Décembre
December
2004
Volume 86
N° 856

# Revue internationale de la Croix-Rouge

## Débat humanitaire : droit, politiques, action

# International Review of the Red Cross

## Humanitarian Debate: Law, Policy, Action

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

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Geneva

## Mission de la Revue internationale de la Croix-Rouge

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

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

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

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

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

## Mission of the International Review of the Red Cross

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

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

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

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

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

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Un texte paraissant dans la *Revue* n'engage que son auteur. En publiant un article dans la *Revue*, ni la rédaction ni le CICR ne prennent position au sujet des opinions exprimées par son auteur. Seuls les textes signés par le CICR peuvent lui être attribués.

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

# Éditorial

*La* Revue internationale de la Croix-Rouge *a 135 ans, un âge vénérable. Elle témoigne de la continuité de l'organisation à vocation internationale la plus ancienne, une institution qui a porté assistance et protection à d'innombrables victimes des conflits armés. Hier publication officielle et chronique des activités internationales du CICR, la* Revue *traite aujourd'hui de questions juridiques et de politique qui touchent à l'action humanitaire en période de conflit armé.*

*La* Revue *a pour objet de promouvoir la réflexion sur le droit, la politique et l'action humanitaires. Elle a pour ambition d'être à la fois une publication indispensable pour les législateurs et les décideurs qui s'intéressent à l'action humanitaire, et une référence pour les milieux universitaires spécialisés dans le droit et la politique internationaux humanitaires. Pour réaliser ces objectifs, le CICR a décidé de constituer un Comité de Rédaction multidisciplinaire à large participation qui s'attachera à renforcer le caractère universel de la publication, dont il s'emploiera aussi à élargir la portée et à préserver la grande qualité. Le Comité de Rédaction a tenu sa première réunion à Genève en septembre 2004 et a adopté la stratégie éditoriale qui est présentée ci-après.*

- *Tous les numéros à venir de la* Revue *seront centrés sur un thème spécifique touchant au droit, à la politique et à l'action humanitaires et revêtant une importance particulière pour les conflits armés contemporains. Une démarche multidisciplinaire sera encouragée et la publication reflètera les opinions d'un large éventail de secteurs spécialisés extérieurs mais liés au droit et à la politique humanitaires en période de conflit armé (par exemple, les aspects historiques, psychologiques ou sociologiques du respect du droit international humanitaire).*
- *Les articles sur le droit international humanitaire seront toujours l'épine dorsale de la* Revue, *dont le statut de publication spécialisée dans le droit international humanitaire sera consolidé, notamment par le biais d'articles choisis sur cette branche du droit international.*
- *L'anglais sera la langue officielle de la* Revue internationale de la Croix-Rouge. *Néanmoins, les articles rédigés en arabe, chinois, français, russe ou espagnol seront aussi les bienvenus. Les articles sélectionnés qui seront soumis dans une langue autre que l'anglais seront traduits pour publication dans la* Revue. *En outre, une sélection annuelle d'articles présentés dans la* Revue *sera traduite dans d'autres langues. En donnant aux auteurs la possibilité de rédiger leurs contributions dans la langue de leur choix, le Comité de Rédaction offrira au lecteur l'accès à un éventail plus largement représentatif d'opinions sur des aspects essentiels du droit et de l'action humanitaires. Cela contribuera, en retour, à renforcer l'universalité de la* Revue.
- *La* Revue *pourra toujours être consultée gratuitement en ligne, ce qui permettra d'atteindre un lectorat plus large. Le format et la maquette de la version papier et de la version électronique seront modifiés.*

*Le premier numéro de la* Revue internationale de la Croix-Rouge *nouvelle formule sera publié en mars 2005. Il sera consacré à l'une des activités essentielles du CICR, et aura pour thème la « Détention ». La détention dans le cadre de la lutte contre le terrorisme inter-*

*national et la remise en question de l'interdiction de la torture sont des sujets d'une grande actualité. Ce premier numéro cherchera avant tout et surtout à jeter la lumière sur des phénomènes insuffisamment pris en compte dans le débat actuel, tels que le recours croissant aux prises d'otages comme méthode de guerre.*

*Le Comité de Rédaction a défini, pour les numéros suivants, d'autres thèmes se rapportant tout particulièrement au droit et à l'action humanitaires. Jusqu'en juin 2006, la* Revue *aura pour thèmes la «Religion» (juin 2005), les «Armes» (septembre 2005), la «Communication» (décembre 2005), les «Tribunaux internationaux» (mars 2006) et les «Méthodes de guerre» (juin 2006). Ces différents thèmes sont présentés plus en détail dans la section «Faits et documents» de ce numéro.*

*À travers cette publication, le CICR entend promouvoir la connaissance et une analyse critique du droit, de la politique et de l'action humanitaires. Nous espérons que la nouvelle stratégie éditoriale favorisera l'expression d'idées et de convictions profondes, conduisant à une protection accrue des victimes des conflits armés.*

# Editorial

*The* International Review of the Red Cross *has reached the venerable age of 135. It bears witness to the continuity of the oldest organization with an international vocation, an institution which has brought assistance and protection to countless victims of armed conflicts. Formerly the official publication of the ICRC and a chronicle of its international activities, the* Review *now deals with law and policy matters which are of relevance for humanitarian action in times of armed conflict.*

*The aim of the* Review *is to promote reflection on humanitarian law, policy and action. Its ambition is to be an indispensable publication for law- and decision-makers interested in humanitarian work and to serve as a reference for academic circles specialized in international humanitarian law and policy. So as better to achieve these aims, the ICRC has decided to appoint a broadly based multidisciplinary Editorial Board that will help to strengthen the universal character of the journal, to enlarge its scope and to ensure its continuing high quality. The Editorial Board held its first meeting in Geneva in September 2004 and adopted the following editorial strategy.*

- *All future issues will focus on a specific theme concerned with humanitarian law, policy and action of particular importance for present-day armed conflicts. A multidisciplinary approach will be encouraged and the journal will reflect the views of an extensive range of specialized fields transcending, but related to, issues of humanitarian law and policy in times of armed conflict (e.g. historical, psychological or sociological aspects of respect for international humanitarian law).*
- *Articles on international humanitarian law will remain the backbone of the journal. Its status as* the *specialized publication on international humanitarian law will be consolidated, in particular by the ongoing publication of selected articles on this branch of international law.*
- *English will be the official language of the* International Review of the Red Cross. *Nevertheless, articles written in Arabic, Chinese, French, Russian or Spanish are also welcome. Selected articles submitted in a language other than English will be translated for publication in the* Review. *In addition, a yearly selection of articles that appear in it will be published in other languages. By allowing authors to write contributions in their preferred language, readers will be given access to a more widely representative array of viewpoints on key issues of humanitarian law and action. This will in turn consolidate the universality of the* Review.
- *The* Review *will remain free online in order to reach a wide readership. It will be given a new form and layout both in the printed version and on the website.*

*The first issue of the* International Review of the Red Cross *in its new format will come out in March 2005. It will be devoted to one of the core activities of the ICRC and will focus on the subject of "Detention". The question of detention in connection with the fight against international terrorism and the renewed querying of the prohibition of torture are highly topical. Above all, the issue will try to elucidate those aspects which have only insufficiently featured in current debate, such as the increasingly witnessed recourse to hostage-taking as a means of warfare.*

# Editorial

*For subsequent issues the Editorial Board has identified other themes that are highly relevant for humanitarian law and action. In the period until June 2006 the* Review *will thus focus on "Religion" (June 2005 issue), "Arms" (September 2005), "Communication" (December 2005), "International Tribunals" (March 2006) and "Methods of Warfare" (June 2006). These future themes are outlined in the section "Reports and documents" in the present issue of the* Review.

*With this publication, the ICRC intends to promote knowledge and critical analysis of humanitarian law, policy and action. It is hoped that the new editorial strategy will enable expression to be given to ideas and profound convictions leading to better protection for the victims of armed conflicts.*

# Privatisations, sous-traitance et partenariats public-privé : charity.com ou business.org ?

GILLES CARBONNIER *

## Introduction

Depuis quelques années, la privatisation de nombreuses activités considérées jusqu'alors du seul ressort des États suscite de vifs débats : privatisation de la guerre, compagnies militaires privées cotées en bourse, privatisation des services publics, etc. Dans le contexte de la guerre en Irak, les médias et le grand public ont pris conscience de l'ampleur du phénomène des compagnies militaires privées aujourd'hui. Avec plus de 20 000 employés en Irak, ces compagnies représentent le deuxième plus grand contingent étranger après les soldats américains, mais nettement devant les troupes britanniques.

Les institutions publiques de nombreux pays en développement souffrent d'un déficit de légitimité ainsi que de faiblesses structurelles qui les empêchent d'exercer l'ensemble de leurs fonctions et d'opérer sur l'ensemble du territoire national. Dans certaines régions, ce sont les sociétés pétrolières et minières qui sont devenues les principaux pourvoyeurs de fonds dans le domaine de l'éducation, de la santé publique, de la sécurité ou encore des infrastructures. En parallèle, les États sous-traitent une part croissante de leurs fonctions et activités à des entreprises privées par le biais d'appels d'offres sur les marchés publics et de contrats de concession, par exemple pour assurer l'approvisionnement en eau potable de la population, pour gérer le système pénitentiaire ou encore les services de santé. L'avènement du XXIe siècle se caractérise ainsi par une profonde remise en question des prérogatives, responsabilités et domaines d'activités traditionnels des institutions publiques et du secteur privé. En outre, les distinctions et barrières habituelles entre les organisations à but non lucratif et les sociétés privées mues par le profit deviennent floues.

* L'auteur est Conseiller économique et coordinateur des relations avec l'économie privée au Comité international de la Croix-Rouge. Les vues exprimées dans cet article reflètent celles de l'auteur et pas nécessairement celles du CICR.

Les tensions entre forces du marché et intervention étatique ne datent pas d'hier, et les relations entre secteurs public et privé ont été l'objet de débats et combats passionnés dès la révolution industrielle. Aussi, nous portons d'abord un regard historique sur les rapports entre l'État et le secteur privé avant de nous pencher sur le phénomène de privatisation et de sous-traitance dans quelques secteurs d'intérêt particulier par l'action humanitaire: la sécurité et les forces armées, la santé et l'approvisionnement en eau ainsi que le système pénitentiaire.

### L'État dans les pays industrialisés

Avec la révolution industrielle au XVIII^e^ siècle, les forces du marché se sont emparées non seulement du commerce des marchandises, mais aussi des facteurs de production que sont le travail et la terre. La société dans son ensemble risquait ainsi d'être soumise au jeu de l'offre et de la demande avec l'extension des lois du marché aux êtres humains et à leur environnement naturel. De ce fait, les gouvernements des pays industrialisés ont adopté et renforcé une série de mesures au cours du XIX^e^ siècle dans le but d'empêcher que le travail et la terre en tant que facteurs de production ne soient subordonnés aux seules forces du marché[1]. Par contre, les États ont favorisé une première phase de mondialisation des échanges par le biais d'une libéralisation du commerce des marchandises à l'échelle planétaire.

Avec les deux guerres mondiales et la crise des années 1930, les États sont intervenus de manière beaucoup plus directive dans la sphère économique, notamment par le biais de mesures protectionnistes et par la planification des activités de production au titre de l'effort de guerre. Après 1945, le processus de libéralisation des échanges a redémarré sous l'égide de l'Accord général sur les tarifs douaniers et le commerce (GATT). Mais le fait le plus marquant de cette période est sans conteste l'exceptionnelle croissance de la part des dépenses publiques au sein des économies nationales. Comme le montre le tableau ci-contre, la part des dépenses publiques par rapport au produit intérieur brut (PIB) des pays de l'Organisation de Développement et de Coopération économiques (OCDE) est passée de 23 % à 45 % entre 1937 et 2003, avec une croissance particulièrement marquée durant les années 1960-80.

1 C'est ce qu'a démontré Karl Polanyi dans son ouvrage magistral sur les origines politiques et économiques de l'effondrement de la civilisation du XIX^e^ siècle et sur la grande transformation qui a suivi. Cf. Karl Polanyi, *The Great Transformation*, Beacon Press, Boston, 1944.

Part des dépenses publiques dans le PIB, pourcentage

| | 1937 | 1960 | 1980 | 1990 | 1996 | 2000 | 2003 |
|---|---|---|---|---|---|---|---|
| France | 29 | 35 | 46 | 50 | 55 | 53 | 51 |
| Allemagne | 34 | 32 | 48 | 45 | 49 | 48 | 50 |
| Italie | 31 | 30 | 42 | 53 | 53 | 47 | 49 |
| Suède | 17 | 31 | 60 | 59 | 64 | 59 | 53 |
| Suisse | 24 | 17 | 33 | 34 | 40 | 39 | 40 |
| Royaume-Uni | 30 | 32 | 43 | 40 | 43 | 40 | 43 |
| États-Unis | 20 | 27 | 31 | 32 | 32 | 32 | 30 |
| Moyenne OCDE | 23 | 28 | 43 | 45 | 46 | 44 | 45 |

Source: United Nations Online Network in Public Administration and Finance; V.Tanz & L. Schuknecht (2000), *Public Spending in the 20th Century*. Cambridge: Cambridge University Press; Dissemination Standards Bulletin Board, IMF.

Dans les années 1980, la croissance des dépenses publiques s'est nettement ralentie avec l'introduction de réformes libérales et la privatisation de grandes régies publiques, notamment aux États-Unis et au Royaume-Uni. Au milieu des années 1990, la part des dépenses publiques dans le PIB a même connu une légère chute qui s'explique par divers facteurs[2]. Premièrement, les dépenses militaires ont baissé dès la fin de la guerre froide. Deuxièmement, le coût du service de la dette publique a chuté en raison de la baisse des taux d'intérêt, de même que le montant de cette dette grâce au remboursement via les recettes des privatisations d'entreprises publiques. Troisièmement, les réformes fiscales se sont traduites dans de nombreux pays par une baisse de la fiscalité ce qui a obligé la plupart des États à adopter des mesures temporaires pour geler ou réduire les dépenses (par exemple, réductions linéaires sur toutes les lignes budgétaires, gel du nombre d'employés des administrations publiques). L'OCDE note que les dépenses publiques risquent fort de croître à nouveau du fait du vieillissement de la population, de la fin des programmes de privatisation, de la hausse des taux d'intérêt et d'une forte augmentation des dépenses liées à la sécurité suite aux attentats du 11 septembre 2001 aux États-Unis.

De ce fait, les gouvernements des pays de l'OCDE font face à des pressions budgétaires croissantes. Les craintes relatives au financement des dépenses sociales sur le long terme incitent les institutions publiques à adop-

2 Organisation de Développement et de Cooperation économiques, «Enhancing the cost effectiveness of public spending», *OECD Economic Outlook*, No. 74, 2003.

ter de nouvelles pratiques visant à améliorer le rapport coût/bénéfice de l'argent du contribuable investi dans les services publics. Les administrations publiques empruntent des modes de gestion qui ont fait leur preuve dans le secteur à but lucratif *(new public management)*. Les gouvernements empruntent au secteur privé des méthodes de gestion financière, d'audit, de suivi et d'évaluation dans un souci d'efficience et d'efficacité. En outre, les gouvernements recourent directement au secteur privé en sous-traitant de nombreuses tâches qui étaient traditionnellement considérées du ressort exclusif des États: services de sécurité publique, programmes de coopération au développement et de réhabilitation post-conflit, approvisionnement en eau, gestion des hôpitaux, des prisons, etc. Cette évolution pose de sérieux défis d'un point de vue humanitaire, comme nous le verrons plus en détail ci-après.

Les institutions publiques recourent ainsi davantage aux mécanismes du marché pour satisfaire les besoins de leurs «clients». Elles introduisent une concurrence accrue sur les «marchés publics» par le biais d'appels d'offres pour confier à des sous-traitants – entreprises privées et organisations non gouvernementales – la mise en œuvre de diverses politiques publiques. En 1998, les marchés publics des pays de l'OCDE représentaient déjà 20 % du revenu national de ces pays (soit US$ 4 733 milliards). Selon les estimations de l'OCDE, le montant mondial des marchés publics totaux équivalait à 82 % des exportations mondiales de marchandises et de services cette année-là[3].

Il existe encore peu d'études qui évaluent avec précision les gains d'efficacité et les économies que génèrent ces mesures, et les controverses sur le bien-fondé de ces politiques connaissent un regain d'intensité. Comme nous le verrons plus tard, le recours systématique aux approches et méthodes de gestion du secteur privé peut s'avérer contre-productif, voire dangereux, lorsqu'il s'applique à des phénomènes sociaux complexes tels que les processus de paix ou la reconstruction de sociétés déchirées par la guerre, même si ces méthodes ont fait leurs preuves dans le cas d'activités commerciales.

### ... et dans les pays en développement

La part des dépenses publiques dans le PIB des pays en développement est plus faible que dans la zone OCDE: en 1993, le taux était de 24 % pour les pays à moyen revenu et 28 % pour les pays à faible revenu, dont une part substantielle absorbée par le service de la dette[4]. Les réformes économiques

3 Source: *OECD Journal on Budgeting*, Vol. 1, No. 4.

4 Source: IMF, *Government Finance Statistics Yearbook*, 1993.

d'inspiration libérale prônées par le Fonds monétaire international (FMI) et la Banque mondiale ont sans conteste contribué à contenir les dépenses publiques des pays en développement à des niveaux inférieurs à ceux des pays industrialisés.

Part des dépenses publiques dans le PIB, pourcentage

| | 1992 | 1994 | 1996 | 1998 | 2000 | 2002 |
|---|---|---|---|---|---|---|
| Brésil | 17 | 18 | 19 | 19 | 19 | 20 |
| Colombie | 12 | 14 | 18 | 20 | 21 | 21 |
| Guatemala | 6 | 6 | 5 | 6 | 7 | 7 |
| Inde | 11 | 11 | 11 | 12 | 13 | 13 |
| Indonésie | 10 | 8 | 8 | 6 | 7 | 8 |
| Rwanda | 13 | 8 | 10 | 9 | 9 | 9 |
| Chine | 14 | 13 | 12 | 12 | 13 | N/A |
| Moyenne UE | 45 | 51 | 51 | 48 | 46 | 47 |

Source: United Nations Online Network in Public Administration and Finance; Dissemination Standards Bulletin Board, IMF; Bulletin of the European Union, European Commission

A la fin de la guerre froide, le retrait du soutien des grandes puissances du Nord à leurs alliés au Sud conjugué à l'imposition de programmes d'ajustement structurel ont accru le risque de voir les États les plus faibles s'effondrer. L'affaiblissement des institutions étatiques est devenu une préoccupation majeure dans les années 1990[5]. Si ce risque ne s'est pleinement matérialisé que dans le cas de la Somalie, il n'en demeure pas moins que nombre d'États se sont affaiblis au point de ne plus pouvoir fournir les services publics de base ni garantir la sécurité de la population sur l'ensemble du territoire national. C'est dans ce contexte que des opérateurs privés se sont graduellement substitués aux États pour répondre à la demande des individus et des organisations capables de payer un prix suffisant pour préserver leur propre sécurité et bénéficier de services essentiels (par exemple santé, éducation).

Ce phénomène a fortement affaibli la légitimité de l'État aux yeux d'une population privée de services publics essentiels, ce qui n'incite pas les contribuables à s'acquitter de leurs obligations fiscales ni les entrepreneurs à

5 Cf. par exemple William Zartman, ed., *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, Lynne Rienner, Boulder, 1995.

opérer dans le secteur formel qui est soumis au fisc. Pris dans un cercle vicieux, l'État est alors incapable de récolter les fonds nécessaires au financement des services publics, ce qui l'affaiblit encore plus et érode le capital de confiance que la population peut encore avoir envers les institutions publiques.

### Rôles et responsabilités du secteur privé

Aujourd'hui, les entreprises transnationales semblent mieux placées que les États pour opérer de manière coordonnée au niveau planétaire, prendre rapidement des décisions et les mettre en œuvre simultanément sur plusieurs continents. Principaux agents de la mondialisation, les sociétés privées jouissent de droits et de liberté accrus suite à la libéralisation des règles commerciales et des régimes d'investissement. De plus, les grandes multinationales ont acquis une taille et un poids financier bien supérieurs à la majorité des économies nationales. Suite aux fusions et acquisitions des vingt dernières années, une trentaine d'entreprises multinationales se sont hissées parmi les cent plus grandes économies mondiales[6]. Leurs seuls bénéfices nets dépassent les revenus nationaux cumulés de nombreux pays à faible revenu. L'investissement direct étranger des entreprises transnationales dans les pays en développement a surpassé dès 1994 le total de l'aide publique au développement (environ US$ 60 milliards) pour dépasser la barre des US$ 200 milliards en 2000.

Dans ce contexte, il n'est pas surprenant que diverses organisations internationales et acteurs de la société civile se tournent vers les entreprises pour qu'elles assument une plus large responsabilité dans la résolution de problèmes globaux tels que la lutte contre la pauvreté, la pénurie d'eau, le réchauffement planétaire, ou encore les conflits armés, ainsi que l'illustrent les exemples ci-après:

- Le Secrétaire général des Nations Unies a institué en 2003 la Commission du secteur privé et du développement, coprésidée par le Premier ministre canadien Paul Martin et l'ancien Président du Mexique Ernesto Zedillo. La Commission a rendu son rapport en mars 2004 intitulé «Libérer l'entreprenariat: mettre le monde des affaires au services des

6 Vingt-sept entreprises transnationales figuraient déjà parmi les plus grandes économies de la planète en 2000, en comparant la valeur ajoutée générée par ces firmes au PIB des pays. En considérant le chiffre d'affaires des entreprises, une cinquantaine de firmes se retrouveraient parmi les cent plus grandes économies (cf. UNCTAD's *World Investment Report*, 2000 & 2002).

pauvres». Les recommandations de la Commission insistent sur le fait que l'initiative privée, les petites et moyennes entreprises locales et le secteur informel représentent un immense potentiel pour lutter contre la pauvreté et favoriser le développement économique. Elles appellent les multinationales à appuyer les entrepreneurs et les petites entreprises au niveau local par la stimulation de la demande, les partenariats et le transfert de compétences et de technologies.

- Le Nouveau Partenariat pour l'Afrique (NEPAD) met lui aussi l'accent sur le rôle central des entreprises et de l'investissement privés pour le développement du continent africain.
- Le Président de la Banque mondiale a souligné devant le Conseil de sécurité des Nations Unies le 15 avril 2004 que le secteur privé a un rôle majeur à jouer dans la réduction des conflits et la construction de la paix, par exemple en offrant un emploi et des perspectives professionnelles aux jeunes générations de pays ravagés par les conflits. Les questions économiques occupent par ailleurs une place croissante dans les négociations de paix, tels que les accords de paix au Soudan ou au Guatemala le démontrent[7].
- Devant l'échec de la diplomatie interétatique traditionnelle pour s'attaquer efficacement aux grands défis globaux qui menacent la planète, les «partenariats public-privé» se multiplient depuis quelques années, par exemple dans la lutte contre la pandémie du VIH/SIDA ou la préservation des forêts. Ainsi, l'ensemble des acteurs concernés par une problématique donnée s'organise en réseau *ad hoc*, à commencer par les entreprises dont le savoir-faire, la capacité d'action et les technologies représentent un atout majeur[8].

Devant les attentes croissantes des Organisations non gouvernementales (ONG) et des consommateurs, une majorité des grandes sociétés transnationales ont souscrit au concept de responsabilité sociale de l'entreprise et ont pris une série d'engagements volontaires au titre de la protection de l'environnement et du respect de diverses normes reconnues en droit international public. Les grandes industries minières et pétrolières ont par exemple annoncé en décembre 2000 qu'elles souscrivaient à l'objectif de respecter les

7 L'Accord sur le partage des richesses conclu par le Gouvernement soudanais et le SPLM/SPLA en janvier 2004 fixe un cadre pour la gestion et la répartition de la manne pétrolière durant une période intérimaire. Au Guatemala, les accords de paix conclus en 1996 entre le Gouvernement et la guérilla prévoyaient une hausse des recettes de l'État par le biais d'une fiscalité accrue selon un barème progressif.

8 Jean-François Rischard, *High Noon: Twenty Global Problems, Twenty Years to Solve Them*, Basic Books, New York, 2002.

droits de l'homme et le droit international humanitaire, et d'en promouvoir le respect[9]. Le Secrétaire général des Nations Unies a proposé en 1999 aux dirigeants du monde des affaires un Pacte mondial (*Global Compact*) qui invite les entreprises à s'engager à respecter diverses normes dans le domaine des droits de l'homme, des droits sociaux et de l'environnement. Cinq ans après, plus de 1 700 sociétés privées y ont souscrit. Plus de la moitié de ces firmes sont originaires de pays en développement alors que ces derniers avaient eu jusqu'alors tendance à résister à l'imposition de normes sociales et environnementales considérée comme une tentative de protectionnisme déguisé de la part des pays riches.

Les dépenses «philanthropiques» des grandes entreprises au titre de l'aide humanitaire et de la coopération au développement ont aussi connu une croissance notable ces dernières années. Les multinationales qui travaillent dans des régions où les services publics font défaut ont mis en œuvre de larges programmes en faveur des communautés locales afin de renforcer leur acceptabilité sur le terrain et de palier aux carences des institutions publiques. Certaines entreprises sont devenues *de facto* les premiers bailleurs de fonds dans le domaine de la santé ou de l'éducation, devant les gouvernements, les agences bilatérales de coopération au développement et les ONG. La compagnie minière Freeport McMoran et Shell ont ainsi investi des montants supérieurs à US$ 60 millions par an en Papouasie de l'Ouest et dans le Delta du Niger respectivement. Ces efforts s'inscrivent dans une politique de gestion des risques selon laquelle il est non seulement important de maintenir une image positive de l'entreprise auprès des diverses «parties prenantes» de la firme, mais aussi de s'assurer que les communautés locales ne soient pas tentées de mettre en péril la rentabilité des investissements réalisés sur le terrain par des actions violentes.

Les réponses apportées par le secteur privé à des problématiques sociales complexes sont susceptibles d'aviver les tensions au lieu de les apaiser. Une étude confiée par Shell à un groupe d'experts en résolution des conflits a examiné en 2003 l'impact des activités de la firme pétrolière sur la paix et la sécurité dans le Delta du Niger. Selon l'agence de presse Bloomberg, l'étude conclut que les activités de Shell ont exacerbé les tensions et la violence dans la région plutôt que de les réduire. Shell ne souscrit pas aux recommandations de l'étude qui préconise une cessation pure et simple des activités de la firme pétrolière dans le Delta du Niger («on-shore»), mais affirme vouloir modifier ses pratiques, y compris en matière de développement communautaire et de

9 Voluntary Principles on Security and Human Rights for Extractive Industries, 20 December 2000.

gestion de la sécurité afin de contribuer à réduire les conflits[10]. Tout comme les agences de développement et les organisations humanitaires avant elles, les entreprises apprennent à leur tour que des projets de soutien aux communautés locales réalisés avec les meilleures des intentions peuvent avoir des effets négatifs, opposés aux objectifs initiaux. Ces firmes sont toujours plus nombreuses à engager des spécialistes de l'humanitaire et du développement pour gérer leurs projets et modifier certains comportements à l'intérieur de l'entreprise.

D'autre part, diverses sociétés transnationales offrent la possibilité à leurs collaborateurs de consacrer une partie de leur temps de travail à de «bonnes œuvres», notamment en offrant leurs services gratuitement ou à bas prix à des organisations caritatives. Les objectifs sont divers: conquérir des parts de marchés au sein du secteur à but non lucratif en plein expansion, améliorer l'image de l'entreprise, motiver et fidéliser les employés, acquérir de nouvelles compétences susceptibles d'être utiles à l'entreprise, etc.

Finalement, une série de cabinets de consultants et de sociétés privées se sont spécialisés dans le soutien aux réformes économiques et à la privatisation, la coopération au développement, la réhabilitation post-conflit et l'aide humanitaire. Abt Associates s'est par exemple vu confier par l'Agence américaine de coopération au développement USAID en 2003 un contrat visant à assurer la prompte réhabilitation du système de santé en Iraq pour plusieurs dizaines de millions de dollars. Parmi les autres sociétés privées engagées dans la réhabilitation post-conflit figurent essentiellement des firmes américaines telles que Chemonics International, PADCO Inc. et DPK consulting qui fournissent des conseils et un appui dans divers domaines, y compris en matière de gouvernance et de privatisations d'organismes publics, que ce soit en Irak, en Afghanistan ou au Soudan.

### Émergence du «tiers secteur»

L'un des phénomènes les plus frappants de ces dernières décennies est l'émergence des ONG dans la sphère publique, que ce soit au niveau du débat politique, de la défense des droits de groupes vulnérables ou de l'aide humanitaire. Le Comité d'aide au développement de l'OCDE estime les dépenses des ONG à US$ 7,6 milliards pour 2001[11]. Selon le rapport *Global*

10 Source: <http://quote.bloomberg.com/apps/news?pid=10000085&sid=aC3m6AFYzJjM&refer=europe> (site visité le 03.12.2004).

11 Source: Development Co-operation Committee (DAC) Statistics, <http://www.oecd.org/department/0,2688, en_2649_34447_1_1_1_1_1,00.html> (site visité le 03.12.2004).

*Humanitarian Assistance 2003*, l'aide humanitaire fournie par les ONG dépassait US$ 2,5 milliards en 2001. Les plus grandes organisations gèrent des sommes plus élevées que les dépenses globales d'aide au développement de divers pays de l'OCDE. Elles sont actives dans un nombre plus élevé de pays que certains gouvernements donateurs, et ont une influence politique égale ou supérieure à de nombreux ministères d'aide au développement[12].

Corollaire de la tendance des États à sous-traiter ou à gérer à distance leurs programmes d'aide humanitaire et de coopération au développement, la part des États dans le financement des activités internationales des ONG est passée de 1,5 % en 1970 à plus de 40 % en 1998[13]. A titre d'exemple, 44 % des dépenses du Haut Commissariat des Nations Unies pour les Réfugiés en 2001 ont transité par des ONG. Étant donné les défis sécuritaires et les difficultés d'accès que rencontrent les acteurs humanitaires et agents de la reconstruction dans des contextes tels que l'Afghanistan ou l'Irak, ils sous-traitent à leur tour l'exécution de leurs programmes à des «ONG» locales qui se révèlent souvent tenir plus de l'entité commerciale que de l'organisation à but non lucratif. En l'absence d'alternatives économiques viables, nombre d'entrepreneurs afghans ou irakiens créent en effet des ONG afin de bénéficier de la manne financière des programmes de reconstruction en sous-traitance. Si ce mécanisme permet d'offrir du travail et un revenu temporaire à une petite partie de la population, voire de leur fournir de nouvelles compétences et de nouvelles technologies, le développement économique à long terme ne saurait reposer sur l'émergence d'une multitude d'ONG locales dont le financement sur la durée est condamné à se tarir.

Sous la pression des gouvernements donateurs, eux-mêmes soumis à de fortes exigences d'efficacité et de *reporting*, les ONG adoptent elles aussi des méthodes managériales et financières inspirées du monde des affaires: planification et budget en fonction d'objectifs prédéfinis, recherche du meilleur rapport coût/bénéfice, suivi et évaluation systématique de l'impact des programmes par le biais d'indicateurs quantitatifs, etc.

Les organisations humanitaires travaillent très fréquemment en partenariat avec des organisations locales publiques ou privées, que ce soit pour soutenir le système pénitentiaire, les services de santé ou le système d'adduction d'eau. Dans ce contexte, il devient impératif pour les organisations humanitaires de maîtriser les outils de base de gestion administrative et

12 Source: < http://www.globalhumanitarianassistance.org > (site visité le 03.12.2004).

13 Robin Davies, «The Relief Industry», in ICRC (ed.), *Forum – War, Money and Survival*, CICR, Genève, 2000.

financière pour soutenir les institutions locales partenaires et comprendre comment les fonds et le matériel qu'elles apportent sont alloués au sein des systèmes locaux. Une bonne compréhension des contraintes budgétaires et institutionnelles des partenaires locaux permet aussi d'assurer une certaine pérennité des projets une fois que les acteurs extérieurs quittent les lieux après la crise.

Sur cette toile de fond, les cloisons entre le monde des affaires et le monde associatif se lézardent et les échanges entre cadres d'entreprises privées et d'organisations humanitaires se multiplient. L'ONG britannique Oxfam a ainsi fait appel à des managers confirmés issus de grandes entreprises plutôt qu'à des experts de l'aide humanitaire pour prendre la direction de ses programmes internationaux et les gérer avec efficacité dans des pays en développement[14].

## Enjeux et implications pour l'action humanitaire

Les phénomènes décrits ci-dessus posent de sérieux défis à une organisation humanitaire telle que le Comité international de la Croix-Rouge (CICR). Nous proposons de les examiner plus en détail en se penchant sur l'émergence des compagnies militaires privées dans les conflits contemporains, ainsi que sur la privatisation de l'approvisionnement en eau ainsi que du système carcéral et des services de santé.

### Privatisation de la guerre

Le marché des services de sécurité est en pleine expansion depuis la fin de la guerre froide. Selon les experts, le chiffre d'affaires des compagnies militaires privées dépassait déjà les US$ 100 milliards en 2002, soit avant le conflit irakien. La multiplication des ces firmes actives en Irak depuis l'intervention des Forces coalisées a suscité un intérêt accru de la part des médias pour ce phénomène. L'assassinat d'employés américains de la firme Blackwater à Fallujah ainsi que l'implication d'employés de CACI International et Titan Corp. dans les mauvais traitements infligés à des détenus dans la prison d'Abu Ghraib ont mis en lumière la gamme de plus en plus variées de services offerts par les compagnies privées: soutien logistique, formation et entraînement des forces armées et de la police, interrogatoires et travail d'intelligence, sécurisation de lieux stratégiques, protection rapprochée de personnalités du monde politique et économique, participation directe aux hostilités, etc.

14 Nick Pandya, «Oxfam Shops for Managers», *The Guardian*, 26 June 2004.

La motivation première de ces firmes reste évidemment l'appât du gain, ce qui ne va pas sans poser des questions d'ordre éthique dans le cadre de conflits armés dans lesquels la majorité des victimes sont des civils. Suivant une rationalité purement économique, ces sociétés ont intérêt à voir la demande pour leurs services croître par le biais d'une hausse du sentiment d'insécurité, voire d'une multiplication des conflits armés. La compression des coûts visant à maximiser leur profit suite à la conclusion d'un contrat peut aussi avoir divers effets négatifs d'un point de vue humanitaire. Outre cette question d'ordre éthique, Peter Singer relève dans un ouvrage de référence sur l'émergence de l'industrie militaire privée[15] que le pouvoir législatif risque de perdre le contrôle qu'il est à même d'exercer sur l'engagement de troupes à l'étranger en raison des contrats de sous-traitance que le pouvoir exécutif conclut directement avec les sociétés privées de sécurité.

Une organisation humanitaire telle que le CICR n'a pas pour habitude de s'exprimer sur la légitimité des parties engagées dans la conduite des hostilités. De ce fait, la question n'est pas tant de s'exprimer sur le phénomène de privatisation en tant que tel. La principale préoccupation du CICR est plutôt de s'assurer que la privatisation d'activités qui étaient traditionnellement exécutées par des armées régulières ou des forces d'opposition – du moins ces deux derniers siècles – n'affecte pas négativement les victimes des conflits armés. Aussi, il est essentiel que les États signataires des Conventions de Genève de 1949 assument leur responsabilité de faire respecter le droit humanitaire, y compris par des contractants privés de sécurité qui opèrent sur leur territoire ou qu'ils contractent pour des opérations à l'étranger.

A ce titre, l'Article 1 commun aux Conventions de Genève stipule que les États signataires s'engagent non seulement à respecter eux-mêmes, mais aussi à faire respecter ces Conventions. *Le Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, élaboré par la Commission du droit international et adopté par l'Assemblée générale des Nations Unies en 2001, confirme en outre un important principe en droit international public. Il stipule que les États sont responsables non seulement des actes commis par leurs propres organes, mais aussi par toute personne ou entité qui n'est pas un organe de l'État, mais qui est habilitée par le droit de cet État à exercer des prérogatives de puissance publiques (Art. 5). L'article 8 ajoute que «le comportement d'une personne ou d'un groupe de personnes est considéré comme

15 Peter Singer, *Corporate Warrior: The Rise of the Private Military Industry. The Privatization of War*, New Books, Inc., Portland, 2003.

un fait de l'État d'après le droit international si cette personne ou ce groupe de personnes, en adoptant ce comportement, agit en fait sur les instructions ou les directives ou sous le contrôle de cet État».

Dans ce contexte, il s'agit de clarifier les responsabilités respectives des gouvernements et des sociétés privées de sécurité. Quelle est par exemple la juridiction qui doit être saisie en cas de violation du droit humanitaire par un employé sud-africain engagé par une société américaine en Irak? Quelles sont les obligations de l'État où la violation a été commise, du pays d'origine de l'employé, du gouvernement qui a conclu le contrat avec la société privée de sécurité et de la firme elle-même? L'objectif est d'éviter que le flou juridique existant ne confère une immunité de fait aux employés de compagnies militaires privées qui commettraient des violations du droit humanitaire. Pour ce faire, il s'agit de s'assurer que ces derniers connaissent ce droit et s'engagent à le respecter. De plus, il est essentiel de prévoir un système de sanctions en cas de violations du droit international humanitaire, quelle que soit la nationalité de l'auteur des abus, de la société pour laquelle il travaille, et le pays dans lequel la violation a été commise.

