honneur d'être la première à ratifier. Les populations et les troupes n'ont reçu aucune instruction à son sujet. Le service de santé est dans le même état de délabrement que celui qui avait conduit au désastre de Solferino. Quant à la Croix-

Rouge française, son action ne dépasse guère le cadre des salons parisiens: elle ne dispose ni de personnel formé, ni de matériel médical, ni d'un plan d'engagement. Dans ces conditions, les violations seront innombrables, suscitant des récriminations qui compromettront même le maintien de la Convention de Genève.

Ces récriminations conduiront à la remise en cause de la Convention de Genève que l'on tiendra pour responsable de tous les manquements. D'où l'apparition de nombreux projets destinés à remplacer la Convention par des prescriptions que chaque État adopterait pour son propre compte. On aurait perdu par là le bénéfice d'un engagement réciproque établissant une règle identique pour tous les belligérants, condition essentielle de son respect sur le champ de bataille. Pour sa part, le cabinet de Saint-Petersbourg tentera d'englober la Convention dans un projet plus vaste de règlement des lois et coutumes de la guerre sur terre, qu'il patronne à travers la Conférence de Bruxelles de 1874, puis les Conférences de La Haye de 1899 et de 1907. Il faudra toute l'habileté diplomatique de Gustave Moynier, président du CICR, pour déjouer ces manœuvres et préserver les acquis de la Convention de 1864.

Lorsqu'une nouvelle conférence diplomatique se réunira enfin à Genève, en juillet 1906, pour réviser la Convention de Genève, la diplomatie française contribuera de façon décisive, comme en 1864, au succès des délibérations. Le nom de l'éminent jurisconsulte Louis Renault restera attaché à la Convention révisée, et c'est à bon droit qu'Édouard Odier, qui présida la Conférence, lui décernera le titre de « véritable architecte » de la nouvelle Convention.

Alors qu'en 1864, la France n'avait adopté aucune des mesures concrètes qui lui auraient permis de s'acquitter de ses obligations, la situation est tout autre à la veille de la Première Guerre mondiale. Par la loi du 1<sup>er</sup> juillet 1889, le Service de santé des armées a été finalement libéré de la tutelle désastreuse de l'Intendance et réorganisé. La guerre a été précédée de signes avant-coureurs trop nombreux pour qu'on pût se méprendre sur le désastre imminent. Surtout, la France entre dans la lutte en ayant la conviction de mener la guerre du droit, alors que l'Allemagne, en violant outrageusement la neutralité de la Belgique, ne craint pas de saper les bases juridiques et morales de sa cause en affirmant la primauté de la force sur le droit. La France se fera donc un point d'honneur de respecter ses engagements humanitaires, alors que l'Empire allemand aura fréquemment recours – souvent de manière abusive – au droit de représailles et proclamera même son droit à se dégager

de ses engagements internationaux lorsqu'il estimera que ses intérêts vitaux sont en jeu. Quant au CICR, en créant l'Agence internationale des prisonniers de guerre, en envoyant ses délégués visiter les lieux de détention et en s'entremettant entre les belligérants pour améliorer le sort des captifs, il donnera à son action un développement sans précédent qui fera de lui la cheville ouvrière de l'œuvre de secours aux prisonniers de guerre.

En adoptant comme fil conducteur la relation entre Genève et Paris, Véronique Harouel projette un nouvel éclairage sur des années décisives pour l'histoire du Comité international de la Croix-Rouge ainsi que pour la naissance et les premiers développements du droit humanitaire.

Elle a conduit des recherches approfondies, aussi bien dans les archives du CICR et celles de la Confédération suisse que dans les archives diplomatiques et militaires françaises, ce qui lui permet de confronter les perceptions des différents protagonistes et de montrer combien le même fait pouvait faire l'objet de lectures diverses selon qu'on l'envisageait de Genève, de Paris ou de Berlin. Couché dans un français élégant, le récit s'appuie sur une bibliographie exhaustive et sur un appareil critique qui permet d'identifier précisément les sources utilisées par l'auteur. La version originale de cette étude, sensiblement plus longue et plus détaillée encore, a été présentée comme thèse de doctorat à la faculté de droit de l'université de Poitiers.

Par le biais de préfaces de M. Jakob Kellenberger, président du CICR, du professeur Marc Gentilini, président de la Croix-Rouge française, et de M. Roger Durand, président de la Société Henry Dunant, les trois institutions ont tenu à rendre hommage aux qualités de l'ouvrage de Mme Harouel.

## **Faits et documents**

### **Reports and documents**

# **“International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence”**

**Address by Jakob Kellenberger, President of the International Committee of the Red Cross**

**International Institute of Humanitarian Law in co-operation with the International Committee of the Red Cross**

**27th Annual Round Table on Current Problems of International Humanitarian Law, 4 September 2003**

Thirty-five years ago the International Conference on Human Rights held at Teheran adopted a resolution entitled “Human Rights in Armed Conflicts”. In political terms, the 1968 resolution signalled the international community’s recognition that armed conflicts “continued to plague humanity” despite the United Nations Charter’s prohibition on threats or use of force in international relations. By dealing with human rights in armed conflict, the resolution also put an end to more than two decades of United Nations reluctance to address issues of *ius in bello* for fear of undermining the Charter’s provisions on *ius ad bellum*. In legal terms, the adoption of the Teheran resolution opened the way for a fresh look at the relationship between international humanitarian law and international human rights law in the protection of persons affected by war.

The decades that have passed since the Teheran Human Rights Conference have confirmed that comprehensive protection of individuals in armed conflict requires the application of international humanitarian law and of other bodies — including international human rights law, international refugee law, international criminal law and domestic law. In addition to the United Nations, whose resolutions over the years have consistently invoked

the various legal regimes, and the efforts of individual States, a major contribution to enhancing protection by reliance on the different bodies of law has been made by non-governmental organizations.

Despite the undoubted progress achieved in enlarging the scope and content of legal norms on the protection of persons, the question remains of the exact interplay between the different bodies of law in situations of violence. Are the different legal regimes, as some continue to believe, mutually exclusive, or are they, as others think, one and the same normative framework aimed at protecting human beings? Or, are they, as we believe, distinct but complementary? That is the overriding issue that this Round Table will attempt to address through the sessions and working groups planned for over the next two and half days.

I will not attempt to outline the factual evolution of international humanitarian law, or of the other bodies of law that we will be dealing with during the Round Table, as that will be aptly done by other speakers. What I would like to briefly touch upon are the similarities and differences between international humanitarian law and human rights law, which, for the purposes of my presentation, will also largely include international refugee law. The similarities are to be found in both purpose and content.

The common underlying purpose of international humanitarian and international human rights law is the protection of the life, health and dignity of human beings. While one of the specific aims of international humanitarian law is to ensure the protection of persons affected by armed conflict and, in particular, of those who find themselves in the hands of the adversary, the purpose of human rights law is to govern relations between States and individuals. In either case, the guiding principle is that individuals have the right to be protected from arbitrariness and abuse because they are human, which was an idea that revolutionized international law and had a lasting impact on international relations.

For centuries, international law was only concerned with relations among States, not recognizing that individuals could also be the subject of its rules. While international humanitarian law primarily establishes the duties of parties to an armed conflict, there is no doubt that humanitarian law norms in fact serve to spare individuals — to the extent possible — from the ravages of war. It was international human rights law that gave normative expression to the notion that a state's treatment of persons on its territory or under its jurisdiction does not belong to the sphere of its internal affairs. Individuals thus became subjects of international law by means of various

human rights mechanisms permitting international scrutiny over the way in which a state treats persons.

The result of these extraordinary developments for international relations was succinctly expressed by UN Secretary-General Kofi Annan in his Millenium Report. After a reminder that the avowed purpose of the United Nations is transforming relations among States, the Report adds: "...Even though the United Nations is an organization of States, the Charter is written in the name of 'we the peoples'. It reaffirms the dignity and worth of the human person, respect for human rights and the equal rights of men and women, and a commitment to social progress (...) Ultimately, then, the United Nations exists for, and must serve, the needs and hopes of people everywhere".

The similarity of purpose between international law norms dealing with the protection of persons is mirrored by the similar, albeit not identical, content of many of their norms. Like international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process.

International humanitarian law rules on the conduct of hostilities and on the treatment of persons who find themselves in enemy hands are designed to safeguard the right to life. Basic international humanitarian law tenets such as the principle of distinction, the prohibition of direct attacks against civilians and the prohibition of indiscriminate attacks are meant to protect the lives of persons not taking a direct part in hostilities. Many other international humanitarian law norms serve the same purpose, among them provisions on the treatment of persons *hors de combat*, on internees and detainees, on humanitarian assistance to populations in need. While international human rights norms protecting the right to life are more stringent — which is not surprising given that they are meant to be applied in a law enforcement context — the fact is that both bodies of law prescribe what constitutes unlawful taking of life within their respective scope of application. One of the basic tenets of international refugee law aimed also at safeguarding, among other things, the right to life, is the principle of non-refoulement.

As regards torture and other forms of cruel, inhuman or degrading treatment or punishment, it hardly needs to be emphasized that such acts are prohibited under both international humanitarian law and other bodies of law in all circumstances, and are considered crimes under international law. Permit me therefore to say that it is with the gravest concern that the

International Committee of the Red Cross (ICRC) has been following the renewed public debate on whether torture or other cruel, inhuman or degrading treatment or punishment should in some cases be permitted. In our view, such acts are most certainly never justified, whatever the reasons or circumstances.

Fundamental judicial guarantees are another example of norms that are common to international humanitarian and human rights law. Article 3 common to the Geneva Conventions, which is applicable in all types of armed conflicts, prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court”. The fair trial standards of human rights law must be relied on to interpret and give specific content to the relevant provisions of common article 3. The mutually reinforcing nature of humanitarian and human rights law in the area of judicial guarantees is, moreover, confirmed by the wording of article 75 of Additional Protocol I of 1977 and article 6 of Additional Protocol II, which was clearly influenced by human rights law. And, despite those elaborations, IHL lawyers must still resort to human rights standards in order to apply certain terms used in the Additional Protocols such as the right of an accused to the “necessary rights and means of defence”. Similarly, human rights standards need to be relied on, particularly in non-international armed conflicts, when it comes to determining the treatment of persons deprived of liberty and their conditions of detention.

Apart from similarity of norms in the areas just mentioned, international humanitarian law also facilitates the realization of a certain number of economic and social rights in situations of armed conflict. Even though international humanitarian law does not, for example, explicitly mention the right to food, many of its provisions are aimed at ensuring that civilians and other persons are not denied food or access to food in armed conflict. Thus, humanitarian law rules on the conduct of hostilities prohibit both starvation of the civilian population as a method of warfare and attacks against or destruction of objects indispensable to the survival of the civilian population.

As is well known, humanitarian law also contains rather detailed provisions on humanitarian assistance to civilian populations when basic needs, including food, are inadequately provided for. Just as important are humanitarian law provisions aimed at ensuring that specific categories of individuals are supplied with food and are able to receive individual and collective relief. The sheer volume of these rules is such that they cannot be covered in this brief review.

The similarity of purpose and, to an extent, of content between international humanitarian and human rights law is also evidenced by the adoption of several treaties containing a mix of international humanitarian law and human rights provisions. The Convention on the Rights of the Child and, in particular, its recent Protocol on the Involvement of Children in Armed Conflict are cases in point. Likewise, the Rome treaty establishing a permanent International Criminal Court pools together violations of separate bodies of law — war crimes, genocide and crimes against humanity.

It should also be mentioned that the ICRC's Study on Customary International Humanitarian Law Applicable in Armed Conflicts, which will be available at the International Conference of the Red Cross and Red Crescent in December this year, confirms the overlapping nature of a number of fundamental guarantees provided for in both humanitarian and human rights law. Among them are some already mentioned safeguards — the prohibition of arbitrary killing, torture, or denial of judicial guarantees — as well as others, including respect for religion and religious practices and respect for family life.

Even though international humanitarian and human rights law share certain features, there are also important distinguishing characteristics stemming from their distinct scope of application. Humanitarian law is the *lex specialis* designed to regulate armed conflict, whether international or non-international. The exceptional circumstances of armed conflict by their very nature demand that no derogations from any of the obligations of the parties to a conflict be allowed if humanitarian law is to serve the purpose of protecting persons. Thus, in contrast to certain rules of human rights law, the totality of humanitarian law norms is non-derogable.

Just as importantly, international humanitarian law binds parties to an armed conflict, which includes state and non-state actors. Humanitarian law defines the identical obligations of parties to an armed conflict (which is not the case under domestic law), in order to provide predictability of behavior and thus maintain the parties' interest in abiding by humanitarian law norms. By contrast, international human rights law governs relations between a state and individuals. As is well known, the issue of how to hold organized armed groups accountable for human rights violations that do not rise to the level of crimes under international law remains contentious.

Another distinguishing feature of international humanitarian law is the extraterritorial applicability of its norms. There is no question, either as matter of logic or of law that the parties to an armed conflict remain bound

by their humanitarian law obligations regardless of where the hostilities triggering humanitarian law application may be taking place. Effective control over territory is not a precondition for parties' compliance with treaty or customary norms governing the conduct of hostilities or the treatment of persons belonging to the adverse party who may have fallen into their hands. The extraterritorial application of international and regional human rights treaty law, by contrast, is still being clarified by means of human rights jurisprudence.

The general complementarity between the different bodies of law aimed at ensuring the protection of the human person does not mean that the law provides clear or sufficiently detailed guidance to those who are meant to apply it in every situation. Challenging questions remain related to determining the thresholds of violence necessary for the application of humanitarian law, to legally characterizing new forms of violence, and to the exact interplay of the different bodies of law regardless of the type of violence involved. Permit me to mention a few specific issues on the agenda which your deliberations, I am confident, will help clarify.

The Geneva Conventions and Additional Protocol I regulate international armed conflicts, defined as those taking place between High Contracting Parties, that is, States. However, acts of transnational violence since September 11th 2001 have led to suggestions that international armed conflicts may, under customary humanitarian law, also involve States and non-State actors. Although the ICRC does not share this view, it will be interesting to examine if there is a legal basis for such an interpretation and the content of the customary norms allegedly involved.