La question des droits et responsabilités de tous les acteurs concernés par les activités d'une compagnie militaire privée devient encore plus complexe dans les cas où cette dernière sous-traite elle-même une partie de son mandat à des milices privées locales, ou qu'elle opère pour le compte d'une entreprise multinationale plutôt que pour un État. Trop souvent, les contrats confiés à des compagnies militaires privées ne comportent aucune clause relative au respect des droits de l'homme ou du droit international humanitaire. Pour le CICR, il est impératif qu'un cadre normatif adéquat soit adopté par les États. En outre, les contrats passés entre les diverses parties ainsi que la formation des employés des sociétés privées doivent concourir à minimiser les risques de violations du droit international humanitaire dont pourraient pâtir les communautés affectées par les conflits armés.

### Privatisation de l'approvisionnement en eau

Depuis plusieurs décennies, les régies publiques chargées de l'approvisionnement en eau potable et du traitement des eaux usées ont été partiellement privatisées, notamment dans les pays en développement sous l'impulsion des institutions financières internationales. Ainsi, la gestion des stations de pompage et de traitement de l'eau ainsi que le système d'adduction d'eau et la perception des redevances auprès des usagers ont été confiées à des entreprises multinationales par le biais de contrat de concessions ou d'affer-

mage. Par ces mesures, la Banque mondiale et d'autres institutions financières entendent améliorer l'efficacité et la rentabilité du secteur.

Or, le marché de l'eau comporte diverses spécificités qui le distinguent d'autres marchés. La rentabilité du secteur dépend entre autres du prix de vente du mètre cube de l'eau qui est fréquemment soumis à des plafonds souvent arbitrairement fixés par les gouvernements pour des raisons politiques. En cas de crise humanitaire, l'accès à l'eau potable demeure une priorité absolue pour éviter les épidémies et préserver la santé publique, notamment dans les centres urbains. De ce fait, il est essentiel que les opérateurs privés continuent à fournir leurs services à la population en cas de guerre, même s'il n'est techniquement plus envisageable de prélever les redevances auprès des consommateurs, et par conséquent de générer des profits. Priver la population d'eau potable constitue en outre une violation grave du droit international humanitaire.

Sur la base d'un simple calcul de rentabilité, ces firmes sont tentées de se retirer du marché en cas de conflit armé pour éviter les pertes. Au nom de la responsabilité de l'entreprise et dans une perspective de long terme, certaines entreprises décident néanmoins de poursuivre leur travail malgré la situation de guerre et cherchent alors à limiter les pertes par divers moyens, y compris le recours aux fonds disponibles pour l'aide humanitaire et la reconstruction.

Pour les États donateurs comme pour les organisations humanitaires, il est essentiel d'assurer l'approvisionnement en eau de la population. La question se pose alors de savoir si – et jusqu'à quel point – soutenir une entreprise multinationale sans que les fonds et le matériel mis à disposition ne deviennent une subvention indue, contraire aux dispositions de l'Organisation mondiale du Commerce et injustifiable envers les contribuables et les concurrents. Une option consiste à avancer les fonds en spécifiant que ceux-ci seront déduits des dettes de l'État envers l'entreprise concessionnaire dès que la perception des redevances auprès des consommateurs aura pu être rétablie. En tout état de cause, la responsabilité des entreprises en cas de conflits armés dans des secteurs aussi vitaux que l'approvisionnement en eau mérite d'être beaucoup plus clairement spécifiée dans les contrats de concessions, notamment lorsque la Banque mondiale ou d'autres organisations internationales soutiennent le processus de privatisation.

Certains responsables humanitaires refusent de travailler en partenariat avec les sociétés transnationales pour des raisons de principe. D'autres se demandent pourquoi se montrer si réticent avec des opérateurs privés alors que la communauté humanitaire soutient des régies publiques dans d'autres pays en crise sans jamais effectuer d'audit détaillé, même si certaines de ces

régies sont réputées pour leur manque de transparence et la mauvaise gestion des fonds octroyés. Ces diverses positions traduisent des sensibilités personnelles et des positions propres à chaque organisation.

### Privatisation du système carcéral

Dans de nombreux pays, certains établissements pénitentiaires sont gérés en partenariat entre les secteurs public et privé. Des services aux détenus tels que la restauration et les soins de santé sont sous-traités à des sociétés privées dans un nombre croissant de contextes. Toutefois, c'est notamment dans les pays anglo-saxons[16] que des sociétés privées[17] en sont venues à gérer certains établissements pénitentiaires dans leur ensemble, y compris en ce qui concerne les services de surveillance et de gardiennage. L'objectif de maximisation du profit poursuivi par les sociétés privées peut entrer en contradiction directe avec les contraintes et objectifs du système carcéral, tel que garantir des conditions de détention satisfaisantes aux personnes internées, ne pas abuser du travail des détenus pour en tirer profit, ou encore préparer et favoriser la réintégration sociale des détenus. D'un point de vue purement économique, ces sociétés ont tout intérêt à voir la demande croître, autrement dit à voir le nombre de leurs clients augmenter dans les lieux de détention, tout en comprimant les coûts de fonctionnement liés à la gestion des prisons.

Lorsque les employés d'une société multinationale commettent des abus sur les détenus dont ils ont pour mission de s'occuper, diverses questions se posent: qui est responsable et qui doit être sanctionné: l'employé, la compagnie ou le ministère de tutelle? Quelle est la responsabilité de l'État d'origine de la société privée et de l'État où les abus ont été commis? Sous quelle juridiction et selon quelles procédures le cas doit-il être traité? Le contrat passé entre l'État et la compagnie prévoit-il des dispositions spécifiques à cet effet? A qui les organisations de défense des droits de l'homme doivent-elles adresser leurs observations en premier lieu? Avec qui doivent-elles privilégier le dialogue pour améliorer les conditions des détenus?

### Privatisation des services de santé

L'accès gratuit aux soins n'est pas ou plus une réalité pour les patients dans la grande majorité des pays en crise, à l'exception des soins fournis directement par les organisations humanitaires. En règle générale, l'on assiste

16 Afrique du Sud, Australie, États-Unis, Nouvelle-Zélande, Royaume-Uni.

17 Par exemple: *Group 4 Securicor; Serco; GEO Group Inc.*

à l'émergence d'un système de santé à double vitesse, avec des structures privées qui fournissent des soins de qualité auxquels seuls les plus riches peuvent accéder, et des structures publiques en faillite qui sont toujours plus nombreuses à introduire un système de recouvrement partiel des coûts par la facturation des soins, et dont les employés mal payés prélèvent de multiples taxes et honoraires informels auprès des patients.

Pour les organisations humanitaires qui s'efforcent de soutenir ces structures durant les périodes de crise, il devient toujours plus important de pouvoir fournir des conseils en matière de gestion administrative et financière aux structures de santé et d'en comprendre le fonctionnement pour être mieux à même d'apporter une aide pertinente et durable.

## Conclusion

La privatisation d'activités qui étaient du ressort exclusif des États ou d'organisations internationales par le passé n'a pas encore fait l'objet d'études rigoureuses qui permettraient de dégager des conclusions définitives quant aux mérites, risques et désavantages de cette tendance d'un point de vue politique, économique, social, etc. Comme nous l'avons vu dans cet article, les crises humanitaires – de par leurs spécificités et les implications dramatiques pour les victimes – mettent en exergue de manière particulièrement saillante quelques-uns des principaux défis et questions de fond que posent la privatisation et la sous-traitance de services publics essentiels.

La première question tourne autour de la compatibilité entre l'objectif de maximisation du profit propre aux entreprises privées et celui du maintien de la sécurité et de la santé publique propre aux États. En effet, le marché en tant qu'institution permet au jeu de l'offre et de la demande ainsi qu'à la concurrence de s'exprimer librement, avec pour objectif d'obtenir une allocation optimale des ressources et de stimuler la créativité et l'innovation pour répondre aux besoins des consommateurs, voire susciter de nouveaux besoins. Mais le marché n'est évidemment doté d'aucune éthique intrinsèque : les mécanismes de l'offre et de la demande s'appliquent aussi bien au marché des actions ou du café qu'au marché de la prostitution infantile ou de la cocaïne. Il appartient à l'État de proscrire ou d'encadrer certains marchés pour des raisons d'ordre public, de sécurité, de morale, de santé ou autres. Il lui appartient aussi de résister aux pressions de sociétés privées qui pourraient être tentées d'inciter les autorités à stimuler la demande pour leurs services, à savoir à engager, poursuivre ou intensifier un conflit armé dans le cas de compagnies militaires privées.

Dans cet article, notre propos n'est pas de porter un jugement de valeur sur le phénomène et les acteurs de la privatisation. Par contre, la réalité sur le terrain démontre que pour protéger les victimes de conflits armés, il est impératif que les États se dotent d'un cadre normatif adéquat pour éviter que l'explosion du marché des sociétés privées de sécurité ne s'accompagne d'un affaiblissement du droit international humanitaire et d'une multiplication des violations du droit international humanitaire par des employés de sociétés privées qui jouiraient d'une impunité de fait.

En outre, il est essentiel que les contrats de sous-traitance confiés par des gouvernements à des sociétés privées dans des domaines aussi sensibles que l'approvisionnement en eau et la gestion des prisons prévoient des clauses précises relatives aux responsabilités et obligations de chaque partie en cas de conflit armé, ainsi que des mécanismes d'incitation économique et financière pour garantir que les préoccupations humanitaires soient prises en compte de manière prioritaire en cas de force majeure. Sans quoi les sociétés privées auront beau jeu de se référer aux termes des contrats passés avec les autorités qui ne comporteraient aucune disposition à cet effet.

La deuxième question porte sur le respect du droit international par les sociétés privées et la responsabilité de l'État lorsque les activités de ces sociétés sont susceptibles de mettre en danger le respect du droit international humanitaire. Comme nous l'avons vu en matière de droit international public, les États sont responsables des actes commis par toute personne ou entité habilitée à exercer des prérogatives de puissance publique ou qui agit (*de facto*) sur les instructions ou sous le contrôle de l'État.

La troisième controverse concerne l'exercice même de la démocratie, à savoir le risque pour le pouvoir législatif de perdre toute autorité et capacité de contrôle sur des questions aussi délicates que les modalités d'une intervention militaire à l'étranger, et ce par le biais de contrats de sous-traitance laissés à la discrétion du pouvoir exécutif. Pour Peter Singer, de la Brookings Institution, c'est déjà le cas pour les contrats passés par l'administration américaine avec nombre de compagnies militaires privées actives en Irak.

La quatrième et dernière question que nous souhaitons soulever ici porte sur le bilan économique de ce phénomène de privatisation. En d'autres termes, quels sont les coûts et les bénéfices pour les usagers des services ainsi privatisés et pour les contribuables qui en assurent indirectement le financement. Le principal argument des responsables politiques et des institutions qui promeuvent les privatisations repose sur le gain d'efficacité et les économies qui en résultent. Si la fin de la guerre froide a consacré la supériorité de l'éco-

nomie de marché sur l'économie planifiée, le bilan de la privatisation des services publics reste sujet à controverses. Une étude publiée en 1998 par Abt Associates – une société de conseil américaine qui fournit des services dans le domaine des réformes économiques et de la privatisation et ne peut être soupçonnée de véhiculer des préjugés négatifs à cet égard – conclut que les analyses et données disponibles ne démontrent pas que le recours à des sociétés privées dans le domaine pénitentiaire permet de réaliser des économies[18]. Plus incisif, l'organisation «War on Want» affirme que la privatisation de nombreux services publics a aggravé la pauvreté dans les pays en développement et que l'agence britannique de coopération au développement en soutenant ces réformes a contribué à enrichir les consultants et entreprises privées britanniques plutôt qu'à réduire la pauvreté dans les pays bénéficiaires[19]. L'organisation en appelle à la création d'une commission indépendante chargée d'examiner l'ampleur des privatisations dans les pays en développement et leurs effets. Dans l'attente d'études rigoureuses, il convient de considérer les avantages de différents arrangements institutionnels entre les secteurs public et privé avec prudence.

Les organisations humanitaires tentent de suivre et d'interpréter cette évolution, d'en évaluer les conséquences en termes de besoins et d'actions humanitaires et de s'adapter en conséquence. Pour le CICR, cette évolution requiert un renforcement du dialogue avec les États pour assurer le respect du droit international humanitaire dans des secteurs en voie de privatisation partielle tels que la formation des forces armées, le soutien aux combats, la gestion de lieux de détention ou l'accès à l'eau et aux soins de santé.

18 The Sentencing Project, *Prison Privatization and the Use of Incarceration*, Update of September 2004. Source : < http://www.sentencingproject.org/pdfs/1053.pdf > (site visité le 03.12.2004).

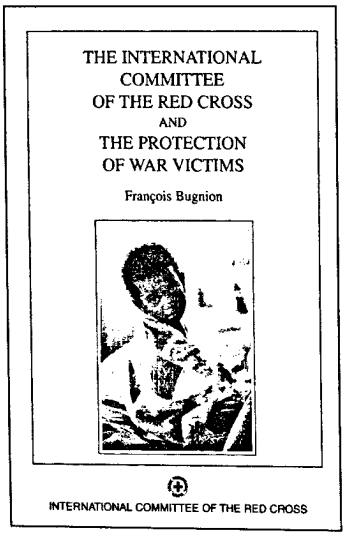
19 Duncan Campbell, «UK accused of using aid to promote privatisation», *The Guardian, 27 September 2004*.

# Résumé

## *Privatization, Outsourcing and Public-private Partnerships: Charity.com or Business.org?*

*Gilles Carbonnier*

*Today's tendency to privatize or outsource many activities hitherto considered the exclusive preserve of the State has given rise to sharp debate. This phenomenon is of direct concern to humanitarian organizations when it involves essential public services such as the water supply and health care. Privatizing the realms of defence and security — the very core of State prerogative — raises serious legal and humanitarian questions. In this article the author takes a brief look at developments in the interaction between the State and the private sector, as well as at the emergence of the non-profit sector. The specific nature of humanitarian emergencies brings out in particularly stark contrast some of the main challenges related to the privatization and outsourcing of public services and security. The author dwells in particular on the privatization of military functions (including the running of detention places), of health care and of the supply of drinking water. He examines the role, responsibility and obligations of the various parties concerned. The economic rationale behind these practices is put into question, as well as the compatibility between the corporate motive of profit-maximization, on the one hand, and the need to ensure public security and health on the other. The author suggests that humanitarian agencies need to better understand how the private sector operates and how they may interact with it. There is a need to better assess both the potential benefits and risks resulting from the current privatization and outsourcing trend — with the ultimate objective of ensuring more effective protection and assistance for people affected by war.*




## The International Committee of the Red Cross and the protection of war victims

*by François Bugnion*

How the ICRC is constituted, what tasks are assigned to it and what principles guide its work — these are some of the questions that the author seeks to answer. Examining the tasks and role of the ICRC both from a historical and from a legal point of view, the book shows how the development of international humanitarian law is reflected in the action taken by the ICRC. Ideal for consultation, the book is simple and direct in style, and is intended primarily for people engaged in humanitarian work and specialists in humanitarian law.

This is the English translation of the second edition of François Bugnion's book *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva, ICRC, June 2000).

*ICRC & Macmillan, Geneva, 2003*
*Available in English. 2000 edition available in French*
*CHF 59.- / ref. 0503*

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# Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation

MARTEN ZWANENBURG*

The gulf war of 2003 and its aftermath have led to passionate debates among lawyers. Most of this debate has focused on questions of *jus ad bellum*, in particular the legality of the attack on Iraq by the United States (US), the United Kingdom (UK) and their allies in March 2003.[1] Questions of *jus in bello* have received less attention. This is unfortunate, because the occupation of Iraq by the US and the UK is one of the few instances in which States have accepted that the law of occupation is applicable to them. Hitherto the law of occupation has mostly been addressed in the context of the Israeli-occupied territories. Israel denies that the law of occupation applies to those territories *de jure*, although it has stated that it applies the law *de facto*.[2]

In the case of Iraq, the situation was governed not only by the law of occupation but also by United Nations Security Council resolutions. The question is how these two legal instruments relate to each other. It is argued in this article that Resolution 1483[3] may have made certain inroads on the law of occupation. The goals set for the occupying powers in the resolution with regard to the political and economic transformation of Iraq, as well as the resolution's reference to States contributing troops to the multinational stabilization force, opened up the possibility to go beyond some of the limits set by the law of occupation or even not to apply that law at all. A number of concrete examples are discussed below. This argument is based on the premise that the UN Security Council may derogate from international law when it is acting under Chapter VII of the UN Charter. The question whether and

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under which conditions this is a valid premise received much scholarly discussion in the 1990s.[4] That discussion was centred in particular on possible legal limits to the imposition of economic sanctions, as well as the subject matter of the *Lockerbie* case before the International Court of Justice (ICJ). However, these two debates have not led to definitive legal conclusions. Although the occupation of Iraq came to an end in June 2004, this does not affect the importance of reflecting on the relationship between the law of occupation and Security Council resolutions. Legislation promulgated by the occupying powers in Iraq remained in force after the transfer of authority, and consequently such legislation continues to have effect.[5] Nor can the eventuality of other circumstances in which the law of occupation and Security Council resolutions address the same situation be excluded.[6]

### A preliminary question

A preliminary question which may be asked before considering whether the Security Council can and has set aside the law of occupation is how that law can be reconciled with measures needed to initiate a transition process, i.e. a complete restructuring of a formerly authoritarian State system. In other words, is the law of occupation itself sufficient to make such a transformation possible without Security Council involvement? Although this is an important question, it is not the main focus of this article. At least

1 See e.g. Colin Warbrick, "The use of force against Iraq", *International & Comparative Law Quarterly*, Vol. 52, No. 3, 2003, p. 811 (2003); "Agora: Future implications of the Iraq conflict", *American Journal of International Law*, Vol. 97, No. 3, July 2003, p. 553.

2 On the applicability of the law of occupation in the Israeli-occupied territories, see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004. Not yet published but available at the website of the ICJ: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited 25 October 2004).

3 SC Res. 1483, 22 May 2003.

4 See e.g. Gabriel Oosthuizen, "Playing the devil's advocate: The United Nations Security Council is unbound by law", *Leiden Journal of International Law*, Vol. 12, No. 3,1999, p. 549; Bernd Martenczuk, "The Security Council, the International Court and judicial review: What lessons from Lockerbie?", *European Journal of International Law*, Vol. 10, No. 3, 1999, p. 517; Terry Gill, "Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter", *Netherlands Yearbook of International Law*, Vol. 26, 1995, p. 33.

5 Thus the validity of the Coalition Provisional Authority's legislation which was in breach of occupation law and which is still in force could be disputed insofar as it has not been explicitly ratified by the interim government.

6 Consider for example the possible scenario of the UK government intervening militarily in Sudan, as it has suggested it might, and the Security Council subsequently adopting a resolution in response to the situation. See Matthew Tempest, "Blair: Nothing is ruled out in Sudan", *The Guardian*, 22 July 2004.

in the specific case of Iraq, it is very doubtful that without Security Council cover this result could have been achieved.[7] Moreover, as this article will demonstrate, in a number of instances States have in the case of Iraq explicitly or implicitly relied on Security Council authorization and not on the law of occupation to justify their actions and positions. This strongly suggests that in their own opinion these actions and positions went beyond the limits of the law of occupation. In this case, they themselves answered the preliminary question in the negative.

This article will not discuss in any detail the question whether the law of occupation should be amended to render it more conducive to the transformation of States. Proponents of such amendments should realize, however, that a more liberal law of occupation could encourage States to attempt regime change, because it could make it easier for them to do so without breaching the law.[8]

## Conflict and occupation in Iraq

After the US and UK armed forces, supported by a small number of troops from Australia and Poland, defeated the Iraqi armed forces, they became the *de facto* authority in Iraq. The two countries took steps to put in place a postwar administration. This administration, initially known as the Office of Reconstruction and Humanitarian Aid (ORHA), was headed by retired US General Hay Garner, who reported to the Pentagon. A few months later, L. Paul Bremer III, a US diplomat, was appointed to direct the postwar administration, renamed the Coalition Provisional Authority (CPA).[9] The CPA arrogated broad powers to itself.[10] On 16 June 2003 it issued "Coalition Provisional Order Number 1". This Order states *inter alia* that the CPA "shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration"[11] and that it "is vested with all executive, legislative

7 See David Scheffer, "Beyond occupation law", *American Journal of International Law*, Vol. 97, No. 4, October 2003, p. 844; Mahmoud Hmoud, "The use of force against Iraq: Occupation and Security Council Resolution 1483", *Cornell International Law Journal*, Vol. 36, 2004, p. 449. But see Eyal Benvenisti, "The Security Council and the law on occupation: Resolution 1483 on Iraq in historical perspective", at http://www.tau.ac.il/law/members/Benvenisti/work.html (last visited 20 October 2004).

8 On regime change see Michael Reisman, "Why regime change is (almost always) a bad idea", *American Journal of International Law*, Vol. 98, No. 3, July 2004, p. 516.

9 Steven. R. Weisman, "US set to name civilian to oversee Iraq", *New York Times*, 2 May 2003.

10 Mike Allen, "Expert on terrorism to direct rebuilding", *The Washington Post*, 2 May 2003.

11 Coalition Provisional Authority Regulation Number 1, 16 May 2003, CPA/REG/16 May 2003/01, Section 1 (1).

and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions."[12]

## Application of the law of occupation

### Scope of application

At some point in this period, the US and the UK became occupying powers under international humanitarian law.[13] Both the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land,[14] and the Fourth Geneva Convention of 1949[15] contain provisions on occupation. Article 42 of the 1907 Hague Regulations provides that: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[16]

The said article makes clear that whether or not a territory is occupied is a question of fact. Neither the occupant nor any other party is required to declare that there is an occupation. The article also appears to require that the occupant is actually exercising control over the territory. As the American Military Tribunal sitting at Nuremberg also made clear in the *Hostages* trial, this requirement must not be read restrictively. It is sufficient that the occupying forces "could at any time they desired assume physical control of any part of the country."[17] In the cases of Greece and Yugoslavia, with which the Tribunal was dealing, the fact that there were guerrilla operations against the Germans and that the guerrillas were able to control sections of those countries at various times did not detract from the conclusion that there was an occupation. It is submitted that the same applies to Iraq.

12 *Ibid.*, Section 1 (2).

13 As discussed below, a territory becomes occupied when it is actually placed under the control of the occupying forces. It is submitted that the precise point in time at which this occurred in the case of Iraq could only be ascertained by commanders on the ground. In any event it can safely be said that on 1 May 2003, when President Bush declared the end of major combat operations, Iraq was occupied.

14 Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, 2 AJIL Supp. 90 (1908), TS No. 539, 205 Parry's TS 277 (Hague Regulations).

15 Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention).

16 *United States* v. *Wilhelm List and others (the Hostages Trial)*, United States Military Tribunal, Nuremberg, VIII Law Reports of Trials of War Criminals 55 (1949).

17 *Ibid.*, at 56. See also Gerard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 28.

Common Article 2 of the 1949 Geneva Conventions provides that the Conventions apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. The ICRC Commentary to the Fourth Geneva Convention states that the term "occupation" as used in that Convention has a wider meaning than it has in Article 42 of the Regulations annexed to Hague Convention (IV) of 1907. According to the Commentary, so far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 of the Hague Regulations.[18] This point of view was also adopted by Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia in its judgment in *Prosecutor* v. *Naletilić and Martinović*. The Trial Chamber gave a twofold definition of "occupation". It held that for the purposes of Article 42 of the Hague Regulations of 1907, actual control of the territory is required,[19] and listed a number of factors helpful in determining whether actual control is established. The Chamber adopted a different test with regard to occupation in the sense of the Fourth Geneva Convention of 1949. According to the Chamber, the application of the law of occupation as it affects "individuals" as civilians under that Convention does not require the occupying power to have actual authority. For the purposes of those individuals' rights, a state of occupation exists once they fall into "the hands of the Occupying Power."[20] The Trial Chamber's interpretation of the scope of application of the Fourth Geneva Convention's provisions on occupation is questionable. It appears to conflate the determination of "protected person" with the determination of an occupation, and does not recognize that the Convention contains a number of provisions that apply specifically to occupied territories.

The ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, although it addressed the law of occupation, did not take an explicit position on the question of scope considered above.[21]

18 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 60.

19 *Prosecutor* v. *Mladen Naletilić and Vinko Martinović*, Judgment, Case No. IT-98-34-T, Tr. Ch. I, 31 March 2003, para. 218.

20 *Ibid.*, para. 221.

21 *Op. cit.* (note 2).

## Content

The applicability of the law of occupation places certain obligations on the occupying power. The essence of the law of occupation is that the occupation will be of limited duration.[22] During that period, the occupying power is given limited managerial powers and certain obligations, as set out in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949. These obligations include the prohibition on taking possession of cash, funds, and realizable securities other than those which are strictly the property of the State;[23] the obligation to administer public buildings, real estate, forests and agricultural estates belonging to the hostile State in accordance with the rules of usufruct;[24] and the obligation for the occupying power to ensure, to the fullest extent of the means available to it, the food and medical supplies of the population.[25]

An important obligation from the law of occupation is the stipulation in Article 43 of the Hague Regulations that the occupying power must respect, unless absolutely prevented, the laws in force in the country. In 1949 this article was supplemented by Article 64 of the Fourth Geneva Convention.[26] The drafters of the Hague Regulations seem to have viewed military necessity as the only relevant consideration that could "absolutely prevent" an occupying power from respecting the law in force.[27] In later years certain commentators have maintained that other considerations can also legitimize replacing legislation, notably the welfare of the population of the occupied territory.[28] Some

22 See e.g. Hans Peter Gasser, "Protection of the civilian population", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 242.

23 Hague Regulations, Art. 53.

24 *Ibid.*, Art. 55.

25 Fourth Geneva Convention, Art. 55.

26 This article reads:

"The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

27 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 14.

28 See e.g. Allan Gerson, "War, conquered territory, and military occupation in the contemporary international legal system", *Harvard International Law Journal*, Vol. 18, No. 3, Summer 1977, p. 535; Odile Debbasch, *L'Occupation Militaire: Pouvoirs Reconnus aux Forces Armées Hors de Leur Territoire National*, Pichon et Durand-Auzias, Paris, 1962, p. 172.

authors even go so far as to affirm that sufficient justification is all that is needed to deviate from local legislation.[29] It appears to be currently widely accepted in legal doctrine that the welfare of the local population may justify deviation from the legislation in force.[30] Such a view reflects the fact that respect for the human person is at the root of modern international humanitarian law, as well as the increasing ascendancy of human rights and their influence on the interpretation of humanitarian law. It should be noted, however, that using a subjective criterion such as "sufficient justification" might lead to abuse, as the occupying power will define what is reasonable from its own socio-economic perspective. That an occupying power's definition of what is absolutely necessary will also be largely determined by its own socio-economic perspective, which may be very different from that of the population of the occupied territory, cautions against accepting a broad definition of what may absolutely prevent respecting the laws in force.

### The US and UK as occupying powers in Iraq

The US and the UK addressed a letter to the President of the UN Security Council on 8 May 2003 in which they stated that they would strictly abide by their obligations under international law.[31] According to that letter, the obligations include those relating to the essential humanitarian needs of the people of Iraq. This appears to be a reference to the law of occupation, which includes the duty for an occupying power to ensure the food and medical supplies of the population to the fullest extent of the means available to it.[32] However, the US does not appear to have said explicitly at that time that it was an occupying power. At a briefing on 7 April 2003, a US Department of Defense official stated that at that moment the US was not a military occupier or occupation force in the technical sense of the law of war.[33] The official said that it is not "until the fighting has concluded and is very conclusive, [that] you reach the point where technically there might be a military occupation (...) and a declaration of occupation is issued."[34] On 25 April 2003, US Secretary of Defense Rumsfeld suggested that the US would become an

29 Ernst. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington, 1942, p. 89.

30 Von Glahn, *op. cit.* (note 17), p. 97; Gerson, *op. cit.* (note 28), p. 538.

31 Letter from the Permanent Representatives of the United Kingdom and the United States to the United Nations addressed to the President of the Security Council, of 8 May 2003, UN Doc. S/2003/538.

32 *Op. cit.* (note 25).

33 Briefing on Geneva Convention, EPWs and War Crimes, 7 April 2003, Department of Defense.

34 *Ibid.*

occupying power at the moment the war was declared over.[35] This indicates that the US considered that it became an occupying power at the latest on 1 May 2003, when President Bush declared the end of major combat operations in Iraq.[36] At a later date US officials did explicitly state that the US is an occupying power.[37] UK officials have on several occasions expressly referred to the UK as an occupying power in Iraq.[38]

On 28 June 2004 the occupying powers transferred full sovereignty to an Iraqi interim government and dissolved the CPA.[39] The transfer of authority, originally scheduled for 30 June 2004, had already been anticipated in UN Security Council Resolution 1546 of 8 June 2004. Operative paragraph 2 of that resolution stated that the Council: "Welcomes that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty."[40]

The said statement raises the question as to the point in time at which the occupation of Iraq ends. This question is not dispositive for the subject under discussion in this article, i.e. the relationship between Resolution 1483 and the law of occupation and the possibility for the Security Council to set aside that law. It is, however, an important question in its own right. According to Lauterpacht, occupation comes to an end when an occupant withdraws from a territory, or is driven out of it.[41] The law of occupation itself, in Article 6 of the Fourth Geneva Convention, merely states that its application shall cease one year after the general close of military operations, but that some provisions remain in force for the duration of the occupation. In other words, the application of the law of occupation ends at the moment there is no longer effective control over the occupied territory,[42] for without effective control there is no

35 Department of Defense News Briefing — Secretary Rumsfeld and General Myers, 25 April 2003.

36 Amy Goldstein & Karen DeYoung, "Bush to say major combat has ended", *The Washington Post*, 1 May 2003.

37 See e.g. Rajiv Chandrasekaran, "The final word on Iraq's future: Bremer consults and cajoles, but in the end, he's the boss", *The Washington Post*, 18 June 2003, p. A01.

38 See e.g. written statement to the House of Commons by the Foreign Secretary Jack Straw on a timetable for a new constitution and elections in Iraq, 20 November 2003.

39 Rajiv Chandrasekaran, "U.S. hands authority to Iraq two days early: Fear of attacks hastens move — interim leaders assume power", *The Washington Post*, 29 June 2004, at A.01. The UN, the US and Iraqi political figures were involved in selecting the members of the interim government.

40 SC Res. 1546, 8 June 2004.

41 H. Lauterpacht (ed.), *Oppenheim's International Law: A Treatise*, Vol. 2: *War, Disputes, and Neutrality*, Longman, London, 1952, p. 436.

42 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II: *The Law of Armed Conflict*, Stevens, London, 1968, p. 317.

occupation. Besides the two instances mentioned by Lauterpacht, that law may also cease to apply where troops of the former occupying power remain in the territory of the formerly occupied territory but the legitimate power is no longer in the hands of the occupant. This is a question of fact, but international recognition, in particular by the UN Security Council, may be an indicator.[43] Of importance in this connection is the announcement made by the President of the Security Council in a press statement on 28 June 2004: "The members of the Security Council welcome the handover of full responsibility and authority for governing Iraq to the fully sovereign and independent Interim Government of Iraq, thus ending the occupation of the country."[44]

As for the facts, media reports suggest that the US and UK did effectively hand over administrative authority on 28 June.[45] The same is also implied by the statement by US Secretary of State Colin Powell that the troops would leave Iraq if the Iraqi government asked them to.[46] In conclusion, the occupation appears to have ended on 28 June 2004.

### The Stabilization Force Iraq

After the US and the UK had captured the whole of Iraq, they started a diplomatic campaign to convince as many States as possible to contribute military personnel to a Stabilization Force Iraq (SFIR), with the task of maintaining a secure environment there in which the CPA could function. A number of nations decided to contribute troops to the force, under the command of the US. One of these, Poland, accepted the invitation to take up command of a multinational division. The US and the UK found that many nations were reluctant to contribute troops to an international force in Iraq. One reason for this reluctance was the broad public opposition to the invasion of Iraq and the way in which Washington ignored the majority view of the United Nations Security Council in the run-up to the invasion.[47] Another reason was that many nations were uncomfortable with the idea that they might become occupying powers upon deciding to participate in

43 Marco Sassòli, "Article 43 of the Hague Regulations and peace operations in the twenty-first century", background paper prepared for informal high-level expert meeting on Current Challenges to International Humanitarian Law, Cambridge, 25–27 June 2004.

44 Press statement by Security Council President of 28 June 2004, UN Doc. SC/8136.

45 Robin Wright, Rajiv Chandrasekaran, "U.S. now taking supporting role in Iraq, officials say", *The Washington Post*, 22 September 2004.

46 Glenn Kessler, "Powell says troops would leave if new leaders asked", *The Washington Post*, 15 May 2004.

47 Guy Dinmore, James Politi, Mark Odell, "US struggles to top up Allied force in Iraq", *Financial Times*, 2 July 2003.

the Stabilization Force. Leaving aside the effects of Security Council Resolution 1483, the manner in which many States participate in the Stabilization Force would appear to make them occupying powers. As Lijnzaad comments, carrying out tasks under the command or instruction of an occupying power tends to confer occupying power status on those cooperating with them.[48] This depends to a large extent on the nature of the activities undertaken in occupied territory, as well as on the command structure and the room left for national decision-making.

In an attempt to avoid becoming an occupying power, certain troop-contributing nations have limited the tasks they perform. Norway, for example, has insisted that its troops in Iraq are only carrying out "humanitarian" tasks and that consequently Norway has not become an occupying power.[49] This claim is not uncontroversial, as the Norwegian Defence Department has conceded that the Norwegians will be assigned to a combination of military and humanitarian work.[50] A similar claim by other troop-contributing nations which have not limited the tasks of their forces in the way Norway has done are even less likely to stand up to legal scrutiny. This impression was reinforced by Coalition Provisional Authority Order No. 17,[51] which determined the legal status of personnel of "Coalition Forces" and specified that they were subject to the exclusive jurisdiction of their sending State. The Order did not make a distinction between Coalition forces personnel from the US and the UK and those from other States. They were all included in the definition of "Coalition Personnel" as being:

> "All non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA."[52]

48 Liesbeth Lijnzaad, "How not to be an occupying power: Some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation", in L. Lijnzaad, J. van Sambeek & B. Tahzib-Lie (eds.), *Making the Voice of Humanity Heard*, Martinus Nijhoff, Leiden/London, 2003, p. 298. See also Hmoud, *op. cit.* (note 7), p. 451.

49 "Norway's role in Iraq catches more flak", *Aftenposten*, 9 December 2003.

50 "Norwegian soldiers head for Iraq", *Aftenposten*, 26 June 2003.

51 Coalition Provisional Order No. 17, Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors, 26 June 2003, CPA/ORD/26 June 2003/17. The Order was revised on 27 June 2004 and the privileges and immunities accorded to Coalition personnel were greatly extended. See CPA Order No. 17 (revised) of 27 June 2004, CPA/ORD/27 June 2004/17.

52 *Ibid.*, Section 1 (1).

In short, without Security Council involvement it appears highly unlikely that a State contributing troops to SFIR would not become an occupying power.

### Security Council Resolution 1483 and the law of occupation

Concern over the status of occupying power was one of the elements that played an important role in the drafting of UN Security Council Resolution 1483. This resolution was the result of the perceived need to set out the process of stabilization and political transition in Iraq after the conflict, including the role of the United Nations in that process. On 9 May 2003, the US, the UK and Spain informally circulated a draft resolution in the Security Council. The draft resolution closely followed the intentions of the US and UK in Iraq as formulated in their letter to the President of the Security Council of the previous day.[53] The letter referred to the establishment of the Coalition Provisional Authority to exercise powers of government temporarily and, as necessary, to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction. As stated above, the letter also suggested that the US and the UK considered themselves to be occupying powers in the sense of international humanitarian law.

The draft resolution contained a preambular paragraph taking note of the letter and "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers and the responsibilities of others working now or in the future with them under unified command (the Authority)".[54] In a statement to the House of Commons UK Foreign Secretary Jack Straw reaffirmed that this paragraph constituted acceptance of the status of occupying power.[55] The draft resolution did not at first exclude the possibility that other States contributing troops to the Stabilization Force would also become occupying powers. According to the initial text, they would become part of the Authority together with the US and the UK.[56] But the original draft underwent a large number of revisions to take into account the wishes of interested parties. Among them were France, Germany and the Russian Federation, which

53 *Op. cit.* (note 31).

54 Draft Security Council Resolution of 9 May 2003, copy on file with the author.

55 Statement by the Foreign Secretary, Jack Straw, to the House of Commons, 12 May 2003, Vol. 405, Part 392, column 22.

56 Lijnzaad, *op. cit.* (note 48), p. 295.

demanded that the resolution provide for a larger role for the United Nations. Other interested parties included potential troop-contributing nations to a Stabilization Force in Iraq. The concerns of the latter States led to the insertion of a further paragraph in a revised draft resolution of 15 May: "Welcoming the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment and other resources under the Authority..."

The draft of 15 May repeated the preambular paragraph in the version of 9 May, which referred to the obligations of the US and UK and of other States working with them. In the final version of the resolution, however, a clear distinction has been drawn between the US and the UK, on the one hand, and other States working with them. In this version, preambular paragraphs 13 and 14 read:

> "Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),
> Noting further that other States that are not occupying powers are working now or in the future may work under the Authority..."[57]

The insertion of preambular paragraph 14 led to an ambiguous situation. The paragraph could be interpreted as a factual observation by the Security Council that other States did not meet the criteria under international humanitarian law for the status of occupying power. On the other hand, it could also be a decision by the Security Council, acting under Chapter VII of the UN Charter, to take away a status of occupying power that would otherwise exist. The latter interpretation would be a far-reaching one on the basis of a mere preambular paragraph. Nevertheless, at least one government has argued that this is the correct interpretation of Resolution 1483. The government of the Netherlands stated, in reply to a question by a Member of Parliament, that the determination by the Security Council in preambular paragraph 14 is an authoritative determination of the status of troop-contributing nations to the Stabilization Force.[58] According to the said

57 SC Res. 1483, preambular paras. 13-14.

58 Kamerstukken TK 2002-03, 23 432, No. 116, at 8; Kamerstukken TK 2002-03, 23 432, No. 117, at 20.

government, this determination is binding on UN member States on the basis of Article 25 of the UN Charter. Moreover, Article 103 of the UN Charter stipulates that in the event of a conflict between the obligations of member States under the UN Charter and their obligations under another treaty, their obligations under the Charter prevail.

Nor is this the only way in which Resolution 1483 has been invoked as setting aside part of the law of occupation. On 19 September 2003 Paul Bremer enacted CPA Order No. 39.[59] This Order made important changes to Iraqi investment law. It replaced all previously existing foreign investment law in Iraq, and essentially opened up the Iraqi economy to foreign investment to an unprecedented degree. It allowed, and until rescinded by the Iraqi government continues to allow, for example, foreign investors to own Iraqi companies fully with no requirements for the reinvestment of profits back into the country, something that had previously been restricted by the Iraqi constitution to the citizens of Arab countries. Immediately, questions arose as to the legality of Order No. 39. A number of commentators maintained that it was contrary to the nature of the law of occupation as a temporary regime designed to make limited inroads on the occupied country's existing governmental, administrative and economic structures.[60] In particular, they argued that it violated Article 43 of the Hague Regulations. It would be very difficult to claim that a fundamental revision of Iraq's investment law would be such a necessity for the US and the UK that they would be absolutely prevented from respecting the legislation in force unless that revision took place.

The CPA appears, however, to have considered that Resolution 1483 gave it licence to act in contravention of the law of occupation. Order No. 39 claims to be consistent with that resolution. US officials say US actions in Iraq were authorized in general terms by Resolution 1483.[61] A UK government official stated in the House of Lords that his government was "confident that their policies and actions in Iraq are right and consistent with the UK's international obligations."[62] The UK Secretary of State for Foreign and

59 Coalition Provisional Authority Order No. 39, Foreign Investment, 19 September 2003, CPA/ORD/19 September 2003/39. This Order was revised in CPA Order 46 of 20 December 2003, CPA/ORD/20 December 2003/46.

60 Thomas Catán, "Iraq business deals may be invalid, law experts warn", *Financial Times*, 2 November 2003; Daphne Eviatar, "Free-market Iraq? Not so fast", 10 January 2004, *New York Times*.

61 "Questions raised about legality of US attempts to transform Iraq", *Pakistan Tribune*, 14 January 2004.

62 *Hansard*, House of Lords, Vol. 653 (145), c. 293WA.

Commonwealth Affairs has said that his government "[is] therefore satisfied that Security Council Resolution 1483 provides a sound legal basis for the policy goals of the CPA Foreign Investment Order."[63] In a written answer to a question from a member of parliament, the Dutch Minister of Foreign Affairs commented that it did not consider Order No. 39 as a violation of international law, given the object and purpose of the Hague Regulations and the Fourth Geneva Convention, the request for assistance to the Iraqi people through economic restructuring measures in Resolution 1483, the object and purpose of Order No. 39 and its genesis.[64] The government appears to suggest that if Order No. 39 violates the law of occupation, this was authorized by Resolution 1483.

The two challenges to the law of occupation on the basis of Resolution 1483 discussed above raise two important questions which will be analysed below. The first question is whether the Security Council is authorized to derogate from the law of occupation. The second question is whether it has done so in this particular case.

First, however, other challenges made by the CPA to the law of occupation, in the sense of taking actions which were arguably not in conformity with the law of occupation, will be considered. One of these was the revision of the tax system of Iraq. CPA Order 37 set out a tax strategy for Iraq for the year 2003.[65] Its preamble included the statement that the CPA was determined to complete a broad review of taxes in Iraq.[66] It is difficult to see how the CPA was "absolutely prevented" from respecting the existing tax system. Article 48 of the Hague Regulations provides that the occupant may collect the taxes, dues and tolls imposed for the benefit of the State, but must do so as far as possible in accordance with the rules of assessment and incidence in force. Some legal doctrine interprets this as not permitting the occupant to create new and additional taxes, either for his own benefit or for that of the occupied territory.[67] It has also been suggested in legal doctrine that the exception of Article 43 of the Hague Regulations may be interpreted more extensively the longer an occupation lasts, in particular in regard to the rules on taxation.[68] In comparison with other occupations such as that of the Israeli-occupied territories, however, the

63 HC Deb. 20 November 2000 c. 1304W.

64 Aanhangsel Handelingen II 2003/04, No. 720.

65 CPA/ORD/19 September 2003/37.

66 *Ibid.*, preambular para. 4.

67 Glahn, *op. cit.* (note 17), p. 150.

68 Sassòli, *op. cit.* (note 43).

occupation of Iraq does not classify as a prolonged occupation. It is also difficult to see why the occupying powers needed to make changes to Iraqi company law in CPA Order 64.[69] These changes would seem to reflect the preferences of the US for a liberal economy rather than an absolute necessity for the security of the occupying powers or for the welfare of the Iraqi population. Scheffer names the Security Council's decision regarding the Development Fund for Iraq, the management of petroleum, petroleum products and natural gas, and the formation of an Iraqi interim administration as a transitional administration run by Iraqis, as examples of additional obligations placed on the US and UK by the Security Council which are prohibited by a strict reading of the law of occupation.[70] In contrast to the two examples given above concerning the status of certain troop-contributing nations and CPA Order 39, however, these challenges do not appear to have been defended on the ground that they were actions going beyond the law of occupation that were mandated by the Security Council, which is the focus of this article.

### Can the Security Council derogate from the law of occupation?

The UN Charter and general international law are the sources of the powers and obligations of the UN Security Council. The UN Charter is a treaty, and as such the organization and its organs must respect the division of competences and limitations on power in that treaty.[71]

Article 24 of the UN Charter recognizes the particular role of the Security Council in the UN structure. It provides that the Council has primary responsibility for the maintenance of international peace and security. In discharging that responsibility, however, the "Security Council shall act in accordance with the Purposes and Principles of the United Nations." The purposes of the organization are set out in Article 1 of the Charter. Article 1, paragraph 1, provides that one of the purposes of the organization is the maintenance of international peace and security.[72]

69 CPA/ORD/5 March 2004/64.

70 Scheffer, *op. cit.* (note 7), p. 846.

71 Ian Brownlie, *Principles of Public International Law*, Clarendon Press, London, 1998, p. 697; *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 28.

72 Article 1 (1) reads: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

This article states that the Security Council must act in conformity with the principles of justice and international law in the adjustment or settlement of international disputes. However, there is no similar obligation when the Council is acting under Chapter VII of the UN Charter. Decisions made by the Security Council under Chapter VII are binding on member States. Articles 24 and 1 (1) make clear that such a decision can derogate from international law that would otherwise be applicable.[73]

The *travaux préparatoires* of the UN Charter confirm this interpretation. The Dumbarton Oaks proposals did not include a reference to international law in their provisions on purposes and principles. A proposal was made at the United Nations Conference on International Organization by China, supported by the United Kingdom, the United States and the Soviet Union, to add that peaceful settlement of disputes must be brought about "with due regard for principles of justice and international law".[74] Other delegations thought that this phrase was inadequate, and that "a more explicit requirement for strict observance of the principles of justice, international law, and morality should be written into the Declaration of Purposes in the Charter."[75] On several occasions an amendment was introduced to place the words "in conformity with the principles of justice and international law" in the first line after the words "peace and security." These amendments were rejected.[76] This indicates that the drafters considered that the Council could derogate from international law when it takes decisions under Chapter VII of the UN Charter.

The principle that the UN Security Council can derogate from international law that would otherwise be applicable is supported by Article 103 of the Charter, which provides that if the obligations of member States under the UN Charter conflict with their obligations under another international agreement, those under the Charter prevail.[77] Obligations "under the Charter" include obligations arising directly from provisions of the Charter

73 Ruediger Wolfrum, "Article 1", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 1994, p. 52.

74 UNCIO III, at 622, Doc. 2 G/29.

75 Summary Report of Third Meeting of Committee I/1, doc. 197, 10 May 1945, UNCIO Documents Vol. 6, pp. 281-282.

76 Summary Report of the Ninth Meeting of Committee I/1, Doc. 742, I/1/23/ 1 June 1945, UNCIO Vol. 6 at 317, at 318; Verbatim Minutes of First Meeting of Commission I, 14 June 1945, Doc. 1006, UNCIO.

77 Article 103 UNC reads: "In 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."

as well as those arising from binding decisions of the UN Security Council.[78] This was confirmed by the ICJ in its Order on provisional measures in the *Lockerbie* case.[79] Several judges were more explicit in their opinions than the Order itself. Judge Oda, for example, stated in his declaration that "under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources."[80]

Article 103 refers only to treaty obligations, not to obligations under customary international law. This does not mean, however, that obligations under the Charter do not prevail over customary international law. This result is achieved by Article 25 of the Charter,[81] whereby member States agree to accept and carry out the decisions of the Security Council in accordance with the Charter. There is no limitation in the article to decisions which are in conformity with customary international law.[82] Article 103 must be seen against the background of general rules on the resolution of conflicts between treaties.[83] It has the specific purpose of making clear that the general rules on conflicts between treaties do not apply.

Several commentators argue that in any event — notwithstanding Articles 25 and 103 of the Charter — the Security Council is bound by *jus cogens* norms.[84] They contend that the character of such norms as being hierarchically superior to all other norms of international law leads to the conclusion that the Council must respect them. This argument was also made by ad hoc Judge Lauterpacht in his separate opinion in the *Genocide* case.[85] The advent of

78 Rudolf Bernhardt, "Article 103", in Simma, *op. cit.* (note 73), p. 1120.

79 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya* v. *United Kingdom), Provisional Measures, Order, 1992*, ICJ Reports 3, at 16, para. 39.

80 *Ibid.*, Declaration by Judge Oda, para. I.

81 Michael Reisman, "The constitutional crisis in the United Nations", *American Journal of International Law*, Vol. 87, No. 1, January 1993, p. 93. Interestingly, there is also State practice which appears to support the scope of application of Article 103 to customary law. An example is the statement by the Russian Federation to the Security Council on 24 March 1999 concerning Kosovo: "Article 103, precisely establishing an absolute priority of the Charter obligations before any other international obligations of the members of the Organization."

82 This limitation is not established by the words "in accordance with the Charter". See Jost Delbrück, "Article 25", in Simma, *op. cit.* (note 73), pp. 459-460.

83 Bernhardt, *op. cit.* (note 78), p. 1118.

84 Gill, *op. cit.* (note 4), p. 33.

85 "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*, Separate Opinion of Judge Lauterpacht, 1993 ICJ Reports 4, at 440.

the concept of *jus cogens* has not, however, led to amendments to the UN Charter. Even if it is true that the Security Council may not derogate from *jus cogens*, the question remains whether the category of *jus cogens* norms includes obligations arising from the law of occupation. While it has been maintained that such obligations do not appear to have the character of *jus cogens* norms,[86] the ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, did suggest that at least certain norms of the law of occupation may have a peremptory character. The Court held that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall, and that it is also for all States to see to it that any impediment created by the construction of the wall is brought to an end. This constituted an application of the principles in Articles 40-41 of the ILC draft articles on State responsibility, which by their own terms apply "to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law." Coupled with the ICJ's conclusion that the law applicable to the Israeli-occupied territories includes the law of occupation, this suggests that the latter may include peremptory norms. ICTY Trial Chamber II explicitly held in its judgment in the *Kupreškić* case that: "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character."[87]

Neither Article 25 nor Article 103 of the UN Charter provides that if the Security Council derogates from particular rules of international law, it should make clear which alternative regime applies. It is difficult to accept, however, that the drafters of the UN Charter intended to create a legal vacuum when the Council does derogate from international law. A legal argument could be made that the Security Council should indicate an alternative standard on the ground that, since it acts by delegation from the UN membership as a whole, it cannot delegate powers to States without continuing to maintain close scrutiny.[88] It has moreover been argued that the Council must at all times retain overall authority and control over the exercise of delegated powers under Chapter VII.[89] The determination by the Council that States may do certain

86 Scheffer, *op. cit.* (note 7), p. 852.

87 *Prosecutor* v. *Zoran Kupreškić* et al., Judgment, Case No. IT-95-16-T, Tr. Ch. II, 14 January 2000, para. 520.

88 See e.g. Derek Bowett, "The impact of Security Council decisions on dispute settlement procedures", *European Journal of International Law*, Vol. 5, 1994, p. 8.

89 Danesh Sarooshi, *The United Nations and the Development of Collective Security*: The delegation by the Security Council of its Chapter VII powers, Oxford University Press, Oxford, 1999, pp. 34, 159-160.

things in Iraq that they would otherwise not be able to do constitutes such a delegation. The Council should, according to this argument, provide a standard on the basis of which it can maintain scrutiny over the way in which the delegated powers are being exercised. Another legal argument could be made that the Security Council has an obligation to act in good faith. Article 2 (2) of the UN Charter requires member States to fulfil their obligations under the Charter in good faith. At first glance this requirement seems to concern member States only, but read together with the first sentence of Article 2 it appears that it could apply to the UN as well.[90] In any event the principle applies to the member States participating in the decision-making process of the organization.

As Kirgis remarks, the principle of good faith is difficult to define, "but at the very least, the principle seems to require the Council to act responsibly when it carries out its Charter-based functions."[91] It could be argued that an open-ended derogation from the law of occupation is irresponsible behaviour on the part of the Council. Even if there was no legal obligation for the Council to provide an alternative standard, it would be a wise policy choice for it to do so. In this respect the case of UN peace support operations is instructive. It has been claimed that the law of occupation is not applicable to those operations because they are governed by an alternative legal regime, i.e. a Security Council resolution.[92] However, Security Council resolutions generally do not provide a framework that establishes clear guidance for practical questions raised by the administration of territory.

In sum, the Security Council can derogate from the law of occupation at least with regard to non-peremptory norms, but if it does so it should provide an alternative standard of behaviour.

### Has the Security Council derogated from the law of occupation in the case of Iraq?

Whether or not the Security Council has derogated from the law of occupation in the case of Iraq is a matter of interpretation of Resolution 1483. The principles applicable to such interpretation are underdeveloped.[93]

90 See e.g. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford/Portland, Or., 2004, p. 195.

91 Frederic Kirgis, "Security council governance of post-conflict societies: A plea for good faith and informed decision-making", *American Journal of International Law*, Vol. 95, No. 3, July 2001, p. 581.

92 Daphna Shraga, Intervention in L. Condorelli, A.M. La Rosa & S. Scherrer (eds.), *Les Nations Unies et le Droit International Humanitaire*, Pedone, Paris, 1996, p. 433.

93 See Michael Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 73.

The principal authoritative statement in this field is a passage in the ICJ's *Namibia* Advisory Opinion:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."[94]

An answer to the question whether the Council in Resolution 1483 altered the status of States contributing troops to the Stabilization Force is not to be found in the terms of the resolution. On the one hand preambular paragraph 14 suggests that the Council has changed the legal status of these States. On the other hand operative paragraph 5 of the resolution "calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907". This paragraph could be read to mean that under the circumstances these conventions, which include the main body of the law of occupation, are applicable to all States concerned, including States working under the Authority. However, if preambular paragraph 14 is considered to have constitutively determined that States working under the Authority are not occupying powers, then in the case of those States "their obligations" simply do not include the obligations of an occupying power. They are nonetheless still bound to respect the provisions of the law of occupation which are addressed to all States party to the Geneva Conventions, including for example the obligation in Article 59 of the Fourth Geneva Convention to permit the free passage of relief to the population of an occupied territory.

The discussions leading up to the adoption of Resolution 1483 are for the most part not on public record. Much of the negotiating process of a Security Council resolution characteristically takes place in informal consultations. Nevertheless, the changes in the draft resolution suggest that the Council did alter the status of troop-contributing States. As explained

94 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971*, ICJ Reports 1971, p. 53.

above, what ultimately became preambular paragraph 13 was changed during the drafting of the resolution to attenuate the connection between these States on the one hand and the US and the UK on the other.

The record of the Security Council meeting in which the resolution was adopted can help with its interpretation,[95] but in this particular case it does not provide much guidance. One delegation made a clear distinction between the occupying powers and member States which, in the near future, will be involved in the rebuilding of Iraq.[96] It did not specify whether these other member States would, in the absence of the resolution, be occupying powers.

Subsequent State practice which shows how the resolution is interpreted by States more or less directly involved can be a supplementary means of interpretation.[97] As pointed out above, the Netherlands invokes Resolution 1483 in affirming its status as a non-occupying power. New Zealand appears to do likewise. In a statement issued on 11 August 2003 the Prime Minister indicated that Resolution 1483 provided the necessary multilateral cover for the deployment of New Zealand troops in Iraq. She stated that: "Under Resolution 1483, we can make a useful contribution without in any way becoming an occupying power."[98] On the other hand, in reply to questions by members of Parliament the New Zealand Minister of Foreign Affairs emphasized that his country's troops would not be carrying out tasks characteristic of occupying powers in the same way as the government of Denmark has done. He stated that:

> "The proposed deployment of New Zealand Defence Force engineers is in fact in response to Resolution 1483, which was passed, I think unanimously, by the United Nations. These engineers are not part of the occupation forces. They are there to do the job that we said we would always be there to do, and that is to assist the civil reconstruction of Iraq."[99]

This State practice indicates that at least certain States contributing troops to SFIR considered that Resolution 1483 prevented them from becoming occupying powers, which they might otherwise have been.

From the terms of Resolution 1483 it is not clear whether the Security Council intended to authorize the Authority to derogate from the law of

95 Wood, *op. cit.* (note 93), at 93.
96 S/PV.4761 of 22 May 2003, at 10 (Cameroon),
97 Wood, *op. cit.* (note 93), at 95.
98 Press release, New Zealand Defence Force, 11 August 2003.
99 Debates of Parliament, 30 July 2003, The Hon. Phil Goff.

occupation in the reconstruction of the Iraqi economy. Yet the language used implies a broad role for the Authority in the reconstruction of Iraq. The Coalition is called upon to "promote the welfare of the Iraqi people through the effective administration of the territory". In addition, the resolution refers to a role for the Authority in promoting economic reconstruction, the conditions for sustainable development, and legal and judicial reform. These tasks would seem difficult to reconcile with the restrictions in the law of occupation.[100] According to Grant, this difficulty suggests that the Council has created a "carve out" from the Hague Regulations and the Fourth Geneva Convention.[101] On the other hand, Resolution 1483 explicitly calls upon all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907, without making an express exception for those provisions that are difficult to reconcile with the reconstruction of Iraq.

The record of the meeting at which Resolution 1483 was adopted offers some evidence in support of the argument that part of the law of occupation was set aside. The Spanish delegate stated that the resolution provided an appropriate legal framework for dealing with the special, anomalous and grave situation, pointing out, among other things, that it contained "guidelines for the conduct of the authorities that will be managing this transitional period in Iraq – and transparency in economic affairs is not the least relevant of these guidelines."[102] This statement implies that the law of occupation was not deemed to be the only legal regime applicable. More specifically, Pakistan considered that the resolution included the delegation of certain powers by the Security Council to the occupying powers, represented by the Authority.[103] It could be argued that such a delegation would be unnecessary except if there were a need to derogate from existing international law.

As mentioned above, subsequent State practice (as exemplified by the Netherlands) would appear to suggest that Resolution 1483 has created a "carve out" from the law of occupation. In response to a question by a member of the House of Lords concerning the legality of Order 39, a UK government representative stated that the content of the Order was decided by the

100 But see Alexander Orakhelashvili, "The post-war settlement in Iraq: The UN Security Council Resolution 1483 (2003) and general international law", *Journal of Conflict & Security Law*, Vol. 8, 2003, p. 307.

101 Thomas D. Grant, "Iraq: How to reconcile conflicting obligations of occupation and reform", *ASIL Insight*, June 2003.

102 *Op. cit.* (note 96), at 6 (Spain).

103 *Ibid*, at 11 (Pakistan).

Iraqi Interim Governing Council and endorsed by the CPA.[104] This could be read as implying that the CPA could in certain circumstances derogate from the law of occupation, provided the Iraqi authorities agreed. Indeed, paragraph 4 of the resolution calls upon the Authority "to promote the welfare of the Iraqi people through the effective administration of the territory". This suggests that the Authority should consult Iraqi representatives before taking important decisions, since Iraqis are in the best position to determine what promotes their welfare. However, this does not detract from the fact that the ultimate decision, in this case the promulgation of Order 39, was made by the Authority.

## Conclusion

The situation in Iraq has focused renewed attention on the law of occupation. It is rare that States accept the status of occupying powers, as the US and the UK have done. However, the adoption of Resolution 1483 combined with the activities of the US, the UK and States assisting them in Iraq has raised questions as to the relationship between that resolution and the law of occupation. The Security Council, acting under Chapter VII of the UN Charter, appears able to derogate from at least those rules of the law of occupation which do not constitute peremptory norms of international law. Claims that the Security Council has done precisely that in Resolution 1483 are neither clearly corroborated nor clearly dismissed by an analysis of the resolution and the circumstances surrounding its adoption. The lack of clarity in this respect has been lamented by commentators, who argue that the Council should have set out a mandate of civilian and military responsibilities and UN oversight that would eclipse much of occupation law with a larger body of modern international law as a source of guidance in attaining transformational objectives.[105] I fully support that argument. If the Council intends to derogate from international law in a resolution, it should do so explicitly and determine the alternative regime to be applied. A decision as important as derogating from the law of occupation should not be made ambiguously. It is clear from the geopolitical situation at the time Resolution 1483 was adopted, however, that an explicit derogation was not feasible. Such a determination could have been regarded as endorsing the armed intervention in Iraq, which was unacceptable to several permanent

104 *Hansard*, House of Lords, 8 October 2003, c. 293-294.
105 Scheffer, *op. cit.* (note 7), p. 850.

members of the Council. In this respect an analogy between the Stabilization Force in Iraq and UN-authorized peace support operations including ISAF and KFOR is misleading.[106] In the case of the latter, the Security Council has set out clear mandates in enabling resolutions and has authorized the use of all necessary means to achieve those mandates. In the case of the Stabilization Force in Iraq, the Council in the first instance appears primarily to have taken note of the factual situation of the US and UK as occupying powers. Only in Resolution 1511 adopted on 16 October 2003 did the Council authorize a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.[107] Resolution 1511 also expressly underscored the temporary nature of the exercise by the Coalition Provisional Authority of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in Resolution 1483 (2003).[108]

The foregoing analysis leads to the conclusion that developments in Iraq are not in themselves, as some maintain, an argument for revising the existing law of occupation.[109] That law remains an important framework for addressing such situations. In exceptional cases in which it is considered too restrictive, the Security Council may derogate from certain provisions. In a case such as Iraq, where there are divergent views as to the legitimacy of the events that have led to the occupation, there can be no derogation or only an ambiguous one, and the States concerned will have only limited latitude for reforms. More fundamental changes to the occupied territory's political, legal and economic system will have to be left to that territory's population. If such changes are considered necessary, power should be transferred to the local population as soon as possible. In the present case, this means that power should pass as soon as possible to the Iraqi people. And that is precisely what Resolution 1483 contemplated in its fourth preambular paragraph, which expresses "resolve that the day when Iraqis govern themselves must come quickly".[110]

106 The analogy is made by Scheffer, *ibid.*, p. 859.

107 SC Res. 1511, 16 October 2003.

108 *Ibid.*, para. 1.

109 Scheffer, *op. cit.* (note ), p. 859. See also D. P. Goodman, "The need for fundamental change in the law of belligerent occupation", *Stanford Law Review*, Vol. 37, 1985, p. 1573.

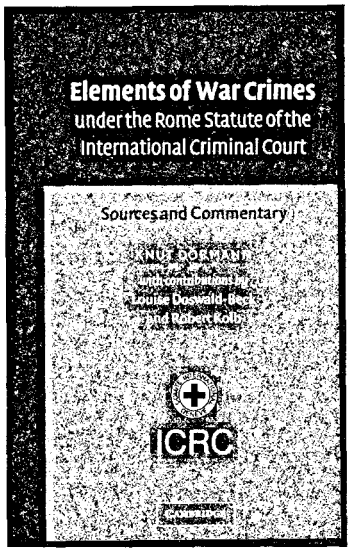
110 SC Res. 1483, preambular para. 4.

# Résumé


## *L'existentialisme en Irak : la résolution 1483 du Conseil de sécurité et le droit de l'occupation*

*Marten Zwanenburg*

*Le droit de l'occupation était une composante importante du régime juridique applicable en Irak jusqu'au transfert de souveraineté au gouvernement intérimaire irakien, en juin 2004. Les résolutions du Conseil de sécurité relatives à l'Irak, en particulier la résolution 1483, constituaient, elles aussi, un élément significatif de ce régime juridique, un élément qui n'était cependant pas nécessairement compatible à tous égards avec le droit de l'occupation. L'auteur examine la relation entre le droit de l'occupation et la résolution 1483 du Conseil de sécurité en Irak et la question de savoir si – et le cas échéant, à quelles conditions – le Conseil de sécurité peut déroger au droit de l'occupation. Il analyse à cette fin les articles pertinents de la Charte des Nations Unies. L'article soulève ensuite une interrogation: le Conseil de sécurité a-t-il effectivement dérogé au droit de l'occupation dans le cas de l'Irak? Pour y répondre, l'auteur étudie la résolution 1483 ainsi que la pratique des États en la matière.*

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# Neighbours as human shields? The Israel Defense Forces' "Early Warning Procedure" and international humanitarian law

BY ROLAND OTTO*

The "Early Warning Procedure"[1], colloquially referred to as "Neighbour Procedure", is a means employed by the Israel Defense Forces (IDF) to arrest wanted persons in the West Bank and to avoid civilian and military casualties. If the Israeli armed forces have knowledge of a wanted person's presence in a house, according to the "Early Warning Procedure" the forces surround the house but do not enter it themselves. They then obtain the assistance of local Palestinians, i.e. a neighbour who is persuaded to enter the house. That person warns the occupants of the house, asks them to leave it and requests the wanted person to surrender to the Israeli forces. If the wanted person does not obey, the forces enter the house to arrest him. The general idea of the "Early Warning Procedure" is to find a volunteer, who is persuaded by words only, is not threatened, and has every possibility to refuse. The person in question may not be ordered to perform military tasks and may not assist in situations where he is liable to be injured.[2] According to the IDF, the "Early Warning Procedure" avoids civilian casualties, i.e. of innocent house occupants, as well as injuries to soldiers who could be targeted while approaching the house. Furthermore, it gives the Israeli armed forces the possibility to operate in a manner attracting less attention: a loud warning by megaphone is not necessary to evacuate the house. Thus, attacks from the neighbourhood can be avoided.

Quite apart from the fact that it might not always be possible to fulfil the preconditions set out above, as pressure might be put on civilians[3] and the danger of injury cannot be absolutely excluded,[4] the legality of this method is questionable in several respects. The legal background that has to be taken into account is determined by the Israeli occupation of the West Bank.

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## The normative framework: international humanitarian law and human rights law

The International Court of Justice has recently clarified that Israel is still belligerently occupying the West Bank:

> "The territories situated between the Green Line (...) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories (...) have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."[5]

In contrast to this, the State of Israel claims that the West Bank has a status *sui generis*, i.e. outside the law, as being neither part of Israeli territory, nor formally occupied territory.[6] According to the Israeli "Missing Revisioner Theory", in 1967 the West Bank was not the "territory of a High Contracting Party" within the meaning of Article 2, para. 2, of the Fourth

1 Other terms used are "Prior Warning Procedure" or "Advance Warning Procedure", see Military Order (Israel), "Advance Warning Procedure", 26 November 2002, translation by B'Tselem <http://www.btselem.org/english/legal_documents/advanced_warning_procedure.doc> (last visited 10 November 2004).

2 Military Order (Israel), "Advance Warning Procedure", 26 November 2002, *op. cit.* (note 1).

3 See e.g. testimony of Ahmad Abd al-Qader Ahmad, in "Soldiers use Ahmad Asaf as a human shield in Tulkarem refugee camp", B'Tselem, 12 January 2004, <http://www.btselem.org/English/Testimonies/040112_Ahmad_Assaf_Human_Shield.asp> (last visited 10 November 2004).

4 E.g. the case of Nidal Abu Mukhsan, who was killed by the person he was supposed to convince to surrender. See "The IDF continues to force Palestinians to serve as 'human shields' for soldiers in contempt of High Court of Justice injunction", B'Tselem, <http://www.btselem.org/english/testimonies/021226_human_shields_update.asp> (last visited 10 November 2004).

5 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 78, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 10 November 2004); see also Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, HCJ 2056/04, Judgment of 30 June 2004, para. 23, available at <http://62.90.71.124/Files_ENG/04/560/020/a28/04020560.a28.pdf> (last visited 10 November 2004); *Ajuri* v. *IDF Commander*, HCJ 7015/02, Judgment of 3 September 2002 ("Assigned Residence"), in *Israel Law Reports*, 2002, pp. 2 and 12 ff.

6 David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, New York, 2002, pp. 3234; Richard A. Falk; Burns H. Weston, "The relevance of international law to Israeli and Palestinian rights in the West Bank and Gaza", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, p. 131.

Geneva Convention,[7] as it had been occupied by Jordan since the 1948 War. According to the State of Israel it was thus not occupied by Israel in 1967. Consequently, Israel denies the direct applicability of the Fourth Geneva Convention regarding that territory.[8] However, "the whole of the international community — except Israel"[9] accepts that the Fourth Geneva Convention is applicable *de jure*.[10] The State of Israel agrees that the "humanitarian provisions" laid down in the Convention are at least *de facto* applicable.[11]

In addition, Israel generally applies the 1907 Hague Regulations[12] and the Israeli Supreme Court has recognized them as being customary international law and thus part of Israeli law.[13] Israel is furthermore bound by the International Covenant on Civil and Political Rights (ICCPR),[14]

7 Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, entry into force on 21 October 1950, Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol. 1, pp. 297-330; reprinted in *UNTS*, Vol. 75, 1950, pp. 287-417; Israel signed the Fourth Geneva Convention on 8 December 1949 and ratified it on 6 July 1951. The only reservation Israel made refers to the use of the Red Shield of David as the emblem and distinctive sign of its medical services, see "Reservations and declarations concerning the four Geneva Conventions of 12 August 1949", reprinted in Dietrich Schindler; Jirí Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 2nd ed., Sijthoff & Noordhoff, Alphen aan den Rijn, 1981, p. 506.

8 Yehuda Zvi Blum, "The missing revisioner: Reflections on the status of Judea and Samaria", in *Israel Law Review*, Vol. 3, 1968, pp.279-301; Meir Shamgar, "The observance of international law in the administered territories", in: *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 265 ff.

9 Ardi Imseis, "On the Fourth Geneva Convention and the occupied Palestinian territory", in *Harvard International Law Journal*, Vol. 44, No. 1, 2003, p. 97.

10 See e.g. Security Council Resolution 1435 (24 September 2002), UN Doc. S/RES/1435 (2002), on the situation in the Middle East, including the Palestinian question; ICJ, *op. cit.* (note 5), paras. 89-101; "Declaration on the Convention's applicability to the occupied Palestinian territories", High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, reprinted in *Journal of Palestine Studies*, Vol. 31, No. 3, 2002, pp. 148-150.

11 See Supreme Court of Israel, *op. cit.* (note 5), pp. 12 ff.

12 Regulations respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, entry into force on 26 January 1910, in J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York 1918, pp. 100-127 (English translation by US Department of State, with minor corrections by J. B. Scott); reprinted in *American Journal of International Law*, Vol. 2, Suppl., 1908, pp. 97-117 (hereinafter 1907 Hague Regulations).

13 Supreme Court of Israel, *Ayyoub v. Minister of Defence (Beth-El* case), H.C. 606/78, H.C. 610/78, in *Piskei Din [Decisions of the Israeli Supreme Court]*, Vol. 33, No. 2, p. 133; English summary in *Israel Yearbook on Human Rights*, Vol. 9, 1979, pp. 337 ff.; see also Thomas S. Kuttner, "Israel and the West Bank: Aspects of the law of belligerent occupation", in *Israel Yearbook on Human Rights*, Vol. 7, 1977, p. 171; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, N.J., 1993, pp. 109 and 112.

14 International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, entry into force on 23 March 1976, in *UNTS*, Vol. 999, 1976, pp. 171-346; entry into force for Israel on 3 January 1992. The only reservation Israel made concerns matters of personal status which are to be governed in Israel by religious law (Art. 23 of the Covenant), available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited 10 November 2004).

which is also applicable to Israeli authority exercised in the occupied territories.[15]

The following analysis will focus on the 1907 Hague Regulations and the Fourth Geneva Convention. Reference will also be made to related human rights questions.

## Israel's responsibility for order and security in the occupied territories

According to Article 43 of the 1907 Hague Regulations, an occupying power assumes responsibility for the occupied territory and its inhabitants and is responsible for "*l'ordre et la vie publics*".[16] This provision is further developed in Articles 29 and 47 ff. of the Fourth Geneva Convention. Hence the occupying power has not only the right, but even the responsibility to take security measures. If a civilian is reasonably suspected of an offence for which arrest would be an appropriate measure, an arrest is allowed under international humanitarian law. This may involve the use of force if necessary, but such security measures are always subject to the rule of proportionality.[17] As a precondition for the following considerations, we will accept that the arrest of a wanted person in an occupied territory is legal and that the means employed, i.e. the force used against that person, comply with the requirements of proportionality. The present examination thus concerns the rights of the person who might voluntarily warn the occupants of the house in question as part of an otherwise legal action.

15 ICJ, *op. cit.* (note 5), paras. 110 f.; see also Jochen Abr. Frowein, "The relationship between human rights regimes and regimes of belligerent occupation", in *Israel Yearbook on Human Rights*, Vol. 28, 1998, pp. 6 and 11; Manfred Nowak, *U.N. Covenant on Civil and Political Rights — CCPR Commentary*, Engel, Kehl am Rhein, 1993, Art. 2, para. 28.

16 The common English translation differs from the authentic French version at this point and reads "public order and safety"; compare e.g. Adam Roberts; Richard Guelff (eds.), *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 81. This seems to be based on the semi-official English translation by the US Department of State as given in James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., Oxford University Press, New York, 1918, p. 123. A more adequate translation is contained in *American Journal of International Law*, Vol. 2, Suppl., 1908, pp. 112 f., which refers to "public order and life". The correct translation is most likely the one proposed by Edmund H. Schwenk, "Legislative power of the military occupant under Article 43, Hague Regulations", in *Yale Law Journal*, Vol. 54, 1945, pp. 393 (footnote 1) and 398: "As the French term 'la vie publique' encompasses 'social functions [and] ordinary transactions which constitute daily life' the term 'public order and civil life' seems to come closest to the meaning of 'l'ordre et la vie publics', whereas the term 'l'ordre' means 'security or general safety'". See also Benvenisti, *op. cit.* (note 13), p. 7; Kretzmer, *op. cit.* (note 6), p. 58.

17 Hans-Peter Gasser, "Protection of the civilian population", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1999, pp. 214, 242 and 246; see also Kretzmer, *op. cit.* (note 6), pp. 131 and 155.

At first sight, the problem thus seems to be a factual one: how can it be determined whether a person is truly voluntarily helping or is subject to any kind of pressure? Cases in which the person in question felt "the barrel of a rifle touching [his] back"[18] are clearly illegal. But if certainty as to the voluntary character of the person's actions could be achieved, why should that person not help to avoid casualties? Nevertheless, legal questions arise even before the factual question of the true voluntary character, for even though a person helps voluntarily, that person's rights could still be infringed in a way rendering the action illegal. This would first be the case if an absolute prohibition of the "Early Warning Procedure" existed under international humanitarian or human rights law, and secondly if that person's rights were infringed in a disproportionate manner.

### An absolute prohibition of the "Early Warning Procedure"

Civilians residing in the occupied territories are protected persons within the meaning of Article 4, para. 1, of the Fourth Geneva Convention.[19] They are, under Article 27, para. 1, of the Convention and customary international law, entitled to respect for their persons and must be protected against all acts of violence or threats thereof.[20] According to Article 47 of the Fourth Geneva Convention, protected persons in occupied territory "shall not be deprived (...) of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory". These benefits cannot even be changed "by any agreement concluded between the authorities of the occupied territories and the Occupying Power". The rights guaranteed by the Convention are thus not subject to the disposition of either the Occupying or the Occupied Power.

18 Statement by Emil Darwazeh, quoted in Aryeh Dayan, "Refuse to be a human shield? No such thing — mocking High Court rules, the IDF still put Palestinians in the way of danger", on Haaretz.com, 7 July 2003 available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=315128&contrassID=1> (last visited 10 November 2004).

19 "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."; see Yuval Shany, "Israeli counter-terrorism measures: Are they 'kosher' under international law?", in Michael N. Schmitt, Gian Luca Beruto (eds.), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, 2003, p. 96 <http://www.michaelschmitt.org/images/4996terr.pdf> (last visited 10 November 2004).

20 Gasser, *op. cit.* (note 17), p. 212.

Moreover, they are not even open to modification by the protected persons themselves, as Article 47 is supplemented by a second layer of protection: Article 8 of the Fourth Geneva Convention stipulates that protected persons may not renounce the rights secured to them. Article 8 was introduced to make clear that "States party to the Convention (...) could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired."[21] It replaced an earlier draft possibly leaving room for the interpretation that protected persons could renounce the benefits of the Convention, provided that their choice was made completely freely and without any pressure. The present wording was chosen to avoid the difficulty of proving the existence of duress or pressure on persons renouncing their rights.[22] Thus, even a renunciation of rights by a protected person on his or her own initiative is null and void. This principle, laid down in Article 8 of the Fourth Geneva Convention, applies to the entirety of international humanitarian law.[23]

The aforesaid provisions establish the background that has to be borne in mind when examining the legality of the "Early Warning Procedure". There is no rule under international humanitarian law explicitly prohibiting that procedure. However, it might fall under the prohibition on compelling protected persons to serve in the Occupying Power's armed forces or take part in military operations and the prohibition of the use of human shields.