A distinct issue that also merits reflection is the exact scope of international humanitarian law as *lex specialis* in relation to other bodies of law in situations of international armed conflict. Does the *lex specialis* exclude the application of other bodies of law, and if, as we believe, it does not, how does human rights law help ensure the comprehensive protection of persons? Do, for example, persons interned for security reasons in international armed conflict have the right to be assisted by a lawyer in proceedings related to the internment? Can it be said, as a result of developments in human rights law, that the right to appeal in criminal proceedings against protected persons today includes the right of having one's conviction and sentence reviewed by a higher tribunal? Or, is the right to appeal, as defined in article 75 of Additional Protocol I, still limited to a person being advised of the availability of judicial and other remedies that may exist?

If the *lex specialis* nature of humanitarian law in international armed conflicts is well established, the relationship between international humanitarian and other bodies of law is considerably more complex in internal armed conflicts. First, there are significantly fewer treaty rules regulating internal armed conflicts than international armed conflicts, which means that comprehensive protection can only be achieved by recourse to customary humanitarian law, human rights and domestic law. This is quite evident in non-international armed conflicts governed only by article 3 common to the Geneva Conventions. While common article 3 functions as a safety net, providing basic rules on the treatment of persons not taking or no longer taking part in hostilities, it must, as already mentioned, be given specific content by application of other bodies of law in practice.

Furthermore, non-international armed conflicts are those that ordinarily take place within the territory of a state, either between its armed forces and rebel groups or between rebel groups themselves. The existence of an armed conflict — and the application of humanitarian law — does not mean that the government is absolved of its human rights obligations towards persons on its territory or subject to its jurisdiction pursuant to treaty-based or customary human rights law. Human rights law continues to apply alongside domestic law in armed conflict, except for the limited extent to which certain human rights norms may have been derogated from under the relevant treaty provisions governing states of emergency.

The complementary application of different bodies of law in internal armed conflicts does not, however, mean that effective protection of persons in these types of conflicts is provided. In fact, the contrary may be claimed. Often-times governments deny that a situation of violence has risen to the level of non-international armed conflict triggering humanitarian law application. The determination of this issue is not helped by the lack of precise criteria distinguishing sporadic violence from internal armed conflict. I am pleased that one Round Table session will be devoted to an examination of the legal and factual criteria that must be met in order to assert the existence of a non-international armed conflict, and look forward to learning about the outcome of your deliberations.

One form in which the post-September 11th 2001 fight against terrorism is being waged are so-called “extraterritorial self-help operations”, which you will also be discussing. These may be described as law enforcement — or sometimes even military-like actions — taken by one state on the territory of another, with or without the latter’s consent, against individuals or groups

suspected of criminal activity. Given the scarce precedents over the last several decades — at least as a matter of public record — these operations raise a host of legal and protection issues. Among them are questions such as when does an “extraterritorial self-help operation” become an armed conflict and what legal regimes are applicable to such operations? Bearing in mind that the extraterritorial application of human rights law is still in the process of being clarified, dealing with possible protection gaps is also an issue deserving of attention.

Another consequence of the fight against terrorism has been the erosion of States’ compliance with international standards governing deprivation of liberty. Administrative detention without criminal charge or judicial review of persons suspected of terrorist acts is a tool that States have been resorting to, and is one that is often made use of in internal disturbances and tensions and in non-international armed conflicts. Apart from mentioning internment, humanitarian law applicable in internal armed conflicts does not regulate the rights of internees or the procedure to be followed, which means, as earlier explained, that human rights and domestic law must be relied on for guidance. Given the paucity of human rights treaty norms governing this type of detention, the Round Table’s examination of the substantive rules governing administrative detention is, in my view, most timely and welcome.

In this context, it should be remembered that humanitarian law applicable in international armed conflicts does not allow the indefinite detention of protected persons. Prisoners of war and civilian internees must be released, if not before, then no later than after the end of active hostilities. If they have been charged with a criminal offense, protected persons must be released once the sentence imposed has expired, which can obviously occur at a later point in time.

There are a range of other topics of equal importance that will be discussed at the Round Table that I simply do not have time to mention. Permit me, therefore, in closing, to briefly raise two final points. The first concerns complementarity in action between the agencies and organizations, including non-governmental organizations, entrusted with protection activities, and the second concerns the importance of ensuring compliance with the law.

It should not be forgotten that protection of individuals is primarily the responsibility of States and that the tasks associated with protection are assumed by humanitarian and human rights organizations when States fail to meet their obligations. Therefore, before considering, or in parallel to

assisting persons in need, the thrust of efforts of agencies and organizations involved in protection must be to encourage and help governments fully assume their protection duties and, when appropriate, to support them in that direction.

It is important, however, that humanitarian and human rights organizations be aware of and rely on the differences and complementarity between their specific specializations and skills if they are to achieve their goals. Just as the legal protection of persons depends on the complementary application of different bodies of law, it is essential that, in practice, each organization make full use of its specific mandate and mode of actions.

As is well known, the ICRC's primary mode of action is persuasion, through confidential dialogue with governments based on its mandate under international humanitarian law. The primary mode of action of human rights agencies and organizations is to engage with governments in a public dialogue on ways of improving human rights protection. The scope of human suffering in situations of violence is so vast that only a focused effort by the agencies and organizations involved can hope to address even the most basic needs.

Despite the fact that this Round Table is devoted to examining legal standards, I cannot end my statement today without a reminder that persistent work to ensure compliance with existing law continues to be our basic, common task. With this goal in mind, the ICRC recently organized several regional expert seminars — in Cairo, Pretoria, Kuala Lumpur and Mexico City — devoted to examining ways and mechanisms of improving compliance with international humanitarian law during armed conflicts. The final expert seminar in the series will be held in Bruges, Belgium, next week.

Regardless of some of the open questions in the law outlined above for the purposes of this Round Table, we must not forget that the international community has, over many decades, created a significant body of rules that does not permit the existence of any "rights-free zone" in situations of violence. Our abiding challenge is to make a difference to people's lives by ensuring that those norms are applied and by working constantly to defend and expand the scope of individual protection in practice.

# National implementation of international humanitarian law

## Biannual update on national legislation and case law

### January – June 2003\*

#### A. LEGISLATION

##### Armenia

The Criminal Code of the Republic of Armenia was adopted by the National Assembly on 18 April 2003 and published on 2 May 2003. It entered into force on 1 August 2003.<sup>1</sup> The Code establishes a comprehensive system for the repression of war crimes, in accordance with the country's international obligations under the 1949 Geneva Conventions and their Additional Protocols of 1977. It does not distinguish between acts committed in internal and in international armed conflicts and contains general principles of repression such as universal jurisdiction, command responsibility, no impunity on grounds of superior order, no statutory limitation. The Code also contains, in a Special Part, a separate chapter on the repression of genocide, crimes against humanity and war crimes (*Part 13, Chapter 34*).

##### Austria

The Law on Cooperation with the International Criminal Court was adopted on 10 July 2002, published on 13 August 2002 and entered into force on 1 October 2002.<sup>2</sup> It provides the legal basis for compliance with requests from the ICC for the arrest and surrender of suspects and for other forms of assistance, including the handing over of information to the Court. It also provides that persons convicted by the ICC may serve their sentences in Austria and lays down rules for the enforcement of fines and forfeiture measures. Lastly, it includes a provision relating to the punishment of offences against the administration of justice by the ICC.

\* National legislation and case law occurring before or after these dates may also be included in the update. The time frame essentially corresponds to the reception of the relevant material by the Advisory Service on International Humanitarian Law.

## Belarus

The Law of the Republic of Belarus No. 173-3 “On Inclusion of Changes and Amendments into Certain Legislative Acts” of 2003 introduced amendments to Article 136 of the Criminal Code rendering violations of Protocol II to the 1954 Hague Convention for the Protection of Cultural Property a criminal offence. The Law was adopted by the House of Representatives on 11 December 2002 and adopted by the Council of the Republic on 20 December 2002. It was published on 22 January 2003 in the National Register and entered into force on 1 February 2003.

## Belgium

Two laws were adopted in 2003 regarding the punishment of serious violations of international humanitarian law. The first one, amending the 1993 Law on the Punishment of Serious Violations of International Humanitarian Law, received royal assent on 23 April 2003 and was published on 7 May 2003.<sup>3</sup> The second one, which introduces the content of the 1993 law into other laws and abrogates the 1993 law, received royal assent on 5 August 2003 and was promulgated on 7 August.<sup>4</sup>

The law of 23 April 2003 introduced substantial changes in that, first of all, it adds to the list of crimes against humanity three crimes that were previously left out, thus bringing it in line with the Rome Statute. Secondly, it includes a number of violations of IHL and slightly redefines others in order to cover as widely as possible all grave breaches of the Geneva Conventions and their Additional Protocol I, on the one hand, and all war crimes as defined in the Rome Statute, on the other. Moreover, specific provisions were added that criminalize the serious violations of Protocol II to the 1954 Hague Convention which are defined in Article 15 of that Protocol. The law also provides that the international immunity attached to an official position may prevent its application, within the limits set by international law. Other sections of the

<sup>1</sup> Registration No.: HO-528-N, published in *Official Bulletin of Republic of Armenia* No. 25 (260) on 2 May 2003.

<sup>2</sup> Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, *Bundesgesetzblatt für die Republik Österreich*, 13 August 2002, No. 135, pp. 1423-1436.

<sup>3</sup> Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit humanitaire et l'article 144 ter du Code judiciaire, published in *Moniteur Belge* on 7 May 2003, Ed. 2, No. 167, pp. 24846-24853.

<sup>4</sup> Loi relative aux violations graves du droit international humanitaire, published in *Moniteur Belge* on 7 August 2003, Ed. 2, No. 286, pp. 40506-40515.

amended law modify the jurisdiction of Belgian courts over crimes covered by it. In particular, a mechanism was introduced to filter out cases that do not present a minimum link with Belgium.

The law of 5 August 2003 includes the crimes listed previously and introduces them into the Penal Code. It also maintains the imprescriptibility of these crimes by modifying the Penal Code and the Code of Criminal Procedure. Moreover, the following elements have been transposed into the Penal Code: the forms of participation in the commission of a crime; the exclusion of any defence based on interests or necessity of a political, military or national nature, even in the context of reprisals; and the exclusion of the defence of superior orders when, in the specific circumstances, the order could clearly have led to the commission of a serious violation of international humanitarian law. The law also develops further the limitations laid down for its application under the rules of immunity as they derive from international law. It substantially modifies the criteria establishing the jurisdiction of Belgian courts. These last modifications have been introduced into the Code of Criminal Procedure. A link is now required between a case and Belgium for the courts to have jurisdiction over it: this can be territorial, active personality or passive personality jurisdiction. However, the Federal Prosecutor may initiate proceedings relating to a case that has no link with Belgium if so demanded by international treaty or customary law.

### Kazakhstan

Order No. 455 of the Minister of Defence was adopted on 26 November 2002. It basically determines the shape, and orientation (new moon, or moon opened to the left) of the red crescent emblem to be used by the medical services of the armed forces.

### Kyrgyzstan

Order No. 448 "On Measures to Protect the Red Cross and Red Crescent Emblems" was issued by the Minister of Health on 31 October 2002. This order instructs various administrative offices and health care centres to stop using the emblem on ambulances, offices and signboards. It also instructs the administration to arrange for the development of distinctive signs to be used by medical services.

Under Order No. 17-ct "On the Red Cross Emblem", issued on 3 April 2003, the Kyrgyz State Inspection Board on Standardization and Metrology issued an instruction removing, as far as the territory of Kyrgyzstan is concerned,

the requirement of placing a red cross on the labels of medical products from the seven state standards (GOSTs).

### Lithuania

The Criminal Code was adopted on 26 September 2000 and entered into force on 1 May 2003.<sup>5</sup> In its Chapter 8, entitled “Crimes against Humanity and War Crimes” the Code defines, criminalizes and sets the sentences for the crime of genocide and crimes against humanity. It also defines a number of war crimes and provides for penalties for them, namely: the killing, injury, torture or other inhuman treatment of protected persons; the deportation of civilians of an occupied territory; violations of norms of international humanitarian law regarding the protection of civilians and their property in time of war; the destruction of protected objects or the looting of national treasures; marauding; prohibited military attacks; the use of prohibited methods and means of combat; the forced engagement of civilians or prisoners of war in enemy armed forces; undue delay in the repatriations of prisoners of war; undue delay in the release of interned civilians or impediment of the repatriation of other civilians; and illegal use of the red cross or red crescent emblem or of the United Nations emblem.

The Code of Criminal Procedure was adopted on 14 March 2002 and entered into force on 1 May 2003.<sup>6</sup> It includes provisions for the proper cooperation with the ICC.

### Malta

The International Criminal Court Act<sup>7</sup> was passed by Parliament in November 2002. Its purpose is to make further provisions in Malta for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, thereby enabling the State to cooperate with the ICC and to authorize ratification of the Rome Statute. The act introduces genocide, crimes against humanity and war crimes into the Criminal Code, using the same definitions for these crimes as the Rome Statute. It defines the responsibility of commanders and other superiors, and includes extraterritorial jurisdiction whenever one of the above mentioned crimes is committed by a

<sup>5</sup> *Law No. VIII-1968*, published in *Valstybes zinios*, 2000, No. 89-2741.

<sup>6</sup> *Law No. IX-785*, published in *Valstybes zinios*, 2002, No. 37-1341.

<sup>7</sup> International Criminal Court Act to provide for assistance to the International Criminal Court, Act XXIV of 2002, Chapter 453.

person subject to military law, and jurisdiction over any citizen or permanent resident of Malta who, outside the country, conspires to commit such an offence either within or outside Malta. The Act also regulates assistance to the ICC, offences in relation to the ICC, the enforcement of sentences and orders, and arrest and surrender. Lastly, it contains a special clause on State or diplomatic immunity, and provides for an amendment of other Acts.

### Mauritius

On 7 May 2003 the President of the Republic of Mauritius assented to the Geneva Conventions (Amendment) Act 2003. The Act was published in the *Government Gazette* on 17 May 2003, General Notice 722 as Act No. 2 of 2003, and came into force on that same day. It provides for an amendment of the Geneva Conventions Act 1970 to incorporate the 1977 Additional Protocols and allows for the prosecution of grave breaches and offences other than grave breaches, as well as the additional emblems signs and signals of the Protocol.

The Chemical Weapons Convention Act 2003 was likewise approved on 7 May 2003, to give effect to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.<sup>8</sup> The Act stipulates, in particular, that no person shall develop, produce, acquire, stockpile or keep chemical weapons, directly or indirectly transfer a chemical weapon to another person, or use a chemical weapon. It also establishes the Mauritius National Chemical Weapons Authority, which is in charge *inter alia* of supervising and monitoring the enforcement of the Act. In addition, the Act provides for extraterritorial jurisdiction over citizens of Mauritius and any person on board a Mauritian ship or aircraft. Lastly, it specifies the offences, lays down penalties for violations of this Act and provides detailed schedules of listed chemicals.