### Compulsion of protected persons to serve in the occupying power's armed forces is prohibited

Under Article 51, para. 1, of the Fourth Geneva Convention, protected persons may not be compelled to serve in the Occupying Power's armed or auxiliary forces, nor may the Occupying Power use pressure or propaganda to achieve voluntary enlistment. This prohibition is a universally recognized basic principle of the laws of war.[24] It is absolute and permits no derogation,[25] and is included in the catalogue of war crimes of the Rome

21 Jean S. Pictet, Oscar M. Uhler, Henri Coursier (eds), *The Geneva Conventions of 12 August 1949: Commentary, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 74.

22 *Ibid.*, pp. 74 ff.

23 Gasser, *op. cit.* (note 17), p. 252.

24 Pictet, *op. cit.* (note 21), p. 292; Gasser, *op. cit.* (note 17), p. 263.

25 Pictet, *ibid.*, p. 293; Gasser, *ibid.*, p. 263.

Statute of the International Criminal Court (ICC).[26] While Article 23 (h), para. 2, of the 1907 Hague Regulations only forbade forced participation of nationals of the hostile party in operations of war directed against their own country, the Fourth Geneva Convention extended the scope of the prohibition: it refers to all recruitment and enlistment in the armed forces of the Occupying Power, whatever the theatre of operations and whoever the opposing forces might be, including resistance movements operating within the occupied territory.[27]

At first sight it might seem unlikely that the help of the "Early Warner" on an *ad hoc* basis falls under this prohibition. The wording "serve in its armed forces" and "servir dans ses forces armées" apparently relates to something more durable than bringing a message to the residents of a house. However, the object of this prohibition is to protect the inhabitants of an occupied territory from actions offensive to their patriotic feelings and from attempts to undermine their allegiance to their own country.[28] Protected persons should not be subjected to an unbearable loyalty conflict.[29] For example, the use of a protected person in an operation against the forces with whom that person identifies or sympathizes amounts to a serious attack on human dignity and causes serious mental suffering or injury.[30] Furthermore, a person supporting the Occupying Power's forces, even on a single occasion, will very likely be stigmatized as a "collaborator". Such a person might, at least in the perception of the other civilians, have changed sides. Thus, even an isolated supporting action runs counter to the purpose of Article 51, para. 1, of the Fourth Geneva Convention.

Another important factor that has to be taken into account is the rule preventing protected persons from renouncing the rights secured to them. Read in connection with Article 8 of that same Convention, the said Article 51, para. 1, amounts to an absolute prohibition of the "Early Warning Procedure": it bans not only forced service in the Occupying Power's armed forces, but also propaganda for voluntary service. It thus covers pub-

26 Article 8.2 (a) (v) of the Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, entry into force on 1 July 2002, UN Doc. A/CONF.183/9; reprinted in *UNTS*, Vol. 2187, 2002, pp. 90-158; *ILM*, Vol. 37, No. 5, 1998, pp. 1002-1069.

27 Pictet, *op. cit.* (note 21), p. 293; Gasser, *op. cit.* (note 17), p. 263.

28 Pictet, *ibid.*, p. 293.

29 Michael Bothe, "War crimes", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 394.

30 ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A (Appeals Chamber, Judgment of 29 July 2004), para. 597.

licity aimed at the population of an occupied territory, i.e. by radio or television. Such means used to influence protected persons seem rather harmless compared to the situation a neighbour faces when asked to serve as an "Early Warner". That request is not addressed to the general public, but is made directly to one specific person. It is not transmitted by an anonymous medium such as radio or television, but is most likely made to him by several heavily armed members of the Occupying Power's armed forces. Nor is it an invitation he can think over for some time, but a request he must decide on that very moment. These factors add up to a considerable amount of pressure imposed on the person in question. The previous practice of the Israeli armed forces has shown that the possibility of a negative answer might not even be taken into account.[31]

### Prohibition on compelling protected persons to take part in military operations

Protected persons can under certain conditions be compelled to work. However, under Article 51, para. 2, of the Fourth Geneva Convention, work that would oblige them to take part in military operations is excluded. This rule, already formulated in Article 52 of the 1907 Hague Regulations, is also contained in the ICC Statute's list of war crimes.[32] Protected persons may not be ordered to contribute to military operations.[33] This covers operations against their own country or another State, as well as actions against resistance and partisans in the occupied territory.[34]

The said prohibition is intended to ensure that civilians who are compelled to work by the occupying authorities always retain their status as civilians.[35] This is not the case as regards the "Early Warning Procedure", for the protected person becomes part of a military action by the occupying forces. Even though the reason for the arrest of the wanted person may be of a penal nature or based on security considerations, the forces performing that action are the Occupying Power's armed forces. This association with them can endanger the protected person, who may meet with armed opposition[36] or become the victim of a booby trap. Such risks are typically taken by combat-

31 Dayan, *op. cit.* (note 18).
32 Article 8, para. 2, lit. b (xv) ICC Statute.
33 ICTY, *op. cit.* (note 30).
34 Gasser, *op. cit.* (note 17), p. 264.
35 *Ibid.*
36 E.g. the case of Nidal Abu Mukhsan, *op. cit.* (note 4).

ants, not civilians. The "Early Warning Procedure" uses civilians to avoid those risks and thus shifts the front line of hostilities into the midst of the civilian population.

Nonetheless, the wording of Article 51, para. 2, might suggest that protected persons may not be compelled to take part in military operations, but that room is left for voluntary participation.[37] Again, this prohibition has to be read in close connection with the said Convention's Article 8. While it is expressly prohibited to force a civilian to take part in a military operation, Article 8 is meant to preclude forced participation in the guise of voluntary participation. It follows that the prohibition in Article 51, para. 2, must amount to a general prohibition on civilians taking part in military operations.

This more extensive interpretation finds support in the phrasing of Article 51: the general rule is that "[t]he Occupying Power may not compel protected persons to work" unless certain conditions are fulfilled. Thus, compelling protected persons to work is permissible only as an exception. Article 51, para. 2, spells out this exception, i.e. the kind of work the persons in question may be compelled to do. The exception does not include military operations, a fact that is further clarified. Under Article 8 of the Fourth Geneva Convention, protected persons cannot renounce these limitations, i.e. a person compelled to work cannot voluntarily agree to do work other than that specified in Article 51, para. 2 thereof. Hence a person compelled to work cannot agree voluntarily to take part in military actions. It would consequently be somewhat surprising if this did not hold true for a person who agreed to work voluntarily at the start, and later took part in a military operation.

### Prohibition on the use of human shields

Under Article 28 of the Fourth Geneva Convention it is absolutely forbidden to use civilians as shields; they may not be used to render certain points or areas immune from military operations. Yet one aim of the "Early Warning Procedure" is to avoid injuries to soldiers who could be targeted while approaching the house, e.g. by booby traps, or while surrounding the house and drawing attention to themselves by using a megaphone to warn the residents in it.

37 Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed., Ashgate, Aldershot, 1998, p. 200.

It is questionable whether such attacks on the occupying forces are covered by the term "military operations", which seems to refer first and foremost to acts of warfare committed by the enemy's military forces. But it also covers acts of war by groups such as volunteer corps and resistance movements, which are placed in the same category as the regular armed forces under Article 4, paragraphs 2, 3 and 6, of the Third Geneva Convention.[38] The aforesaid prohibition also applies to occupied territory.[39] However, civilians who spontaneously attack occupying forces neither fulfil the requirements of the said article's paragraph 2 in terms of command responsibility for subordinates and distinctive signs, nor are they members of armed forces within the meaning of its paragraph 3, nor do they constitute a *levée en masse* in accordance with its paragraph 6. Thus, at first sight, the "Early Warning Procedure" would not amount to the use of civilians as shields, since it serves as protection against persons not covered by Article 4 of the Third Geneva Convention.

However, the scope of this prohibition is broader: civilians may not be used in order to gain a military advantage or secure a military operation.[40] While it remains questionable whether security measures by the occupying forces represent a "military advantage", they surely have to be regarded as "military operations", for they are performed by the Occupying Power's armed forces and not by any kind of security force provided by the occupied population. It is not clear whether they are law enforcement measures or further the military aims of the Occupying Power. In the case of the "Early Warning Procedure" a civilian is exposed to danger in order to help the military forces achieve their aims and reduce the risks taken by them. Therefore the person helping voluntarily is indeed serving as a shield, perhaps not in the classic sense, but he does nevertheless diminish the risk of an attack on the military forces in that he is a civilian and is less likely to be attacked in that kind of situation.

The fact that according to the "Early Warning Procedure" the civilian helps voluntarily loses its relevance, first if Article 8 of the Fourth Geneva Convention is taken into account and, secondly, if the situation is viewed from the standpoint of a potential attacker. In the latter's perception, it is

38 Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, entry into force on 21 October 1950, Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol. 1, pp. 243-276; reprinted in *UNTS*, Vol. 75, 1950, pp. 135-285.

39 Pictet, *op. cit.* (note 21), p. 209.

40 Gasser, *op. cit.* (note 17), pp. 218 and 265.

not possible to distinguish a volunteer from a human shield under duress. This results in exactly the kind of conflict the prohibition of human shields is meant to avoid: the need to decide between attacking one's equals or refraining from an attack.

To sum up, the prohibition on compelling protected persons to serve in the Occupying Power's armed forces might at first sight not amount to an absolute prohibition of the "Early Warning Procedure". However, if the ban on propaganda to obtain voluntary service and Article 8 of the Fourth Geneva Convention are taken into account, it becomes clear that the "Early Warning Procedure" violates that prohibition. This becomes even more evident when paragraphs 1 and 2 of Article 51 are read in context: it is prohibited not only to force protected persons to participate in military operations, but also to use publicity in order to obtain voluntary service. The tenor of this is that a protected person may not be used in a military context. If the ban on the use of propaganda is taken seriously, he cannot even be asked to participate. Moreover, under Article 8 of the Fourth Geneva Convention the limitations imposed by the above prohibition cannot be renounced by protected persons, as that would render possible the abusive use of "forced volunteers".

While this might still be subject to further discussion in terms of "real volunteers", the fact that the use of civilians as human shields is prohibited means that the "Early Warning Procedure" infringes upon international humanitarian law. Even a perfectly voluntary "human shield" falls under this prohibition, as it is not possible for third persons to distinguish volunteers from non-volunteers. Thus, the "Early Warning Procedure" violates Article 51 of the Fourth Geneva Convention as well as the said prohibition.

### The human rights perspective

The situation differs if considered from a human rights perspective: the right at stake is the right to life, as laid down in Article 6 of the ICCPR.[41] This right is not guaranteed in an absolute manner. "Lawful acts of war" are not prohibited by Article 6 "if they do not violate internationally recognized laws and customs of war."[42] The illegality of the "Early Warning

41 Article 6, para. 1, of the ICCPR reads "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

42 Report of the Secretary-General on "Respect for Human Rights in Armed Conflicts", UN Doc. A/8052 (18 September 1970), p. 104; see also Jochen Abr. Frowein, "Article 15", in Jochen Abr. Frowein; Wolfgang Peukert (eds.), *Europäische Menschenrechtskonvention — EMRK-Kommentar*, 2nd ed., N. P. Engel, Kehl am Rhein, 1996, para. 12.

Procedure" is, as shown above, a direct result of the special situation of occupation. The authority of a State to limit the rights of the persons within its jurisdiction is broader than that of an Occupying Power with regard to protected persons, for in human rights law there is no prohibition of voluntary renunciation of protection comparable to Article 8 of the Fourth Geneva Convention. It is true that States are obliged to take positive measures to ensure the right to life.[43] This does not, however, comprise a duty to protect individuals from any risk they take voluntarily.[44] Thus, the persons themselves have to assess the risks they take. The present issue is an example of international humanitarian law providing for a higher standard of protection than human rights law. In this context, the international humanitarian law rules are the *leges speciales* and prevail over the human rights norms.[45]

### A different approach: proportionality considerations

The foregoing analysis has shown that various international humanitarian law rights and human rights are affected by the "Early Warning Procedure". This list is supplemented by Article 27, para. 1(2), of the Fourth Geneva Convention and customary international law, which states that protected persons "shall be protected especially against all acts of violence or threats thereof".[46] All acts that might cause unjustifiable harm to a civilian must be avoided.[47] The prohibition of physical or moral coercion, in particular to obtain information, that is laid down in Article 31 of the Fourth Geneva Convention and Article 44 of the 1907 Hague Regulations, and the prohibition on forcing enemy nationals to act as a guide for invading enemy forces[48] follow the same pattern: the use of protected persons against their will in any manner to achieve military advantages is either prohibited or subject to limitations.

43 Halûk A. Kabaalioğlu, "The obligation to 'respect' and to 'ensure' the right to life", in Bertrand. G. Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 164 f.

44 See Nowak, *op. cit.* (note 15), Art. 6, paras. 3 ff. and 17; Eckart Klein, "The duty to protect and to ensure human rights under the International Covenant on Civil and Political Rights", in: Eckart Klein (ed.), *The Duty to Protect and Ensure Human Rights*, Berlin Verlag, Berlin, 2000, pp. 306-310.

45 See ICJ, *op. cit.* (note 5), para. 106; Frowein, *op. cit.* (note 15), pp. 9 and 11; Nowak, *op. cit.* (note 15), Art. 4, para. 27; Hans-Joachim Heintze, "The European Court of Human Rights and the implementation of human rights standards during armed conflict", in *German Yearbook of International Law*, Vol. 45, 2002, p. 64.

46 Gasser, *op. cit.* (note 17), p. 212.

47 *Ibid.*

48 Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 83.

Even without an absolute prohibition, the "Early Warning Procedure" could be illegal, as the infringement of any rights of the civilian in question is subject to proportionality: in *jus in bello* proportionality is used to control permitted harm to others.[49] This principle applies not only to military operations, where it requires that the losses and damages caused must not be excessive in relation to the direct military advantage anticipated,[50] but also to the exercise of authority and security measures by the military commander in an area under belligerent occupation.[51] "Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue."[52] This includes the principle that the means used to realize the legitimate objective have to be of a proper proportion to their costs.[53]

### Legitimate objectives to be achieved by the "Early Warning Procedure"

The "Early Warning Procedure" is designed to achieve several objectives. The main objective of the whole operation is to arrest the wanted person. There are several others, which might vary in priority, namely to cause as few civilian casualties as possible, to suffer as few casualties in the armed forces as possible, and to act quietly and thus avoid attacks by third parties.[54]

### The "Early Warning Procedure" as an appropriate means to achieve these objectives

This procedure is probably an appropriate means of arresting the wanted person, either because he gives himself up to the armed forces or because they enter the house after the warning. It is unlikely that the warning will enable the wanted person to flee, as the house is surrounded.

49 Michael Bothe; Karl Josef Partsch; Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Nijhoff, The Hague, 1982, p. 299.

50 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon, Oxford, 1994, p. 230; Judith Gail Gardam, "Proportionality and force in international law", in *American Journal of International Law*, Vol. 87, 1993, pp. 391 and 409.

51 Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, *op. cit.* (note 5), para. 39; Supreme Court of Israel, *Ajuri et al.* v. *IDF Commander*, *op. cit.* (note 5), pp. 21 f.; Kretzmer, *op. cit.* (note 6), pp. 131 and 155; Gasser, *op. cit.* (note 17), pp. 214, 242 and 246.

52 Supreme Court of Israel, *Ajuri* v. *IDF Commander*, *op. cit.* (note 5), p. 13.

53 *Ibid.*, pp. 21ff.

54 Military Order (Israel), "Advance Warning Procedure", *op. cit.* (note 1).

At first sight the "Early Warning Procedure" procedure is likely to cause only few civilian casualties, as long as the civilian occupants of the house in question trust the forces and leave the house voluntarily. On the other hand, if those occupants or the wanted person put up any resistance, there might be an additional civilian victim, as the "Early Warner" is drawn into the fighting.[55] Also, he might trigger a booby trap and thus be the first civilian victim even before delivering his message. However, a person from the neighbourhood might know about the booby traps and therefore be able to avoid them. But even a successful "Early Warner" may well be stigmatized as a "collaborator" and subjected afterwards to reprisals by members of his community. The relevant troop commander has to take all these factors into account in order to ensure that the person in question is not injured.[56] A reliable prognosis seems hardly possible.

The "Early Warning Procedure" is certainly appropriate to avoid further casualties among the Israeli armed forces. As already pointed out above, they do not have to approach the house themselves and thus do not run the risk of being attacked from it or triggering a booby trap. They can also proceed very quietly, as no megaphone warning is given. Thus, the said procedure is a suitable means to achieve the legitimate objectives.

### Less injurious means

There might, however, be other less injurious means to achieve the same aims. The first is that the forces could enter the surrounded house without any warning. This strategy is probably appropriate to arrest the wanted person. The risk of him managing to flee because he is confused with the civilian occupants of the house is no greater than in the case of the "Early Warning Procedure", as the house is nevertheless surrounded by armed forces. But this method is very unlikely to keep civilian casualties to a minimum. At the time the forces enter the house and fighting might start, all civilian occupants are still in it. They might be confused with the wanted person and thus injured or killed during the attempt to arrest him. They might also be injured or killed by means such as gunfire or explosives used by the wanted person to defend himself. The risk of civilian casualties is therefore much higher than with the "Early Warning Procedure", even if the absence of the "Early Warner" means that he at least will not be an addi-

55 See the case of Nidal Abu Mukhsan, *op. cit.* (note 4).

56 Military Order (Israel), "Advance Warning Procedure", *op. cit.* (note 1).

tional victim. So entry without warning is no less harmful to civilians than the "Early Warning Procedure". The same might apply in terms of the casualties suffered by the Israeli forces: it is at least possible that more soldiers are injured or killed, e.g. by booby traps or if the startled civilian occupants try to defend themselves. Moreover, the number of persons taking part in such an operation is higher. So even though this alternative method does not provoke more attacks by third parties, it is less suitable to achieve the desired aims than the "Early Warning Procedure".

Secondly, the forces could enter the surrounded house after a warning is given by megaphone. This tactic is just as appropriate to arrest the wanted person as the other methods. As long as the civilian occupants trust the Israeli forces' warning and leave the house, the risk of civilian casualties should be the same, with one exception — since no civilian "Early Warner" is required, at least one person less is exposed to possible injury. Admittedly, the residents are arguably less likely to leave the house, but on the other hand no civilian runs the risk of triggering a booby trap. It is questionable whether this method is likely to result in fewer casualties among the armed forces, for the manner in which they have to approach the house and the risk of fighting or being struck by a booby trap while trying to arrest the wanted person there are the same as in the case of an "Early Warner". On the other hand, by giving a megaphone warning the armed forces draw attention to their operation and thus invite attacks from third parties in the neighbourhood. This method is at least in that regard less appropriate than the "Early Warning Procedure".

### Proportionality "in the narrow sense"

As shown above, the second alternative method, i.e. to surround the house, warn by megaphone and enter the house afterwards, is only less appropriate insofar as it increases the risk of the Israeli forces being attacked from the surrounding area. No other alternative offers absolutely the same possibilities to achieve the aims. The question therefore arises whether the risk for the civilian involved in the "Early Warning Procedure" is duly proportionate to the advantages of that method.

In weighing up the danger for a civilian totally unconnected to the events against a reduced risk for the security forces, whose very task it is to take such risks, the scales should always tilt in favour of the civilian's rights. What the Israeli armed forces seem to be doing is to shift those risks away from themselves by using civilians, which not only endangers the civilian

concerned but might also lead to subsequent local reprisals against him. The front line of the conflict is thus transferred into the midst of the civilian population. This cannot be deemed proportionate if the values of international humanitarian law, the essence of which is to keep civilians separate from military measures by the Occupying Power, are taken into consideration. This conclusion is supported by the findings of the Israeli Supreme Court in its Separation Fence Decision;[57] if a possible alternative method, even though its benefit will be somewhat smaller than that of the former one, causes significantly less damage, the original act is disproportionate.[58] As stated, the possible alternative of giving a warning by megaphone increases the risk for the armed forces and is thus of less benefit in that regard. It is not of any less benefit, however, in terms of its main objective: it is suitable to achieve the arrest of the wanted person. The lesser benefit applies only to the possible "costs" for the Israeli armed forces in doing so. On the other hand, this method is significantly less harmful to the person whose rights are at stake: the "Early Warner" is not endangered, since he is not needed. The "Early Warning Procedure" is therefore not proportionate, for it is possible for the forces to achieve their aims with a slightly increased risk for themselves, but without any danger for the civilian who has nothing to do with the events.

## Conclusion

In the author's opinion, the "Early Warning Procedure" infringes both Article 51 of the Fourth Geneva Convention and the prohibition on the use of human shields and is thus a means absolutely prohibited by international humanitarian law.

Even if this conclusion is not accepted, the "Early Warning Procedure" violates the principle of proportionality. While it may be an appropriate means to achieve the legitimate aims discussed above, the two factors to be weighed up against each other are the safety of a person with no connection whatsoever to the events and the safety of the armed forces. As it is possible for the latter to achieve their aims at a higher risk for themselves but without any harm at all to the civilian in question, the outcome must be the following: the "Early Warning Procedure", even if it is not subject to an absolute prohibition, is not a proportionate means under international humanitarian law.

57 Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, *op. cit.* (note 5).

58 *Ibid.*, para. 41; see also United Kingdom, *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford 2004, para. 2.7.1.

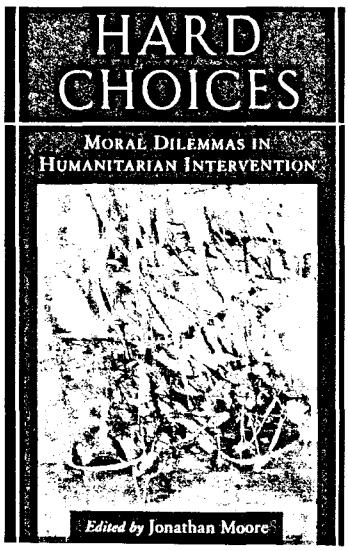
## Résumé


***À la fois voisins et boucliers humains ?***

***La «procédure d'alerte précoce» des forces armées israéliennes et le droit international humanitaire***

*Roland Otto*

*La « procédure d'alerte précoce » permet aux forces armées israéliennes d'obtenir l'assistance d'un civil volontaire, à savoir un voisin, pour arrêter une personne recherchée dans les territoires occupés. L'auteur rappelle que les personnes protégées ne peuvent pas renoncer aux droits que leur confère la IVe Convention de Genève. Il soutient ensuite que cette pratique viole l'interdiction qui est faite d'obliger des personnes protégées à servir dans les forces armées de l'occupant et à participer aux opérations militaires, ainsi que celle d'utiliser des boucliers humains. Dans ce contexte, le droit international humanitaire est une* lex specialis *du droit des droits de l'homme. En outre, la procédure viole le principe de la proportionnalité, car les forces armées peuvent atteindre leurs objectifs en prenant elles-mêmes des risques accrus, sans faire courir un danger au civil en question.*

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*CHF 35.- / Ref. 2166*

# On the relationship between human rights law protection and international humanitarian law

HANS-JOACHIM HEINTZE*

As States tend not to be willing to push for the further codification of international humanitarian law and, especially, of mechanisms of implementation, the question is posed as to which developments have been made in the abutting bodies of law and how they influence international humanitarian law.[1] Particular attention must be paid to international human rights law, as today human rights are an integral part of international law for the common welfare of humanity and represent common values that no State may revoke, even in times of war.[2] While international humanitarian law and human rights law vary in terms of origin and the situations in which they apply, the two bodies of law share the objective of protecting and safeguarding individuals in all circumstances.

## Relationship between international humanitarian law and human rights law

Classic international public law recognized the separation between the law of peace and the law of war. Depending on the state of international relations, either the *corpus juris* of the law of peace or that of the law of war was applied. The adoption of the United Nations Charter in 1945 and of subsequent major human rights documents changed this surgically clear division. Since then there have been norms which are valid both in peacetime and in times of war. As with every innovation, this development was not immediately accepted by all. In particular, those who subscribed to the so-called separation theory rejected the application of human rights norms during armed conflicts with the argument that they and the norms of the *jus in bello* were two separate fields, which could not be applied at the same time.[3] This position is rather surprising because, in classic international public law, human

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rights considerations — on the basis of natural law — were taken into account. In this vein, *Bluntschli* argued in 1872 that the declaration of war did not rescind the legal order but "on the contrary, we recognize that there are natural human rights that are to recognized in times of war as in peacetime ...".[4] Furthermore, the 1907 Hague Convention on Land Warfare refers to the parties to the treaty as "[a]nimated by the desire to serve, even in this extreme case, the interests of humanity".[5] In the light of these statements one can have doubts about the justification of the separation theory.

Yet the separation theory seems to have supporters even nowadays. For instance, the well-known *Handbook of Humanitarian Law* does not deal at all with the topic "human rights in armed conflicts".[6] In this regard, it may be argued that the handbook lags behind the leading opinion expressed by the International Court of Justice in the "Nuclear Weapons Advisory Opinion"[7] and "Legal Consequences Advisory Opinion".[8] In these Advisory Opinions the Court clearly rejected the position that the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 could only be applied in peacetime. The wording of relevant human rights treaties supports the ICJ jurisprudence on the subject. Indeed, these treaties contain clear stipulations concerning the observance of human rights obligations by States Parties in times of armed conflict. For example, Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 deals with the fate of human rights norms in situations in which the life of a nation is threatened by war or other public emergencies.

1 This approach is in line with the ICRC's *Avenir* statement, which stresses that "the relationship between humanitarian law and human rights law must be strengthened." See David Forsythe, "1949 and 1999: Making the Geneva Conventions relevant after the Cold War", *International Review of the Red Cross*, Vol. 81, No. 834, 1999, p. 271.

2 Christian Tomuschat, "Obligations arising for States against their will", *Recueil des Cours*, No. 241, Vol. IV/1993, Nijhoff, The Hague, 1994, p. 195.

3 See Otto Kimminich, *Schutz der Menschen in bewaffneten Konflikten*, Beck, München, 1979, p. 28.

4 Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten*, 3rd ed., Beck, Nördlingen 1878, para. 529.

5 Preamble, Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, in: Dietrich Schindler and Jiri Toman (eds.), *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Nijhoff, Leiden, 2004, p. 55.

6 Dieter Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, Oxford, 1995.

7 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, para. 26.

8 *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, paras. 102-106. Not yet published but available at the website of the ICJ: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited 25 October 2004).

Under such circumstances the respective State Party is allowed to "take measures derogating from its obligations under this Convention". However, the human rights enshrined in the ECHR may be limited only to the extent strictly required by the exigencies of the situation. Some of the rights explicitly mentioned in the foregoing articles may not be derogated from (*inter alia* the right to life, the freedom of belief and the prohibition of torture). These human rights are called non-derogable, which means that they are to be applied in all circumstances, without exception. The traditional impermeable border between international humanitarian law, which applies during armed conflicts, and the law of peace is thereby crossed. This "crossing of the border" is further supported by Article 3 common to the Geneva Conventions of 12 August 1949 containing a list of rights which are to be protected in all circumstances. Interestingly, these rights broadly cover the non-derogable human rights. This very configuration is what led academics to draft the "Turku Declaration",[9] which called for the legal grey zones — in the border areas of the law of peace and the law of war — to be filled by the cumulative application of human rights law and international humanitarian law, thereby guaranteeing at least minimum humanitarian standards.[10]

The ECHR is not the only instrument referring to the applicability of human rights in wartime. A further regional human rights instrument, the American Convention on Human Rights of 22 November 1969, lists in its Article 27 non-derogable rights which cannot be abrogated in times of war. Universal human rights treaties also refer to non-derogable rights. For example, Article 4 of the ICCPR includes an emergency clause similar to that formulated in regional instruments.

All these human rights instruments show that human rights are an intrinsic part of the legal rules governing wars and other emergency situations. Taking into account the obligation of States to respect non-derogable rights in all circumstances, according to human rights instruments and the final document of the First World Conference on Human Rights in Teheran in 1968, Cerna concluded in 1989 that international public law had already been "transformed into a branch of human rights law and termed 'human rights in armed conflicts'".[11]

9 UN Doc. E/CN.4/Sub.2/1991/55.

10 See Allan Rossas and Theodor Meron, "Combatting lawlessness in grey zone conflicts through minimum humanitarian standards", *American Journal of International Law*, Vol. 89, No. 2, 1995, p. 215.

11 Christina M. Cerna, "Human rights in armed conflict: Implementation of international humanitarian law norms by regional intergovernmental human rights bodies", in Frits Kalshoven and Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, ICRC, Geneva, 1989, p. 39.

The Convention on the Rights of the Child (CRC) adopted in 1989 impressively corroborates this view. Here the substantial overlap between international human rights protection and international humanitarian law becomes obvious. Article 38(1) of that Convention obliges the States Parties to undertake to respect and ensure respect for rules of international humanitarian law that deal with the protection of children. Thus a human rights treaty, normally applicable in peacetime, contains provisions that are not only applicable in armed conflicts but are also enshrined in the law regulating armed conflicts. The regulations are even more detailed because Article 38 (2), (3) and (4) repeats the standards laid down in Article 77 of Additional Protocol I to the Geneva Conventions that restricts the recruitment and participation of children in armed conflicts. Those standards, adopted in 1977, permit the recruitment and direct participation of children from the age of fifteen onwards.

This undoubtedly unsatisfying standard in the CRC of 1989 runs counter both to the progressive codification of international public law and to the goal of the Convention, which, according to Article 3, is to ensure that the "best interests" of the child (defined in Article 1 as a person below the age of eighteen years) are protected. It is most unlikely that it is in the interest of a child aged fifteen to take direct part in hostilities.

This contradiction has been severely criticized in legal literature. Particularly at issue is why the 1989 Convention on the Rights of the Child, which was drawn up more than a decade after the adoption of the Additional Protocols to the Geneva Convention and marks considerable progress in codification of the protection of the individual, contains no protection exceeding that of Article 77 of Additional Protocol I.[12] This failure is all the more regrettable because, when the CRC was being negotiated, the opponents of the relevant improvement in child protection (in particular the USA, Iran and Iraq) had not put forward a very sturdy legal argument. As a matter of fact, the USA was of the opinion that neither the General Assembly nor the Human Rights Commission were suitable fora for the revision of existing international humanitarian law.[13]

However, the American argument, which is based on the aforementioned traditional separation of the law of peace and the law of war, is not

12 Hans-Joachim Heintze, "Children need more protection under international humanitarian law — Recent developments concerning Article 38 of the UN Child Convention as a challenge to the International Red Cross and Red Crescent Movement", *Humanitäres Völkerrecht — Informationsschriften*, Vol. 8, No. 3, 1995, p. 200.

13 UN Doc. E/CN.4/1989, p. 55, Add.1, p. 6.

convincing, for the CRC was intended to be a new, independent treaty and not a revision or amendment of international humanitarian law. It can moreover also be argued that obligations over and above the general standards should have been laid down for the States party to the new instrument, as is definitely possible in treaty law. Since many feared a lowering of standards, the American argument was not further discussed. The USA later departed from its (untenable) position when, in 1992, it signed the Optional Protocol on the involvement of children in armed conflict to the CRC. This Protocol, adopted in 2000 through Resolution 54/263 of the UN General Assembly, obliges the States Parties to take all feasible measures to ensure that children under the age of 18 do not take a direct part in hostilities. It entered into force on 12 February 2002 and has to date been ratified by 52 States. This means that, at least where these States are concerned, the standard of protection is higher than that propounded in international humanitarian law.[14]

The example of the CRC demonstrates not only that the law of peace and the law of war overlap but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration. This situation alone justifies speaking of a convergence of both bodies of law which is more far-reaching than only "a natural convergence of humanitarian principle underlying these two bodies of law."[15] Convergence here means an overlap in terms of the scope of protection. However, the distinction between the two areas of law, which is primarily procedural, must be borne in mind.[16] The convergence approach opens the possibility for the cumulative application of both bodies of law.

14 This aspect was not taken into consideration by Matthe Happold, "The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict", in: Horst Fischer (ed.), *Yearbook of International Humanitarian Law*, Vol. 3, 2000, Asser Press, The Hague, 2002, p. 242.

15 Dale Stephens, "Human rights and armed conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons case", *Yale Human Rights & Development Law Journal*, Vol. 4, No. 1, p. 2.

16 According to Melysa H. Sperber, "John Walker Lindh and Yaser Esam Hamdi: Closing the loophole in international humanitarian law for American nationals captured abroad while fighting with enemy forces", *American Criminal Law Review*, Vol. 40, Winter 2003, p. 239, human rights law is invoked by an individual against a State. However, humanitarian law is not at present enforced against a State by individuals. See also Noëlle Quénivet, "The *Varvarin* case: The legal standing of individuals as subjects of international humanitarian law", *Journal of Military Ethics*, Vol. 3, No. 2, 2004, pp. 181-187.

## The cumulative application of human rights law and humanitarian law

Some obligations in human rights treaties remain in force during armed conflicts. The result is undoubtedly a substantial overlap of both bodies of law. However, the response of legal opinion to this situation differs. Some authors argue against "advocating a merger of the two bodies of international law" and speak of the theory of complementarity.[17] According to this theory, human rights law and international humanitarian law are not identical bodies of law but complement each other and ultimately remain distinct. This is undoubtedly true, but the point is that they do overlap.

Although the ICRC has in the past approached the subject cautiously, it is nowadays involved in the establishment of common values that transcend legalistic arguments and distinctions. For example, it has published a special edition of the *Review* on the convergence of international humanitarian and human rights law.[18] The somewhat more assertive convergence theory is gaining in influence. It goes further than mere complementarity and aims at providing the greatest effective protection of the human being through the cumulative application of both bodies of law. Reference can consequently be made to one unified complex of human rights beneath different institutional umbrellas.[19]

A glance at the most recent State practice shows that this is not merely theory. Examples are Kuwait in 1991 and Iraq in 2003-2004. The cumulative application of both bodies of law during the armed conflict in Kuwait was both "feasible and meaningful" and clarified the practical meaning of the convergence theory applied to the occupying regime in Kuwait in 1990/91.[20] Parallels can be drawn between this and the situation in Iraq in 2003-2004. Security Council Resolution 1483 (2003), which lays down the basic principles for the occupation and reconstruction of Iraq, requires all "involved" to fulfil their obligations under international law, especially those according to the Geneva Conventions (para. 5), and requests the Secretary-General's Special Representative for Iraq to work for the promotion of human rights protection

17 Hans-Peter Gasser, "International humanitarian law and human rights law in non-international armed conflict: Joint venture or mutual exclusion?", *German Yearbook of International Law*, Vol. 45, Duncker & Humblot, Berlin, 2002, p. 162.

18 See e.g. David Forsythe, *op. cit.* (note 1), p. 271. The Human Rights Sub-Commission of the UN Commission on Human Rights also refers in its Resolution 1989/26 to "Convergence".

19 Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Cambridge University Press, Cambridge, 1987, p. 28.

20 Walter Kälin (ed.), *Human Rights in Times of Occupation: The Case of Kuwait*", Stimpfli, Bern, 1994, p. 27.

(para. 8 g)). It goes without saying that such duties require the cumulative application of international humanitarian law and human rights law. With regard to cumulative application, three points need to be underscored:

(i) The interpretation of rights and duties must refer to both areas of law. It is, for example, difficult to interpret the term "inhuman treatment" found in human rights law in any other way than according to the requirements of the Third Geneva Convention, as it has a specific meaning in the context of a prisoner-of-war camp. On the other hand the requirements of paragraph 1(c) of Article 3 common to the four Geneva Conventions could not be fulfilled, after considering "the legal guarantees deemed imperative by civilized nations" in criminal proceedings, without applying the human rights instruments.

(ii) Human rights law strengthens the rules of international humanitarian law by providing a more exact formulation of State obligations. Thus the duties arising from Article 55 of the Fourth Geneva Convention and pertaining to health care have to be applied in the light of the right to health contained in the International Covenant on Economic, Social and Cultural Rights.[21] In the separation of rape, as a method of war and as prohibited by international humanitarian law, from torture, the human rights law provisions of the UN Convention against Torture must necessarily be resorted to.[22]

(iii) International humanitarian law brings human rights law into effect by spelling out, for example, the duties regarding missing persons. Even though "disappearances" undoubtedly represent a serious human rights violation, the relevant law regarding the obligations of States in such cases is very underdeveloped. In times of armed conflict, the occupying power is obliged by the Third and Fourth Geneva Conventions to provide information about detained persons, including notification of the death of detained persons and the possible causes thereof, and to search for persons whose fate is unknown.[23]

In a report to the Security Council entitled "On the Protection of Civilians in Armed Conflict",[24] the UN Secretary-General voiced his opinion

21 UNTS, Vol. 993, p. 3.

22 UNTS, Vol. 1465, p. 85. See Deborah Blatt, "Recognizing rape as a method of torture", *New York University Review of Law and Social Change*, Vol. 19, No. 4, 1994, p. 821.

23 Walter Kälin, *op. cit.* (note 20), p. 27.

24 UN Doc. S/1999/957.

on the cumulative application of all norms which protect the individual, at least those civilians as defined in the Geneva Conventions and their Protocols. He recommended States to ratify equally the relevant instruments of international humanitarian law, international human rights law and refugee law, as all three are "essential tools for the legal protection of civilians in armed conflicts".[25]

From a practical point of view the growing recourse to international humanitarian law protection is, of course, also a result of the increased occurrence of civil conflicts, which often take place in a grey zone in terms of that law owing to its relatively few rules governing such situations. Its practical importance for parties to conflict has been convincingly pointed out in legal literature.[26]

### International humanitarian law as *lex specialis*

The cumulative application of human rights law and international humanitarian law inevitably raises the question of the reciprocal relationship. The ICJ had to answer this question in the Nuclear Weapons Advisory Opinion[27] because the advocates of the illegality of the use of nuclear weapons had argued that such use violated the right to life laid down in Article 6 of the ICCPR.[28] Article 6 of the ICCPR stipulates that: "No one shall be arbitrarily deprived of his life." The ICJ established in its Opinion that Article 6 is a non-derogable right and consequently also applies in armed conflict, and that even during hostilities it is prohibited to "arbitrarily" deprive someone of their life. In the same Opinion, the ICJ recognizes the primacy of international humanitarian law over human rights law in armed conflicts, thereby designating the former as *lex specialis*. The term "arbitrarily" is, therefore, to be defined according to international humanitarian law.

The 2004 Advisory Opinion concerning the wall in the occupied Palestinian territory tends to show even more clearly that the right to life in times of armed conflict is only to be interpreted according to international

25 Ibid., para. 36.

26 Dieter Fleck, "Humanitarian protection against non-State actors", in: Jochen A. Frowein *et al.* (eds.), *Verhandeln für den Frieden, Liber Amicorum Tono Eitel*, Springer, Berlin, 2003, p. 78.

27 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 7), p. 26.

28 According to Greenwood this viewpoint was taken by Malaysia, Salomon Islands and Egypt. See Christopher J. Greenwood, "*Jus bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion", in: Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 253.

humanitarian law.[29] The Human Rights Committee, too, stresses in its General Comment on Article 2 that the ICCPR applies also in situations of armed conflicts to which the rules of international humanitarian law are applicable. However, the Human Rights Committee is not as crystal clear as the ICJ because it avoids touching on the *lex specialis* issue: "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[30] The *lex specialis* character of international humanitarian law is nevertheless essential. In certain circumstances human rights law cannot be considered; for example a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant cannot, according to *jus in bello*, be charged with a criminal offence.[31]

The evaluation given in the ICJ Opinion has been welcomed by academics, mainly for its clarification that the norms developed for peacetime, i.e. human rights law, cannot be applied "in an unqualified manner" to armed conflicts. Human rights have instead to be inserted into the structure of international humanitarian law in a sensitive manner.[32] The primacy of international humanitarian law is herewith emphasized. It must, however, be noted that the provisions of human rights law as a whole remain valid as prescribed in Article 4 of the ICCPR (and the analogous regional treaties) and are consequently of importance. The ICJ in its Advisory Opinions therefore supports the need to regard the *protection* granted by international humanitarian law and human rights law as a single unit and to harmonize the two sets of international rules.

Admittedly, such a viewpoint inevitably raises the *lex specialis derogat legis generalis* objection. It can be refuted by reference to the Martens Clause, which is accepted both in international treaties and in customary international law. This clause confirms that the rules of the laws pertaining to armed conflicts cannot be regarded as the final regulation of the protection of human beings, but can be supplemented with human rights law protection.[33]

29 *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, op. cit.* (note 8), para. 101.

30 UN Doc. CCPR/C/74/CPR.4/Rev.6.

31 Laurence Boisson de Chazournes and Philippe Sands, *op. cit.* (note 29), p. 253.

32 Michael J. Matheson, "The opinions of the International Court of Justice on the threat or use of nuclear weapons", *American Journal of International Law*, Vol. 91, No. 3, 1997, p. 423.

33 See Heinrich B. Reimann, "Menschenrechtsstandard in bewaffneten Konflikten", in: Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Nijhoff, Geneva and The Hague, 1984, p. 773.

Article 72 of 1977 Additional Protocol I also proves the "openness of the international laws of armed conflicts",[34] as it specifies with regard to the treatment of persons who find themselves in the power of a party to conflict that "[t]he provisions of this Section are additional to (...) other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict".

The interpretation of the right to life by human rights law in times of armed conflict becomes more obvious in regional human rights instruments than in the ICCPR. In Article 15 of the ECHR, for instance, it is made clear that cases of death as a result of legal acts of war are not to be regarded as a violation of the right to life spelled out in Article 2 of the ECHR.

## Implementation mechanisms of human rights law protection

Legal literature aptly points out that human rights protection not only shares a common philosophy with international humanitarian law, but can also be used to compensate for the deficits of international humanitarian law.[35] The underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses. So it comes as no surprise that both the ICRC and academics have on numerous occasions attempted to use the implementation mechanisms of the UN human rights treaties, disarmament treaties and environmental treaties as examples of possible systems to ensure compliance with international humanitarian law and to make them appealing to States. Central to these implementation mechanisms are the State reporting procedures.[36]

The amazing thing about these suggestions is that academics advocate new reporting procedures and therefore support the proliferation of such mechanisms. This is not convincing because it is already difficult enough today, with the sheer number of such reporting procedures in the human rights field, to keep an overview of the content and avoid endless repetitions. Nor should it be forgotten that many governments are unable to submit their periodical reports on time, mainly because of a serious lack of resources. For example, Suriname

34 Silja Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten*, Springer, Berlin, 2001, p. 286.

35 Judith Gardam, "The contribution of the International Court of Justice to international humanitarian law", *Leiden Journal of International Law*, Vol. 14, No. 2, 2001, p. 353.

36 See Krzysztof Drewicki, "The possible shape of a reporting system for international humanitarian law: Topics to be addressed", in: Michael Bothe (ed.), *Towards a Better Implementation of International Humanitarian Law*, Berlin Verlag, Berlin, 2001, p. 73.

owes four State reports to the Human Rights Committee and eight State reports to the Anti-discrimination Committee. In all, 44 member States have not provided the Human Rights Committee with a report due every five years, and 68 of those reports are over five years late.[37] In view of this dilemma the UN General-Secretary has been requested to compile methods for tightening up ("streamlining") the State reporting procedure. In this connection a brainstorming meeting that focused on the strengthening and consolidation of the reporting procedure took place in early 2003.[38]

In view of these problems regarding UN reporting procedures, the proposal to create a new reporting procedure for international humanitarian law seems impracticable. As things stand today, it seems vital to make multiple use of the procedures that already exist. Since human rights law protection and international humanitarian law overlap, such a multiple use would appear possible.[39] The following paragraphs, which describe actual practice, will prove this point.

### Information in the case of a public emergency

It is well known that, especially in conditions of war or other public emergencies in which the life of the nation is threatened, particularly serious human rights violations or mass killings can occur.[40] The observance of human rights in these situations is therefore of crucial importance. This challenge of emergency situations is met by the ICCPR in that the States Parties which declare an emergency are obliged, under Article 4(3), to inform the UN Secretary-General of the human rights law obligations they are derogating from and their reasons for doing so. The Human Rights Committee is allowed to check the conditions for the existence of a state of emergency and, if necessary, to demand special reports. As early as 1981 the Committee adopted a "General Comment" on the interpretation of State duties as enshrined in Article 4. Emphasizing the extraordinary and temporary nature of the emergency law, it requested States to submit a report immediately after the declaration of a state of emergency and to guarantee

37 UN Doc. HRI/ICM/2003/3, para. 15.

38 UN Doc. HRI/ICM/2003/4.

39 Hampson recommended such an approach already in 1992: Francoise J. Hampson, "Using international human rights machinery to enforce the international law of armed conflict", in: *Revue de Droit Militaire et de Droit de la Guerre*, Vol. 31, No. 1, 1992, p. 118.

40 Vera Gowlland-Debbas, "The right to life and genocide: The Court and the international public policy", in: Laurence Boisson de Chazournes and Philippe Sands, *op. cit.* (note 29), p. 324.

that non-derogable rights would be upheld.[41] The Committee furthermore stresses that the benefit of derogable human rights may be abrogated only if absolutely necessary in the light of the given circumstances. In this regard the ICCPR applies the principle of proportionality, which is also one of the core principles of international humanitarian law.

The ECHR also recognizes a duty to inform. According to Article 15(3), the Secretary-General of the Council of Europe must be informed about emergency measures. This duty is to be taken seriously because an individual may lodge a complaint against a State that may have violated his/her rights. If the State has informed the Secretary-General about the derogations, an individual may not complain about infringements of his/her derogable rights. The information provided by the member State concerning the declaration of emergency is published by the Council of Europe. This European procedure was later emulated in Article 27(3) of the Inter-American Convention on Human Rights, which also requires the member State to inform the Secretary-General of the Organization of American States.

The obligation to inform provides a mechanism that can be used to ensure compliance with both human rights law and international humanitarian law (insofar as both bodies of law overlap). This is clarified in one of the most recent reports of the Human Rights Committee to the UN General Assembly, which states that "[w]hen faced with situations of armed conflicts, both external and internal, which affect States Parties to the Covenant, the Committee will necessarily examine whether these Parties are complying with all their obligations under the Covenant".[42] The advantage of this procedure can be seen especially in the fact that the parties to that treaty have to justify derogations from human rights law. The disadvantage is that the Human Rights Committee, owing to the overload of periodical reports, hardly has time to examine notifications of emergency measures. In sum, effective supervision is not reached through new procedures but through a better organization of the work.

### Individual complaints procedures

There are no individual complaints procedures available to the victims of violations of international humanitarian law at the international level. This once again underscores the fact that Ms Doswald-Beck considers a "truism":

41 Manfred Nowak, *CCPR-Commentary*, Engel, Kehl, 1993, p. 81.

42 UN Doc. A/57/40, para. 29.

international law is primarily aimed at regulating relations between States.[43] Yet human rights law does impose constraints upon States inasmuch as it envisages international complaint procedures.

Of the 149 States party to the ICCPR, 104 have also ratified the Optional Protocol to the ICCPR, which permits victims of human rights violations to file a complaint with the Human Rights Committee after they have exhausted all domestic remedies. The Human Rights Committee then considers whether the complainant's human rights have been violated. According to Article 1 of the Optional Protocol the test is limited to "any of the rights set forth in the Covenant", i.e. international humanitarian law cannot be directly applied. This procedure is useful in the light of the exceptionally numerous and serious human rights violations which can be registered in most emergency situations.[44] Hence international supervision is of the utmost relevance. In addition, such human rights procedures make it possible to check whether the curtailment of the complainant's rights is compatible with the requirements laid down in Article 4 of the ICCPR.[45] The procedure ends with the formulation of an opinion by the Committee,[46] which, with the publicity given to the procedure, puts pressure on the State that has breached human rights law ("public blame effect"). This pressure is all the more intense in procedures introduced by regional human rights treaties inasmuch as these procedures are court-like. Even more interesting are regional complaints procedures, because they take place before human rights courts and their judgments are binding upon the State that has acted in contravention of the regional human rights treaty. Consequently these procedures deserve further consideration.

The question arises whether human rights law procedures can make up for the lack of complaints procedures available to victims of violations of international humanitarian law. It should be noted that the cumulative and direct application of international humanitarian law has already been recognized in these individual regional complaints procedures. This is due to the wording of Article 15 of the ECHR specifying that emergency measures

43 Louise Doswald-Beck, "Implementation of international humanitarian law in future wars", in: Michael N. Schmitt and Leslie C. Green (eds.), *The Law of Armed Conflict into the Next Millennium*, American Naval Academy, Newport, 1998, p. 52.

44 See Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Kluwer, The Hague, 1998, pp. 392 et seq.

45 UN Doc. A/57/40, para. 31.

46 Rüdiger Wolfrum, "The reporting system under international human rights agreements: From collection of information to compliance assistance", in: Michael Bothe (ed.), *op. cit.* (note 37), p. 25.

cannot be "inconsistent with [the State's] other obligations under international law". Article 27 of the American Convention on Human Rights is similarly formulated. A glance at practice shows the advantages and disadvantages.

### The Inter-American human rights protection system

At the beginning it was contentious whether the American human rights bodies were allowed to use international humanitarian law when deciding upon the legality of certain activities and/or measures. The first time the Inter-American Commission on Human Rights was confronted with such a question was in the case of *Disabled Peoples' International* et al. v. *United States* relating to the intervention by the USA in Grenada in 1987 in which 16 inmates of a psychiatric clinic were injured. The US government argued that the Commission was not the responsible authority to adjudicate upon the allegations of improper conduct. In the opinion of the USA, the Commission was not allowed to consider the application of the Fourth Geneva Convention because its mandate was limited to the "examination of the enjoyment or deprivation of the rights set forth in the American Declaration of the Rights and Duties of Man".[47] The position of the USA was criticized at the time by academics, because the principles of international humanitarian law are applicable to a military operation.[48]

Later practice confirmed this view. In this regard, particular attention should be paid to the report of the Inter-American Commission on Human Rights in the *Tablada* case. This case concerned the attack by 42 armed persons on the La Tablada barracks of the Argentine armed forces on 30 October 1997. During the 30-hour battle, 29 of the attackers and many soldiers were killed. Surviving attackers applied to the Commission, complaining that Argentina had violated the Inter-American Convention on Human Rights and international humanitarian law. The Commission examined whether it could directly apply international humanitarian law and finally decided that it was entitled to do so. Great importance was attributed by academics to the decision, as it determined that an international organ responsible for the protection of human rights could directly apply international humanitarian law to a State party to a human rights treaty.[49] The Commission explained its

47 See http://www.wcl.American.edu/pub/humanright/digest/Inter-American/app9213.htm. (last visited 25 October 2004).

48 See David Weisbrodt and Beth Andrus, "The right to life during armed conflict: Disabled Peoples' International v. United States", *Harvard International Law Journal*, Vol. 29, No. 1, 1988, p. 59.

reasoning for the application of international humanitarian law by saying that it was the only manner in which it could do justice to situations of armed conflict. Even though the Inter-American Convention on Human Rights is formally applicable in times of armed conflict, it contains no regulations on the means and methods of conducting war. In order to be able to establish what constituted a (prohibited) deliberate taking of life under conditions of war, the Commission had to resort to international humanitarian law.[50]

In this regard, the Commission's argument is accurate: the human rights provisions of the Inter-American Convention on Human Rights alone are not sufficient to determine who is legally permitted to take part in hostilities and carry out harmful acts. At the same time, however, the Convention does not contain any provision requiring the Commission to use international humanitarian law. The Commission based its approach on:

(i) the overlapping of the scope of application of human rights law and international humanitarian law: according to the said Convention, States have the duty to fulfil the standards laid down in Article 3 common to the Geneva Conventions;
(ii) Article 29(b), which does not allow for an interpretation according to which the enjoyment or the execution of rights that are guaranteed by another agreement binding the State may be limited;
(iii) Article 25, which spells out that everyone has a right to a suitable legal remedy for the violation of his or her basic rights;
(iv) Article 27, which states that derogations from duties entrenched in the Convention may not stand in the way of other international legal duties;
(v) the report of the Inter-American Human Rights Court, which declared that the Commission may use treaties that did not emerge from the Inter-American system.[51]

The reasons provided by the Commission appear to be sound. It thus directly applied international humanitarian law and did not use it merely as an aid in interpretation.

49 Liesbeth Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* case", *International Review of the Red Cross*, Vol. 80, No. 324, 1998, p. 505.

50 "...the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations". Case 11.137. Inter-Am. C.H.R., No. 55/97, para. 161 (1997).

51 Advisory Opinion OC-1/82, 24 September 1982.

The Inter-American Court did not follow the position of the Commission in its decision in the *Los Palmeras* case,[52] for it decided that it was not competent to apply international humanitarian law directly, in particular Common Article 3 of the Geneva Conventions. The Court conceded that it could only use the Geneva Conventions for the purposes of a better interpretation of the Human Rights Convention. It therefore argued in the *Los Palmeras* case, which concerned the execution of six unarmed civilians by the Colombian police, that the Convention "has only given the Court competence to determine whether the acts and norms of States are compatible with the Convention itself and not with the 1949 Geneva Conventions".[53] The main ground for the non-application of international humanitarian law was the argument propounded by the Colombian government, i.e. that the State Parties to the Inter-American Convention had only accepted the contentious jurisdiction of the Court concerning the rights listed in the Convention itself. The Court admitted the objections, thereby rejecting the viewpoint of the Commission that international humanitarian law could be applied as customary international law or as *lex specialis*.

The decision gave rise to an impressive number of comments in legal literature. Ms Martin examined it and concluded that it "overturns" the position taken by the Inter-American Commission.[54] Kleffner and Zegveld, too, consider the decision to be a proof of how problematic the Commission's assertion was, namely that international humanitarian law could be directly applied. The authors argue that, since it is highly questionable whether the Court can apply international humanitarian law, it is necessary to establish an individual complaints procedure for violations of that law.[55] However desirable such a procedure may be, the likelihood of it being implemented in the nearest future is fairly slight. In order to stress the importance and relevance of international humanitarian law, it is therefore expedient to call upon human rights law treaty bodies to pave the way in a manner similar to that of the Commission in its *Tablada* decision. According to Zwanenburg, such courts may use international humanitarian law indirectly as authoritative

52 Inter-Am.Ct.H.R. (Ser.C), No. 67 (2000).

53 *Op. cit.* (note 52), para. 33.

54 Fanny Martin, "Application du droit internationale humanitaire par la Cour interaméricaine des droits de l'homme", *International Review of the Red Cross*, Vol. 83, No. 844, 2002, p. 1066.

55 Jann K. Kleffner and Liesbeth Zegveld, "Establishing an individual complaints procedure for violations of international humanitarian law", in: Horst Fischer (ed.), *Yearbook of International Humanitarian Law*, Vol. 3, 2000, Asser, The Hague, 2002, p. 388.

guidance in interpreting human rights norms.[56] Even in the *Los Palmeras* case the Court did not exclude the possibility, though it stopped short of applying international humanitarian law directly. Furthermore, if the parties to a conflict agree that international humanitarian law applies directly, then the Inter-American bodies may ensure compliance with that *corpus juris*. It is consequently submitted that there is no need to establish new procedures, but instead to disseminate further the available existing mechanisms.

In light of this evaluation the more recent practice of the Inter-American Court is encouraging. The *Bamaca-Velasquez* case[57] in particular relativizes the criticism of Kleffner and Zegveld. This judgment concerned a guerrilla fighter who fell into the hands of the Guatemalan military during a battle and was tortured and murdered by them. In this case international humanitarian law could be applied, as Guatemala and the Commission had agreed to its application and to the use of Article 3 common to the Geneva Conventions in interpreting the duties enshrined in the Inter-American Convention. The Court contended that in order to avoid an unlawful restriction of human rights law and for the sake of the interpretation, Article 29 of the Convention permits reference and resort to other treaties to which Guatemala is a party. The Court clearly concluded that the undeniable existence of an internal armed conflict meant that "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."[58] This judgment ascertained the direct applicability of international humanitarian law by human rights courts.[59]

### European Court of Human Rights

Pursuant to Article 15 of the European Convention on Human Rights, derogations from duties under the Convention are permitted only if concurrent with other international legal duties. The obligations spelled out in the Geneva Conventions are therefore to be observed. In the *Northern Ireland*[60]

56 Marten C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, Proefschrift, Leiden, 2004, p. 291.

57 Inter-Am. Ct.H.R. (Ser.C) No. 70 (2000).

58 *Op. cit.* (note 57), para. 207.

59 See Richard J. Wilson and Jan Perlin, "The Inter-American human rights system: Activities from late 2000 through October 2002", *American University International Law Review*, Vol. 18, No. 3, 2002, p. 670.

60 See David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London, 1995, pp. 489 et seq.

case the European Court of Human Rights (ECtHR) investigated whether the derogations adopted by the United Kingdom were in conformity with its obligations under public international law. In particular, the Court examined whether the British legislation in Northern Ireland was in accordance with the Geneva Conventions. As the Irish side failed to provide further factual details, the investigation was limited to a statement that the Geneva Conventions were also applicable.[61] This example clearly illustrates that referral to international humanitarian law is generally possible under the ECHR.

Practice has nonetheless shown that the bodies of that Convention are hesitating to subscribe to a clear position in this regard. Frowein made this point concerning the first State complaint in *Cyprus* v. *Turkey*, where the European Commission of Human Rights allowed the application of the Third Geneva Convention of 1949 regarding prisoners of war, but nonetheless found it necessary to investigate whether there had been a violation of Article 5 of the ECHR (right to liberty and security).[62] This uncertainty is to be observed throughout the decisions of the ECHR bodies.[63]

In *Loizidou* v. *Turkey*[64] the ECtHR did not apply international humanitarian law, even though the case pertained to human rights violations arising out of a military occupation: the Cypriot complainant was not able to use her property in Northern Cyprus after the Turkish invasion of 1974. In 1989 she lodged a complaint in which she asserted that the continual refusal to allow her access to her property was a violation of her right to the peaceful use of her property according to Article 1 of Additional Protocol I to the ECHR. In the end the ECtHR found in her favour and on 28 July 1998 pronounced the awarding judgment according to Article 50 of the ECHR.

Crucial for the case was the question as to who was sovereign over Northern Cyprus, for Turkey contended that it was not the correct defendant, and that the correct defendant was in fact the "Turkish Republic of Northern Cyprus", an independent State responsible for its actions under international law. In its judgment the ECtHR determined that the definition

61 See *Brannigan and McBride* v. *UK*, ECtHR Series A 258-B, 26 May 1993, paras. 67-73.

62 Jochen A. Frowein, "The relationship between human rights regimes and regimes of belligerent occupation", *Israel Yearbook of Human Rights*, Vol. 28, 1999, Nijhoff, The Hague, 1999, p. 10.

63 Aisling Reidy, "The approach of the European Commission and Court of Human Rights to international humanitarian law", *International Review of the Red Cross*, Vol. 80, No. 324, 1998, p. 519.

64 Case *Loizidou* v. *Turkey*, Application No. 15318/89, Judgement of 18 December 1996, para. 43, available at http://cmiskp.echr.coe.int (last visited 16 November 2004).

of jurisdiction in Article 1 of the ECHR was not limited to one's own national territory. The question of sovereignty was far more important, as it could have implications both inside and outside the State's national territory. A State could thus have effective control over another "entity" outside its own national territory with the use of military measures, it being unimportant whether this control is carried out by its own armed forces or by a subordinate local administration.[65] As the complainant was unable to use her property owing to the occupation by Turkish troops, these measures came under the jurisdiction, according to Article 1 of the ECHR, of Turkey.

At the same time the ECtHR avoided establishing that the case of the "Turkish Republic of Northern Cyprus" concerned an occupied territory to which international humanitarian law applies. This did not, however, hold the Court back from referring to Resolution S/550/1984 of the United Nations Security Council, which clearly speaks of the "occupied part of the Republic of Cyprus". Yet this contradiction did not pass without comment.[66] In a dissenting opinion Judge Pettiti objected to the fact that the whole situation regarding the Turkish intervention in Cyprus had not been sufficiently clarified. In particular, neither the problems relating to the annexation and occupation nor the necessity to apply international humanitarian law had been thoroughly discussed.[67]

In brief, the whole judgment suffers from the fact that the judges avoided dwelling upon the complicated status of the "Turkish Republic of Northern Cyprus". Although the Court pointed out that the ECHR must be interpreted in the light of the rules of interpretation set out in the Vienna Convention on the Law of Treaties and that Article 31, paragraph 3(c), of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties",[68] it did not apply international humanitarian law. Instead the Court determined only whether Turkey is responsible for the alleged violation of the rights of Ms Loizidou under Article 1 of Additional Protocol I with respect to her

65 *Op. cit.* (note 65), para. 49.

66 It is surprising that the ECtHR in *Ilascu* v. *Moldova and Russia* refers to occupation, Application No. 48787/99, Judgement of 8 July 2004 available at http://cmiskp.echr.coe.int (last visited 16 November 2004). The Court argues that in exceptional circumstances the State may be prevented from exercising its authority in part of its territory and goes on: "That may be as a result of military occupation by the armed forces ...". As an example the Court mentioned the *Loizidou* case (*Op. cit.* note 64), para. 312.

67 Individual dissenting opinion, Series A, No. 310, pp. 43-44.

68 *Op. cit.* (note 64), para. 43.

possessions in Northern Cyprus. The legal position in the applicant's submission, namely whether the local administration is illegal in that it is the consequence of the illegal use of force, or whether it is lawful as in the case of a protected State or other dependency, was not considered by the Court. This issue is, however, connected to the law of occupation.

The Court argued that the establishment of State responsibility under the ECHR did not require enquiries concerning the military intervention and confined itself to stating that international human rights law protection was a "matter of international concern". It was therefore necessary to find a pragmatic clarification (*effet utile*). At the same time the question must be posed as to whether it would have been possible to reach the same result with resort to international humanitarian law. That law is, of course, also "a matter of international concern". The application of the Fourth Geneva Convention would have supported the finding of the ECtHR, as Northern Cyprus is an occupied territory and Ms Loizidou, contrary to the said Convention's Article 49, was forced to leave the occupied territory although there were no compelling interests of security or military necessity to justify that act. This contravenes the duty to respect the property of civilians in occupied territories. It is thus incomprehensible why the Court did not make use of this line of reasoning.

According to the Geneva Conventions, the parties to an armed conflict are bound even if their acts have been committed outside the borders of their national territory. In the light of the *Loizidou* v. *Turkey* judgment, it is understandable that a State can exercise jurisdiction even outside its own national territory. It is therefore all the more surprising that the ECtHR was not able to apply a broader interpretation of the term "jurisdiction" in the *Bankovic* v. *Belgium*[69] case.[70] Relatives of four citizens of the Federal Republic of Yugoslavia who had been killed in the NATO attacks on the broadcasting station of Belgrade had lodged a complaint against several States that were NATO members. The complainants notably alleged that the attack violated the right to life, the right to freedom of expression and the right to an

69 Case *Bankovic* v. *Belgium*, Application 52207/99, Inadmissibility Decision of 12 December 2001, available at http://cmiskp.echr.coe.int (last visited 16 November 2004).

70 For comments on the decision, see *inter alia* Francisco Forrest Martin "Colloquy on the law of armed conflict: The unified use of force and exclusionary rules: The unified use of force rule - amplifications in light of the comments of Professors Green and Paust", *Saskatchewan Law Review*, Vol. 65, 2002, pp. 462-467; Bernhard Schäfer, "Der Fall Bankovic oder wie eine Lücke geschaffen wird", *Menschenrechtsmagazin*, Vol. 3, 2002, pp.149-163.

effective legal remedy as laid down in the ECHR. They further based their claim on States' duties arising from international humanitarian law, which they contended was applicable on the one hand because the NATO States were party to the Geneva Conventions and the relevant rules of Additional Protocol I and on the other because both these sets of rules contained norms of a customary nature. The Court did not consider the international humanitarian law argument and concentrated solely on limiting the scope of application of the ECHR by providing a restrictive definition of the term "jurisdiction". It unanimously found that jurisdiction in international law is primarily territorial,[71] and that other grounds of jurisdiction must be considered "exceptional". The claim of Bankovic was consequently declared inadmissible. Shelton argued that this narrow view of jurisdiction is "understandable" because the Court "would seek to limit its jurisdiction to exclude the extra-territorial military operations of its contracting states."[72] However, in the light of the *Loizidou* case this interpretation cannot convince completely. The doubts have been aggravated by the latest judgment in *Ilascu* v. *Moldova and Russia*, in which the Court held both States responsible for human rights violations in Transniestria.[73]

There are other judgments of the ECtHR with a strong relationship to international humanitarian law. The military operations in the Kurdish territories of Turkey have led to countless casualties amongst the civilian population and have caused tremendous material damage, resulting in a plethora of cases brought before the human rights bodies in Strasbourg. The said cases have clearly demonstrated the limits of international jurisdiction, which is applied only when all national remedies have been exhausted and only for the reparation of violations of individual human rights.[74] These procedures are not in fact suitable for taking effective action against large-scale human rights violations.

Yet the latter do simultaneously have an individual dimension. The case of *Ergi* v. *Turkey*[75] concerned the accidental killing of an uninvolved

71 See also "*The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*", *op. cit.* (note 8), para. 109.

72 Dinah Shelton, "The boundaries of human rights jurisdiction in Europe", *Duke Journal of Comparative & International Law*, Vol. 95, No. 1, 2003, p. 128.

73 *Op. cit.* (note 66).

74 See Aisling Reidy, Françoise Hampson and Kevin Boyle, "Gross violations of human rights: Invoking the European Convention on Human Rights in the case of Turkey", *Netherlands Quarterly of Human Rights*, Vol.15, 1997, p. 161.

75 Case *Ergi v. Turkey*, Application No. 23818/93, Judgment of 28 July 1998, available at http://cmiskp.echr.coe.int (last visited 16 November 2004).

woman in a military operation. After analysing the facts of the case the Court confirmed the findings of the European Commission of Human Rights, which established that in the planning and execution of such an operation care must be taken, not only as regards the apparent targets of an operation but also and especially where the use of force is envisaged in the vicinity of the civilian population, to avoid incidental loss of life and injury to others. Measured against these standards, the Commission found that the planning of the above-mentioned operation had not been careful enough to prevent casualties amongst the civilian population and avoid an extension of the conflict.

In its judgment the ECtHR argued that the State had failed "to take all feasible precaution in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life".[76] It must be stressed that in order to analyse the alleged human rights violations the Court used the wording of international humanitarian law, e.g. by referring to "civilian life" and "incidental loss". On the one hand this demonstrates the cumulative application of both legal texts. On the other it also corroborates the decision of the ICJ that international humanitarian law is *lex specialis*, namely the binding law in armed conflicts which is meant to be used to regulate the conduct of hostilities. In other words, like the ICJ when it was examining the legality of nuclear weapons, the ECtHR was unable to avoid checking the compatibility of the weapons systems with both international human rights *and* humanitarian law; the ECtHR also had to refer to international humanitarian law to determine the lawfulness of the measures taken by the Turkish security forces in the Kurdish areas. In the *Ergi* case the ECtHR resorts directly to international humanitarian law, in that it elaborates on the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to the military advantage. It is clear merely from the list of points to be checked that international humanitarian law needs to be taken into account, as it can be of utmost importance for the implementation of human rights law.

In *Gülec* v. *Turkey*,[77] concerning an incident in which shots were fired from a tank at violently protesting demonstrators and the main complainant's

76 *Op. cit.* (note 75), para. 79.

77 Case *Gülec* v. *Turkey*, Application No. 21593/93, Judgment, 27 July 1998, available at http://cmiskp.echr.coe.int (last visited 16 November 2004).

son was fatally injured, the Court examined whether the use of violence was permissible according to Article 2. 2 (c) of the ECHR. The Court ruled that the use of force must be proportional to the aim and the means used. In the case under consideration, the armed forces had obviously not weighed up the situation in that respect, as they had used battlefield weapons, although they were equipped with the necessary equipment (water cannon, protective shields, rubber bullets or tear gas) for the fighting of demonstrators. This was all the more reprehensible in that Sirnak Province was located in an area where a state of emergency had been declared and public disturbances could have been expected. The government could show no proof for its assertion that there had been terrorists amongst the protestors. The massive use of armed force, which had caused the death of *Gülec*, was not found to have been absolutely necessary within the meaning of Article 2. Turkey was therefore found guilty of violating the ECHR.

The Court's reasoning once again shows many parallels with international humanitarian law, beginning with the fact that, in the relevant area, a state of emergency had already been declared and public disturbances were to be expected at any time.[78] Such situations, the Court pointed out, highlighted the lack of education and equipment and the insufficient "rules of engagement" of the armed forces. Finally, the Court also mentions that the numerous losses of human lives in south-east Turkey could be blamed on the "security situation" there, emphasizing at the same time that the frequent "violent armed clashes" did not release the State from observance of the ECHR's Article 2.[79] The cases at hand demonstrate that in the practice of the Strasbourg human rights bodies there are considerable overlaps between human rights law and international humanitarian law, particularly concerning the obligations laid down in Article 3 common to the Geneva Conventions and those characterized as non-derogable in Article 15 of the ECHR. It must be stressed that the use of armed force (in the sense of Article 2 (2) (c)) in emergency conditions or under war conditions is found to be permissible if States have recourse to it to suppress tumult and revolt. This includes the use of force to the point of causing death. Apart from the fact that the article is "unhappily formulated",[80] the question still remains as to which circumstances allow the use of force. The

78 Under these circumstances it can be presumed that the hostilities reached the threshold of common Article 3, which is the lowest threshold in international humanitarian law. Therefore the norms of international humanitarian law could be applied.

79 *Op. cit.* (note 77), paras. 71 et seq.

80 Jochen Frowein and Wolfgang Peukert, *EMRK Kommentar*, Engel, Kehl, 1996, p. 34.

above-mentioned cases show that in this regard the constraints upon the use of force are much looser in human rights law protection than in international humanitarian law. When adjudicating on the actual scale of the use of force, the bodies in Strasbourg would find it much easier if they resorted to the criteria set forth in international humanitarian law, especially the principles of proportionality and distinction, and the standards developed in criminal law. It is also entirely conceivable that situations could occur during an armed conflict in which human rights instruments would have no ready criteria for the legality of the use of force. In such cases international humanitarian law would automatically have to be consulted. This calls for agreement with the views expressed in legal literature that approve of the ECtHR having a limited "potential for the future application of international humanitarian law".[81]

The *Engel* v *The Netherlands* case, in which the ECtHR explicitly refers to international humanitarian law, shows that there are no theoretical legal objections to the direct application of international humanitarian law.[82] This case concerned the unequal treatment of different military ranks in disciplinary punishments. Academics welcomed the reference to Article 8 of the First Geneva Convention because this treaty is "so well accepted".[83] In view of this decision it appears obvious that the ECtHR has been held back until now from applying international humanitarian law only by political grounds.

## Conclusion

Research shows that there is a convergence between the protection offered by human rights law and that of international humanitarian law. Both bodies of law can be applied in armed conflicts in order to achieve the greatest possible protection in the sense of the Martens Clause. The most important practical consequence of this is the possibility to enforce international humanitarian law. As the implementation mechanisms of that law are insufficient and the elaboration of State reports and individual complaints procedures is not to be expected for it in the very near future, the existing human rights procedures gain in practical importance. Initial timid decisions in which international humanitarian law was applied have shown that:

81 Andreas Laursen, "NATO, the war over Kosovo, and the ICTY investigation", *American University International Law Review*, Vol. 17, No. 4, 2002, p. 804.

82 Case *Engel v. The Netherlands*, Application No. 5370/72, Judgment of 23 November 1976, available at http://cmiskp.echr.coe.int (last visited 16 November 2004).

83 See John G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed., Manchester University Press, Manchester, 1993, p. 225.

"In sum, although the practice of human rights bodies described above is still limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with international humanitarian law by parties to armed conflicts."[84] This clearly demonstrates the practical and useful consequences of the convergence of human rights law and international humanitarian law.

84 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 201.

## Résumé


### *De la relation entre le droit international humanitaire et la protection qu'assure le droit des droits de l'homme*

*Hans-Joachim Heintze*

*Il est notoire que les mécanismes de mise en œuvre du droit international humanitaire sont moins intrusifs et donc moins efficaces que ceux du droit des droits de l'homme. Toutefois, les champs d'application de ces deux branches du droit se chevauchent à certains égards. Dans ce contexte, l'auteur décrit les domaines où un chevauchement existe et analyse les conséquences juridiques de cet état de fait pour les mécanismes d'application. La mise en œuvre cumulée du droit des droits de l'homme et du droit international humanitaire soulève inévitablement la question de la relation réciproque. La Cour internationale de Justice y a répondu en reconnaissant la primauté du droit international humanitaire sur le droit des droits de l'homme dans les conflits armés, faisant ainsi du DIH une* lex specialis. *L'examen des décisions de la Commission interaméricaine/Cour interaméricaine des droits de l'homme et de la Cour européenne des droits de l'homme révèle que ces instances ont tendance à appliquer le droit international humanitaire. Bien que la pratique des instances des droits de l'homme soit limitée, elle apporte un complément bienvenu à la panoplie, sans conteste limitée, des moyens internationaux disponibles pour contraindre les parties à un conflit armé à respecter le droit international humanitaire. Voilà qui met clairement en évidence les effets pratiques et utiles de la convergence des droits de l'homme et du droit international humanitaire.*

# Affaires courantes et commentaires
# Current issues and comments

## A new protocol on explosive remnants of war: The history and negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons

LOUIS MARESCA*

On 28 November 2003, the States Parties to the Convention on Certain Conventional Weapons (CCW)[1] adopted a new protocol on explosive remnants of war.[2] This new instrument of international humanitarian law, the fifth protocol to the CCW, is an important addition to the efforts to reduce the death, injury and suffering caused by the explosive munitions that remain after the end of an armed conflict. Protocol V establishes new rules that require the parties to a conflict to clear explosive remnants of war, to take measures to protect civilians from the effects of these weapons and to assist the efforts of international and non-governmental organizations working in these areas. If widely adhered to and fully implemented, it has the potential to significantly reduce the civilian casualties that regularly occur after the end of hostilities and to minimize the long-term socio-economic consequences that explosive remnants of war inflict on war-affected countries.[3] It complements the work of the international community to reduce the suffering caused by anti-personnel landmines.

This article will trace the development of the Protocol and examine the key issues that arose during its negotiation. It will also offer comments on its implications for international humanitarian law, its potential impact in war-affected areas and some of the issues that will be a challenge to its implementation.

### Background: the problem of explosive remnants of war

Nearly every conflict in modern times has left behind large amounts of explosive remnants of war. These are the explosive munitions that have been

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fired, dropped or otherwise delivered during the fighting but have failed to explode as intended or have been abandoned by the warring parties on the battlefield. Explosive remnants of war often found in war-affected areas include artillery shells, hand grenades, mortar shells, cluster-bomb submunitions, air-dropped bombs, missiles and other similar weapons. They are a persistent problem and a deadly threat that kill and injure large numbers of men, women and children who subsequently disturb or tamper with them. As these weapons often take years and even decades to clear, their presence can hinder reconstruction, the delivery of humanitarian aid, farming and the return of people displaced by the fighting.