### Moldova

The Penal Code was adopted on 18 April 2002, promulgated into law on 6 September 2002 and published on 13 September 2002.<sup>9</sup> Its entry into force has been postponed by the Amendment to the Law on Entry into Force No. 1563 of 19 December 2002 which stated that the Criminal Code will

<sup>8</sup> Act No. 3 of 2003, published in the *Government Gazette* on 17 May 2003.

<sup>9</sup> Criminal Code, adopted on 18 April 2002 under No. 985-XV, promulgated by the Decree of the President No. 873-III on 6 September 2002, published in *Monitorul Oficial al Republicii Moldova*, No. 128-129, 13 September 2002, Article 1012 (the Presidential Decree is published under Article 1013).

enter into force together with the Criminal Procedure Code. The two Codes entered into force on 12 June 2003. The Criminal Code contains a specific Chapter on “Crimes against Peace, Security of Humanity and War Crimes” which imposes prison sentence for various crimes, including: genocide; inhuman treatments; planning, preparation, triggering and waging war; mercenary activity; attacks against persons and institutions benefiting from international protection. The new Code also contains a list of specific war crimes in several provisions which have been included both in the Chapter on “Crimes against Peace and Security” (Articles 137, 138, 141 and 143), as well as under the Chapter covering “Military Crimes” (Articles 389 to 392). These provisions cover acts such as torture, inhuman treatment, deportation, perfidious use of the red cross emblem and acts of violence against the civilian population in the area of military hostilities (e.g., robbery, destruction or illegal appropriation of goods under the pretext of war necessity). The Code further includes two provisions containing cross-reference clauses to “use of methods and means of warfare prohibited by international treaties” and to “grave breach of IHL committed during international or internal conflicts”. Crimes against the peace and security of mankind, war crimes and crimes defined in international treaties to which the Republic of Moldova is a party entail criminal responsibility, even if committed outside the territory of Moldova by foreign nationals or stateless persons not residing permanently in the territory of Moldova (Article 11). Furthermore, statute of limitations does not apply to those categories of crimes (Article 60).

### Sweden

The Act on Cooperation with the International Criminal Court<sup>10</sup> was adopted on 25 April 2002 and entered into force on 1 July 2002. This Act covers the arrest and surrender to the ICC of suspects, indicted or convicted persons, legal aid, procedural hindrance, public defence counsel, indemnification and other expenses, cooperation regarding crimes that come under the ICC’s jurisdiction, enforcement of penalties and forfeiture, confession, enforcement of decisions on indemnification for victims, and transport through Sweden of persons deprived of liberty. It also specifies that the Act on Extradition of Offenders (1957:668) applies in some aspects to the surrender to the ICC of suspects, indicted or convicted persons and that the

<sup>10</sup> Act on Cooperation with the International Criminal Court, *The Swedish Code of Statutes*, SFS 2002:329.

Act on International Legal Aid Criminal Cases (2000:562) applies, though with minor adaptations, to legal aid in relation to the ICC.

## **B. CASE LAW**

### Belgium

On 12 February 2003, the Court of Cassation quashed the 26 June 2002 ruling of the Appeal Court's Accusation Chamber in the Sabra and Shatila case. The Court of Cassation held that a prime minister benefits from immunity as long as he is in office and thus cannot be prosecuted during that time, while persons not benefiting from immunity can be prosecuted, wherever they may be. The judgment thus invalidates the interpretation of the 1993 law on universal jurisdiction made by the Accusation Chamber whereby article 12 of the Law of 17 April 1878, requiring the presence of the suspect on the territory, was applicable in relation to offences set out in the 1993 law.

## **C. NATIONAL COMMITTEES ON INTERNATIONAL HUMANITARIAN LAW**

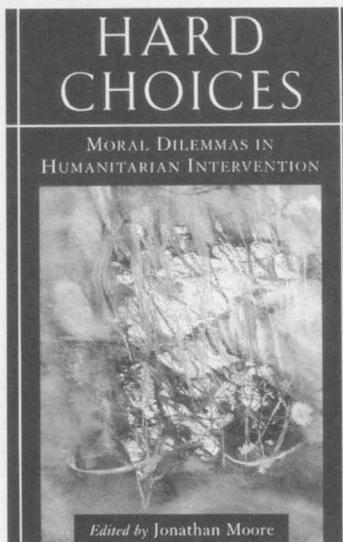
### Kyrgyzstan

Governmental Resolution No. 361 of 18 June 2003 re-established, on a new basis, the Interdepartmental Commission on the Implementation of International Humanitarian Law in the Kyrgyz Republic. The Commission is composed of representatives of the Ministries of Justice, Foreign Affairs, Health, Internal Affairs, Environment and Emergency Situations, Defence, Education and Culture, and of the Social Fund, and in coordination with the National Security Service, representatives of the National Society of the Red Crescent. The role of the Commission consists, among other things, in helping to bring the legislation of the Kyrgyz Republic in line with the provisions of IHL treaties, making suggestions relating to the implementation of IHL, handing down opinions on draft IHL treaties, coordinating the activities of State bodies relating to the incorporation of IHL norms into national legislation, facilitating the dissemination of IHL, gathering information on IHL developments, and participating part in the exchange of information with international bodies.

### Sudan

Presidential Decree No. 48/2003 established a National Commission for IHL on 8 February 2003. The Minister of Justice is in charge of the chairmanship and the Secretariat of the Committee, which comprises representatives of the Ministries of Justice, Foreign Affairs, Interior, Health, Education,

Higher Education and Academic Research, Defence, Humanitarian Affairs, International Cooperation, Information and Communication; representatives of the Council of Ministers; the Chairman of the National Assembly's Law Commission; the Sudanese Intelligence Bureau; the Sudanese Red Crescent Society and independent dignitaries and experts. The Commission's mandate is in particular to review national legislation and determine whether it is in line with IHL and to suggest possible improvements; to set up mechanisms and measures necessary to implement IHL; to approve dissemination plans and programmes; to monitor the implementation of legislation in this area; to study; to approve and/or organize workshops and other activities relating to IHL in Sudan and to participate in conferences or other activities abroad; to study new developments in the field of IHL and make recommendations to the national authorities; to cooperate and exchange experiences with national, regional or international organizations and assist national authorities in drafting required reports; to coordinate government efforts relating to IHL; and to provide the state with advice on IHL.



## **Hard Choices: Moral Dilemmas in Humanitarian Intervention**

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# **Policy on ICRC Cooperation with National Societies**

## **INTRODUCTION**

- A. Purpose of cooperation
- B. Premises for cooperation
- C. Framework for implementing the cooperation policy

## **PART I**

### **CAPACITY-BUILDING COOPERATION WITH NATIONAL SOCIETIES IN THEIR OWN COUNTRIES**

- 1. Strengthening the capacity of National Societies to act in specific areas**
  - 1.1 Purpose and nature of activities
  - 1.2 Implementation and management
  - 1.3 Coordination with the International Federation Secretariat

## **PART II**

### **OPERATIONAL COOPERATION WITH NATIONAL SOCIETIES**

- 2.1 Operational partnerships with National Societies in their own countries**
  - 2.1.1 Purpose and nature of activities
  - 2.1.2 Implementation and management
  - 2.1.3 Coordination with the International Federation Secretariat
- 2.2 Operational partnerships with National Societies working internationally**
  - 2.2.1 Purpose and nature of activities
  - 2.2.2 Implementation and management
  - 2.2.3 Coordination within the Movement

## INTRODUCTION

According to the Statutes of the International Red Cross and Red Crescent Movement, the primary role and mandate of National Societies is to carry out humanitarian activities in their own countries. In addition, within the scope of their resources, they bring aid internationally to victims of various types of emergencies; they do so through the National Society of the country concerned, the International Committee of the Red Cross (ICRC) or the International Federation of Red Cross and Red Crescent Societies. They also contribute to the development of other National Societies which require such assistance, in order to strengthen the Movement as a whole. International activities of the components of the Movement are organized in accordance with the Geneva Conventions, the Movement's Statutes and the relevant resolutions adopted by the Movement's statutory bodies, in particular the Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement ("Seville Agreement", 1997) and the Strategy for the Movement (adopted by the Council of Delegates in 2001).

The ICRC works together with National Societies in both their domestic and international activities, particularly in countries suffering the effects of or prone to conflict or internal strife, but also in times of peace in matters falling under its responsibility according to the Geneva Conventions, the Movement's Statutes and the relevant resolutions adopted by the Movement.

The ICRC and National Societies in their own countries often join forces in activities that they choose to implement together for the benefit of persons affected by conflict or internal strife. In each such operation, various other components of the Movement frequently offer substantial support, which can range from donations of operational resources and expertise to activities on the ground together with the ICRC and/or the host National Society.

This introduction is intended to highlight the purpose of ICRC cooperation within the Movement, the premises on which it should be developed, and the framework for implementing the cooperation policy.

## A - Purpose of cooperation

The ICRC views cooperation with National Societies and their International Federation as important to fulfilling its own mandate and essential to accomplishing the Movement's mission, which is to prevent and alleviate human suffering wherever it may be found, to protect life and health, and to ensure respect for the human being, in particular in times of armed conflict and other emergencies.

The aim of this cooperation is to effectively mobilize and employ the Movement's many resources to achieve the following objectives:

- increased coverage of humanitarian needs;
- more effective management and greater quality in the services provided;
- increased contributions to ICRC operations;
- greater coherence in the work of the Movement as a whole;
- greater use of the Movement network to achieve results on issues of common concern.

While the ICRC provides the human and material resources needed to achieve these objectives, it would like to see the National Societies as a whole contribute in a determined and lasting manner to this effort and display a greater degree of solidarity towards each other.

## B - Premises for cooperation

The cooperation and partnership between the ICRC, the National Societies and their International Federation need to be developed in accordance with the following premises:

- each Movement component has *distinct but closely related and complementary roles*, and has capacities (competencies, material and financial resources, networks and other assets) which can be made available to other components in order to benefit people in need;
- there is a clear *commitment to work together* in the pursuit of established objectives so as to maximize the impact of the entire Movement;
- all the components agree to *place the above commitment on a formal footing*, by establishing well-defined consultation mechanisms, agreements and work contracts;

- there is a commitment to strike a balance between promoting complementary roles and pooling resources, and acknowledging and indeed *emphasizing the importance of each component's role* in relations and contacts outside the Movement (such as with other organizations and the authorities).

This is the form that partnership should take within the International Red Cross and Red Crescent Movement, where each component has its own responsibilities, capacities and activities, which enhance its opportunities for working together successfully with other components of the Movement.

National Societies are referred to as operating National Societies in their own countries and as participating National Societies when they participate in international operations.

## C - Framework for implementing the cooperation policy

The aim of the ICRC's cooperation with National Societies is to promote greater efficiency in the Movement's activities. There are two main ways of achieving this:

- by strengthening in peacetime the National Societies' capacity to take action and provide appropriate services in time of conflict;
- by promoting operational interaction in responding to conflicts in order to maximize the various strengths of the Movement and benefit the persons affected by conflict, internal strife and their direct results.

These broad approaches are reflected in two kinds of cooperation involving three distinct types of relationships between the ICRC and National Societies. They need to be understood as dynamic and interactive processes in which the ICRC and the National Societies contribute to and benefit from each other's work. However, whatever the kind of cooperation, each partner plays its respective role and fulfils its responsibilities differently, depending on the circumstances and the expected results. The two main kinds of cooperation between the ICRC and National Societies are described below.

## **1. Capacity-building cooperation with National Societies in their own countries**

Strengthening a National Society to act in specific areas

The ICRC makes its expertise in certain areas available to all National Societies in order to strengthen their capacity to conduct activities domestically in accordance with their own priorities and plans. This support is intended to help National Societies contribute more effectively to the Movement's work of preventing and alleviating human suffering resulting from conflicts and internal strife.

## **2. Operational cooperation with National Societies**

An operational partnership is a mode of cooperation between two or more Movement components that combine some or all of their resources in order to contribute to common or coordinated objectives in a given operation.

Operational partnerships with National Societies in their own countries

A National Society responds to the needs in its own country that arise from conflict, internal strife or their direct results. When the ICRC fulfils its international mandate in the same country, both components must whenever possible pool their capacities and resources in carrying out humanitarian operations and meeting the population's needs.

Operational partnerships with National Societies working internationally

Many National Societies have the resources and willingness to work internationally together with the ICRC, and are prepared to contribute to operations in various ways ranging from straightforward cash, kind or personnel to complex operational management endeavours in the field.

In most operational situations today, all three types of cooperation outlined above may, and often do, occur simultaneously in one given context, and need to be carefully organized and managed in order to achieve their respective expected results. At all times, cooperation between the ICRC and National Societies should benefit conflict affected persons and result in mutual advantage for the partners concerned.

## PART I

### CAPACITY-BUILDING COOPERATION WITH NATIONAL SOCIETIES IN THEIR OWN COUNTRIES

#### **1. Strengthening the capacity of National Societies to act in specific areas**

##### **1.1. Purpose and nature of activities**

The main purpose of the ICRC's contributions to National Society development is to enhance, in peacetime and especially in situations of armed violence, the capacity of National Societies to accomplish their own mission and carry out specific activities aimed at preventing and alleviating human suffering caused by armed conflict or internal strife. The broader purpose is to reinforce the activities of the Movement as a whole and achieve greater coherence in the conflict-related humanitarian tasks of its various components.

The ICRC's contributions to National Society development respect the Societies' national development plans. The aim of these contributions is to strengthen the capacity of National Societies to provide services that meet identified needs in areas where the ICRC can offer its expertise and support. These areas, which are closely related to the tasks assigned the ICRC in the Geneva Conventions, the Movement's Statutes and the relevant resolutions of the Movement's statutory bodies, include:

- promoting international humanitarian law, and spreading knowledge of the principles, ideals and activities of the Movement among both internal and external audiences;
- preparing for and providing health-care and relief services in situations of conflict and internal strife and preparing to do so, in close coordination with National Societies;
- restoring family links through the worldwide Red Cross and Red Crescent tracing network;
- raising awareness of the dangers of mines and unexploded ordnance;
- supporting National Societies in certain legal matters, such as recognizing or reconstituting the Societies, drawing up or amending Statutes, and preparing for statutory meetings of the Movement.