It is estimated that at least 82 countries and 10 territories are affected by explosive remnants of war.[4] Iraq is one recent example. Although the security situation has made it difficult to obtain a comprehensive view of the scale of the problem, one non-governmental organization reported that it had cleared over one million pieces of explosive remnants of war from the recent fighting.[5] A Human Rights Watch study found that tens of thousands of submunitions used by Coalition forces failed to explode as intended and will need to be cleared.[6] Large amounts of explosive weapons were also abandoned by Iraqi forces and were later found or disturbed by civilians, causing many casualties.[7] Past conflicts in other parts of the world have also produced enormous quantities of explosive debris. Some, such as Laos and Angola, have been struggling to deal with the problem for decades.[8]

There have been significant developments in recent years to reduce the death, injury and suffering caused by anti-personnel landmines. The

1 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to Cause Unnecessary Suffering or to Have Indiscriminate Effects (CCW), 10 October 1980.

2 Protocol on Explosive Remnants of War annexed to the CCW, 28 November 2003.

3 The Protocol on Explosive Remnants of War will enter into force once 20 States have notified the depositary, the Secretary-General of the United Nations, of their consent to be bound by it. At 1 November 2004, 3 States had done so (Sweden, Lithuania, Sierra Leone).

4 *Explosive Remnants of War: A Global Survey*, Landmine Action, London, 2003.

5 Iraq: MAG clears more than one million mines and bombs since the war. <http://www.mag.org.uk/magtest/n_iraq/marcho4.htm>.

6 *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Human Rights Watch, New York, 2003, p. 104.

7 *Ibid.*, p. 7.

8 For an overview of the impact problem in these and other contexts, see Arthur Westing (ed.), *Explosive Remnants of War: Mitigating the Environmental Effects*, Taylor and Francis, London, 1985; *Explosive Remnants of War: Cluster Bombs and Landmines in Kosovo*, ICRC, Geneva, 2000; *Explosive Remnants of War; Unexploded Ordnance and Post-conflict Communities*, Landmine Action, London, 2002.; Landmine Action, *op. cit.* (note 4).

long-term and indiscriminate effects of these weapons led to the adoption in 1997 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.[9] Anti-personnel mines, however, are only one part of the problem. Equal or even greater numbers of other munitions that remain after the end of an armed conflict also claim thousands of civilian victims. With the growing capacity to deliver large amounts of explosive ordnance in battle, the serious humanitarian costs of explosive remnants of war were likely to continue to increase unless concerted international action was taken.

### Towards a new protocol on explosive remnants of war

An early call to address the problem of explosive remnants of war came from the United Nations Environment Programme, which published a report in 1983 drawing attention to the impact of these weapons and proposing a series of recommendations.[10] Although the report was the basis for several subsequent resolutions adopted by the United Nations General Assembly, it did not result in the development of new international rules to mitigate the effects of explosive remnants of war.

A more recent initiative came from the International Committee of the Red Cross (ICRC) and Landmine Action, a UK-based non-governmental organization that works on landmines and related issues.[11] During an informal meeting in early 2000 to discuss the adverse humanitarian impact of cluster-bomb submunitions, these organizations examined the need for a broader approach to deal with forms of unexploded and abandoned ordnance other than anti-personnel mines. Both felt that a comprehensive approach could be developed and that the Second Review Conference of the CCW, scheduled for December 2001, was the appropriate forum to consider the issue.

The two organizations prepared studies to raise awareness of the problem and facilitate the start of discussions with governments. An ICRC study highlighted the effects of explosive remnants of war in Kosovo following the end of the conflict in 2000. It showed that Kosovo was affected by a wide

9 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997.

10 "Explosive remnants of conventional war": UN Doc. A/38/383 (19 October 1983).

11 In 2000, Landmine Action was known as the UK Working Group on Landmines. It changed its name to Landmine Action later that year.

range of unexploded ordnance and that more than two-thirds of the resulting civilian casualties were killed or injured by munitions other than anti-personnel landmines.[12] Cluster-bomb submunitions were found to be a particular problem. A second study focused on the use and design of submunitions and the characteristics that made them a humanitarian concern.[13] These studies led the ICRC to call for a moratorium on the use of submunitions, and for the development of new international rules on the clearance of explosive remnants of war and other measures to protect civilians from those weapons. A publication by Landmine Action also looked at the problems caused by submunitions and made similar recommendations.[14]

In September 2000, the ICRC convened a meeting of governmental and other experts to examine the problem of explosive remnants of war and to consider proposing that it be placed on the agenda of the Second CCW Review Conference. For the most part, initial reactions were favourable. Many experts believed that a comprehensive approach to the problem was necessary and a logical complement to the work done on anti-personnel mines.[15] Several experts, however, believed that discussions on explosive remnants of war would be long and complex and felt that the issue should be dealt with at a later review conference.[16]

On the basis of these reactions, the ICRC submitted a report and proposals to the First Meeting of the Preparatory Committee for the Review Conference.[17] In this document the ICRC called for the negotiation of a new protocol to the CCW to reduce the humanitarian problems caused by explosive remnants of war; it proposed that this protocol should cover all types of explosive ordnance, except anti-personnel mines.[18] It also proposed that the main elements of a new protocol should include:

12 ICRC, *op. cit.* (note 8).

13 *Explosive Remnants of War: A Study on Submunitions and Other Unexploded Ordnance*, ICRC, Geneva, 2000.

14 Rae McGrath, *Cluster Bombs: The Military Effectiveness and Impact on Civilians*, UK Working Group on Landmines, London, 2000.

15 *Expert Meeting on Explosive Remnants of War*, ICRC, Geneva, 2000, pp. 14-15.

16 *Ibid.*

17 "Report of the International Committee of the Red Cross to the First Preparatory Committee for the 2001 Review Conference of the United Nations Convention on Certain Conventional Weapons", UN Doc. CCW/CONF.II/PC.1/WP.1 (2000).

18 The ICRC believed that landmines were comprehensively dealt with by the Convention on the Prohibition of Anti-personnel Mines and therefore did not need to be included in a new instrument.

- the central principle that those who use munitions which remain after the end of active hostilities are responsible for clearing such weapons or providing the technical and material assistance needed to ensure their clearance;
- the principle that technical information to facilitate clearance should be provided to mine-clearance organizations immediately after the end of active hostilities in an affected area;
- the principle that those who use munitions likely to have long-term effects should provide warnings to civilian populations on the dangers of such weapons;
- for cluster-bomb and other submunitions only (whether delivered by air or ground-based systems), a prohibition of their use against military objects located in concentrations of civilians.[19]

The ICRC noted that obligations with regard to clearance, the provision of information and warnings to civilians were already laid down for mines, booby traps and other devices in Amended Protocol II of the CCW and thus were already established in international humanitarian law. It also explained that an additional restriction on the use of cluster-bomb and other submunitions in civilian areas was necessary, in view of the particular characteristics of these weapons. Studies have shown that submunitions have created a large proportion of the explosive remnants of war problem in conflicts where they have been used. The fact that these weapons are delivered over a wide area, are free falling and are difficult to direct towards their intended target also warrants a specific restriction on their use.[20]

Several States also submitted proposals on specific weapons that often became explosive remnants of war. Switzerland called for new rules that would require all new submunitions to have self-destruct and self-deactivation features to neutralize the weapons if the primary fuse failed to detonate as intended.[21] The United States proposed new regulations to deal with the problems caused by anti-vehicle mines.[22] This proposal would require all

19 ICRC Report, *op. cit.* (note 17), pp. 11-12.

20 See Rae McGrath, *op. cit.* (note 14); *Cluster Munition Systems*, Handicap International, Lyon, 2003; *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, Human Rights Watch, New York, 2002; Steve Goose, "Cluster munitions: Towards a global solution", *Human Rights Watch World Report 2004*, Human Rights Watch, New York, 2004, pp. 244-276.

21 UN Doc. CCW/CONF.II/PC.1/WP.4, 14 December 2000.

22 UN Doc. CCW/CONF.II/PC.1/WP.7, 14 December 2000. In the CCW context, anti-vehicle mines are formally referred to as "Mines Other than Anti-personnel Mines" (MOTAPM). This proposal later became a joint submission by the United States and Denmark for a new protocol to the CCW.

such mines to be detectable and remotely-delivered anti-vehicle mines to possess self-destruct and self-deactivation features in order to prevent the weapon from becoming a threat to civilians, peacekeepers and humanitarian organizations.

There was broad support for work on explosive remnants of war at the first meeting of the Preparatory Committee. The Netherlands took a lead role on the issue and submitted a working paper, co-sponsored by 26 States, to structure discussions in the next sessions of the Committee.[23] Discussions at its second and third meetings (April and September 2001) were also substantive. Governments, international and non-governmental organizations and independent experts presented a range of papers on the nature of the explosive remnants of war problem, its impact on war-affected countries and strategies for addressing the issue in the CCW context. As the Review Conference approached, there was a growing consensus that explosive remnants of war was an issue which needed to be addressed by the international community, that the CCW was the right framework to do so, and that work on the issue should continue in 2002.[24]

The momentum of the work started on explosive remnants of war continued at the Review Conference, held from 11 to 21 December 2001. The Conference decided to establish a Group of Governmental Experts to examine further the legal, technical, operational and humanitarian aspects of the various proposals, and appointed two coordinators to guide the Group's work in 2002 on explosive remnants of war and anti-vehicle mines.[25] It also decided that anti-vehicle mines would be dealt with separately from other

23 UN Doc. CCW/CONF.II/PC.1/WP.6, 14 December 2000. The co-sponsors were Argentina, Austria, Belgium, Bulgaria, Canada, Cambodia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, New Zealand, Norway, Peru, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom, United States.

24 In addition to those on explosive remnants of war, proposals were also submitted on extending the scope of application of the Convention and its protocols to non-international armed conflicts (United States and the ICRC); wound ballistic regulations for small calibre weapons and ammunition (Switzerland), and a compliance mechanism for the Convention (United States, South Africa and the European Union). For a summary of the results of the Review Conference, see Louis Maresca, "Second Review Conference of the Convention on Certain Conventional Weapons", *International Review of the Red Cross*, Vol. 84, March 2002, pp. 255-261.

25 The Group of Governmental Experts is made up of government delegations and representatives of international and non-governmental organizations. It has been used to examine proposals for new CCW protocols and to develop recommendations for States Parties to consider. Ambassador Chris Sanders of the Netherlands was selected as the coordinator on explosive remnants of war. Mr Peter Kolarov of Bulgaria was selected as the coordinator on anti-vehicle mines.

explosive remnants of war,[26] primarily because many States believed that anti-vehicle mines were different from the other weapons that often remained after a conflict. In their view, anti-vehicle mines were designed to be left unexploded and lie in wait for their intended victim; the adverse humanitarian consequences resulted from the weapon's improper use. Other forms of explosive remnants of war, however, were viewed as a problem not because they were used improperly, but rather because they did not function as intended when fired or delivered.

The Group of Governmental Experts met for a total of five weeks in 2002. As its work progressed, growing support emerged for the development of new rules on the clearance of explosive remnants of war, the sharing of information to facilitate clearance and risk education, and the provision of warnings to civilian populations. Such obligations would not be specific to any particular type of weapon but requirements of a general nature which would apply to all explosive munitions that remained after a conflict. There was also support from many European countries, China, Japan, the ICRC and international and non-governmental organizations to consider preventive measures to stop explosive ordnance from becoming explosive remnants of war in the first place. These included developing generic standards and procedures for the production, transport and storage of munitions.

There was less agreement on specific restrictions on the design and use of weapons, in particular submunitions. Proposals tabled included that of Switzerland for self-destruct and self-deactivation features to be required on submunitions, and the ICRC's proposal for a prohibition on the use of submunitions against military objectives in or near a concentration of civilians. While both proposals garnered some support in the Group, a number of delegations, including China, Russia and Pakistan, voiced reservations about the costs of self-destruct and deactivation features and of destroying or altering weapons already in stock. Many governments, including Russia and the USA, also believed that the existing international humanitarian law on the targeting of weapons was adequate to deal with the ICRC's concerns about submunitions. In their view, better implementation of the existing rules, rather than new rules, was needed.

In its report to CCW States Parties, the Group recommended that it continue its work in 2003 and announced that it was ready to begin negotiations on "a new instrument on the post-conflict remedial measures of a

26 For the full mandates, see UN Doc. CCW/CONF.II/2, (2001), pp. 12-13.

generic nature which would reduce the risks of ERW"[27] It also proposed to explore whether the negotiations could include generic preventive measures for improving the reliability of munitions in areas such as the manufacturing, handling and storage of munitions. Separate from the negotiations, the Group would continue its discussions on preventive measures aimed at improving the design of munitions, including submunitions, and the implementation of the existing principles of international humanitarian law.[28] At a meeting of States Parties held in December 2002, the continuation of the Group and its recommendations were approved.

The negotiations on explosive remnants of war were held in March, June and November 2003. They were chaired by Ambassador Chris Sanders of The Netherlands, who prepared several papers that were instrumental in synthesizing the variety of proposals submitted, and took place in three stages: the March session focused on the possible elements of a new protocol; the June meeting centred on reactions to the coordinator's draft text; and final negotiations on the articles and other issues were conducted in November. In addition to the papers and proposals prepared by government experts, important submissions also came from international and non-governmental organizations and the ICRC. Work progressed smoothly on most of the protocol's provisions. It was nonetheless unclear until the final session whether the Group would be able to finalize several important articles and arrive at the consensus needed to adopt the instrument.

## Key issues in the negotiations

### The legal nature of the instrument

Like the other CCW protocols, the Protocol on Explosive Remnants of War is a legally binding instrument and a State must express its consent to the depositary in order to be bound by the Protocol's rules. But it was uncertain until the final negotiating session whether the text would be adopted as a legally binding protocol or as a less legally binding text (e.g. a political declaration or a statement of best practices).

27 "Procedural Report of the Group of Governmental Experts of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects", UN. Doc CCW/GGE/III/1, 11 December 2002.

28 Besides explosive remnants of war (ERW), the Group also continued to explore the most appropriate way to deal with the problems caused by anti-vehicle mines. As mentioned above, this issue was being discussed separately. The Group continued its work on anti-vehicle mines in 2003 and 2004 but not did agree to begin negotiations on a new protocol. Work on this issue will continue in 2005.

Throughout the negotiations, the United States expressed reservations about the adoption of a new protocol. It believed that negotiations on legally binding rules would be complex and consume much of the Group's time, and therefore favoured the development of an instrument of a political character that could be concluded more quickly. However, nearly all other States Parties expressed a desire for legally binding rules in the form of a CCW protocol. At the final negotiating session and after a number of amendments to the text of key provisions, the United States agreed to support the adoption of a legally binding protocol. Subsequent statements by US officials welcomed the conclusion of the protocol and announced that the United States would give careful consideration to becoming a State Party.

### The preamble

The Protocol on Explosive Remnants of War (Protocol V) is the only CCW protocol to have a preamble. It underscores the motivations underlying the instrument's adoption and links the Protocol to the two principal elements of the Group's negotiating mandate: (1) to negotiate a new instrument on post-conflict remedial measures of a generic nature, and (2) to determine whether the negotiations could address generic preventive measures to improve the reliability of munitions. The Group was able to respond affirmatively to the second point. The negotiations did deal successfully with preventive measures on munition reliability, but these measures are voluntary best practices, as made clear in Article 9 and the Protocol's Technical Annex.

The preamble played a central role in allaying the misgivings of at least one delegation about mixing legal obligations and voluntary best practices in the Protocol. France argued that legally binding remedial measures and preventive best practices should be dealt with in separate instruments. It held that Article 9 should not be part of the Protocol because it did not encompass a legal obligation. Use of the preamble to make clear that States intended to include a mix of legally binding provisions and non-legally binding elements, and the placing of emphasis on the voluntary nature of the Protocol's generic preventive measures, helped to address the French concerns on this point.

### Scope of application

Importantly, States Parties agreed that the Protocol would apply in both international and non-international armed conflicts. Its application to non-international armed conflicts did not give rise to controversy during the negotiations and no State spoke against it applying in such circumstances.

Like anti-personnel landmines, explosive remnants of war have been a serious humanitarian problem in internal wars, killing and injuring scores of civilians. Article 1(3) states that the Protocol will apply to the situations arising from the conflicts referred to in paragraphs 1 to 6 of Article 1 of the CCW as amended on 21 December 2001. This is a reference to the amendment adopted by the Second CCW Review Conference that extends the scope of application of CCW Protocols I-IV to non-international armed conflict. The amendment stipulated that the scope of application for other CCW protocols would be determined on a case-by-case basis.

As a result of its application to non-international armed conflicts, the Protocol refers to "High Contracting Parties" and "parties to an armed conflict". The former is the equivalent of "States Parties", i.e. States that have formally ratified or acceded to the Convention and the Protocol. The phrase "parties to an armed conflict" is a reference to non-State actors (i.e. organized armed groups) and is the formula used in Amended Protocol II to the CCW, which also applies to non-international armed conflicts. As used in Protocol V, "parties to an armed conflict" does not encompass States involved in a conflict that have not ratified or otherwise expressed their consent to be bound by the Protocol. Such States are not bound by it.

A related issue is the application of the Protocol's rules to explosive remnants of war from previous conflicts, i.e. conflicts that took place before its entry into force for the relevant High Contracting Party. Although the Protocol would clearly apply to future conflicts, several delegations, including Austria, Brazil, China and Pakistan, believed that it also had to address explosive remnants of war already on the ground. A number of delegations, notably Italy, France and Japan, opposed extending its rules to past conflicts. In the end, Article 1(4) clarified that the Protocol's main operative provisions apply to explosive remnants of war produced after the Protocol's entry into force for the relevant State and a separate provision on assistance in dealing with existing explosive remnants of war was also included (Article 7).[29]

### Definitions

Definitions were an important issue for most delegations and there was rapid agreement on their general parameters. All agreed that the Protocol should deal only with the explosive remnants of war from conventional weapons and not address the post-conflict problems arising from the use of biological, chemi-

29 See below, "Assistance and cooperation", p 16.

cal or nuclear weapons. This is in line with the purpose of the CCW, which, when negotiated, was not meant to deal with "weapons of mass destruction".

Most delegations supported a general definition of explosive remnants of war which would cover all forms of explosive ordnance that might become a threat after the end of an armed conflict. Although the idea was briefly considered, there was little support for the Group to develop lists or define specific categories of munitions that were most likely to become explosive remnants of war. It was also agreed that weapons covered by other international treaties, such as anti-personnel mines, anti-vehicle mines, booby traps and other similar devices, should be excluded from Protocol V so as to avoid an overlap with existing instruments, in particular the CCW's Amended Protocol II. This earlier treaty already contained specific post-conflict obligations to reduce the impact of such weapons.

Importantly, clearance organizations had stressed that post-conflict clearance involved not only the removal of explosives that had been used and failed to explode as intended but also considerable stocks of ordnance that had been abandoned. For this reason, "explosive remnants of war" is stated to mean (1) unexploded ordnance, and (2) abandoned explosive ordnance.[30] Each is defined in Article 2 of the Protocol.[31] These two categories cover the principal situations in which explosive weapons become a threat to civilian populations in a post-conflict setting. Article 2 furthermore contains definitions of "explosive ordnance" and "existing explosive remnants of war".

The negotiations benefited from earlier definitions developed by mine action experts for the International Mine Action Standards (IMAS).[32] The IMAS definitions for explosive ordnance and unexploded ordnance were a starting point and were altered to correspond with the parameters of the Group's work as mentioned above. The Protocol's definition of abandoned explosive ordnance, however, is new, as is the term itself. It was developed by the Group in response to concerns that the IMAS definitions did not seem to cover explosive ordnance that had not been used or prepared for use but rather had been stockpiled on or near the battlefield.

### The clearance of explosive remnants of war

One of the main issues was responsibility for the clearance of explosive remnants of war. There are few treaty or customary legal rules that address

30 Protocol on Explosive Remnants of War, *op. cit.* (note 2) Art. 2 (4).

31 *Ibid.*, Art. 2 (2) and 2 (3), respectively.

32 International Mine Action Standards (04.10) 3.217 (UXO) and 3.67.

this issue and those that do exist are generally limited to the removal of landmines.[33] Historically, each party has been responsible only for the removal of unexploded and abandoned ordnance on its territory. However, such clearance is often difficult or impossible if the affected country does not have the means to accomplish it. In some instances, the affected country is not a party to the conflict. In the opinion of a number of delegations and organizations, to improve the law in this area was a primary goal of a new protocol; strong obligations on the clearance of explosive remnants of war and requirements to assist in the removal of weapons wherever they are found would have the potential to significantly reduce the problem.

Article 3 establishes new and important rules on clearance. First and foremost, for the first time in a treaty of international humanitarian law there is a clear rule that explosive munitions, other than landmines, must be cleared once the fighting has ended.[34] Each High Contracting Party and party to a conflict is responsible for the clearance of these weapons in the affected territory under its control.[35] The Protocol adds that the parties must take measures to reduce the risks posed by explosive remnants of war until clearance takes place. Such measures include a threat survey and assessment, needs assessment, the marking of dangerous areas, and resource mobilization to carry out these activities,[36] which must occur "after the cessation of active hostilities and as soon as feasible".[37] It is important to note that after the end of active hostilities does not mean after the conclusion of a formal peace agreement. Clearance is to begin as soon as feasible in affected areas and must not wait for a formal declaration of peace between the parties.

Perhaps even more importantly, the Protocol identifies an explicit responsibility, outlined in Article 3(1), for the users of explosive ordnance to provide assistance, where feasible, to facilitate the marking and clearance of the explosive remnants of war in territory outside their control that have

33 See Protocol on Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, and Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II) of 3 May 1996. It is also arguable that general rules of international humanitarian law that establish a general protection for civilians against the effects of military operations, prohibit indiscriminate attacks and require parties to take feasible precautions to minimize civilian casualties also entail responsibilities for the clearance of explosive remnants of war.

34 Protocol on Explosive Remnants of War, *op. cit.* (note 2), Art 3 (2).

35 *Ibid.*

36 *Ibid*, Art. 3 (3).

37 For comments on the qualifying phrases used in the Protocol, see "Implications and challenges" below, p. 19.

been produced by the conduct of their military operations. Such assistance may be technical, material, financial or in the form of personnel. It may be provided directly to the party in control of the territory where the explosives are found, or through a third party such as the United Nations, international agencies or non-governmental organizations. This requirement is parallel to obligations that already exist for the clearance of mines, booby traps and other devices found in Amended Protocol II to the CCW.[38]

The final wording of Article 3(1) was a major improvement on the initial text. Previous drafts contained an obligation for the parties to clear explosive remnants of war in territory under their own control, but merely "to cooperate" with the other side in the clearance of those weapons in other areas. Many delegations considered the second part of this formulation to be weak, ambiguous and not a substantial advancement of the law. The ICRC pointed out that an obligation to cooperate would be significantly less than what was already required for landmines under Amended Protocol II and argued that the hostilities themselves and claims of non-cooperation between the parties would probably result in no action being taken. Others believed that the primary responsibility for the clearance of explosive remnants of war had to remain with the affected State and that it was unrealistic to expect the parties to do anything more than cooperate in clearing them. The final wording of Article 3(1) was based on a proposal which was put forward by the United States in the latter stage of negotiations and helped to reconcile the various views.

### Recording and sharing of information

The lack of information on the explosive ordnance used or abandoned in an armed conflict and the areas where explosive remnants of war may be found is often one of the difficulties facing clearance organizations and organizations conducting mine risk education. The rapid transmission of such information to them by High Contracting Parties and parties to a conflict can significantly improve an organization's ability to respond swiftly to explosive remnants of war. Even where the parties are willing to provide such information, it can be a frustratingly slow process, as most of them do not have the mechanisms to gather, approve and transmit such information to the relevant organizations. In most cases the dangerous areas are identified through accidents involving civilians and reports by local communities.

38 Amended Protocol II, *op. cit.* (note 33), specifically, Arts. 3(2) and 10.

Requirements for the recording and sharing of information on the explosive ordnance used or abandoned in armed conflict were widely supported in the negotiations, and there were few issues dividing delegations in these areas. Such obligations were viewed as practical measures that would facilitate the response to explosive remnants of war. While the original and amended versions of Protocol II to the CCW and the military doctrine of many States already required that information on the location of laid landmines be recorded, similar rules had not previously been developed for other forms of explosive ordnance.[39]

Article 4 of the Protocol stipulates that High Contracting Parties and parties to an armed conflict must record and retain information on the use or abandonment of explosive ordnance "to the maximum extent possible and as far as practicable". Parties are subsequently required to share this information without delay after the cessation of active hostilities and as far as practicable with other parties, the UN or organizations involved in risk education or the marking and clearance of contaminated areas.

The kinds of information that the High Contracting Parties and parties to a conflict are expected to record are listed in the Protocol's Technical Annex. These include the types and amounts (number) of explosive ordnance used; the areas targeted with these weapons; the types, amount and location of abandoned explosive ordnance; and the general location where unexploded ordnance is known to exist or is likely to be found. The Annex also details the information that should be transmitted to the other parties and relevant organizations. As indicated in its heading, the Technical Annex sets out voluntary best practices and its contents are not legally binding. However, as High Contracting Parties and parties to the conflict are bound by Article 4 to record, retain and transmit information to facilitate the rapid removal of explosive remnants of war as well as risk education, the article's effective implementation will require that the information recorded matches the specifications in the Technical Annex.

The United Nations Mine Action Service and other organizations have cited the Protocol's information requirements as one of the most important developments in assisting rapid mine action. Such requirements not only assist the activities of organizations. They are also essential steps that allow the High Contracting Parties and parties to the conflict to implement the Protocol's requirements on clearance (Art. 3), precautions for the pro-

39 Protocol II, *op. cit.* (note 33), Art. 7; Amended Protocol II, *op. cit.* (note 33), Art. 9.

tection of the civilian population (Art. 5) and protection for humanitarian organizations (Art. 6).

### Precautions to protect civilians and humanitarian organizations

In addition to its clearance and information requirements, the Protocol also stipulates that High Contracting Parties and parties to an armed conflict must take additional measures to protect civilians. Under Article 5, the parties must take all feasible precautions in territory under their control to protect civilians and civilian objects from the effects of explosive remnants of war. Specific mention is made of precautions such as warnings, risk education to civilians and the marking, fencing and monitoring of contaminated territory under the parties' control. Feasible precautions are those precautions that are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. A number of standards considered to be best practices in some of these areas are listed in Part 2 of the Technical Annex. States are encouraged to have regard to these standards in implementing Article 5.

This article was widely supported during the Protocol's development and negotiation. It encompasses measures to minimize the threat of explosive remnants of war until such weapons can be cleared. The definition of what is meant by "feasible precautions" closely follows the wording of that in Amended Protocol II, under which High Contracting Parties and parties to a conflict are obliged to take all feasible precautions to minimize the effects on civilians of mines, booby traps and other devices.[40]

Article 6 is meant to minimize the effects of explosive remnants of war on the operations of humanitarian organizations. It states that the High Contracting Parties and parties to a conflict must protect, as far as feasible, such organizations from the effects of explosive remnants of war. That protection could, for instance, include providing safe passage through dangerous areas, clearing roads where access is required and giving information on safe routes through dangerous areas. Although these specific activities are not stipulated in Article 6, they are the kind of measures identified in Amended Protocol II to protect humanitarian and peace-keeping missions from mines, booby traps and other devices.[41] Such measures would be equally relevant for

40 Amended Protocol II, *op. cit.* (note 33), Art. 3 (10).

41 *Ibid.*, Art. 12.

explosive remnants of war. Article 6 also states that each party must, upon request, provide humanitarian organizations with information on the location of all explosive remnants of war that it is aware of in territory where those organizations are operating or will operate. This article, too, had wide support during the negotiations and was based on an Australian proposal that the kinds of protection found in Amended Protocol II be included in the new protocol, but in a much simpler format.

### Assistance and cooperation

The Protocol contains two articles on assistance and cooperation. The first (Article 7) covers assistance to High Contracting Parties in dealing with problems posed by explosive remnants of war that already exist at the time they become party to the Protocol. The second (Article 8) is concerned more broadly with assistance in implementing the Protocol and in dealing with an explosive remnants of war problem that arises after its entry into force for a particular State.

How to deal with existing remnants of war was a major issue during the negotiations and one of the last to be resolved.[42] As mentioned above, a number of countries wanted the Protocol's obligations with regard to clearance, the recording and transmission of information and the taking of precautions to apply to all explosive remnants of war, including those already present from earlier conflicts. Such an approach was opposed by other States, which had concerns about the retroactive application of the Protocol and sought to have it apply only to future conflicts involving one or more High Contracting Parties.

A compromise was reached through Article 7. Under this provision, each High Contracting Party facing problems posed by existing remnants of war has the right to seek and receive assistance, where appropriate, from other States and relevant organizations in dealing with them. In parallel, each High Contracting Party in a position to do so is required to provide assistance, where necessary and feasible, to help others deal with the problems posed by these weapons. The qualifications in this article (i.e. "where appropriate", "as necessary and feasible") show that it was intended to be a flexible provision and was not meant to be absolutely binding for the parties

42 "Existing remnants of war" is defined in Art. 2 of Protocol V as "unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists".

to earlier conflicts. Nevertheless, when coupled with the consultations of High Contracting Parties laid down in Article 10, it provides an important mechanism through which affected States and the users of explosive ordnance in past wars can work to address an existing problem. As explained below, this provision may be one of the important areas of work for High Contracting Parties in the early meetings on the Protocol's implementation. It is also an incentive for States already affected by explosive remnants of war to become party to the instrument and to the CCW as a whole if they have not already done so.

Article 8 is concerned more generally with assistance and cooperation in implementing the Protocol. It contains a range of requirements designed to involve all High Contracting Parties in efforts to address the problem of explosive remnants of war, and is based on similar provisions found in Amended Protocol II to the CCW and in the Convention on the Prohibition of Anti-personnel Mines.[43] Each High Contracting Party in a position to do so must provide assistance for the marking and clearance of explosive remnants of war and for risk education to civilian populations, and must contribute to UN and other trust funds and databases to facilitate the provision of assistance.

Importantly, as a result of efforts led by South Africa and supported by the ICRC and several non-governmental organizations, Article 8 also contains obligations on assistance to the victims of explosive remnants of war. High Contracting Parties in a position to do so are required to provide assistance for the care, rehabilitation and socio-economic reintegration of persons injured by explosive remnants of war. Such a provision was deemed an essential part of a comprehensive response to the problem of explosive remnants of war. Article 8(2) parallels the provision on assistance to mine victims found in the Convention on the Prohibition of Anti-personnel Mines.[44]

### Generic preventive measures

Measures to prevent explosive ordnance from becoming explosive remnants of war were a crucial issue during the negotiations. Many States and organizations, including the ICRC, felt that such measures had an important role to play in reducing the large numbers of explosive remnants of war that

43 Amended Protocol II, *op. cit.* (note 33), Art. 11; Convention on the Prohibition of Anti-personnel Mines, *op. cit.* (note 9), Art. 6.

44 *Ibid.*, Art. 6 (3).

result from armed conflict. Several States, though, led by France, were opposed to including such provisions. France's objections were not concerned with the substance of the article but rather with the mixing of legally binding and non-legally binding provisions in the Protocol. As mentioned above, a compromise was found by including a reference to this approach in the Protocol's preamble.

Article 9 encourages High Contracting Parties to implement generic preventive measures aimed at minimizing the occurrence of explosive remnants of war. They encompass a range of activities taken before the use of explosive ordnance, so as to help ensure that weapons will explode as intended. A number of general best practices are listed in Part 3 of the Protocol's Technical Annex. They include standards for munitions manufacturing, storage, transport and handling, as well as for the training of personnel.

### Promoting implementation and compliance

The Protocol's final provisions deal with mechanisms to review its implementation and ensure compliance with its provisions. Article 10 establishes that High Contracting Parties will consult and cooperate with each other on all issues related to the Protocol's operation. In this regard, a Conference of High Contracting Parties may be convened to review the status and operation of the Protocol, consider matters of national implementation and prepare for future CCW review conferences. Unlike the meetings of High Contracting Parties to Amended Protocol II, which are mandated to occur on an annual basis, the decision to convene a Conference on Protocol V must be agreed by a majority, but by no less than 18 High Contracting Parties. This flexible approach was adopted in light of concerns raised by a number of governments about the number of CCW meetings and other arms control meetings already held annually. It is likely that a first meeting will be held soon after the entry into force of the Protocol, and thereafter as needed.

Article 11 promotes ways to ensure compliance with the Protocol. It stipulates that each High Contracting Party must issue appropriate instructions and procedures and make sure that its personnel receive training consistent with the Protocol's provisions. It also requires High Contracting Parties to work bilaterally, through the UN or through other international procedures, to resolve any problems that may arise in the Protocol's interpretation or application. It should be noted that when these requirements were adopted, the Group of Governmental Experts was also considering proposals to establish a broader mechanism to monitor compliance with the CCW and

its protocols. The CCW itself does not contain any provisions on compliance, although Amended Protocol II and now the Protocol on Explosive Remnants of War have some limited requirements in this area. The Group of Governmental Experts will continue to work on this issue in 2005.

### Implications and challenges

The Protocol on Explosive Remnants of War is a major development of international humanitarian law. It strengthens the law in areas where no specific rules have previously existed, providing an important legal regime to address one of the principal dangers faced by civilian populations in the aftermath of an armed conflict. Along with Amended Protocol II to the CCW and the Convention on the Prohibition of Anti-personnel Mines, international humanitarian law now has a series of complementary treaties laying down a comprehensive set of rules to reduce the problems caused by the explosive remnants of war.

These three instruments also reflect an extension of international humanitarian law into the post-conflict setting. While some rules, such as the transfer of human remains and the search for missing persons, apply beyond the actual conduct of hostilities, the recent developments on landmines and explosive remnants of war have established post-conflict responsibilities for the parties to an armed conflict to reduce to a minimum the harmful effects of weapons they have used during the fighting. Some obligations, such as clearing explosive remnants of war after the cessation of active hostilities, may take years to fulfil if the problem is severe. As pointedly observed by a representative of the United Nations Mine Action Service, "It will no longer be permissible for the parties to a conflict to fire and forget."[45]

The Protocol also has the capacity to strengthen the international response to problems posed by explosive remnants of war. It will, if fully implemented, make it easier for organizations working to reduce the effects of these weapons to accomplish their goals. Organizations could expect greater cooperation and assistance from the warring sides and would be able to plan more effectively and allocate resources more efficiently in order to tackle explosive remnants of war once a conflict was over. In short, the Protocol's requirements have the potential to speed up clearance, decrease casualties and reduce costs. In addition, the meetings of High Contracting

45 Statement of Martin Barber, Director of the United Nations Mine Action Service, at the Informational Meeting on Explosive Remnants of War, New York, 19 October 2004.

Parties provided for in Article 10 could serve as an important forum for affected States and relevant organizations to report on the progress, or lack of it, in particular countries, as well as to garner assistance from High Contracting Parties to support ongoing work. Such meetings would also be a major opportunity to deal with existing explosive remnants of war. As the Protocol's main provisions will apply to future conflicts, States affected by explosive remnants from earlier wars could use these meetings to call attention to their existing problem and ways to address it. Although generic preventive measures are voluntary and technical improvements in the design of munitions are still under discussion, the new obligations to clear and assist clearance once the fighting has ended should provide an incentive to take such preventive action at the national level. In the long run it would seem cheaper and more effective to prevent the occurrence of explosive remnants of war rather than absorb the costs of removing these weapons later.

The adoption of the Protocol has had implications for the CCW process. Unlike the negotiations on Amended Protocol II in 1995 and 1996, the 2002-2003 meetings of the Group of Governmental Experts were open to non-governmental organizations. Non-governmental representatives participated in the negotiating sessions and in meetings of military experts, bringing their expertise and field-based experience to bear on the discussions. This helped to ensure that the humanitarian aspects of the explosive remnants of war problem and the needs of organizations working in affected countries were not overlooked. Their presence highlighted the important role that non-governmental organizations can play in the CCW process.

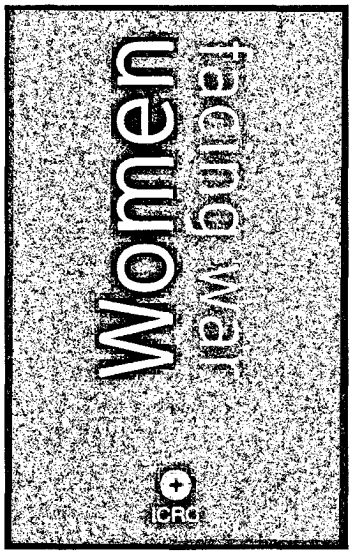
One potential concern with regard to the Protocol's implementation is the impact of the qualifying phrases found in many of its key provisions. These include phrases such as "where feasible" and "as soon as feasible". Such clauses were intended to provide a degree of flexibility to deal with the practical difficulties and complexities that governments and armed forces often face in post-conflict situations. Many experts recognized that it would be difficult to implement the Protocol's operational provisions in an environment that was not secure or in situations where there was not sufficient good will between the parties to conflict. These phrases were not meant to be loopholes for inaction but, if abused, such qualifications could undermine the effectiveness of the Protocol.

It is expected, however, that most governments and armed forces will act in good faith and improve their response to explosive remnants of war. The Protocol's rules were adopted by consensus and supported by the five permanent members of the United Nations Security Council and other mil-

itary powers. Its provisions outline the relevant expectations of the international community. As a result, it is no longer permissible to do nothing to address explosive remnants of war after the cessation of hostilities. In most situations, measures to reduce the dangers of these weapons will be rendered feasible either by the actions of parties themselves or through support for the programmes of international or non-governmental organizations.

Another source of possible concern is the extent to which the Protocol can be implemented by non-State actors involved in the hostilities. Like other areas of international humanitarian law, securing implementation and compliance among organized armed groups will be a major challenge. Concerted efforts have, however, been made to obtain commitments from such groups that they will end the use and address the effects of anti-personnel mines. Similar initiatives with regard to Protocol V are needed to raise awareness of the new rules on explosive remnants of war and encourage compliance by non-State actors involved in the fighting.

It is also hoped that the adoption of the Protocol on Explosive Remnants of War will help to extend adherence to the Convention on Certain Conventional Weapons. At 1 November 2004, 97 States were party to the Convention. However, the number of ratifications in several important regions, namely Africa, Asia and the Middle East, is still rather low, despite the fact that many countries in those very regions are affected by explosive remnants of war and have firsthand experience in dealing with their consequences. Encouragingly, many non-party States joined in the work of the Group of Governmental Experts and contributed to the development of the Protocol. Its mechanisms for dealing with existing and future explosive remnants of war might therefore prove to motivate countries that have not already done so to consider becoming party to the Convention and all its protocols.




**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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# Legality of amnesties in international humanitarian law
# The Lomé Amnesty Decision of the Special Court for Sierra Leone

SIMON M. MEISENBERG*

On 13 March 2004, the Special Court for Sierra Leone (SCSL) rendered an important decision on the validity of amnesties under international law.[1] The Appeals Chamber of the SCSL ruled that amnesties granted to persons of the warring factions in the Sierra Leone civil war by the so-called Lomé Peace Agreement are no bar to prosecution before it. This decision is the first ruling of an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts. The following article will briefly discuss this significant and controversial decision for the development of international humanitarian law and will then examine the most important and critical findings of the ruling, after first giving a brief summary of the legal background to the SCSL, the Lomé Peace Agreement and the Appeals Chamber decision (Lomé Decision) itself.

## Legal background to the Special Court for Sierra Leone

The SCSL was established by an agreement between the United Nations and the government of Sierra Leone on 16 January 2002.[2] This newly established ad hoc criminal tribunal is considered to represent a new category of international criminal courts and is largely referred to as a *hybrid* tribunal, since it incorporates various national elements in its Statute.[3] The mandate of the Secretary-General of the United Nations to enter into negotiations with Sierra Leone in order to establish an independent criminal court for the prosecution of serious violations of international humanitarian law was based on Security

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Council Resolution 1315.[4] The Special Court Agreement (the Agreement)[5] and the Special Court Statute (the Statute)[6] were ratified by the Sierra Leone parliament in March 2002 through the Ratification Act that explicitly states: "The Special Court shall not form part of the Judiciary of Sierra Leone."[7] Nor is the Special Court, unlike the two ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), linked to the United Nations. It is therefore an independent international criminal tribunal. It has jurisdiction *ratione materiae* with respect to crimes against humanity, serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and national crimes, such as serious abuse of female children and deliberate destruction of property as defined by national laws of Sierra Leone.[8] The jurisdiction *ratione temporae* runs from 30 November 1996, the date of an earlier ceasefire – the Abidjan Accord – that also provided for an amnesty. The personal jurisdiction is limited to persons "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law..."[9] The Trial and Appeals Chamber are composed of a minority of judges appointed by the government of Sierra Leone; the remaining judges are appointed by the Secretary-General.[10] This structure and the incorporation of national crimes into the Statute led the Secretary-General to label the Special Court as a "treaty-based *sui generis* court of mixed jurisdiction and composition."[11]

1 *The Prosecutor* v. *Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004) (hereinafter Lomé Decision).

2 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, annex to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereinafter Agreement).

3 Avril McDonald, "Sierra Leone's shoestring Special Court", *International Review of the Red Cross*, Vol. 84, 2002, p. 124; Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, Vol. 97, April 2003, p. 295.

4 UN Doc. S/Res/1315 (2000), 14 August 2000.

5 Agreement, *op. cit.* (note 2).

6 Statute of the Special Court for Sierra Leone, enclosure to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereinafter Statute).

7 Article 11(2) of the Special Court Agreement, 2002, Ratification Act, 2002, Supplement to the Sierra Leone Gazette, Vol. CXXX, No. II, dated 7 March 2002 (hereinafter Ratification Act 2002).

8 Statute, Articles 2-5.

9 *Ibid.*, Article 1.

10 *Ibid.*, Article 12.

11 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 9 (hereinafter Report of the Secretary-General).

## Background to the Lomé Amnesty Decision

On 7 July 1999, the Revolutionary United Front (RUF) and the government of Sierra Leone signed a peace agreement in Lomé, Togo (Lomé Agreement).[12] Article IX of the Lomé Agreement made broad concessions to the RUF including, among other things, a blanket amnesty in order to calm the decade-long civil war.[13] The amnesty granted unconditional and free pardon to all participants in the conflict.[14] The United Nations Special Representative of the Secretary-General for Sierra Leone appended a disclaimer to the agreement, stating that the amnesty provision therein would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[15] Article 10 of the Statute accordingly declares: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."[16] The accused, Kallon and Kamara, unsurprisingly referred to the amnesty provisions of the Lomé Agreement in a preliminary motion and argued, *inter alia*, that not all amnesties are unlawful in international law and that the Lomé Agreement was binding on the government of Sierra Leone, since it constituted an international treaty governed by the Vienna Convention on the Law of Treaties.[17] They held that obligations deriving out of an international treaty could not be altered by a later treaty — the Agreement between the United Nations and Sierra Leone — without the consent of the parties to the Lomé Agreement. Therefore the government of Sierra Leone had acted contrary to its prior and international obligations when it signed the Agreement with the United Nations. More specifically, the defendants argued that the Lomé Agreement obliged the government of Sierra Leone to ensure that "no official or judicial action" would be taken against any members of the RUF and other participants in the conflict.[18] This would include acceding to an extradition request or an agreement to

12 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, Lomé, UN Doc. S/1999/777 (hereinafter Lomé Agreement), Annex.

13 Lomé Agreement, Article XI.

14 *Ibid.*

15 Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7.

16 Statute, Article 10.

17 Lomé Decision, *op. cit.* (note 1), paras. 22-35.

18 *Ibid.*, para. 24.

establish an international court, as such measures would clearly amount to "judicial or official" actions.

The preliminary motion was decided by the Appeals Chamber without a prior decision of a Trial Chamber, since Rule 72(E) of the Rules of Procedure and Evidence of the SCSL (Rules) provides for a referral of preliminary motions to the Appeals Chamber when an issue of jurisdiction is concerned.

### The Lomé Amnesty Decision

In its decision, the Appeals Chamber sets forth its deliberations in three key steps and arguments. First it examines the status of the Lomé Agreement and whether insurgents have treaty-making capacity in international law, and the legal consequences thereof for Article 10 of the Statute. Secondly, the Appeals Chamber considers whether it is authorized to review the legality of its statutory provisions. Thirdly, it examines the limits of amnesties in international law. The judges further discuss whether a prosecution predating the Lomé Agreement amounts to an abuse of process.

With reference to the first argument, the Appeals Chamber finds that the mere fact that the United Nations and other third State parties signed the Lomé Agreement cannot naturally categorize the agreement as an international treaty, creating obligations towards its signatories.[19] The court did not accept the opinion of Kooijmans, who suggested that in certain cases peace agreements could be of an international character if the United Nations were strongly involved in the conflict through peace-keeping forces and had played an active role as mediator in the peace negotiations;[20] in any such cases it should be assumed that the non-State entity had committed itself to its counterparts, the government and the United Nations.[21] The judges, however, argued that the United Nations and third State parties were mere "moral guarantors" with the purpose of observing that the Lomé Agreement was enacted in good faith by both parties. Such moral functions of the guarantors could not presuppose any legal obligation.[22] International agreements in the nature of treaties had to create rights and obligations towards all parties. The Lomé

19 *Ibid.*, paras. 37-42.

20 *Ibid.*, para. 38.

21 Peter H. Kooijmans, "The Security Council and non-State entities as parties to conflicts", in Karel Wellens (ed.), *International Law: Theory and Practice — Essays in Honour of Eric Suy*, M. Nijhoff Publishers, The Hague, 1998, p. 338.

22 Lomé Decision, *op. cit.* (note 1), para. 41.

Agreement only created a factual situation to the restoration of peace; it did not create rights or duties which could be regulated by international law.[23]

On the basis of the same arguments the Appeals Chamber further considers whether the RUF had treaty-making capacity under international law. The judges opined that the mere fact that insurgents are subject to international humanitarian law may not lead to the conclusion that they are provided with an international personality under international law.[24] The fact that the Sierra Leone government regarded the RUF as an entity with which it could enter into an agreement could not suffice for concluding that the RUF had international treaty-making capacity, since no other State granted them recognition as an entity under international law.[25] The Appeals Chamber found that the validity of the Lomé Agreement's amnesty provision in the domestic law of Sierra Leone is of no importance for its conclusion, as it is concerned only with international crimes and whether the Lomé amnesty bars the SCSL from exercising jurisdiction over such offences.[26]

As for the second argument, the Appeals judges consider whether the court has jurisdiction and inherent powers to review treaty provisions of the Statute or the Agreement on the grounds that they are unlawful.[27] The Appeals Chamber held that it is not vested with powers to declare statutory provisions of its own constitution unlawful. Only in cases where it could be established that the provisions in question, in terms of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties or under customary international law, were void would the Appeals Chamber be empowered to undertake such a measure.[28] However, no foundation for the applicability of these provisions had been provided by the parties.[29] The Chamber explicitly finds that the *Tadić* jurisdiction decision of the ICTY[30] cannot be considered as authority, since the conditions were not alike.[31] The ICTY was established

23 *Ibid.*, para. 42.

24 *Ibid.*, para. 45.

25 *Ibid.*, paras. 47, 48.

26 *Ibid.*, para. 50.

27 *Ibid.*, paras. 61-65.

28 *Ibid.*, para. 61.

29 *Ibid.*

30 *The Prosecutor* v. *Dusko Tadić*, International Criminal Tribunal for the former Yugoslavia, IT-94-I-AR72, Decision on the Defence Motion on Jurisdiction, (Appeals Chamber, 2 October 1995) (hereinafter *Tadić* Decision); the SCSL Appeals Chamber mistakenly quotes the ICTY Trial Chamber decision dating 10 August 1995, see Lomé Decision, *op. cit.* (note 1), para. 57, note 45.

31 Lomé Decision, *op. cit.* (note 1), para. 62.

by a Security Council resolution, whereas the SCSL is a treaty-based tribunal.[32] The *Tadić* Decision only discusses the extent of powers of the Security Council to establish an international criminal court. It did not involve the validity of the provisions of a treaty.[33] The judges nonetheless recognized that the situation would be different where a court is duly established to be called upon to declare the limits of its powers.[34]

In its last argument the Appeals Chamber discusses the limits of amnesties in international law.[35] Here the judges mainly drew on the doctrine of universal jurisdiction to establish their opinion. They determined that the grant of amnesties falls under the authority of the State exercising its sovereign powers.[36] However, where a jurisdiction is universal, such a State could not deprive another State of its jurisdiction to prosecute perpetrators by granting amnesties.[37] The Appeals Chamber opines: "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."[38] After referring to *In re List et al.* of the Military Tribunal at Nuremberg and the *Eichmann* case, the Appeals Chamber concludes that the crimes enumerated in Articles 2 to 4 of its Statute are international crimes, which can be prosecuted under the principle of universality.[39] Amnesties granted by Sierra Leone, therefore, cannot cover crimes under international law, as they are subject to universal jurisdiction and by reason of the fact that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[40] The grant of an amnesty for international crimes therefore is not only in breach of international law, "but is in breach of an obligation of a State towards the international community as a whole."[41] However, the Appeals Chamber finds, too, that there is no customary rule prohibiting national amnesty laws, but only a development towards an exclusion of such laws in international law.[42]

32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*, paras. 66-74.
36 *Ibid.*, para. 67.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*, paras. 68, 70.
40 *Ibid.*, para. 71.
41 *Ibid.*, para. 73.
42 *Ibid.*, para. 82.

## Comment on the Lomé Amnesty Decision

The Lomé Decision is of critical importance for the development of international humanitarian law, since it is the first decision of an international criminal court to state that amnesties are no bar to prosecution for all international crimes before international or foreign courts. The ICTY in its *Furundzija Judgement* discussed the validity of amnesties under international law and found that an individual could be prosecuted for torture before an international tribunal, by a foreign State and under a subsequent regime even if the conduct in question had been the subject of an amnesty.[43] However, the judgment limits itself to the unlawfulness of amnesties for the crime of torture and does not reach a similar conclusion with regard to other international crimes. The Lomé Decision therefore goes beyond common international jurisprudence. Despite their relevance for the development of international humanitarian law relating to this subject matter, the findings of the Appeals Chamber are controversial. Not only did the Appeals Chamber fail to examine the validity of amnesties in the domestic legal system of the State that granted them, but in addition drew some critical conclusions that depart from prominent jurisprudence of other international criminal tribunals.

The Appeals Chamber found that it did not have the authority to declare the court's statutory provisions unlawful since the SCSL was created by a treaty.[44] Only where the court were established, or had the authority, to declare its own jurisdictional limits would the judges be empowered to declare a provision of the Statute unlawful.[45] This finding departs from the *Tadić* jurisdiction decision of the ICTY Appeals Chamber. The Appeals judges of the SCSL argued that the ICTY and the SCSL were of a different nature, as the former was directly established by a Security Council resolution. Although the *Tadić* Decision was highly controversial at the time, most authors acknowledged the fact that the ICTY was honestly willing to examine its own legality and the legality of provisions of its Statute.[46] Aldrich expressed a widely shared view that "[on] balance, I prefer the Tribunal's approach, as it emphasizes the right of the individual — the accused — to

43 *The Prosecutor* v. *Anto Furundzija*, International Criminal Tribunal for the former Yugoslavia IT-95-17/1-T, Judgement (Trial Chamber, 10 December 1998), para. 155.

44 Lomé Decision, *op. cit.* (note 1), para. 62.

45 *Ibid.*

46 George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, Vol. 90, January 1996, p. 65.

force the Tribunal to confirm the validity of the provisions of its Statute and even of its own creation. For a criminal tribunal in particular, it is reassuring to know that it finds inherent to the exercise of its judicial function the jurisdiction to examine the legality of its establishment."[47] It seems that the SCSL has departed from such safeguards for the accused. Furthermore, the finding appears to be *ultra vires* in relation to the Statute since Article 14 of the Statute incorporates the Rules of Procedure and Evidence of the ICTR *mutatis mutandis* into its legal system, which the judges of the SCSL may amend only "where the applicable Rules do not, or do not adequately, provide for a specific situation."[48] Rule 72 of those Rules — under which the Appeals Chamber acted in this decision — provides explicitly for objections to jurisdiction.[49] This provision was interpreted in the said *Tadić* Decision and in other decisions of the two ad hoc Tribunals in such a way as to enable the defendants to challenge the legality of the creation of the tribunals and the validity of their provisions.[50] Therefore the finding of the judges that they were not vested with powers to declare statutory provisions unlawful is not convincing: such authority had been acknowledged in prominent jurisprudence of the ICTY and ICTR by way of Rule 72 of their respective Rules, and was again implicitly provided for by the authors of the SCSL Statute through Article 14 thereof. Moreover, the conclusion of the Appeals Chamber judges appears to be inconsistent with their own precedents. In another decision the same judges and Judge Robertson — who was later disqualified from all RUF decisions[51] — referred to the same *Tadić* Decision and stated that inherent powers and jurisdiction are a necessary component of the judicial function of the SCSL "and do not need to be expressly provided for in the constitutive documents of the tribunal."[52]

47 *Ibid.*

48 Article 14 Statute.

49 Rule 72(B) (i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

50 See *The Prosecutor* v. *Joseph Kanyabashi*, International Criminal Tribunal for Rwanda, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (Trial Chamber, 18 June 1997); *The Prosecutor* v. *Momcilo Krajisnik*, International Criminal Tribunal for the former Yugoslavia, IT-00-39-PT, Decision on Motion challenging Jurisdiction — with Reasons (Trial Chamber, 22 September 2000).

51 *The Prosecutor* v. *Issa H. Sesay*, Special Court for Sierra Leone, SCSL-2004-15-AR15, Decision on the Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber (Appeals Chamber, 13 March 2004).

52 *The Prosecutor* v. *Sam H. Norman, Morris Kallon, and Augustine Gbao*, Special Court for Sierra Leone, SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Application for Stay of Proceedings and Denial of Right to Appeal (Appeals Chamber, 4 November 2003), para 27.

After the aforementioned findings the Appeals Chamber could have refrained from any further legal deliberation on the legality of amnesties in international law, since it had stated that it did not have the authority to declare Article 10 of the Statute unlawful, but it nevertheless went on to address the question. It is therefore uncertain whether the remainder of the decision is simply *obiter dictum* and therefore of questionable precedential value, or an additional examination of the Special Court's statutory provisions under customary international law. As the decision in this regard lacks clarity, a final conclusion would be mere speculation.

The Appeals Chamber based its Lomé Decision on the doctrine of universal jurisdiction, stating that "[w]here jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty."[53] This conclusion is widely shared among academics.[54] However, the Appeals Chamber did not demonstrate that war crimes in non-international armed conflict are subject to universal jurisdiction. Such jurisdiction applies to grave breaches of the Geneva Conventions and of Additional Protocol I, which require States to prosecute or extradite persons who commit these offences in an international armed conflict.[55] There are no similar treaty provisions concerning the prosecution or extradition of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Therefore violations in non-international armed conflict have traditionally not been considered to be subject to universal jurisdiction.[56] In this regard the Appeals Chamber refers only to the *Eichmann* case[57] and the *Hostage* case[58] to establish universal jurisdiction for international crimes. These trials, however, only charge the accused persons with crimes against humanity and war crimes committed in an international

53 Lomé Decision, *op. cit.* (note 1), para. 67.

54 See Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 315; Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2003, para. 191; International Law Association, "Final report on the exercise of universal jurisdiction in respect of gross human rights offences", in *Report of the Sixty-Ninth Conference*, London, 2000, p. 417; Princeton Project on Universal Jurisdiction (eds.), *The Princeton Principles on Universal Jurisdiction*, Princeton, 2001, Principle 7(2); Roman 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, p. 297.

55 Luc Reydams, *Universal Jurisdiction*, Oxford University Press, Oxford, 2003, p. 55.

56 Denise 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.

57 *Attorney-General of the Government of Israel* v. *Eichmann*, 36 ILR 18 (District Court of Jerusalem 1961), 5, 12.

58 *In re List et al.*, US Military Tribunal at Nuremberg, Judgment 29 July 1948, printed in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, VIII, p. 1242.

armed conflict. The passage that is also mentioned of the *Arrest Warrant* case of the International Court of Justice (ICJ) refers only to sovereign immunity before certain international criminal courts and does not make any statement in regard to crimes subject to universal jurisdiction.[59] Even though the Appeals Chamber admits that "not every activity that is seen as an international crime is susceptible to universal jurisdiction",[60] its decision falls short of establishing such jurisdiction on a case-by-case analysis for each crime before the court and in particular for war crimes committed in non-international armed conflict. This inadequacy of the Lomé Decision is unfortunate, as there are strong arguments in recent developments of international law for inclusion of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in the prominent list of crimes subject to the principle of universality.[61]

The attempt to resolve the challenging issue of amnesties by reference to the doctrine of universal jurisdiction moreover only partly covers the factual subject, as the jurisdiction of the Special Court is a truly unique one deriving from the cession of judicial powers from the State of Sierra Leone, and not first and foremost from universal jurisdiction. As the SCSL is established by a bilateral agreement, its jurisdictional powers primarily derive from Sierra Leone's own jurisdiction, based on the territorial and nationality principle. In international law a State can naturally only confer, through a treaty, powers and authorities it possesses (*nemo plus juris transferre potest quam ipse habet*). Only from such powers can the SCSL derive its jurisdiction. Hence the conclusion that third States have jurisdiction to prosecute persons who were covered by a domestic amnesty is not entirely applicable to the SCSL. Even though it is a "certain international criminal court" in the sense of the cited *Arrest Warrant* case, this conclusion does not change the aforementioned principles of international law, since the *obiter dictum* of the ICJ refers only to immunities from prosecution before certain courts.[62]

59 See *Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, ICJ Reports 2002, para. 61.

60 Lomé Decision, *op. cit.* (note 1), para. 68.

61 Thomas 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; Theodor Meron, "International criminalization of internal atrocities ", *American Journal of International Law*, Vol. 89, 1995, p. 554; International Law Association, *op. cit.* (note 54), pp. 408-409.

62 Simon M. Meisenberg, "Die Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone", *Humanitäres Völkerrecht*, Vol. 17, No. 1, 2004, p. 30.

In mainly invoking the concept of universal jurisdiction to establish that the Lomé amnesty is no bar to prosecution, the Appeals Chamber seems to be ignoring the fact that the SCSL is dependent on the judicial cooperation of the authorities of Sierra Leone. The Appeals Chamber misinterprets the meaning of "official or judicial action" mentioned in Article IX(2) of the Lomé Agreement, as it limits its conception of such measures to the ratification of the Agreement and the Statute. In all current cases where accused persons have been arrested, their capture and transfer to the premises of the SCSL were carried out by the Sierra Leonean authorities because the Special Court, like the ICTY and ICTR, lacks a police force of its own. These actions were based on Article 17(2) of the Agreement, which stipulates that the government of Sierra Leone "shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers..."[63] Such actions by Sierra Leone are undoubtedly of a judicial and official character. As the Appeals Chamber does not declare Article IX of the Lomé Agreement to be illegal in the domestic system of Sierra Leone,[64] such measures by the national authorities consequently would still be in contradiction to that agreement. The argument of the court's universal jurisdiction over international crimes to establish the illegality of amnesties for the purpose of prosecution by the SCSL as a treaty-based international criminal court is therefore not persuasive.

The core question of the Appeals Chamber should have been whether Article IX of the Lomé Agreement has generally violated international law and whether any amnesties granted were consequently invalid and henceforth not to be considered by the SCSL. By linking the complex issue merely to the principle of universality the Appeals Chamber simplifies and eliminates the fundamental questions at stake. The particular question of an *erga omnes* obligation to prosecute was not accurately discussed by the judges. On the one hand they adopt an opinion by Cassese stating that "if a State passes any such law [on amnesty], it does not breach a customary rule."[65] Yet on the other hand, the same paragraph within the Lomé Decision states that prosecution of international crimes "is a peremptory norm and has assumed the nature of an obligation *erga omnes*."[66] If such *erga omnes* obligations in

63 Agreement, Article 17(2).
64 Lomé Decision, *op. cit.* (note 1), para. 50.
65 *Ibid.*, para. 71.
66 *Ibid.*

international law do exist, then they also have to apply to Sierra Leone, and the grant of a blanket amnesty would consequently be in breach of international law. The contradiction becomes more evident when the judges — by agreeing to the *amicus curiae* submissions of Orentlicher — declare that the grant of amnesty for international crimes "is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole."[67] Apart from the fact that the Appeals Chamber does not provide any references for its conclusions but merely refers to the material provided by the *amicus curiae*, there are uncertainties about the sources of law being applied by the Chamber. For example, it rejects the proposition that there is a crystallizing international norm that a government cannot grant amnesty for serious crimes.[68] It accepts only that "such a norm is developing under international law."[69] Then again, the Appeals Chamber maintains: "Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."[70] This finding opposes the opinion adopted earlier by Cassese, who expressed the view that customary law has not yet crystallized and therefore advocated prosecutions under the doctrine of universal jurisdiction.[71] Admittedly, there is a move towards abandoning amnesties in current international law, as shown by the waiver of the Representative of the Secretary-General appended to the Lomé Agreement. However, it is doubtful whether an international norm that is still taking shape can already constitute custom, as the Appeals Chamber seems to imply. Even though crystallizing custom can also exert a considerable influence on international courts,[72] the findings of the judges and their declaration of their "discretionary power" to attribute little or no weight to the grant of amnesties, despite their conclusion that such custom is still developing, is striking and raises questions about the sources of law applied.

67 *Ibid.*, para. 73.

68 *Ibid.*, para. 82.

69 *Ibid.*

70 *Ibid.*, para. 84.

71 Cassese, *op. cit.* (note 54), p. 315.

72 See E. Jéménez de Aréchaga, "International law in the past third of a century", 159 *Recueil des Cours* (1978), p. 20.

It is not submitted that blanket amnesties have a standing in the international legal system. Many international conventions provide for the prosecution or extradition of offenders of certain international crimes, and it seems as though at least unconditional amnesties may be implied as the counterpart to such a duty.[73] In this regard the Appeals Chamber provided some guidance by its reference to such treaty obligations, namely those laid down in the Genocide Convention, the Torture Convention and the four Geneva Conventions. However, the applicability of these treaties in the context of the SCSL is questionable and the Appeals Chamber did not provide any support for a conclusion with regard to war crimes in non-international armed conflict. The crimes before the court do not come within the grave breaches regime of the four Geneva Conventions. For violations in non-international armed conflict of Article 3 common to the Geneva Conventions and of Additional Protocol II there is, as mentioned above, no explicit provision entailing an obligation to prosecute or extradite. Moreover, the Genocide Convention is not of particular importance in the case of the Sierra Leonean conflict, since it is assumed that the crimes were generally not committed with a genocidal intent, which is again the reason why the Statute does not contain such crimes.[74] In addition, the applicability of the Torture Convention is open to doubt, as it refers to reprehensible conduct by State officials. Even though torture in human rights treaties and international humanitarian law has a number of common characteristics, the ICTY expressly held that the definition of torture in international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law.[75] The appellants Kallon and Kamara did not occupy official State positions in or for Sierra Leone before the signing of the Lomé Agreement. It would have been the task of the Appeals Chamber to specifically establish treaty obligations with respect to crimes adjudicated before its jurisdiction and the appellants' indictment.

The Appeals Chamber tends to assume the existence of specific duties to prosecute international crimes rather than to sincerely establish such obligations. None of the conventions referred to expressly prohibit or

73 Naomi Roht-Arriaza, "Special problems of the duty to prosecute: Derogation amnesties, statutes of limitations, and superior orders", in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, p. 57.

74 Report of the Secretary-General, *op. cit.* (note 11), para. 13.

75 *The Prosecutor* v. *Dragoljup Kunarac et al.*, The International Criminal Tribunal for the former Yugoslavia, IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber, 22 February 2001), para. 496.

expressly provide for amnesties. An exception is Additional Protocol II to the Geneva Conventions, Article 6(5) of which stipulates that "[at] the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict". In the AZAPO case this provision was used to justify conditional amnesties, stressing the need for reconciliation and peaceful transition.[76] The Appeals Chamber unfortunately did not discuss the need of war-torn societies for peaceful transition and refused any comparison with the said case by plainly stating that this decision dealt with domestic law and therefore was not applicable to the internationally founded SCSL.[77] Given the fact that the judges based their findings on the principle of universality, such a conclusion is only consistent. But it is also regrettable, since the SCSL plays an integral part in Sierra Leone's progress towards a peaceful transition. Nevertheless, it is meanwhile widely accepted that the rationale of Article 6(5) of Additional Protocol II does not justify amnesties for serious violations in internal armed conflict because such violations, as pointed out above, are international crimes under customary international law.[78] Article 6(5) therefore refers only to legitimate acts of hostility,[79] and its mere existence does not imply that there is no duty to prosecute crimes in non-international armed conflict.

The unbalanced reasoning of the Lomé Decision, according to which amnesties are to be rejected unconditionally, raises concerns that affect provisions relating to the court's own functioning, as well as provisions of international humanitarian law. Under the former, the Special Court has jurisdiction to prosecute persons who have "the greatest responsibility" for the crimes committed in Sierra Leone.[80] The Statute's disregard for those "least

76 See *The Azanian Peoples Organization (AZAPO)* v. *The President of the Republic of South Africa*, 4 SA 653 (Constitutional Court 1996), para. 53.

77 Lomé Decision, *op. cit.* (note 1), para. 73.

78 Yasmin Naqvi, "Amnesty for war crimes: Defining the limits of international recognition", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, p. 604; Avril McDonald, "Sierra Leone's uneasy peace: The amnesties granted in the Lomé Peace Agreement and the United Nations' dilemma", *Humanitäres Völkerrecht*, Vol. 13, No. 1, 2000, p. 19; Roht-Arriaza, *op. cit.* (note 73), pp. 58-59; Christian Tomuschat, "The duty to prosecute international crimes committed by individuals", in Hans-Joachim Cremer *et al.* (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger*, Springer Verlag, Berlin, 2002, p. 348; Jessica Gavron, "Amnesties in the light of development in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51, January 2002, pp. 102-103.

79 Gavron, *Ibid.*

80 Statute, Article 1.

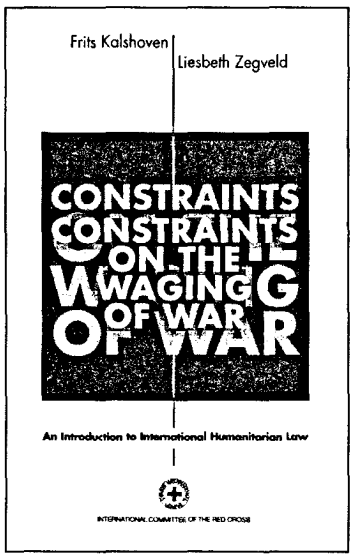
responsible" is not strictly speaking an amnesty. But in reality the effect is the same, as the Lomé Decision did not expressly declare the amnesty invalid for Sierra Leone's domestic legal system.[81] Such measures narrowly concentrating on the instigators and leaders of an armed conflict are highly pragmatic, since any other approach would jeopardize the SCSL's mandate. At the same time pragmatism might occasionally lead to impunity, as shown by the aforesaid statutory provision. Effective international humanitarian legislation has to take these specific situations into account. It is essential to strike a balance between impunity and facilitating a peaceful transition for a war-torn country. Limited and qualified amnesties must be seriously considered in this regard and may not be unconditionally rejected. It is necessary to find valid international parameters for such qualified amnesties as measures of last resort.[82] Since the SCSL had to deal with unconditional amnesties, it is understandable that it did not contribute to such a more balanced approach.

## Conclusion

The Lomé Decision of the Special Court for Sierra Leone is a step towards the abolition of blanket amnesties for mass atrocities rather than a landmark in the development of international humanitarian law. The Appeals Chamber did not address Sierra Leone's own duty to investigate and prosecute in international law, but merely based its findings on the principle of universality. Such an approach is unconvincing, owing to the unusual place of the Special Court in international law, and incompatible with the country's legal obligation to transfer arrested persons to the court, since the court lacks its own enforcement mechanisms. The court should have specifically established treaty obligations for Sierra Leone to prosecute with regard to all crimes before it and to non-international armed conflict in particular, rather than invoke the principle of universal jurisdiction in order to rule that the amnesties granted are no bar to prosecution before an international and foreign court.

81 Lomé Decision, *op. cit.* (note 1), para. 50.

82 See Naqvi, *op. cit.* (note 78), p. 583.

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## De l'assistance humanitaire : la résolution sur l'assistance humanitaire adoptée par l'Institut de droit international à sa session de Bruges en 2003

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Après quelques années de travaux[1], l'Institut de droit international (IDI) a adopté une résolution intitulée « L'assistance humanitaire »[2]. Les travaux préparatoires avaient été menés avec application et énergie par le rapporteur B. Vukas, de Croatie, après que M. Carrillo Salcedo eut renoncé à son mandat pour des raisons de santé. L'IDI est, de longue date, une institution scientifique du droit international de renom[3]. Son objectif est de promouvoir le développement du droit international et d'agir pour qu'il soit appliqué. Il a été fondé en 1873, à l'Hôtel de Ville de Gand, en Belgique. L'Institut se réunit en principe tous les deux ans. Dans l'intervalle des sessions, des commissions scientifiques étudient des thèmes qui sont choisis par l'Assemblée plénière. Celle-ci reçoit les travaux des commissions et elle adopte des résolutions de caractère normatif sur la base de ces travaux préparatoires, quand cela lui paraît opportun. Ces résolutions sont portées à l'attention des autorités gouvernementales, des organisations internationales et de la communauté scientifique. Elles jouissent d'un poids certain au regard de la renommée et du sérieux de l'Institut.

La résolution adoptée en 2003, relative à l'assistance humanitaire, ne contient pas de grandes innovations[4]; elles ne se seraient pas recommandées dans un domaine comme celui-ci. De plus, le rôle de l'Institut n'est pas de s'inspirer de postulats simplement désirables, mais de proposer à l'attention

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de tous un texte équilibré, qui reflète le droit en vigueur, tout en tentant de le pousser dans la direction voulue là où il est lacunaire ou incertain. La résolution présente des aspects intéressants et donne des précisions utiles, qui feront ici l'objet de quelques brèves réflexions[5].

L'assistance humanitaire était peu traitée avant les années 1980. Les réflexions portaient, à cette époque, tout d'abord sur des situations de catastrophes naturelles. Certains auteurs en appelèrent à un nouveau corps de normes, réglementant pour ces cas la solidarité entre les États[6]. Il y eut ensuite le conflit au Biafra (1967), avec ses cortèges de souffrances, et le coup de force de «Médecins sans frontières», qui mit en pleine lumière la question[7]. Celle-ci devait gagner en importance dans les années 1990, quand de graves convulsions internes dans nombre d'États provoquèrent des situations humanitaires intenables. Le cas de la Somalie, en 1992, est emblématique à

1 Voir ces travaux dans: *Annuaire de l'Institut de droit international*, Session de Bruges, Vol. 70-I, 2002-2003, pp. 399 ss.

2 Sur le sujet de l'assistance humanitaire, voir, entre autres: Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization*, Martinus Nijhoff Publishers, Dordrecht, 1985; Bosko Jakovljevic, «The right to humanitarian assistance: Legal aspects», *Revue internationale de la Croix-Rouge*, Vol. 69, N° 260, 1987, pp. 469ss; Marie-Jose Domestici-Met, «Aspects juridiques récents de l'assistance humanitaire», *Annuaire français de droit international*, Vol. 35, 1989, pp. 117ss; Yves Beigbeder, *The role and status of international humanitarian volunteers and organizations: The right and duty to humanitarian assistance*, Martinus Nijhoff Publishers, Dordrecht, 1991; Dietrich Schindler, «Humanitarian assistance, humanitarian interference and international law», in: Ronald S. J. Macdonald (éd.), *Essays in honour of Wang Tieya*, Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 689ss; Marie-Jose Domestici-Met, «Aide humanitaire internationale: un consensus conflictuel?» in: UNESCO (éd.), *Le droit à l'assistance humanitaire*, Actes du Colloque international organisé par l'UNESCO, UNESCO, Paris, 1996; Rohan J. Hardcastle et Adrian T. L. Chua, «Humanitarian assistance: Towards a right of access to victims of natural disasters, *Revue internationale de la Croix-Rouge*, Vol. 80, N° 325, 1998, pp. 589ss; Peter Walker, «Victims of natural disaster and the right to humanitarian assistance: A practitioner's view», *Revue internationale de la Croix-Rouge*, Vol. 80, N° 325, 1998, pp. 611ss; Peter Herby, «Arms transfers, humanitarian assistance and international humanitarian law», *Revue internationale de la Croix-Rouge*, Vol. 80, N° 325, 1998, pp. 685ss; Yoram Dinstein, «The right to humanitarian assistance». in: *Mélanges Karel Vasak, Les droits de l'homme à l'aube du XX^e siècle*, Bruylant, Bruxelles, 1999, pp. 183ss; Christa Rottensteiner, «The denial of humanitarian assistance as a crime under international law», *Revue internationale de la Croix-Rouge*, Vol. 81, N° 835, 1999, pp. 555ss. Voir aussi: *Guiding principles on the right to humanitarian assistance*, *Revue internationale de la Croix-Rouge*, Vol. 75, N° 297, 1993, pp. 519ss.

3 Sur l'IDI, voir IDI, *Livre du Centenaire*, Bâle, 1973. Voir aussi: <http://www.idi-iil.org>.

4 Voir le texte de la résolution en annexe.

5 Un commentaire plus complet du présent auteur sera publié dans la série des brochures de l'Institut.

6 Manfred Lachs, «The development and general trends of international law in our time», *Recueil de Cours de l'Académie de droit international*, Vol. 169, 1980-IV, pp. 72ss. Voir aussi Nicola Politis, *La morale internationale*, La Bâconnière, Neuchâtel, 1943, pp. 84ss.

7 Voir Domestici-Met, «Aspects juridiques récents de l'assistance humanitaire», *op. cit.* (note 2), p. 127.

cet égard. L'action humanitaire fut, dès ce moment, souvent couverte par des mandats du Conseil de sécurité en vertu du Chapitre VII de la Charte, le Conseil estimant que les souffrances indicibles des civils constituaient des menaces à la paix au sens de l'article 39 de la Charte[8]. Des forces armées, couvertes par l'aval des Nations Unies, reçurent pour mandat de protéger l'acheminement de l'aide humanitaire. Aujourd'hui, au début du III^e^ millénaire, d'autres graves problèmes se posent. On peut ici se borner à évoquer les effets d'une certaine contamination de l'aide humanitaire par la politique étrangère et surtout par les forces armées de tel ou tel État. Dès lors que l'aide humanitaire est ainsi embrigadée dans l'étau gouvernemental, elle devient suspecte, car les gouvernements et les factions locaux la ressentent comme le bras prolongé d'une politique étrangère sélective, et en définitive comme une ingérence dans leurs affaires intérieures. La situation en Afghanistan, en cette année 2004, en porte témoignage: nombre d'organisations humanitaires y ayant subi des attaques ont dû se résigner à se retirer de ce pays.

Toute la pratique des années 1990 a fini par cristalliser quelques règles de droit en la matière. Il y a eu d'abord trois résolutions de l'Assemblée générale des Nations Unies (notamment la résolution 46/182 de 1991 sur le «Renforcement de la coordination de l'aide humanitaire d'urgence de l'Organisation des Nations Unies»)[9]; il y a eu ensuite la pratique du Conseil de sécurité des Nations Unies. Quant à cette dernière, il suffira de rappeler les mesures coercitives – adoptées rarement en marge du Chapitre VII, et presque toujours en vertu du Chapitre VII – relatives à la situation des Kurdes en Irak (résolution 688), à l'ex-Yougoslavie (résolution 770) ou à la Somalie (résolution 794). On peut en résumer la teneur comme suit.