The ICRC's approach to strengthening National Societies' capacity to act in specific areas involves support, advice and expertise to build up:

- the National Society's sense of programme "ownership" and its commitment to the implementation and sustainability of programme activities;
- the planning and organization of each programme, so as to ensure that activities and services are carried out efficiently and effectively at national and branch levels;
- the skills and expertise among National Society staff needed to carry out and manage programme activities;
- the network of relationships with all parties concerned by specific programmes, so as to enhance performance, improve coordination and set down roots in the working environment outside the Society;
- the availability and suitability of tools and other resources needed to carry out programme activities with professionalism and efficiency.

The ICRC works with any or all National Societies in one or more of the above areas, within the limits of its resources and priorities. It carries out long-term activities and gives support to National Societies in close consultation and coordination with the International Federation's Secretariat.

The Movement's resources and capacities also need to be mobilized for other tasks assigned by the Geneva Conventions and the Statutes to the ICRC, such as the promotion of issues relating to international humanitarian law. The ICRC can perform these tasks by assuming its lead role in this area and providing guidance to National Societies on how, on what issues, and with what people to engage in dialogue on issues of humanitarian concern to the whole Movement.

## 1.2. Implementation and management

Each of the above-mentioned areas of contribution to National Society development has clear objectives. There is room for creativity in the approaches used and in defining activities that suit the local working situation and meet identified needs. National Societies may carry out such activities in a variety of ways, which may differ from country to country. Each Society's own way of doing things must be preserved to the greatest extent possible.

The ICRC seeks to enhance National Society capacity by supporting the Societies as institutions, which have their own structures and decide

on their own levels of operation. Cooperation objectives, plans of action and budgets are set by the Societies in consultation with the ICRC. The National Society designs, manages, implements and monitors the activities carried out by all its units, and assumes final responsibility for them.

The ICRC facilitates implementation of National Society activities by ensuring that suitable technical information is available. It does this in a number of ways:

- by providing National Societies with regular support through its own delegates and other staff with technical expertise, and material and financial assistance in certain areas, to help the Societies carry out their tasks and fulfil their responsibilities;
- by providing National Societies with technical expertise for particular events and activities where their capacities need to be reinforced;
- by mobilizing support from other National Societies in specific areas and retaining a monitoring and support role with respect to the achievement of agreed objectives; and
- by making delegates available for seconding to National Societies, where they can exercise executive, managerial or support responsibilities in programmes or areas agreed upon by the ICRC and the National Society.

Whatever form the ICRC's support may take, it is offered in a spirit of partnership so as to transfer know-how and thus meet the overall objective of strengthening National Societies' capacity to act in a sustainable manner. When the costs of National Society personnel for permanent activities are covered by the ICRC, care should be taken to avoid excessive dependency. From the outset, there should be a strategy for progressive ICRC withdrawal that involves helping the National Society to find alternative sources of support. National Society dependency on ICRC managerial systems should likewise be avoided.

Priority should be given to strengthening the capacity of National Societies to deliver services or carry out activities in the field, while continuing to support their role in programme coordination and management.

Written agreements between the ICRC and each National Society ensure that objectives are clear to each partner and that the working relationship is based on a common understanding of the respective roles and responsibilities. A three- to five-year commitment should be made to providing a given National Society with capacity building support, preferably in a multilateral agreement which should also lay down general objectives

and partnership management procedures. Such an agreement should be supplemented by annual cooperation agreements specifying expected results and setting out plans of action and budgets for one calendar year.

The objective of any agreement concluded between a National Society and the ICRC is for it to be useable as an effective management tool for programme implementation. It is important, therefore, that the terms of the agreement, in particular with regard to particular management procedures, be specific and fully transparent.

### 1.3. Coordination with the International Federation Secretariat

Each National Society has primary responsibility for its own development. The ICRC respects this fact in all its capacity-building endeavours. In many instances, National Societies receive backing from their International Federation Secretariat, which has the lead role in coordinating international support of this kind. The ICRC coordinates and harmonizes the planning and implementation of its own capacity-building activities with those of the Federation and of any Participating National Society concerned.

The ICRC promotes and encourages regular coordination among representatives of all Movement components contributing to the development of a particular National Society. Coordination efforts focus on ensuring that support from the various components is coherent and relevant, and on monitoring the activities receiving support.

In countries or regions where the National Society and/or the Federation develop and apply strategic planning and coordination tools such as national development plans and Cooperation Agreement Strategy, the ICRC takes an active part in the process leading to their drafting and implementation. This process is coordinated with the drafting of bilateral agreements between the ICRC and National Societies mentioned above.

## PART II

### OPERATIONAL COOPERATION WITH NATIONAL SOCIETIES

#### **2.1 Operational partnerships with National Societies in their own countries**

##### 2.1.1. Purpose and nature of activities

National Societies in their own countries and the ICRC have a common responsibility to bring humanitarian aid to persons affected by armed conflicts, internal strife or their direct results. National Societies and the ICRC work together to meet the victims' needs through various programmes and services, most of which are related to emergency medical care (evacuation and first aid in particular), relief and tracing.

The primary objective of cooperation between National Societies and the ICRC, therefore, is to reach conflict affected persons and respond to their needs as quickly and efficiently as possible. However, this should always be done in a way that preserves the National Societies' ability to function as independent institutions and builds further capacity for responding successfully to needs. The vast Red Cross/Red Crescent network, the swiftness with which National Society staff can be mobilized and obtain access to trouble spots, and their intimate knowledge of local conditions are all key assets for the ICRC in the planning and conduct of its operations.

Whenever possible, the ICRC gives priority to operational partnerships with the National Society in the country of operation. The need to preserve the impartiality, independence and neutrality — in both appearance and reality — of components of the Movement in their humanitarian activities and the ability to gain and maintain access to those who need protection and assistance are primary considerations for doing so.

In situations where the ICRC assumes the role of lead agency (as defined in the "Seville Agreement"), it also ensures that the support given by Participating National Societies and the International Federation Secretariat to the host National Society prior to the operation can continue, provided that it is duly coordinated and takes into account the changed operational environment, as well as the capacity and priorities of the National Society.

### 2.1.2. Implementation and management

In an operational partnership between a National Society and the ICRC, activities may be carried out jointly or, in some instances, fully delegated for implementation by the National Society with regular ICRC supervision or monitoring. The National Society's autonomy in managing such activities may vary, depending on its operational capacity and on the conditions on the ground.

In this form of cooperation, which involves meeting the ICRC's own objectives and relying on its budgets, the ICRC itself remains responsible and therefore retains an important role. Opportunities for National Society capacity building should nevertheless be sought whenever possible with ICRC-provided training as required.

The ICRC ensures that the management of additional resources mobilized by the National Society to carry out partnership activities takes into account the fact that their availability is temporary and tied to the emergency situation. In particular, unnecessary liabilities, which may hamper a smooth scaling-down of activities in due time, need to be avoided. All contractual arrangements and managerial procedures need to take this into account.

To formalize the operational partnership, written agreements drawn up and signed between the ICRC and the National Society specify objectives to be achieved, respective roles and responsibilities as well as corresponding plans of action and budgets. Financial, administrative and reporting procedures are clearly agreed upon and form an integral part of such agreements. Other components of the Movement may also be party to such agreements if they are involved in the implementation of the same project or programme.

When working together in an operation on the ground, the ICRC shares its communication and security guidelines with the National Society and encourages it to adopt and implement them in full or in part.

### 2.1.3. Coordination with the International Federation Secretariat

In situations where the ICRC enters into an operational partnership with a National Society in its own country, a considerable strain is put on the Society's managerial and operational capacity. The National Society may need additional support from the International Federation Secretariat to improve its systems and procedures, in addition to maintaining its core programmes and activities.

The ICRC actively promotes International Federation Secretariat support for the development of National Societies' capacity to cope with the administrative and managerial requirements of operational situations. Special agreements may be concluded to this effect between the ICRC and the Federation. These may provide for ICRC support in specific areas of expertise made available by the Federation that are necessary to the smooth running of operations.

In situations where the ICRC assumes the role of lead agency, coordination mechanisms are established comprising all the components of the Movement present and active on the ground. These function with sufficient regularity to serve the needs of the particular operation. Where operational cooperation is intensive and involves a high volume of activities, it may be necessary to set up coordination mechanisms on two different levels, for strategic planning and management on one hand and programme activities on the other.

In situations of conflict and internal strife, the launch of operational activities and of their associated appeals by the International Federation Secretariat takes place in close coordination and in agreement with the ICRC, which is the Movement's lead agency in such circumstances.

## **2.2 Operational partnerships with National Societies working internationally**

### **2.2.1. Purpose and nature of activities**

The aim of operational partnership is to reinforce proximity to persons affected by armed conflict and to enhance the capacity to better address their needs through a coherent and coordinated Movement approach. To achieve this, the ICRC will promote the involvement of National Societies in its field operations and engage an active cooperation with National Societies who can contribute with human, technical and financial resources.

Direct contributions such as cash, staff on loan, goods, materials and equipment in kind are preferred by the ICRC for some types of activities or contexts which require overall coherence and a unified managerial approach. The ICRC manages activities relating to its mandate independently, but counts on direct contributions from National Societies to do so. In return, the ICRC steps up its efforts to defend the interests of these National Societies. In particular, it ensures that their contributions are used in an efficient and relevant manner in accordance with the

expectations of their national stakeholders. Such efforts are undertaken in close consultation with the National Societies concerned.

Partnerships for operations can be formed with National Societies when the ICRC assumes the role of lead agency for the Movement and also in other situations, provided that the Participating National Societies work within the framework of the Movement's Statutes and coordinate their activities with those of either the ICRC or the National Society of the country concerned.

In both circumstances, operational partnerships will be primarily but not exclusively considered for activities which fall within the ICRC objectives and budget. Direct on-site implementation and management of activities by Participating National Societies (in the form of projects or programmes) are supported by the ICRC where they are deemed to be feasible and to contribute positively to the overall operation:

- operational partnerships for carrying out activities planned and budgeted by the ICRC are promoted through various kinds of cooperation (direct contributions of resources, involvement in operational tasks, implementation of programmes or projects, etc.). They are fully integrated into ICRC managerial systems and procedures; the ICRC remains responsible for their successful completion;
- operational partnerships for carrying out activities *not* planned and budgeted by the ICRC may be considered in situations where the environment for humanitarian work is relatively stable or in transitional situations. Such partnerships are not a fundraising tool for ICRC operations and do not require the application of its accountability systems and procedures. The ICRC does, however, seek to ensure operational coherence through overall coordination.

In countries affected by armed conflict or internal strife, the ICRC, in close coordination with the host National Society, may also facilitate and promote the involvement of Participating National Societies so as to support and reinforce the host Society's emergency-response management capacity, thus forming a tripartite operational partnership. Programme continuity is thus, if not ensured, then at least facilitated if and when the ICRC withdraws.

The ICRC may also develop specific and strategic relations and dialogue with selected National Societies proactively in areas of mutual interest and recurrent need, which may include international operations, programmes and other activities.

### 2.2.2. Implementation and management

The organization and management of operational partnerships between the ICRC and Participating National Societies may differ in new and in ongoing operations, particularly where there are managerial and security constraints relating to the theatre of operations. Furthermore, in situations of transition from active hostilities to full re-establishment of peace, the ICRC seeks to ensure continuity in responding to needs through the use of the complementary roles and responsibilities of different components of the Movement.

In *new* operations, the ICRC seeks to engage National Societies from the earliest possible stage — although not necessarily to implement projects through separate managerial structures, which places a considerable burden in terms of coordination and administration on the ICRC delegation set-up. In such situations, the ICRC asks National Societies to provide resources (through rapid mobilization of goods in kind) and identify qualified and experienced specialized personnel to participate in rapid assessments and in the implementation of activities. Such resources are mobilized and deployed under the ICRC managerial set-up and operating procedures. The personnel involved from Participating National Societies may be asked to take part in the planning of programmes and projects in which their National Societies can, in a second stage, take on additional responsibility for implementation.

In the second quarter of each year, the ICRC may invite National Societies to express any interest they may have in working in specific places or on specific themes covered by *ongoing* operations. Any such expressions of interest, which may involve different types of contributions, are duly considered by the ICRC.

In order to manage operational partnerships in a transparent way, all administrative and financial arrangements are settled in advance. Moreover, the partnerships are formalized in written contract agreements. Depending on the terms and conditions of the partnership, any of several types of contracts may be used. All such contracts include the following information:

- the partnership objectives, and timelines for achieving them;
- the budget;
- any specific requirements to be met in implementing the project or activity in partnership;

- an itemized list of each partner's contributions;
- the administrative procedures, in particular in human resources, finance and logistics, adopted to manage the partnership.

When National Societies express an interest in becoming involved in ICRC activities, the ICRC asks for firm commitments, including a positive "statement of capacity".

Different National Societies may jointly form a partnership with the ICRC, as when one National Society is funded by another to carry out a specific activity in partnership with the ICRC. The details of such a relationship are set out in the partnership contract agreement.

### 2.2.3. Coordination within the Movement

The ICRC is responsible for promoting and guiding the contribution and involvement of Participating National Societies in international relief operations in countries affected by armed conflict, internal strife and their direct results. It does so in accordance with the Statutes of the Movement, the "Seville Agreement", other Movement policies relevant to such situations, and in consultation with the National Society of the country concerned.

When the ICRC assumes the role of lead agency, it implements its own activities while also taking responsibility for coordinating the response of the Movement. In both capacities, it considers operational partnerships primarily but not exclusively for activities falling within its own objectives and budget.

Coordinating the work of the components of the Movement in a given operation is a necessity, especially as regards security, communication and logistics.

The ICRC's approach to coordinating Movement activities is defined on a global basis but applied in a particular way in each operation, and revised regularly. Management details are specified in a framework for coordination in the field, which includes:

- information on how the National Societies and the Federation may contribute to the operation with the various resources available to them;
- the services that can be provided by the ICRC to the National Societies and their Federation in the country of operation such as ground and air logistics, accommodation, office space, warehousing, customs clearance, etc.;

- the conditions that must be agreed to and observed by National Societies to benefit from ICRC services. These conditions concern such matters as the management of security, relations with the authorities, coordination with other humanitarian agencies, logistics, relations with the media, the use of the emblem, the use of armed escorts, etc.;
- established coordination mechanisms with clear objectives and specified permanent members, locations, and working procedures, so as to ensure adequate consultation and exchanges of information on operations and programmes.

Participating National Societies or the Federation can benefit from ICRC services when they are involved in activities on the ground, provided they fulfil their obligation to be part of an overall Movement approach. In the event that discussions are not conclusive and a commitment to respect the established framework is not reached, no services are provided by the ICRC.

The deployment of Field Assessment and Coordination Teams (FACT), Emergency Response Units (ERUs), or other modes of operation by the International Federation is closely coordinated with and subject to the agreement of the ICRC field delegation or ICRC headquarters. The ICRC determines how such tools are managed and coordinated with ICRC managerial systems and procedures in a situation of armed conflict or internal strife.

In order to make its own and other objectives clear, the ICRC communicates the approach adopted for each operation, highlighting the main priorities and indicating the possibilities for and the terms and conditions of participation for National Societies and the International Federation Secretariat. Other participating components of the Movement are expected to respect ICRC decisions and contribute to the operation within the framework defined.

# **Doctrine relative à la coopération entre le CICR et les Sociétés nationales**

## **INTRODUCTION**

- A. Objet de la coopération
- B. Prémisses de la coopération
- C. Cadre de mise en œuvre de la doctrine relative à la coopération

## **PREMIÈRE PARTIE**

### **COOPÉRATION AU RENFORCEMENT DES CAPACITÉS DES SOCIÉTÉS NATIONALES À L'INTÉRIEUR DE LEUR PAYS**

- 1. **Renforcement de la capacité des Sociétés nationales d'agir dans des domaines spécifiques**
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  - 2.2.3 **Coordination au sein du Mouvement**

## INTRODUCTION

Conformément aux Statuts du Mouvement international de la Croix-Rouge et du Croissant-Rouge, les Sociétés nationales ont pour mission première et pour mandat de mener des activités humanitaires au sein de leur pays. En outre, dans la limite de leurs ressources, elles apportent leur aide, à l'échelon international, aux victimes de situations d'urgence diverses et ce, par l'intermédiaire de la Société nationale du pays concerné, du Comité international de la Croix-Rouge (CICR) ou de la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge. Pour renforcer le Mouvement tout entier, elles contribuent également au développement des Sociétés nationales qui ont besoin d'assistance. Les activités internationales des composantes du Mouvement sont organisées conformément aux Conventions de Genève, aux Statuts du Mouvement et aux résolutions des organes statutaires du Mouvement, notamment l'Accord sur l'organisation des activités internationales des composantes du Mouvement international de la Croix-Rouge et du Croissant-Rouge (Accord de Séville, 1997), et la Stratégie pour le Mouvement (adoptée par le Conseil des Délégués de 2001).

Le CICR collabore aux activités nationales et internationales des Sociétés nationales, en particulier dans les pays touchés ou plus susceptibles d'être touchés par des conflits ou des troubles intérieurs, mais aussi, en temps de paix, dans les domaines qui sont de sa responsabilité au titre des Conventions de Genève, des Statuts du Mouvement et des résolutions adoptées en la matière au sein du Mouvement.

Il est fréquent que le CICR et la Société nationale à l'intérieur de son pays unissent leurs forces pour conduire des activités qu'ils ont décidé de mettre en œuvre ensemble en faveur des personnes touchées par un conflit ou des troubles intérieurs. Quand une opération de ce type est menée, plusieurs autres composantes du Mouvement offrent généralement un soutien non négligeable, qui peut aller du don de ressources opérationnelles et de compétences à la participation sur le terrain à des activités menées en collaboration avec le CICR et/ou la Société nationale hôte.

Cette introduction vise à mettre en évidence l'objet de la coopération du CICR au sein du Mouvement, les prémisses à partir desquelles cette coopération devrait être développée et le cadre de la mise en œuvre de la doctrine relative à la coopération.

## A – Objet de la coopération

Le CICR considère que la coopération avec les Sociétés nationales et leur Fédération internationale est importante pour l'accomplissement de son mandat et essentielle à la réalisation de la mission du Mouvement, qui est de prévenir et d'alléger en toutes circonstances les souffrances des hommes, de protéger la vie et la santé, et de garantir le respect de la personne humaine, notamment dans les situations de conflit armé et d'urgence.

Le but de cette coopération est de mobiliser et d'utiliser efficacement les nombreuses ressources du Mouvement en vue d'atteindre les objectifs suivants :

- une couverture accrue des besoins humanitaires ;
- une gestion plus efficace et une meilleure qualité des services fournis ;
- des contributions accrues aux opérations du CICR ;
- une plus grande cohérence dans les activités du Mouvement dans son ensemble ;
- une utilisation accrue du réseau du Mouvement en vue d'aboutir à des résultats sur des questions d'intérêt commun.

Dans ce sens, tout en investissant lui-même les ressources humaines et matérielles nécessaires à la réalisation de cet objectif, le CICR souhaite que les Sociétés nationales dans leur ensemble y contribuent de manière décidée et durable, exerçant à ce propos une plus large solidarité entre elles.

## B – Prémisses de la coopération

La coopération et le partenariat entre le CICR, les Sociétés nationales et leur Fédération internationale doivent être renforcés sur la base des prémisses suivantes :

- les composantes du Mouvement ont des missions *distinctes mais complémentaires et étroitement liées*, ainsi que des capacités (compétences, ressources matérielles et financières, réseaux et autres atouts) que chacune peut mettre à la disposition des autres composantes pour en faire bénéficier les personnes dans le besoin ;
- il y a un véritable *engagement à travailler ensemble* à la réalisation des objectifs fixés, de façon à accroître dans toute la mesure du possible l'influence du Mouvement tout entier ;
- toutes les composantes conviennent de *donner une base formelle à l'engagement précité*, par la mise en œuvre de mécanismes de consultation, d'accords et de contrats de travail clairement définis ;

- l'engagement est pris de trouver un équilibre entre, d'une part, la promotion des rôles complémentaires et la mise en commun des ressources, et d'autre part, la reconnaissance et *la mise en relief de l'importance à accorder au rôle de chaque composante* dans les relations et les contacts à l'extérieur du Mouvement (avec d'autres organisations et les autorités, par exemple).

C'est sous cette forme que doit fonctionner le partenariat au sein du Mouvement international de la Croix-Rouge et du Croissant-Rouge, chaque composante ayant ses propres responsabilités, capacités et activités qui renforcent les possibilités qu'elle a de collaborer avec succès avec les autres composantes.

Les Sociétés nationales sont appelées Sociétés nationales opératrices dans leur pays et Sociétés nationales participantes quand elles prennent part à des opérations internationales.

## C – Cadre de mise en œuvre de la doctrine relative à la coopération

La coopération du CICR avec les Sociétés nationales a pour objet de promouvoir une plus grande efficacité des activités du Mouvement. Les deux principaux moyens d'y parvenir sont :

- le renforcement, déjà en temps de paix, de la capacité des Sociétés nationales d'agir et de fournir des services appropriés en temps de conflit ;
- l'encouragement d'une interaction opérationnelle, afin de mobiliser au mieux les différentes forces du Mouvement et d'en faire bénéficier les personnes qui sont touchées par un conflit, des troubles intérieurs et leurs suites directes.

À ces orientations générales correspondent deux formes de coopération qui font intervenir trois types de relations entre le CICR et les Sociétés nationales. Il faut envisager cette démarche comme un processus dynamique et interactif dans le cadre duquel le CICR et les Sociétés nationales apportent leur contribution à l'action de leur partenaire et tirent parti de cette action. Néanmoins, quelle que soit la forme de la coopération engagée, chaque partenaire joue le rôle qui est le sien et assume ses responsabilités de façon différente, en fonction des circonstances et des résultats attendus. Les deux grandes formes de coopération envisagées entre le CICR et les Sociétés nationales sont décrites ci-après.

## **1. Coopération au renforcement des capacités des Sociétés nationales à l'intérieur de leur pays**

Renforcement de la capacité des Sociétés nationales d'agir dans des domaines spécifiques

Le CICR met ses compétences dans certains domaines au service de toutes les Sociétés nationales afin d'en renforcer la capacité de mener des activités dans leur pays, conformément aux priorités et aux programmes qui sont les leurs. Ce soutien a pour objet d'aider les Sociétés nationales à contribuer plus efficacement aux activités qu'engage le Mouvement pour prévenir et alléger les souffrances humaines provoquées par des conflits et des situations de violence interne.

## **2. Coopération opérationnelle avec les Sociétés nationales**

Un partenariat opérationnel est une forme de coopération entre deux composantes du Mouvement ou plus, lesquelles unissent une partie ou la totalité de leurs ressources afin de réaliser des objectifs communs, ou coordonnés, dans le cadre d'une opération donnée.

### **Partenariats opérationnels avec les Sociétés nationales à l'intérieur de leur pays**

Une Société nationale répond, à l'intérieur de son pays, aux besoins qui découlent d'un conflit, de troubles intérieurs ou de leurs suites directes. Quand le CICR remplit son mandat international dans ce même pays, les deux composantes doivent, dans la mesure du possible, mettre en commun leurs capacités et leurs ressources pour mener leurs opérations humanitaires et répondre aux besoins de la population.

### **Partenariats opérationnels avec les Sociétés nationales dans le cadre de leurs activités internationales**

De nombreuses Sociétés nationales souhaitent mener des activités internationales avec le CICR, disposent des ressources nécessaires et sont prêtes à contribuer aux opérations de différentes façons, qui vont du soutien financier, en nature ou en personnel, à des activités complexes de gestion opérationnelle sur le terrain.

Dans la plupart des situations opérationnelles actuelles, les trois formes de coopération précitées peuvent, ce qui est d'ailleurs souvent le cas, coexister dans un contexte précis et doivent être soigneusement gérées afin que les

résultats attendus soient atteints. La coopération entre le CICR et les Sociétés nationales doit, dans tous les cas, profiter aux personnes touchées par un conflit et tous les partenaires doivent en retirer un avantage mutuel.

## PREMIÈRE PARTIE

### COOPÉRATION AU RENFORCEMENT DES CAPACITÉS DES SOCIÉTÉS NATIONALES À L'INTÉRIEUR DE LEUR PAYS

#### **1. Renforcement de la capacité des Sociétés nationales d'agir dans des domaines spécifiques**

##### 1.1. Objet et nature des activités

L'objet principal de la contribution du CICR au développement des Sociétés nationales est de renforcer, déjà en temps de paix, mais tout particulièrement en situation de violence armée, la capacité de celles-ci de remplir leur mission et mettre en œuvre des activités spécifiques pour prévenir et alléger les souffrances humaines provoquées par un conflit armé ou des troubles intérieurs. De façon générale, il est également de renforcer les activités du Mouvement dans son ensemble et de parvenir à une plus grande cohérence des tâches humanitaires menées par ses différentes composantes en cas de conflit.

La contribution du CICR au développement des Sociétés nationales se fait dans le respect des plans nationaux de développement qu'elles ont mis en place. Elle vise à renforcer la capacité des Sociétés nationales de fournir des services qui répondent à des besoins clairement définis dans des domaines où le CICR peut apporter ses compétences et son soutien. Ces domaines, étroitement liés aux tâches que les Conventions de Genève, les Statuts du Mouvement ou les résolutions pertinentes des organes statutaires du Mouvement confèrent au CICR, incluent :

- la promotion du droit international humanitaire et la diffusion des principes, des idéaux et des activités du Mouvement, à l'intérieur comme à l'extérieur de celui-ci;
- la préparation et la fourniture de services de santé et de secours dans les situations de conflit et de troubles intérieurs et la préparation à ces activités, en coordination étroite avec les Sociétés nationales;
- le rétablissement des liens familiaux à travers le réseau mondial de recherches de la Croix-Rouge et du Croissant-Rouge;
- la prévention contre les dangers des mines et des munitions non explosées;
- le soutien aux Sociétés nationales dans certains domaines juridiques tels que la reconnaissance ou la reconstitution des Sociétés, la rédaction ou l'amendement des Statuts et la préparation aux réunions statutaires du Mouvement.

Pour accroître la capacité des Sociétés nationales d'agir dans des domaines spécifiques, le CICR fournit un soutien, des conseils et des compétences visant à renforcer :

- l'« appropriation » des programmes par les Sociétés nationales et l'engagement à mettre en œuvre et à poursuivre de façon durable les activités de ces programmes;
- la planification et l'organisation de chaque programme, de façon à garantir que les activités et les services soient efficacement mis en œuvre tant à l'échelon national que dans les sections;
- les capacités et les compétences du personnel des Sociétés nationales associé à la mise en œuvre et à la gestion des activités des programmes;
- le réseau de relations établies avec toutes les parties concernées par des programmes spécifiques, afin d'améliorer les résultats et la coordination, et de tisser des liens solides dans l'environnement de travail à l'extérieur de la Société;
- la disponibilité et l'adéquation des outils et des autres ressources nécessaires pour réaliser les activités des programmes de façon professionnelle et efficace.

Le CICR collabore avec une ou toutes les Sociétés nationales, dans un ou plusieurs des domaines précités, dans la limite de ses ressources et conformément à ses priorités. Il met en œuvre des activités à long terme et apporte son soutien aux Sociétés nationales en consultation et coordination étroites avec le Secrétariat de la Fédération internationale.

Les ressources et les capacités du Mouvement doivent également être mobilisées au profit d'autres tâches, comme la promotion des questions relatives au droit international humanitaire, qui, en vertu des Conventions de Genève et des Statuts, sont de la compétence du CICR. Le CICR peut remplir ces tâches en assumant le rôle directeur qui est le sien en la matière et en indiquant aux Sociétés nationales comment, sur quels points et avec qui elles doivent engager un dialogue sur des questions humanitaires intéressant le Mouvement tout entier.

## 1.2. Mise en œuvre et gestion

Chacun des domaines précités de contribution au développement des Sociétés nationales doit répondre à des objectifs précis tout en laissant une certaine marge de créativité dans l'approche choisie et la définition des activités, qui doivent être adaptées au contexte local et répondre aux besoins. Les Sociétés nationales peuvent mener ces activités de différentes manières,

qui peuvent varier d'un pays à l'autre. La façon de travailler de chaque Société doit être préservée dans toute la mesure du possible.

Le CICR s'emploie à renforcer les capacités des Sociétés nationales en leur apportant son soutien en tant qu'institutions – des institutions qui ont leurs propres structures et décident dans quelle mesure elles peuvent agir. Les objectifs de la coopération, les plans d'action et les budgets sont fixés par les Sociétés en consultation avec le CICR. Les Sociétés nationales sont responsables de la conception, de la gestion, de la réalisation et du suivi des activités menées par toutes leurs sections et elles en assument la responsabilité ultime.

Le CICR favorise la mise en œuvre des activités par les Sociétés nationales en veillant à ce que les informations techniques appropriées soient disponibles. Il s'y emploie de différentes façons :

- en apportant, par le biais de ses délégués et d'autres collaborateurs ayant des compétences techniques, un soutien régulier ainsi qu'une assistance matérielle et financière dans certains domaines, afin d'aider les Sociétés nationales à remplir leur mission et à assumer leurs responsabilités;
- en mettant à la disposition des Sociétés nationales des compétences techniques dans le cadre d'activités et d'événements particuliers où leurs capacités doivent être renforcées;
- en obtenant l'appui d'autres Sociétés nationales dans des domaines spécifiques, tout en assurant le suivi et le soutien nécessaires pour atteindre les objectifs fixés; et
- en mettant à la disposition des Sociétés nationales des délégués qui seconderont en assumant des responsabilités de direction, de gestion et de soutien dans le cadre de programmes ou dans des domaines ayant fait l'objet d'un accord entre le CICR et la Société nationale.

Quelle qu'en soit la forme, le soutien apporté par le CICR est offert dans un esprit de partenariat et un souci de transfert de compétences, en vue d'atteindre l'objectif général que constitue le renforcement des capacités des Sociétés nationales d'agir de façon durable. Lorsque le CICR prend à sa charge les frais du personnel des Sociétés nationales affecté à des activités permanentes, il convient de veiller à éviter une dépendance excessive. Il faut, dès le départ, prévoir une stratégie de retrait progressif du CICR, et aider la Société nationale à rechercher d'autres sources de soutien. De la même façon, il convient d'éviter toute dépendance des Sociétés nationales à l'égard des systèmes de gestion du CICR.

Il faudrait, en priorité, s'attacher à renforcer la capacité des Sociétés nationales de fournir des services ou mener des activités sur le terrain, tout en continuant de les aider à assumer leur rôle de coordination et de gestion des programmes.

Des accords écrits entre le CICR et chaque Société nationale garantissent que les partenaires sont bien au fait des objectifs et que la relation de travail repose sur une compréhension commune des rôles et responsabilités de chacun. Un engagement de soutien au renforcement des capacités d'une Société nationale devrait être pris sur une durée de trois à cinq ans, de préférence sous la forme d'un accord multilatéral qui fixerait également les objectifs généraux et les procédures de gestion du partenariat. Celui-ci devrait être complété par des accords de coopération annuels qui définiraient les résultats attendus, les plans d'action et les budgets pour chaque année.

Tout accord conclu entre une Société nationale et le CICR doit constituer un instrument efficace de gestion pour la mise en œuvre des programmes. Il est donc important que ses dispositions, notamment celles qui concernent les procédures de gestion, soient précises et tout à fait transparentes.

### 1.3. Coordination avec le Secrétariat de la Fédération internationale

Les Sociétés nationales sont responsables au premier chef de leur développement, un principe que le CICR respecte dans toutes ses initiatives de renforcement des capacités. Dans de nombreux cas, les Sociétés nationales reçoivent le soutien du Secrétariat de leur Fédération internationale qui coordonne le soutien international dans ce domaine. Le CICR coordonne et harmonise la planification et la mise en œuvre de ses propres activités de renforcement des capacités avec celles qui sont menées par la Fédération et par les Sociétés nationales participantes concernées.

Le CICR s'attache à promouvoir et encourager une coordination régulière entre les représentants de toutes les composantes du Mouvement contribuant au développement d'une Société nationale donnée. Les efforts de coordination visent notamment à garantir la cohérence et la pertinence du soutien apporté par les différentes composantes et à assurer le suivi des activités faisant l'objet d'un soutien.

Dans les pays ou régions concernés, le CICR participe activement à la conception et à la mise en œuvre des outils de planification stratégique et de coordination, comme les plans nationaux de développement et les stratégies de coopération, établis ou réalisés par la Société nationale et/ou la Fédération. La coordination de ce processus passe par la signature d'accords entre le CICR et la Société nationale.

## DEUXIÈME PARTIE

### COOPÉRATION OPÉRATIONNELLE AVEC LES SOCIÉTÉS NATIONALES

#### **2.1 Partenariats opérationnels avec les Sociétés nationales à l'intérieur de leur pays**

##### 2.1.1. Objet et nature des activités

Le CICR et chaque Société nationale à l'intérieur de son pays ont pour responsabilité commune de fournir une aide humanitaire aux personnes touchées par un conflit armé, des troubles intérieurs ou leurs suites directes. Les Sociétés nationales et le CICR s'attachent ensemble à répondre aux besoins des victimes par la mise en œuvre de programmes et de services qui, pour la plupart, ont trait aux soins médicaux d'urgence (notamment l'évacuation et les premiers soins), aux opérations de secours et au rétablissement des liens familiaux.

L'objectif principal de la coopération entre les Sociétés nationales et le CICR est donc d'atteindre les personnes touchées par un conflit et de répondre à leurs besoins le plus rapidement et le plus efficacement possible. Il faut néanmoins toujours le faire d'une façon qui préserve la capacité des Sociétés nationales de fonctionner en tant qu'institutions indépendantes et qui renforce leur capacité de répondre aux besoins existants. L'étendue du réseau de la Croix-Rouge et du Croissant-Rouge, la rapidité avec laquelle le personnel des Sociétés nationales peut être mobilisé et accéder aux points chauds, et l'excellente connaissance qu'il a des conditions locales sont autant d'atouts essentiels pour la planification et la direction des opérations du CICR.

Chaque fois que possible, le CICR s'efforce d'établir un partenariat opérationnel avec la Société nationale du pays où il mène une action. Son souci premier est en effet de préserver l'impartialité, l'indépendance et la neutralité – dans la forme et dans la réalité – des composantes du Mouvement dans leurs activités humanitaires, ainsi que d'accéder et de rester présent auprès de ceux qui ont besoin d'une protection et d'une assistance.

Lorsque le CICR assume le rôle d'institution directrice (tel que défini dans l'Accord de Séville), il veille aussi à ce que le soutien que les Sociétés nationales participantes et le Secrétariat de la Fédération internationale apportaient à la Société nationale hôte avant l'opération soit maintenu à la condition qu'il soit correctement coordonné et tienne compte du nouvel

environnement opérationnel, ainsi que des capacités et des priorités de la Société nationale.

### 2.1.2. Mise en œuvre et gestion

Dans le cadre d'un partenariat opérationnel entre une Société nationale et le CICR, les activités peuvent être menées conjointement ou, dans certains cas, entièrement déléguées à la Société nationale, le CICR assurant une supervision ou un suivi réguliers. L'autonomie de la Société nationale dans la gestion de telles activités peut varier en fonction des capacités opérationnelles de celle-ci et de la situation sur le terrain.

Quand la coopération est établie sous cette forme, qui implique que les objectifs à atteindre et les budgets sont ceux du CICR, c'est le CICR qui assume la responsabilité et qui, partant, conserve un rôle important. Il faut néanmoins, dans la mesure du possible, rechercher les moyens de renforcer les capacités de la Société nationale, le CICR assurant une formation en fonction des besoins.

Le CICR veille à ce que la gestion des ressources supplémentaires mobilisées par la Société nationale pour mener les activités de partenariat tienne compte du fait que ces ressources seront temporaires et liées à la situation d'urgence. Les responsabilités inutiles, qui risquent d'entraver une réduction progressive des activités le moment venu, doivent être évitées. Tous les arrangements contractuels et les procédures de gestion doivent en tenir compte.

Pour formaliser un partenariat opérationnel, des accords écrits, établis et signés par le CICR et la Société nationale, définissent les objectifs à atteindre, les rôles et les responsabilités de chacune des parties, ainsi que les plans d'action et les budgets y afférents. Les procédures financières, administratives et d'établissement des rapports doivent être précisées et faire partie intégrante de ces accords. D'autres composantes du Mouvement pourront aussi être parties à ces accords si elles participent à la mise en œuvre du même projet ou programme.

Quand une opération conjointe est menée sur le terrain, le CICR fait connaître ses lignes directrices en matière de communication et de sécurité à la Société nationale, et il l'encourage à les adopter et à les appliquer dans leur totalité ou en partie.

### 2.1.3. Coordination avec le Secrétariat de la Fédération internationale

Lorsque le CICR établit un partenariat opérationnel avec une Société nationale dans le pays de celle-ci, la capacité opérationnelle et de gestion de

la Société est soumise à une pression considérable. La Société nationale peut avoir besoin d'un soutien supplémentaire du Secrétariat de la Fédération internationale pour améliorer ses systèmes et ses procédures tout en préservant ses programmes et activités essentiels.

Le CICR encourage activement le soutien que le Secrétariat de la Fédération internationale apporte au renforcement des capacités des Sociétés nationales concernant les moyens administratifs et de gestion exigés par des situations opérationnelles. Des accords spécifiques peuvent être conclus à cette fin entre le CICR et la Fédération, et prévoir que le CICR apportera son soutien dans des domaines de compétence spécifiques de la Fédération afin de garantir le bon fonctionnement des opérations.

Lorsque le CICR assume le rôle d'institution directrice, des mécanismes de coordination sont établis entre toutes les composantes du Mouvement présentes et à l'œuvre sur le terrain. Ces mécanismes doivent fonctionner de façon suffisamment régulière pour satisfaire aux exigences de l'opération menée. Quand la coopération opérationnelle est intense et porte sur de nombreuses activités, il peut être nécessaire d'établir des mécanismes de coordination à deux échelons différents, à savoir, la planification et la gestion stratégiques d'une part, et les activités des programmes d'autre part.

Dans des situations de conflit et de violence interne, le lancement des activités opérationnelles et des appels correspondants par le Secrétariat de la Fédération se fait en collaboration étroite avec le CICR, qui est alors l'institution directrice du Mouvement.

## **2.2 Partenariats opérationnels avec les Sociétés nationales dans le cadre de leurs activités internationales**

### **2.2.1. Objet et nature des activités**

Les partenariats opérationnels ont pour objet de renforcer l'accès aux personnes touchées par un conflit armé et d'améliorer la capacité de répondre à leurs besoins par une approche cohérente et coordonnée du Mouvement. À cette fin, le CICR encouragera les Sociétés nationales à participer à ses opérations sur le terrain et il établira une coopération active avec celles qui peuvent apporter des ressources humaines, techniques et financières.

Pour certaines activités ou dans certains contextes qui requièrent une cohérence globale et une stratégie unifiée en matière de gestion, le CICR préfère les contributions directes, sous forme d'apport en espèces, de détachement de personnel, de fourniture de biens, de matériel et d'équipement. Le CICR gère ainsi de façon indépendante les activités qui relèvent de son

mandat, tout en comptant pour ce faire sur des contributions directes des Sociétés nationales. En échange, il redouble d'efforts pour défendre les intérêts des Sociétés nationales qui lui apportent leur soutien. Il veille notamment à ce que les contributions soient utilisées de manière efficace et appropriée, en accord avec les attentes des acteurs nationaux. Ces efforts sont entrepris en consultation étroite avec les Sociétés nationales concernées.

Des partenariats opérationnels peuvent être conclus avec des Sociétés nationales quand le CICR est l'institution directrice du Mouvement ainsi que dans d'autres situations, sous réserve que les Sociétés nationales participantes agissent dans le cadre des Statuts du Mouvement et qu'elles coordonnent leurs activités avec celles du CICR ou de la Société nationale du pays concerné.

Dans un cas comme dans l'autre, les partenariats opérationnels sont envisagés principalement pour les activités qui relèvent des objectifs et du budget du CICR, sans pour autant exclure d'autres types d'activités. La mise en œuvre et la gestion des activités sur le terrain par les Sociétés nationales participantes (sous forme de projets ou de programmes) bénéficient d'un soutien du CICR quand il est considéré que ces activités sont réalisables et contribuent de façon positive à l'opération tout entière :

- les partenariats opérationnels visant à mettre en œuvre des activités planifiées et financées par le CICR sont encouragés à travers différentes formes de coopération (apport direct de ressources, participation aux tâches opérationnelles, mise en œuvre de programmes ou de projets, etc.). Ils sont pleinement intégrés aux systèmes et procédures de gestion du CICR, qui assume la responsabilité de leur réalisation ;
- des partenariats opérationnels visant à mettre en œuvre des activités qui *ne sont pas* planifiées et financées par le CICR peuvent être envisagés dans des situations de transition ou de relative stabilité de l'environnement de travail humanitaire. De tels partenariats ne constituent pas un instrument de collecte de fonds pour des opérations du CICR et ne requièrent pas l'application des systèmes et procédures comptables de celui-ci. Le CICR s'efforce néanmoins d'assurer la cohérence opérationnelle par une coordination générale des opérations.

Dans les pays touchés par un conflit armé ou des troubles intérieurs, le CICR peut, en coordination étroite avec la Société nationale hôte, favoriser et promouvoir la collaboration de Sociétés nationales participantes en vue de soutenir et de renforcer, par le biais d'un partenariat opérationnel tripartite, la capacité de la Société nationale hôte de gérer les secours d'urgence.

La continuité des programmes sera ainsi, sinon garantie, du moins facilitée quand, le cas échéant, le CICR se retirera.

Le CICR peut également engager un dialogue et nouer des relations stratégiques spécifiques avec certaines Sociétés nationales afin d'établir une collaboration dynamique dans des domaines d'intérêt commun où les besoins sont récurrents. Ceux-ci peuvent inclure des opérations internationales, des programmes et d'autres activités.

### 2.2.2. Mise en œuvre et gestion

L'organisation et la gestion des partenariats opérationnels conclus entre le CICR et les Sociétés nationales participantes peuvent varier dans les opérations nouvelles ou en cours, notamment quand le théâtre des opérations impose des contraintes de gestion et de sécurité. En outre, dans les situations de transition d'un conflit ouvert au rétablissement de la paix, le CICR veille à ce que les besoins continuent d'être satisfaits, en faisant appel aux rôles et responsabilités complémentaires des différentes composantes du Mouvement.

Dans le cadre des *nouvelles* opérations, le CICR s'efforce de faire participer les Sociétés nationales le plus tôt possible – mais il ne s'agit pas, nécessairement, de mettre en œuvre des projets par le biais de structures de gestion séparées, cela représentant un travail de coordination et de gestion considérable pour la délégation du CICR. Dans de telles situations, le CICR demande aux Sociétés nationales de fournir des ressources (en mobilisant promptement des biens en nature) et d'identifier les membres de leur personnel qui, du fait de leurs qualifications et de leur expérience, peuvent participer à des évaluations rapides et à la mise en œuvre des activités. Ces ressources seront mobilisées et déployées conformément au schéma directeur et aux procédures opérationnelles du CICR. Il peut être demandé au personnel concerné des Sociétés nationales participantes de prendre part à la planification des programmes et des projets qui doivent être mis en œuvre et dont leur Société nationale pourra, ultérieurement, assumer une plus grande responsabilité.

Au cours du deuxième trimestre de chaque année, le CICR peut inviter les Sociétés nationales à indiquer si elles souhaitent travailler dans des lieux précis ou sur des sujets spécifiques faisant l'objet d'opérations *en cours*. Les souhaits exprimés, qui peuvent avoir trait à différents types de contributions, sont dûment examinés par le CICR.

Pour que la gestion des partenariats opérationnels soit transparente, toutes les dispositions administratives et financières sont arrêtées à l'avance.

En outre, les partenariats font l'objet d'arrangements contractuels écrits. Différents types de contrats peuvent être utilisés, suivant les termes et les conditions du partenariat. Tous doivent inclure les informations suivantes :

- les objectifs du partenariat et les délais de réalisation ;
- le budget ;
- toute condition spécifique à respecter dans la mise en œuvre du projet ou de l'activité faisant l'objet du partenariat ;
- une liste détaillée des contributions de chaque partenaire ;
- les procédures administratives relatives aux ressources humaines, aux dispositions financières et à la logistique notamment, qui sont adoptées pour la gestion du partenariat.

Le CICR demande à toute Société nationale souhaitant participer à ses activités, de prendre des engagements fermes et en particulier de faire une « déclaration de capacité ».

Plusieurs Sociétés nationales peuvent établir conjointement un partenariat avec le CICR dans le cas, par exemple, où une Société nationale reçoit un financement d'une autre pour mener une activité spécifique en partenariat avec le CICR. Les détails de cette collaboration figurent dans le contrat de partenariat.

### 2.2.3. Coordination au sein du Mouvement

Il est de la responsabilité du CICR de promouvoir et d'orienter la contribution et la participation des Sociétés nationales participantes aux opérations internationales de secours dans les pays touchés par un conflit armé, des troubles intérieurs et leurs suites directes. Le CICR s'y emploie dans le respect des Statuts du Mouvement, de l'Accord de Séville, des autres orientations du Mouvement relatives à ces situations, et en consultation avec la Société nationale du pays concerné.

Quand le CICR assume le rôle d'institution directrice, il met en œuvre ses propres activités tout en assurant la coordination de l'action du Mouvement. Il peut, à ces deux titres, conclure des partenariats opérationnels couvrant principalement mais non exclusivement les activités qui relèvent de ses objectifs et de son budget.

L'action que mènent les composantes du Mouvement dans le cadre d'une opération doit être coordonnée, notamment en matière de sécurité, de communication et de logistique.

La façon dont le CICR envisage la coordination des activités du Mouvement est établie dans ses grandes lignes mais elle est adaptée à chaque

opération et elle est examinée régulièrement. Les détails relatifs à la gestion d'une opération sont précisés à l'intérieur d'un cadre définissant la coordination sur le terrain et incluent notamment :

- des informations sur la contribution que les Sociétés nationales et la Fédération peuvent apporter à l'opération à travers les différentes ressources dont elles disposent ;
- les services que le CICR peut fournir aux Sociétés nationales et à leur Fédération dans le pays où l'opération est menée (logistique terrestre et aérienne, logement, espaces de bureaux, entreposage, dédouanement, etc.) ;
- les conditions que les Sociétés nationales doivent accepter et respecter pour bénéficier des services du CICR. Ces conditions peuvent porter sur des questions telles que les mesures de sécurité, les relations avec les autorités, la coordination avec d'autres organisations humanitaires, la logistique, l'usage de l'emblème, l'utilisation d'escortes armées, etc. ;
- les mécanismes de coordination établis, y compris une définition précise des objectifs, la liste de leurs membres permanents, leur emplacement et les procédures de travail, afin de garantir une consultation adéquate et des échanges d'informations sur les opérations et les programmes.

Les Sociétés nationales participantes ou la Fédération peuvent bénéficier des services du CICR lorsqu'elles participent à des activités sur le terrain dans la mesure où elles respectent l'obligation de faire partie intégrante d'une approche globale du Mouvement. Le CICR ne fournit aucun service si les discussions n'aboutissent pas et que l'engagement n'est pas pris de respecter le cadre établi.

Le déploiement des Équipes d'évaluation et de coordination sur le terrain (FACT), des Unités d'intervention d'urgence (ERU) ou d'autres mécanismes d'intervention de la Fédération est réalisé en coordination étroite avec la délégation du CICR sur le terrain ou le siège du CICR, et est soumis à leur accord. C'est le CICR qui détermine comment ces mécanismes seront gérés et coordonnés avec les systèmes et les procédures de gestion qu'il met en place dans une situation de conflit armé ou de violence interne.

Dans un souci de clarification des objectifs, à la fois les siens et ceux des autres, le CICR fait connaître l'approche adoptée pour chaque opération en insistant sur les priorités essentielles et en indiquant les possibilités ainsi que les termes et les conditions de la participation des Sociétés nationales et du Secrétariat de la Fédération internationale. Il est attendu des autres composantes du Mouvement qu'elles respectent les décisions du CICR et contribuent aux opérations à l'intérieur du cadre qui a été défini.

## **Launch of an electronic Forum for national committees on international humanitarian law**

Many States have set up National Committees or similar bodies on international humanitarian law (IHL). To assist these bodies in their task of advising and assisting governments in promoting and implementing IHL, the Advisory Service on IHL of the International Committee of the Red Cross (ICRC) has now launched an electronic Forum.

The objective of this new tool is to facilitate the exchange of information and experience between the Committees, to strengthen contacts between them, and to thereby encourage States to take national IHL implementation measures.

The main part of this Forum allows for an interactive discussion on substantive national IHL implementation issues, as well as on the functioning of the Committees.

Other sections offer the possibility to make various documents and information concerning IHL implementation available to the other users, like plans of action, annual reports, announcements relating to regional meetings or to the setting up of a new Committee, etc.

Access to the Forum is essentially limited to members of National Committees on international humanitarian law. However, the ICRC may also grant access to other relevant specialists and organizations. Further information may be obtained from:

Advisory Service on  
International Humanitarian Law  
International Committee of the Red Cross  
19, av. de la Paix  
CH – 1202 Geneva  
Tel.: +41 22 734 60 01  
Fax: +41 22 733 20 57  
E-mail: [advisoryservice.gva@icrc.org](mailto:advisoryservice.gva@icrc.org)

## **Ouverture d'un Forum électronique pour les Commissions nationales de droit international humanitaire**

De nombreux États ont créé des Commissions nationales ou d'autres organes similaires en vue de la mise en œuvre du droit international humanitaire (DIH). Afin d'assister ces organes dans leur tâche de conseil et d'aide aux gouvernements dans la promotion et l'application de ce droit, les Services consultatifs en DIH du Comité international de la Croix-Rouge (CICR) ont maintenant ouvert un Forum électronique.

L'objectif de ce nouvel outil est de faciliter l'échange d'informations, de données et d'expérience entre ces Commissions, de développer les contacts entre celles-ci, et d'encourager ainsi les États à adopter à l'échelon national les mesures nécessaires pour mettre en œuvre le DIH.

La partie principale de ce Forum permet un débat interactif sur des questions portant tant sur des aspects substantiels de la mise en œuvre nationale du DIH que sur le fonctionnement des Commissions.

D'autres sections offrent la possibilité de mettre différents documents et informations concernant la mise en œuvre nationale du DIH à la disposition des autres utilisateurs, tels que des plans d'actions, des rapports annuels, des annonces relatives à des réunions régionales, à la création de nouvelles Commissions, etc.

L'accès à ce Forum est essentiellement limité aux membres des Commissions nationales de droit international humanitaire. Cependant, le CICR peut également permettre à d'autres organisations ou spécialistes intéressés d'accéder au Forum. Des informations supplémentaires peuvent être obtenues auprès des:

Services consultatifs en  
droit international humanitaire  
Comité international de la Croix-Rouge  
19. av. de la Paix  
CH – 1202 Genève  
Tél.: +41 22 734 60 01  
Fax: +41 22 733 20 57  
E-mail: [advisoryservice.gva@icrc.org](mailto:advisoryservice.gva@icrc.org)

## Livres et articles Books and articles

Récentes acquisitions faites par le Centre d'Information et de Documentation, CICR

Recent acquisitions of the Library & Research Service, ICRC

### Afrique – Africa

#### Livres – Books

- **A l'aune de la Guinée équatoriale : colonisation – néocolonisation – démocratisation – corruption** / Max Liniger-Goumaz; préf. de Luis Ondo Ayang. – [Genève]: Ed. du Temps, 2003. – 308 p.: cartes, fotogr.; 22 cm
- **Angola: Prospects for Peace and Prosperity** / Neuma Grobbelaar, Greg Mills and Elizabeth Sidiropoulos. – Johannesburg: South African Institute of International Affairs, 2003. – 112 p.: tabl., carte; 24 cm
- **Preventing torture in Africa: Proceedings of a joint APT–ACHPR Workshop, Robben Island, South Africa, 12–14 February 2002** / ed. by Jean Baptiste Niyizurugero. – Geneva: APT, January 2003. – 197 p.; 21 cm
- **Sierra Leone: Building the Road to Recovery** / Mark Malan... [et al.]. – Pretoria: Institute for Security Studies, March 2003. – 165 p.: tabl.; 21 cm. – ISS Monograph series; no. 80
- **Sustaining the peace in Angola: An overview of current demobilisation, disarmament and reintegration** / João Gomes Porto and Imogen Parsons. – Pretoria: Institute for Security Studies, April 2003. – 90 p.: tabl.; 21 cm. – ISS Monograph series; no. 83

#### Articles

- **Africa at a crossroads** / UNHCR. – Geneva: UNHCR, 2003. – 27 p.; 30 cm. – In: *Refugees*; vol. 2, no. 131
- **Afrique : conflits et développement** / Tom Porteous... [et al.]. – été 2003. – p. 307–350. – In: *Politique étrangère*; no 2
- **Côte d'Ivoire** / Marc Lepape... [et al.]. – Paris: Agence française du développement, été 2003. – p. 5–165. – In: *Afrique contemporaine*; no 206
- **La Côte d'Ivoire en guerre : dynamiques du dedans et du dehors** / coordonné par Richard Banégas et Ruth Marshall-Fratani. – Paris: Khartala, mars 2003. – p. 5–126. – In: *Politique africaine*; no 89
- **“La République de l'Ituri” en République Démocratique du Congo: un Far West ougandais** / Alphonse Maindo Monga Ngonga. – mars 2003. – p. 181–192. – In: *Politique africaine*; no. 89
- **Western and local approaches to justice in Rwanda** / Peter Uvin and Charles Mironko. – Apr.–June 2003. – p. 219–231: tabl. – In: *Global Governance*; vol. 9, no. 2
- **Why the HIV/AIDS pandemic is a structural threat to Africa's governance and economic development** / Alex de Wall. – Summer/Fall 2003. – p. 6–24. – In: *The Fletcher Forum of World Affairs*; vol. 27, no. 2

## Asie – Asia

### Articles

- **Burma's Civil War: A Case of Societal Security** / Alan Collins. – Winter 2002. – p. 119–134. – In: *Civil Wars*; vol. 5, no. 4
- **Bush, China and Human Rights** / Rosemary Foot. – Summer 2003. – p. 167–185. – In: *Survival*; vol. 45, no. 2
- **De l'indépendance du Timor-Oriental** / par Gaël Abline. – 2003. – p. 349–375. – In: *Revue générale de droit international public*; Tome 107, no 2
- **Post-conflict reconstruction of the health system of Afghanistan: Assisting in the rehabilitation of a provincial hospital: Context and experience** / Judith Cook. – April–June 2003. – p. 128–141. – In: *Medicine, Conflict and Survival*; vol. 19, no. 2

## Moyen-Orient – Middle East

### Articles

- **After Saddam** / Kenneth M. Pollack... [et al.]. – July/August 2003. – p. 2–104. – In: *Foreign Affairs*; vol. 82, no. 4
- **Building the New Iraq: The Role of Intervening Forces** / Daniel L. Byman. – Summer 2003. – p. 57–71. – In: *Survival*; vol. 45, no. 2
- **Contemporary practice of the United States relating to international law: Use of military force to disarm Iraq** / ed. by Sean D. Murphy. – April 2003. – p. 419–432. – In: *American Journal of International Law*; vol. 97, no. 2
- **From Victory to Success: Afterwar Policy in Iraq** / Carnegie Endowment for International Peace. – July/August 2003. – p. 49–72. – In: *Foreign Policy*; no. 137
- **Irak, désarmement, intervention militaire: [discours, déclarations de différents chefs d'Etat et du Président du CICR]** / G. Bush, J. Chirac, V. Poutine, G. Schroeder... [et al.]. – 15 mai 2003. – p. 381–389. – In: *Documents d'actualité internationale*; no 10
- **L'échiquier irakien** / Michel Klen. – juillet–août 2003. – p.17–26. – In: *Etudes: revue de culture contemporaine*; T. 39, no 1–2

## Armes – Weapons

### Livres – Books

- **Biological warfare against crops** / Simon M. Whitby. – New York; Basingstoke: Palgrave, 2002. – XV, 271 p.: graph., tabl.; 22 cm. – Global issues
- **The CWC review conference: Issues and opportunities** / Michael Moodie, Isabelle Williams; Chemical and Biological Arms Control Institute. – Washington: CBACI, 2003. – 46 p.; 28 cm. – CBACI special report; 6
- **The future of non-lethal weapons: Technologies, operations, ethics and law** / ed. Nick Lewer. – London; Portland: F. Cass, 2002. – 193 p.: tabl.; 24 cm

– **Völkerrechtliche Probleme des Landmineneinsatzes: Weiterentwicklung des geltenden Vertragsrechts durch das geänderte Minenprotokoll vom 3. Mai 1996 zum UN-Waffenübereinkommen von 1980** / Knut Dörmann. – Berlin: Berliner Wissenschafts Verlag, 2002. – 531 p.; 22 cm. – Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht; 47

## **Assistance humanitaire – Humanitarian assistance**

### **Livres – Books**

– **Basics of International Humanitarian Missions** / ed. by Kevin M. Cahill. – New York: The Center for International Health and Cooperation: Fordham University Press, 2003. – XVIII, 350 p.: graph., tabl., ill.; 23 cm. – International Humanitarian Affairs; no. 1

– **Consultation with and participation by beneficiaries and affected populations in the process of planning, managing, monitoring and evaluating humanitarian action: The case of Angola** / prepared by Paul Robson; ALNAP. – London: ODI, 2003. – 88 p.; 21 cm. – Global study

– **Emergency Relief Operations** / ed. by Kevin M. Cahill. – New York: The Center for International Health and Cooperation: Fordham University Press, 2003. – XVII, 386 p.: graph., tabl., ill.; 23 cm. – International Humanitarian Affairs; no. 2

– **Expanding Global Military Capacity for Humanitarian Intervention** / Michael E. O'Hanlon. – Washington: Brookings Institution, 2003. – XI, 125 p.: graph., tabl.; 23 cm

– **Humanitarian Intervention: Ethical, Legal, and Political Dilemmas** / ed. by J. L. Holzgrefe and Robert O. Keohane. – Cambridge: Cambridge University Press, 2003. – IX, 350 p.; 23 cm

### **Articles**

– **L'humanitaire non gouvernemental face à la guerre** / Béatrice Pouligny. – été 2003. – p. 367–380. – In: Politique étrangère; no 2

– **Le Quai d'Orsay et l'humanitaire** / coord. par Philippe Ryfman. – Paris: Médecins du monde, printemps/été 2003. – p. 14–102. – In: Humanitaire: enjeux, pratiques, débats; no 7

– **The Ethics of Intervention in Self-determination Struggles** / Tom J. Farer. – May 2003. – p. 382–406. – In: Human Rights Quarterly; vol. 25, no. 2

## **Biographie – Biography**

### **Livres – Books**

– **Henry Dunant citoyen de Culoz français de cœur** / Roger Durand et Christiane Dunant. – 2e éd. revue et étoffée. – Genève: Société Henry Dunant, 2003. – 194 p.: fotogr., ill.; 23 cm. – Henry Dunant; n° 18

– **Khrushchev: The Man and his Era** / William Taubman. – New York; London: W.W. Norton, 2003. – XX, 876 p.: cartes, fotogr.; 24 cm

## **Conflicts, sécurité et forces armées – Conflicts, security and armed forces**

### **Livres – Books**

- **Die neuen Kriege** / Herfried Münkler. – 6. Aufl. – Reinbek bei Hamburg: Rowohlt, 2003. – 284 p.: fotogr.; 21 cm
- **Encyclopedia of Modern Conflict** / ed. by Joseph R. Rudolph Jr. – Westport, CO; London: Greenwood, 2003. – 375 p.: fotogr., cartes; 27 cm
- **Guerre et économie** / Institut Choiseul pour la politique internationale et la géo-économie; sous la dir. de Jean-François Daguzan et Pascal Lorot. – Paris: Ellipses, 2003. – 221 p.; 24 cm. – Référence géopolitique
- **Secure02: Security is a State of Mind** / Red Cross Finland, European Commission Humanitarian Aid Office (ECHO). – Helsinki: Finnish Red Cross, 2003. – 168 p.: ill.; 26 cm
- **The Rule of Law on Peace Operations: A Conference of the “Challenges of Peace Operations” Project, Law School, University of Melbourne, 11–13 November 2002** / ed. by Jessica Howard and Bruce Oswald. – The Hague [etc.]: Kluwer Law, November 2002. – XI, 281 p.; 25 cm

### **Articles**

- **Superior Orders and Command Responsibility** / Leslie C. Green. – March 2003. – p. 309–384. – In: *Military Law Review*; vol. 175
- **The Market for Civil War** / by Paul Collier. – May/June 2003. – p. 38–45. – In: *Foreign Policy*; no. 136
- **Un espace de sécurité? = Making space for security?** / Kerstin Vignard. – Genève: UNIDIR, mars 2003. – 79, 77 p.; 30 cm. – In: *Forum du désarmement = Disarmament forum*; 1
- **War** / Lawrence Freedman. – July/August 2003. – p. 16–24. – In: *Foreign Policy*; no. 137

## **Droit international humanitaire – International humanitarian law**

### **Livres – Books**

- **Droit international de l'action humanitaire** / M. Bélanger. – [S. l.]: Juris-Classeur, 2002. – 24 p.; 24 cm
- **Droit international humanitaire** / Michel Bélanger. – Paris: Gualino, 2002. – 150 p.; 24 cm. – Mémentos
- **Protection of Civilians in Armed Conflict** / Maria Neophytou. – Steyning: Wilton Park, November 2002. – 11 p.; 30 cm. – Wilton Park paper

### **Articles**

- **Der Schutz von Kulturgütern bei bewaffneten Konflikten im Lichte jüngster völkerrechtlicher Entwicklungen** / Ronald Pienkny. – 2003. – p. 27–41. – In: *Humanitäres Völkerrecht*; Heft 1

- **L'enseignement du droit humanitaire aux forces armées** / Patrick Suhner. – avril 2003. – p. 31–33. – In: *Revue militaire suisse*; no 4
- **The Evolution of the Law of Belligerent Reprisals** / Shane Darcy. – March 2003. – p. 184–251. – In: *Military Law Review*; vol. 175
- **The International Committee of the Red Cross and International Humanitarian Law** / David P. Forsythe. – 2003. – p. 64–77. – In: *Humanitäres Völkerrecht*; Heft 2
- **The Law of War and Humanitarian Law: A Turbulent Vista** / Edwin M. Smith. – Jan.–Mar. 2003. – p.115–134. – In: *Global Governance*; vol.9, no. 1
- **Toward a Universal Doctrine of Reparation for Violations of International Human Rights and Humanitarian Law** / Abdullahi Ahmed An-Na'im. – February 2003. – p. 27–35. – In: *International Law Forum = Forum du droit international*; vol. 5, no. 1

## **Droit international pénal – International criminal law**

### **Livres – Books**

- **Juridictions pénales internationales: la procédure et la preuve** / Anne-Marie La Rosa; avant-propos de Luigi Condorelli; préf. de Lucius Caflisch. – Paris: Presses universitaires de France, 2003. – XIX, 507 p.; 24 cm. – Publications de l'Institut universitaire de hautes études internationales
- **Stay the Hand of Vengeance: The Politics of War Crimes Tribunals** / Gary Jonathan Bass. – Princeton; Oxford: Princeton University Press, 2000. – IX, 402 p.: cartes; 25 cm

### **Articles**

- **Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism** / Richard J. Goldstone, Janine Simpson. – Spring 2003. – p. 13–26. – In: *Harvard Human Rights Journal*; 16
- **Séance inaugurale de la CPI et prestations de serments des juges**: [discours d'ouverture du Premier Ministre Jan Peter Balkenende et déclaration du secrétaire général Kofi Annan, 11 mars 2003]. – 15 mai 2003. – p. 414–416. – In: *Documents d'actualité internationale*; no 10
- **Some Issues for Sentencing in the International Criminal Court** / Ralph Henham. – January 2003. – p. 81–114. – In: *International Comparative Law Quarterly*; vol. 52, part 1

## **Droit international public – International public law**

### **Livres – Books**

- **L'immunité des dirigeants politiques en droit international** / Alvaro Borghi. – Genève [etc.]: Helbing & Lichtenhahn; Bruxelles: Bruylant, 2003. – XCI, 560 p.; 23 cm. – Collection latine. Série 2; vol. 2

- **Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese** / ed. by Fausto Pocar... [et al.]. – The Hague [etc.]: Kluwer Law International, 2003. – XXVIII, 1032 p.; 25 cm. – International Humanitarian Law Series; vol. 5.
- **United States Hegemony and the Foundations of International Law** / ed. by Michael Byers, Georg Nolte. – Cambridge: Cambridge University Press, 2003. – XVII, 531 p.; 24 cm

## **Droits de l'homme – Human rights**

### **Livres – Books**

- **Human rights defenders on the front line: Annual Report 2002** / The observatory for the protection of human rights defenders; FIDH and OMCT. – [S.l.]: L'Aube, 2003. – 275 p.; 25 cm
- **Intellectual and cultural property rights of indigenous and tribal peoples in Asia** / by Michael A. Bengwayan. – London: Minority Rights Group International, May 2003. – 39 p.: tabl.; 30 cm. – Report
- **La cour interaméricaine des droits de l'homme: analyse de la jurisprudence consultative et contentieuse** / Hélène Tigroudja, Ioannis K. Panoussis. – Bruxelles: Bruylant: Nemesis, 2003. – XXV, 330 p.; 22 cm. – Droit et justice; 41

## **Enfants – Children**

### **Articles**

- **Child Soldiers and Children Associated with the Fighting Forces** / Sarah Uppard. – April–June 2003. – p. 121–127. – In: *Medicine, Conflict and Survival*; vol. 19, no. 2
- **Le Protocole facultatif se rapportant à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés: évolution ou révolution?** / par Fanny Bloise, Audrey Cézard et Jean-Philippe Kot. – automne/hiver 2002. – p. 199–220. – In: *L'observateur des Nations-Unies*; no. 13
- **Niños soldados: comentarios al protocolo facultativo de la convención sobre los derechos del niño relativo a la participación de niños en los conflictos armados** / Maria Rosario Ojinaga Ruiz. – julio–diciembre 2002. – p. 41–103. – In: *Revista española de derecho militar*; 80
- **The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict** / Claire Breen. – May 2003. – p. 453–481. – In: *Human Rights Quarterly*; vol. 25, no. 2

## **Histoire – History**

### **Livres – Books**

- **Das Deutsche Rote Kreuz: eine Geschichte 1864–1990** / Dieter Riesenberger. – Zürich [etc.]: F. Schöningh, 2002. – 785 p., [16] p. de fotogr.: tabl.; 24 cm

- **Jews – Officers and Enlisted Men in the Polish Army, Prisoners of War in German Captivity: 1939–1945** / by Benjamin Meirtchak. – Tel Aviv: Association of Jewish War Veterans of Polish Armies in Israel, 2003. – XII, 108 p.: carte, fac. sim.; 24 cm
- **La Société genevoise d'utilité publique: creuset des réformes sociales à Genève aux XIX<sup>e</sup> et XX<sup>e</sup> siècles** / Jean de Senarclens. – Genève: Slatkine, 2003. – 63 p.: photogr., ill.; 24 cm

## **Organisations internationales, ONG – International Organizations, NGOs**

### Articles

- **Almost There: Another Way of Conceptualizing and Explaining NGO's Quest for Legitimacy in Global Politics** / Bosire Maragia. – 2002. – p. 301–332. – In: *Non–States Actors and International Law*; vol. 2, no. 3
- **Mitigating Conflict: The Role of NGOs** / ed. Henry F. Carey, Olivier P. Richmond. – Spring 2003. – X, 179 p. – In: *International Peacekeeping*; vol. 10, no. 1

## **Réfugiés, personnes déplacées – Refugees, displaced persons**

### Articles

- **Fridtjof Nansen and the International Protection of Refugees: Reports, Documents, Literature Survey** / Ivor C. Jackson... [et al.]. – Geneva: UNHCR, 2003. – III, 189 p.: portrait; 24 cm. – In: *Refugee Survey Quarterly*; vol. 22, no. 1
- **Internal Exiles: What Next for Internally Displaced Persons?** / Thomas G. Weiss. – June 2003. – p. 429–447. – In: *Third World Quarterly*; vol. 24, no. 3
- **Palestinian Refugees** / Robbie Sabel... [et al.]. – February 2003. – 131 p.; 28 cm. – In: *Refuge: Canada's periodical on refugees*; vol. 21, no. 2

## **Terrorisme – Terrorism**

### Livres – Books

- **Anti–terrorism and Peace–building during and after Conflict** / Ekaterina Stepanova. – Stockholm: SIPRI, June 2003. – 50 p.; 25 cm
- **The New Global Terrorism: Characteristics, Causes, Controls** / ed. by Charles W. Kegley. – Upper Saddle River: Pearson Education, 2003. – XIII, 284 p.; 23 cm

### Articles

- **“A War against Terrorism”: What Role for International Law? US and European Perspectives** / Michael Bothe... [et al.]. – Florence: European University Institute, April 2003. – p. 209–378. – In: *European Journal of International Law*; vol. 14, no. 2
- **Humanitarian Law and Counterterrorist Force** / Gerald L. Neuman. – April 2003. – p. 283–298. – In: *European Journal of International Law*; vol. 14, no. 2

- **Le terrorisme nucléaire = Nuclear terrorism** / réd. Kerstin Vignard. – Genève: UNIDIR, May 2003. – 80, 72 p.; 30 cm. – In: Forum du désarmement = Disarmament forum; 2
- **Rebel with a Cause? Terrorists and Humanitarian Law** / Jan Klabbers. – April 2003. – p. 299–312. – In: European Journal of International Law; vol. 14, no. 2
- **Terrorism and the Use of Force** / Geir Ulfstein. – June 2003. – p. 153–167. – In: Security Dialogue; vol. 34, no. 2
- **Which Courts Should Try Persons Accused of Terrorism?** / Detlev F. Vagts. – April 2003. – p. 313–326. – In: European Journal of International Law; vol. 14, no. 2

# Information for contributors



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**LANGUAGE:** Manuscripts should be submitted in either English or French. Texts are published in the original version together with a summary in the other language.

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Manuscripts should be sent to the *Review* as an email attachment (preferably Word or PDF file) or by diskette together with a hard copy to the address below.

**Address:** International Review of the Red Cross  
19, Avenue de la Paix, CH – 1202 Geneva

**Email:** [review.gva@icrc.org](mailto:review.gva@icrc.org)

**Telephone:** (+41) 22 734 60 01

**Fax:** (+41) 22 733 20 57

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**LONGUEUR:** l'article doit compter de 10 à 30 pages dactylographiées en interligne double (3 000 à 12 000 mots). L'auteur est invité à en fournir un résumé de 100 à 200 mots.

**SOUS-TITRES:** l'article ne peut comporter que deux niveaux de sous-titres, le premier en gras et le second en italique.

**NOTES ET RÉFÉRENCES:** elles doivent être présentées sous la forme de notes de bas de page. L'auteur doit suivre les Règles de rédaction – citations et notes de bas de page de la *Revue*, qui peuvent être consultées sur le site web du CICR. Pour accéder à ces informations il faut composer l'adresse suivante <http://www.icrc.org/fre/revue> puis cliquer sur la rubrique Information à l'intention des auteurs de la *Revue* dans laquelle se trouve le lien informatique sur les Règles de rédaction.

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## **International Committee of the Red Cross**

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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