Il peut être utile, d'abord, de s'intéresser au concept d'assistance ou d'aide humanitaire. L'assistance humanitaire a été définie comme suit: «Opération menée par un ou plusieurs États, organisations intergouvernementales ou organisations non gouvernementales, tendant à procurer, dans le respect du principe de non-discrimination, des secours aux victimes, principalement civiles, de conflits armés internationaux ou non internationaux, de catastrophes naturelles ou de situations d'urgence du même ordre.

8 Voir Robert Kolb, *Ius contra bellum, Précis de droit international relatif au maintien de la paix*, Helbing & Liechtenhahn / Bruylant, Bâle / Bruxelles, 2003, pp. 72 et 73.

9 Voir aussi les résolutions suivantes: Doc. ONU A/RES/43/131 (1988) et A/RES/45/100 (1990). Les textes de ces résolutions se trouvent dans Dietrich Schindler et Jiri Toman, *Droit des conflits armés*, Comité international de la Croix-Rouge, Genève, 1996, pp. 937ss.

L'assistance consiste en la fourniture de denrées alimentaires, de vêtements, d'abris, de médicaments, de soins médicaux et de toute autre aide similaire, indispensable à la survie des populations et propre à alléger la souffrance des victimes.»[10] La même définition large, incluant les temps de paix et de conflit armé, se trouve à l'article 1 de la résolution de l'Institut de droit international, adoptée à la session de Bruges en 2003. On peut dire que cette résolution reflète l'état du droit positif à l'heure actuelle.

En temps de paix, l'assistance humanitaire est soumise à des règles générales; en temps de conflit armé, elle est réglementée de manière spéciale par les textes applicables, établissant dans certains cas une série d'obligations précises.

– La situation en *temps de paix*[11] a considérablement évolué depuis les années 1980. La situation juridique se présente comme suit.

Les victimes de catastrophes naturelles ou technologiques ont le droit de demander et de recevoir une assistance humanitaire; les laisser sans assistance constitue une atteinte à leurs droits fondamentaux, notamment le droit à la vie (article 2 de la résolution de l'IDI). Un devoir positif de fournir l'aide n'existe que pour l'État territorial affecté et, dans la mesure de leurs moyens, pour les organisations internationales ayant des capacités et des compétences d'action en la matière (notamment les Nations Unies)[12]: articles 3 et 5, paragraphe 2, de la résolution de l'IDI précitée. Les États tiers n'ont qu'un devoir moral (ou un devoir juridique «mou») d'offrir leur aide dans la mesure de leurs possibilités; ils «devraient» fournir cette aide, mais il n'y a pas d'obligation sanctionnable (article 5, résolution IDI). En tout cas, ces États tiers ont le

10 Jean Salmon (éd.), *Dictionnaire de droit international public*, Bruylant, Bruxelles, 2001, p. 98.

11 Voir notamment le survol sur la réglementation, in: *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, Fédération internationale des Sociétées de la Croix-Rouge ou du Croissant-Rouge, 2003, pp. 12 à 78, et Dietrich Schindler, «Humanitarian assistance, humanitarian interference and international law», in: J. S. MacDonald (éd.), *Mélanges, Wang Tieya*, Martinus Nijhoff Publishers, Dordrecht e.a, 1993, pp. 689ss.

12 On peut, en effet, interpréter l'article 55 de la Charte comme obligeant les Nations Unies à entreprendre l'assistance humanitaire. L'article 55 a la teneur suivante: «En vue de créer les conditions de stabilité et de bien-être nécessaires pour assurer entre les nations des relations pacifiques et amicales fondées sur le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes, les Nations Unies favoriseront: a. le relèvement des niveaux de vie, le plein emploi et des conditions de progrès et de développement dans l'ordre économique et social; b. la solution des problèmes internationaux dans les domaines économique, social, de la santé publique et autres problèmes connexes, et la coopération internationale dans les domaines de la culture intellectuelle et de l'éducation; c. le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion.»

droit d'offrir leur assistance. Cette offre ne constituera pas une immixtion dans les affaires intérieures tant qu'elle restera limitée à une assistance humanitaire sans discrimination et sans visées politiques (article 4, résolution IDI). L'État territorial doit alors en principe accepter cette offre. Il ne peut la refuser que sous certaines conditions restrictives, c'est-à-dire si ce refus n'est pas arbitraire (article 8). Enfin, en cas de refus injustifié de l'État territorial de permettre l'acheminement de l'aide humanitaire, les États tiers peuvent prendre des contre-mesures pacifiques (ce droit leur revient *erga omnes*); la décision d'utiliser la force demeure réservée au Conseil de sécurité des Nations Unies et aux organisations régionales dûment autorisées par lui.

– Dans le cadre des *conflits armés*, l'assistance humanitaire est réglementée assez précisément par les Conventions de Genève et leurs Protocoles additionnels[13]. Les textes applicables en temps de conflit armé se présentent en l'espèce comme des *leges speciales*, qui ont la priorité sur les règles générales à peine exposées. C'est d'ailleurs ce que reconnaît l'article 10 de la résolution de l'Institut de droit international déjà citée. L'aide humanitaire concerne ici surtout les victimes civiles. En effet, il n'y a pas de devoir de fournir de l'aide humanitaire aux membres des forces armées adverses, sauf pour ce qui est du respect et de la protection des blessés et des malades, des naufragés ou des prisonniers de guerre. Les droits et devoirs en cause sont tous «durs» en ce sens qu'il s'agit de devoirs juridiques au sens étroit. Leurs modalités d'application peuvent cependant être plus ou moins poussées. Le droit des conflits armés contient toute une série de règles particulières, obligeant l'État territorial à fournir ou à accepter une assistance humanitaire en faveur de personnes protégées (civiles): c'est le cas, par exemple, des articles 17, 23, 38, 55, 59 de la IVe Convention de Genève de 1949, des articles 69 et 70 du Protocole additionnel I aux Conventions de Genève (1977) ou encore des articles 14 et 18 du Protocole additionnel II (1977).

L'obligation la plus poussée se trouve dans le régime des territoires occupés à la charge de la Puissance occupante. L'article 55 paragraphe 1 de la IVe Convention de Genève impose à l'occupant d'un territoire d'y maintenir et d'y assurer, dans toute la mesure du possible (ce qui est une norme de diligence stricte), l'approvisionnement de la population civile en vivres et en produits médicaux. L'occupant a l'obligation d'importer ces denrées lui-même lorsque les ressources du territoire sont insuffisantes. En particulier, l'occupant ne peut pas faire valoir qu'il a fait le possible avec les forces et les ressources disponibles sur place, quand celles-ci sont insuffisantes en raison

13 Voir Dinstein, *op. cit.* (note 2), pp. 183ss.

d'un défaut de planification. Il s'y ajoute qu'en cas d'insuffisance des ressources affectées aux populations, l'occupant doit accepter les secours des États et des organismes tiers. C'est là une obligation en bonne et due forme qui est énoncée à l'article 59 de la IVe Convention. L'article 69, paragraphe 1, du Protocole additionnel I précise encore la liste des objets d'aide admissibles.

L'article 70 du Protocole additionnel I concerne l'aide humanitaire à la population civile d'un territoire sous le contrôle d'une Puissance qui n'y est pas formellement occupante. Il peut s'agir, par exemple, du territoire propre de cette Puissance ou d'un territoire contrôlé par un mouvement de libération nationale ou par une autre entité non étatique. Dans ce cas, l'autorisation de la Puissance concernée reste nécessaire, mais elle ne doit pas être refusée sans motif valable. On peut ici se référer aux motifs qui ont déjà été donnés en temps de paix sous le chef du refus «arbitraire». L'obligation est moins stricte que celle qui est valable en territoire occupé; elle correspond aux normes dégagées en temps de paix.

D'autres dispositions du droit des conflits armés précisent les droits de la population civile à l'assistance humanitaire ou au maintien des éléments nécessaires à sa survie, par exemple en matière de: (1) siège (article 17, IVe Convention, et article 54, Protocole I); (2) blocus maritime (articles 23 et 59, IVe Convention); (3) droits des civils sur le territoire d'une partie au conflit (article 38, IVe Convention).

En cas de conflit armé non international, le Protocole additionnel II de 1977 prévoit à son article 18, paragraphe 2, un droit d'offrir l'assistance humanitaire «lorsque la population civile souffre de privations excessives par manque des approvisionnements essentiels à sa survie, tels que vivres et ravitaillements sanitaires». Ce droit revient surtout aux sociétés de secours, notamment celles de l'organisation de la Croix-Rouge; l'offre peut émaner aussi d'États tiers, comme la pratique le démontre. Le consentement de l'État territorial reste nécessaire, mais ne doit en principe pas être refusé. On retrouve l'idée de l'interdiction de tout refus «arbitraire». L'interprétation de ce droit de refus est stricte; les motifs de refus doivent être contraignants et raisonnables. Par ailleurs, l'article 3 commun des Conventions de Genève de 1949 permet à tout organisme humanitaire impartial d'offrir ses services, y compris en matière d'aide humanitaire. C'est ce que le CICR a fait dans de très nombreux cas, dès avant l'adoption de cet article, par exemple lors de la guerre civile d'Espagne (1936-1939). L'article 14 du Protocole additionnel II rappelle aussi l'interdiction d'utiliser la famine comme moyen de combat ou encore de détruire les moyens indispensables à la survie de la population civile.

## Les contenus essentiels de la résolution de l'Institut de droit international

Il peut être utile de présenter tour à tour le contenu et l'apport des articles de la résolution plus en détail que dans les lignes qui précèdent. Le texte de la résolution se trouve en annexe et peut être pris comme base de lecture.

• Article 1

L'article premier de la résolution se propose de donner les définitions pertinentes. Son importance dépasse cependant celle d'un simple article de terminologie, car il fixe le champ d'application matériel du texte. La philosophie générale était d'approcher le problème d'une manière progressiste[14], en englobant des aspects de la *lex lata* tout en allant au-delà, vers des plages *de lege ferenda*. Les membres de l'Institut ont pensé qu'en une matière comme celle de l'assistance humanitaire, toute œuvre utile se doit d'indiquer aux États des avenues dépassant, le cas échéant, l'état du droit actuel. Cela se justifie eu égard non seulement aux nombreuses incertitudes et lacunes qui jalonnent cette matière, mais aussi au fait que l'assistance humanitaire a connu et connaît encore d'incessants développements et transformations. Dès lors, toute approche « immobiliste » aurait été inadéquate. De plus, l'Institut a voulu approcher la question d'une manière large. Cela est presque toujours recommandé quand il s'agit de résolutions humanitaires, ce qu'on aurait autrefois appelé des résolutions « civilisatrices ». Ainsi, le texte couvre la période de paix (catastrophes naturelles ou technologiques) et les périodes de conflit armé ; il couvre toutes sortes de moyens d'aide et pas seulement les plus évidents, comme les vivres et les médicaments. Par ailleurs, l'Institut s'est montré restrictif. Il n'a pas voulu inclure les situations d'assistance en dehors des cas de détresse les plus tangibles afin de ne pas entrer dans le domaine politique du *nation-building*, de l'aide au développement, de l'assistance financière internationale, etc. De même, il ne pouvait être question d'entrer dans le domaine de l'intervention humanitaire, c'est-à-dire de l'utilisation de la force par des États pour venir en aide à des populations étrangères soumises à des violations graves et massives dans leur intégrité physique (génocide, crimes contre l'humanité, épurations ethniques). L'intervention humanitaire soulève la question de l'utilisation de la force en droit international. Il s'agit de savoir si elle est compatible avec le droit de la Charte des

14 Voir par exemple la prise de position de Henry G. Schermers, *Annuaire de l'Institut de Droit international*, Vol. 70-I, 2002-2003, p. 516.

Nations Unies et le droit international général[15]. Il était naturel que l'Institut n'ait pas voulu glisser vers cette question épineuse, qui aurait demandé des développements considérables et l'aurait éloigné de son sujet « humanitaire ».

Un problème délicat est celui de la durée temporelle de l'assistance humanitaire. Quand celle-ci prend-elle fin ? Il est aisé de répondre que l'assistance cesse et doit cesser dès que la situation d'urgence qui l'a justifiée prend fin. Cependant, la question de la terminaison de l'aide peut demeurer aiguë. Dans les situations du monde moderne, la détresse des populations locales peut perdurer longtemps; l'État territorial, trop faible ou en déliquescence, peut s'avérer incapable de remplir le service public à longue échéance; l'établissement d'un système efficace d'aide par des puissances étrangères peut créer des dépendances et tendre dès lors à s'implanter, à perdurer. Il peut donc y avoir, un peu comme dans le droit d'occupation de guerre, des situations « d'assistance humanitaire prolongée », dont les problèmes spécifiques n'ont pas été adressés dans ce texte.

15 Sur l'intervention humanitaire, voir, parmi la littérature très abondante : Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Kluwer Law International, La Haye, 1999; Constantine Antonopoulos, *The Unilateral Use of Force by States in International Law*, Sakkoulas, Athènes, 1997, pp. 452ss; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention in International Law*, Oxford University Press, Oxford, 2001; Gino Concetti, *Il diritto di intervento umanitario*, Vigodarzere, Padova, 1993; Olivier Corten et Pierre Klein, « L'autorisation de recourir à la force à des fins humanitaires : droit d'ingérence ou retour aux sources ? », *European journal of international law*, Vol. 4, 1993, 4, pp. 506ss; Karl Döhring, « Die humanitäre Intervention – Überlegungen zu ihrer Rechtfertigung », in : Antonio Augusto Cançado Trindade (éd.), *The Modern World of Human Rights, Mélanges, Thomas Buergenthal*, Instituto Interamericano de derechos humanos, San José, 1996, pp. 549ss; Mattias Falk, *The Legality of Humanitarian Intervention : A Review in Light of Recent UN Practice*, Juristförlaget, Stockholm, 1996; Christine Gray, « The legality of NATO's military action in Kosovo : Is there a right of humanitarian intervention ? », in : Sienho Yee et Wang Tieya (éds.), *International Law in the Post-Cold War World*, Routledge, Londres, 2001, pp. 240ss;. Christopher Greenwood, « Humanitarian intervention : The case of Kosovo », *Finnish Yearbook of International Law*, Vol. 10, 2002, pp. 141ss; Peter Hilpold, « Humanitarian intervention : Is there a need for a legal reappraisal ? », *European Journal of International Law*, Vol. 12, 2001, pp. 437ss; James L. Holzgrefe et Robert O. Keohane (éds.), *Humanitarian Intervention : Ethnical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003; Robert Kolb, « Note on humanitarian intervention », *Revue internationale de la Croix-Rouge*, Vol. 85, N° 849, 2003, pp. 119ss; Abdul G. Koroma, « Humanitarian intervention and contemporary international law », *Revue Suisse de droit international et européen*, Vol. 5, 1995, pp. 409ss; Brian D. Lepard, *Rethinking Humanitarian Intervention*, Pennsylvania State University Press, Pennsylvania, 2002; Richard B. Lillich, « Humanitarian intervention through the United Nations : Towards the development of criteria », *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 53, 1993, pp. 557ss; Peter Malanczuk, *Humanitarian Intervention and Legitimacy of the Use of Force*, Het Spinhuis Amsterdam, 1993; Sean D. Murphy, *Humanitarian Intervention : The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia, 1996; Anne Orford, *Reading Humanitarian Intervention : Human Rights and the Use of Force in International Law*, Cambridge University Press, Cambridge, 2003; Robert L. Philips, *Humanitarian Intervention, Just War*

• Article 2

L'article 2 consacre la reconnaissance du droit fondamental à l'assistance. Les articles qui suivent en tirent les conséquences et se présentent en ce sens comme des concrétisations dudit article. Le droit à l'assistance est affirmé en général. Il n'est pas limité à des cas précis, lorsque des textes le prévoient (comme dans le cadre de conflits armés). L'Institut consacre ainsi au plan du droit international général un droit qui a été longtemps controversé[16]. Selon l'Institut, la pratique des années 1980 et 1990 a fini par cristalliser un tel droit – selon des modalités de mise en œuvre qui restent à définir –, dont les victimes de catastrophes au sens large jouissent directement en vertu de l'ordre juridique international. Le fondement de ce droit général réside dans les droits de l'homme, notamment le droit à la vie[17], reconnu par divers instruments, ainsi que dans les «considérations élémentaires d'humanité»[18] dont la Cour internationale de Justice a parlé dans l'affaire du *Détroit de Corfou* (1949)[19]. Découlant de ces autres droits, invoqués dans diverses affaires, il a ainsi fini par être consacré au plan du droit coutumier.

*vs. Pacifism*, Rowman & Littlefield, Lanham, Md., 1996; Adam Roberts, «The so-called right of humanitarian intervention», *Yearbook of International Humanitarian Law*, Vol. 3, 2000, pp. 3ss; Jens Elo Rytter, «Humanitarian intervention without the Security Council: From San Francisco to Kosovo and beyond», *Nordic Journal of International Law*, Vol. 70, 2001, pp. 121ss; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2e éd., Transnational Publishers, Irvington-on-Hudson (New York), 1998; Christian Tomuschat, «General course on public international law», *Recueil de cours de l'Académie de droit international*, Vol. 281, 1999, pp. 224 à 226; Maurice Torrelli, «De l'assistance à l'ingérence humanitaires?», *Revue internationale de la Croix- Rouge*, Vol. 74, N° 795, 1992, pp. 238ss. Parmi la doctrine plus ancienne: Georges Abi-Saab, «Cours général de droit international public», *Recueil de cours de l'Académie de droit international*, Vol. 207, 1987-VII, pp. 374 et 375; Ian Brownlie, «Humanitarian intervention», in: John Norton Moore (éd.), *Law and Civil War in the Modern World*, Johns Hopkins University Press, Baltimore/London, 1974, pp. 217ss; Ian Brownlie, «Thoughts on the kind-hearted gunmen», in: Richard B. Lillich (éd.), *Humanitarian Intervention and the United Nations*, University Press of Virginia, Charlottesville, 1973, pp. 139ss; Jean-Pierre Fonteyne, «The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter», *California Western International Law Journal*, Vol. 4, 1974, pp. 203ss; Richard B. Lillich, (éd.), *op.cit.* (note 15).

16 Contre cette reconnaissance générale du droit, cf. Yoram Dinstein, *Annuaire*, vol. 70-I, p. 498; Dinstein, *op. cit.* (note 2), p. 183. Selon Yoram Dinstein, ce n'est que dans des dispositions du droit international particulier (notamment le droit des conflits armés) qu'un tel droit a été reconnu en tant que droit subjectif.

17 Voir, par exemple, *Annuaire de l'Institut de droit international*, vol. 70-I, p. 555 (Rapport Vukas) ou Domestici-Met, *op. cit.* (note 13), pp. 121ss; voir aussi Schindler, *op. cit.* (note 15), p. 693.

18 Cf. Schindler, *op. cit.* (note 15), p. 411; *Annuaire de l'Institut de droit international*, vol. 70-I, pp. 429 et 430 (Rapport Carrillo Salcedo); *Annuaire de l'Institut de droit international*, vol. 70-I, p. 450 (Rapport Bennouna).

19 CIJ, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis)*, Jugement (Fond), 27 juin 1986 *Recueil 1986*, p. 22.

Selon l'Institut, il s'agit d'un droit subjectif, bien que le sujet passif n'en soit pas nettement déterminé. On peut dire cependant que l'État sur le territoire duquel se trouvent les populations à secourir a un devoir subjectif plus nettement déterminé que celui des États tiers. Ces derniers ont un devoir «subjectif», pour le moins mou ou moral, d'offrir leur assistance. Ils possèdent de surcroît en la matière certains devoirs durs – par exemple celui de ne pas entraver l'assistance – dérivés, qui reposent eux aussi sur l'affirmation d'un droit général à l'assistance. Dès lors, à condition de ne pas entendre par le droit affirmé à l'article 2 les mêmes droits/devoirs pour tous, il est bien possible de parler d'un droit général à l'assistance humanitaire, sous réserve des précisions contenues dans les dispositions qui suivent. Ce droit est un droit individuel, au bénéfice d'un individu et d'un groupe, et c'est un droit subjectif, à contenu variable.

L'assistance doit être offerte et distribuée sans discrimination. Les besoins et le degré de vulnérabilité des personnes sont les seuls critères de distinction admis. L'affinité idéologique, la religion, le sexe, la race, etc., ne le sont pas. Ce devoir a été affirmé par la Cour internationale de Justice dans l'affaire des *activités militaires et paramilitaires au Nicaragua et contre celui-ci* (*fond*, 1986) en les termes suivants: «Un élément essentiel de l'aide humanitaire est qu'elle doit être assurée «sans discrimination aucune. Selon la Cour, pour ne pas avoir le caractère d'une intervention condamnable dans les affaires intérieures d'un autre État, non seulement «l'assistance humanitaire doit se limiter aux fins consacrées par la pratique de la Croix-Rouge, à savoir «prévenir et alléger les souffrances des hommes et «protéger la vie et la santé [et] faire respecter la personne humaine»; elle doit aussi, et surtout, être prodiguée sans discrimination à toute personne dans le besoin au Nicaragua, et pas seulement aux *contras* et à leurs proches»[20]. Ce devoir de non-discrimination contient en la matière surtout deux volets, qui en constituent des concrétisations: d'un côté *l'impartialité*; et de l'autre la *neutralité* de l'action humanitaire. Ces termes sont définis de manière générale dans le Préambule des Statuts du Mouvement international de la Croix-Rouge et du Croissant-Rouge (1986). Le concept d'impartialité signifie que l'action ne «fait aucune distinction de nationalité, de race, de religion, de condition sociale et d'appartenance politique. [Elle] s'applique seulement à secourir les individus à la mesure de leur souffrance et à subvenir par priorité aux détresses les plus urgentes»[21]. C'est la

20 *Ibid.*, para. 243.

21 Cf. le *Manuel du Mouvement international de la Croix-Rouge et du Croissant-Rouge*, 13e éd., Comité international de la Croix-Rouge, Genève, 1994, p. 431.

non-discrimination au sens étroit. Le concept de neutralité signifie que l'action est dégagée des «controverses d'ordre politique, racial, religieux et idéologique»[22]. C'est ici en quelque sorte le fondement plus général de l'impartialité: la cause de la partialité (ou de la perception éventuelle de partialité) est celle de l'absence de neutralité envers les victimes. Cependant, il faut noter que l'impartialité ne s'épuise pas dans la neutralité: une aide peut être partiale et discriminatoire même si l'approche générale du secouriste est neutre.

Si ce que visent ces aspects du principe est généralement clair, la pratique montre qu'il n'est pas facile de les mettre en œuvre. L'assistance humanitaire est organisée souvent à l'intention de groupes vulnérables envers lesquels les acteurs, les Etats, les donateurs, les organisations humanitaires ou même les secouristes ont un intérêt particulier ou des liens de sympathie, d'affinité, de fraternité ou de religion. Il est manifeste que ces sentiments ne jouent pas indifféremment pour tout groupe humain; la solidarité internationale n'est pas arrivée à ce point. Le public d'une nation va s'émouvoir plus vivement des souffrances de certains groupes, les médias de son pays vont s'occuper davantage des déboires de ce groupe-là, l'impulsion d'aider va fonctionner plus puissamment dans ce cadre que dans un autre. Il en va de même lorsque des États agissent, seuls ou de concert avec d'autres organismes, en la matière. Il est constant que, par exemple, lors des guerres en ex-Yougoslavie, les aides ont souvent été offertes selon des lignes de partage religieuses: les États arabes ont soutenu des populations musulmanes, certains États orthodoxes, notamment la Russie, ont soutenu les populations serbes. Certes, il est possible de dire qu'une telle aide partielle est contraire aux principes; mais faudra-t-il la refuser, qui plus est, s'il n'y a pas d'autre aide disponible?

• Article 3

L'article 3 consacre le principe de subsidiarité: c'est d'abord à l'État territorial affecté par une catastrophe au sens de l'article 1 que reviennent le pouvoir et le devoir de fournir l'assistance humanitaire. Il s'agit d'un devoir juridique. Ce principe a été retenu dans toutes les résolutions des Nations Unies sur le sujet. Ainsi, la résolution 46/182 (1991) porte que: «C'est à chaque État qu'il incombe au premier chef de prendre soin des victimes de catastrophes naturelles et autres situations d'urgence se produisant sur son territoire. Le rôle premier revient donc à l'État touché dans l'initiative, l'or-

22 *Ibid.*, p. 432. Sur ces deux principes, voir aussi les réflexions de Jean Pictet, *Les principes de la Croix-Rouge*, Comité international de la Croix-Rouge, Genève, 1955, pp. 50ss.

ganisation, la coordination et la mise en œuvre de l'aide humanitaire sur son territoire» (paragraphe 4)[23]. Ce principe était tout d'abord inspiré par celui, plus général, de la souveraineté et de l'intégrité territoriale de l'État[24]. Mais c'est aussi un principe de bon sens, car nul autre que l'État territorial n'est normalement mieux en mesure d'apprécier les besoins, de prêter assistance aux secouristes, de contribuer à l'efficacité de l'action. L'essentiel est que l'article 3 rappelle qu'il s'agit en l'espèce d'un devoir international de l'État, et non pas simplement d'un pouvoir discrétionnaire.

La responsabilité de l'État n'est pas uniquement d'aider, mais aussi, collatéralement, de prévenir les détournements de l'assistance et les abus, voire les confiscations. L'entité grevée de la responsabilité principale est l'autorité territoriale effective. Cela peut être un État, mais cela peut être aussi un régime *de facto*, non reconnu; ou une organisation internationale ayant établi une administration civile transitoire; ou des États qui ont envoyé des contingents dans un territoire sous administration internationale; ou encore l'occupant d'un territoire. C'est ici le principe de l'effectivité qui prévaut. La responsabilité de l'État territorial est principale, ce qui implique qu'il y a une responsabilité secondaire d'autres États ou organismes. En cas d'impossibilité matérielle ou de tout autre empêchement équivalent, l'État territorial doit, selon le paragraphe 3, solliciter l'assistance des organisations internationales compétentes ou des États tiers. Les organismes tiers peuvent à leur tour solliciter l'État territorial à cet égard. La résolution retient donc une double responsabilité: L'État territorial doit demander cette aide (article 3, paragraphe 3); les organismes et les États étrangers ont le droit de l'offrir spontanément (article 4, paragraphe 1).

• Article 4

L'article 4 renverse la perspective de l'article 3: il régit les droits des États et des organismes étrangers envers l'État affecté et non ceux de l'État affecté envers les tiers. Le paragraphe 1 de l'article 4 établit le droit des États et des organismes étrangers «d'offrir une assistance humanitaire à l'État affecté». Cela découle nécessairement du principe fondamental retenu à l'article 2, à savoir que les victimes ont un droit à l'assistance humanitaire.

23 Voir aussi les résolutions 43/131 (1988), par. 2; et 45/100, par. 2. dans Schindler & Toman, *op. cit.* (note 9), pp. 937ss.

24 Voir les résolutions précitées, qui établissent explicitement ce lien.

Selon la tradition en la matière, il est ajouté que cette offre de services ne doit pas être considérée comme une immixtion illicite dans les affaires intérieures de l'État sollicité. Le modèle de cette clause se trouve dans la Convention de La Haye (Convention I) de 1907, précisant qu'une offre de règlement pacifique d'un différend ne doit pas être considérée comme un « acte peu amical »[25].

Cela ne signifie toutefois pas que toute offre est conforme *eo ipso* aux exigences du droit international et au principe de non-intervention en particulier. En effet, une offre peut constituer une immixtion si elle n'est pas de caractère « exclusivement humanitaire » (paragraphe 1), à savoir si elle prend pour prétexte la situation humanitaire pour intervenir à des fins politiques, ou si elle est fondée sur une distribution de l'aide ne suffisant pas au principe de non-discrimination. De même, une offre accompagnée d'une menace d'utilisation de la force ou d'autres actes d'intimidation devient par là même une intervention illicite. Comme le rappelle le texte de la résolution 46/182 de l'Assemblée générale des Nations Unies (1991), au paragraphe 3, « la souveraineté, l'intégrité territoriale et l'unité nationale des États doivent être pleinement respectées en conformité avec la Charte des Nations Unies ».

Le paragraphe 2 contient la règle, importante, réservant le consentement de l'État territorial. Cette règle ressort déjà très nettement des résolutions qu'a adoptées l'Assemblée générale des Nations Unies, notamment la résolution 46/182 (1991), dans son paragraphe 3. Le principe du consentement répond à une exigence naturelle des États, qui cherchent à protéger leur souveraineté et leur intégrité territoriale. Ils souhaitent conserver le contrôle sur ce qui se passe sur leur territoire et ne pas voir ce dernier ouvert à des actions humanitaires (ou autres) qu'ils ne peuvent pas contrôler. Le principe du consentement a dès lors été accepté aussi par l'Institut, où il n'a subi que peu de contestations. On rappellera que dans certains cas ce principe ne s'applique pas, par exemple dans le cas des *failed States*. C'est tout aussi naturel: en cas d'effondrement des structures étatiques et d'absence de gouvernement central, il n'y a plus personne pour donner son consentement. On pourrait cependant se demander si le consentement des groupes locaux contrôlant effectivement des parties du territoire ne devrait pas, dans ce cas, être substitué au consentement de l'État. Cependant, il semble excessif de donner un statut international aussi marqué à des groupes de fait, dont l'origine et les orientations sont, de surcroît, souvent liées à la criminalité. Exiger

25 *Convention pour le Règlement pacifique des conflits internationaux*, 1907, Article 3, paragraphe 3.

leur consentement, notamment dans le contexte de l'aide humanitaire urgente, semble inadéquat.

Le principe du consentement peut sembler douteux plus généralement en matière d'aide humanitaire d'urgence. On peut penser par exemple au cas du Biafra (1967), qui a été à l'origine d'une révolution humanitaire postulant le libre accès aux victimes. Peut-on s'arrêter à demander des consentements gouvernementaux alors que des populations entières sont en train de déchoir, de se mourir ? Cependant, il faut bien se rendre compte des aspects pratiques qui militent en faveur de cette règle. D'abord, il y a la nécessité que les autorités territoriales coopèrent si l'on veut mener à bon port une action de ce type ; mais il y a aussi le souci légitime de ces autorités de ne pas voir des immixtions étrangères de type politique s'étendre sur leur territoire, comme c'est le cas en ce moment même, à tort ou à raison, en Afghanistan, en Iraq ou dans d'autres contextes, où l'on assiste même à une militarisation de l'humanitaire.

*Quid*, si l'État territorial refuse de donner son consentement ? C'est là une question de sanction, qui est envisagée par l'article 8 de la résolution.

• Article 5

L'article 5 touche aux devoirs des États et des organismes étrangers face à une situation d'urgence humanitaire. La question est ici surtout celle du devoir d'offrir une aide : un tel devoir existe-t-il *erga omnes* ? La réponse principale différencie les sujets en cause. Pour ce qui est des États, le paragraphe 1 dit qu'il n'y a pas davantage qu'une obligation morale d'offrir ses services ; pour ce qui est des organismes internationaux, le paragraphe 2 stipule qu'ils ont le devoir d'offrir des services pour autant qu'un tel devoir soit compatible avec leurs règles constitutives et leur mandat. Il y a ici plus qu'un renvoi à des textes, car il n'est pas dit que l'organisme ne doit offrir des services que si ses textes le prévoient : il suffit que ces textes ne s'y opposent pas, que le mandat et le profil de l'organisation ne l'empêchent pas d'être active dans le cadre humanitaire. Réponse à la fois prudente, pour ce qui est des États, et hardie, pour ce qui est des organisations internationales, de la part de l'Institut, mais réponse qui se justifie pleinement. Comment, en effet, poser à charge de tout État un tel devoir positif ? Cela semblait aller trop loin, tout en s'écartant de la pratique effective et des prévisions réalistes. L'Institut s'est donc borné à inciter les États à offrir cette aide. L'article 5, paragraphe 1, est donc surtout d'une norme habilitatrice[26], une norme qui permet d'agir de manière

expresse. Cette permission est *erga omnes*. Le paragraphe 2, qui a trait aux organisations (et organismes) internationales, est formulé en termes plus fermes. En vertu de l'article 55 de la Charte, les Nations Unies ont, d'après cette conception, l'obligation d'offrir l'aide humanitaire. Selon quelques membres de l'Institut, une obligation existe généralement pour toutes les organisations internationales compétentes en la matière.

• Article 6

L'article 6 touche au devoir qu'ont les divers acteurs mentionnés de coopérer. C'est un postulat de bon sens et d'efficacité à la fois. En effet, l'aide ne peut arriver à bon port et avoir le maximum de bénéfice que si la coopération des divers acteurs, et notamment celle de l'État territorial, est assurée. Les résolutions pertinentes de l'Assemblée générale des Nations Unies, notamment aux paragraphes 5, 6 et 7 de la résolution 46/182 (1991), consacrent ce principe. La coopération qu'envisage l'article 6 est double : la coopération *ex post facto*, pour l'acheminement efficace de l'aide humanitaire (paragraphe 1) ; la coopération *ex ante facto*, en cas de menace d'une catastrophe, afin d'en minimiser les conséquences (paragraphe 2).

• Article 7

L'article 7 concerne les devoirs « collatéraux » relatifs à l'assistance humanitaire. Il s'agit de la *facilitation de l'assistance*. Ce devoir concerne les États tiers, qui ont une obligation positive de ne pas empêcher l'assistance humanitaire[27], si bien qu'ils doivent, par exemple, permettre le survol de leur territoire, ne pas confisquer les biens en transit, ne pas les taxer, ne pas les réquisitionner, etc. Cette obligation relève du droit positif ; c'est de la *lex lata*, du droit applicable. La mise en œuvre de cette obligation suppose des mesures législatives et réglementaires, voire des accords internationaux, au cas par cas, des mesures et des accords auxquels appelle le paragraphe 2. Le paragraphe 3 concerne le *droit d'accès aux victimes*. C'est une concrétisation directe du droit fondamental à l'assistance humanitaire consacré à l'article 2.

• Article 8

L'article 8 est une disposition essentielle de la résolution. Cette disposition touche surtout à la sanction des droits et s'avère donc être un thermo-

27 Voir, par exemple, *Annuaire de l'Institut de droit international*, vol. 70-I, p. 514 (Rapport Franck). Voir aussi Schindler, *op. cit.* (note 11), p. 697 ; Domestici-Met, *op. cit.* (note 13), pp. 124 et 125.

mètre d'efficacité pratique. Comme on l'a vu, l'acheminement de l'assistance humanitaire étrangère suppose le consentement de l'État territorial affecté, ce qui implique que l'État territorial puisse refuser l'offre qui lui est faite. Cependant, le droit international et, à sa suite, l'Institut s'attachent à restreindre le plus possible les conséquences très graves qu'un refus peut avoir pour les populations touchées. Dès lors, le principe juridique applicable est celui que l'État territorial ne peut pas « refuser de façon arbitraire et injustifiée une offre de bonne foi» (paragraphe 1). Cette obligation a déjà été formulée par l'Institut dans la résolution de 1989, relative à la protection des droits de l'homme et au principe de non-intervention dans les affaires intérieures des États (article 5, paragraphe 2[28]). En termes de droit, ce qui précède signifie que l'État affecté n'a pas une compétence discrétionnaire de refuser l'aide. Il est probable que la compétence est désormais liée, au sens où ce terme est entendu dans la théorie des compétences. Cela dépend de la précision des limites imposées (voir ci-après). En tout cas, l'interdiction du refus arbitraire apporte une limite explicite. Que faut-il entendre par *refus arbitraire* d'une offre de bonne foi ?

En premier lieu, une offre de bonne foi est une offre qui répond aux critères de non-discrimination, d'impartialité et de neutralité déjà commentés à l'article 2. Le sens de ce terme, dans ce contexte, n'est donc pas vague, mais au contraire très précis.

En second lieu, l'interdiction de l'arbitraire est le pivot des limites imposées. L'interdiction de l'arbitraire a été perçue par certains comme un principe général du droit international, qui se rattache à l'interdiction de l'abus de droit et, de manière médiate, au principe de la bonne foi[29]. L'arbitraire connaît diverses définitions juridiques dont le fond est commun. Selon le Dictionnaire de droit international public, est arbitraire une « décision qui heurte les principes d'égalité et de justice, car elle ne peut être fondée sur aucun critère légal ou raisonnable et défie toute prévisibilité»[30]. Le Tribunal fédéral helvétique définit l'arbitraire comme des actes qui ne peuvent être justifiés matériellement; qui apparaissent dépourvus de sens ou de but; qui violent gravement et manifestement le droit supérieur; ou qui s'opposent de

28 « Les États sur le territoire desquels de telles situations de détresse existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires.»

29 Pour des renvois, voir Robert Kolb, *La bonne foi en droit international public*, Presses universitaires françaises, Paris, 2000, pp. 468 et 469.

30 Salmon (éd.), *op. cit.* (note 10), p. 78.

manière choquante à l'idée de justice[31]. En somme, on peut dire que l'interdiction de l'arbitraire constitue un standard pour des actes gravement viciés au regard des idées directrices de l'ordre juridique et de la justice, un standard qui se compose de divers volets non exhaustifs: (1) des actes manifestement injustifiés au regard des faits; (2) l'exercice manifestement et objectivement choquant d'un droit; (3) les actes violant la conscience juridique; (4) les actes en fraude à la loi ou au droit; (5) certains exercices discriminatoires de droits; (6) l'exercice déraisonnable de droits, y compris les actes dépourvus d'utilité réelle.

Ainsi définie, l'interdiction de l'arbitraire a manifestement un rôle à jouer en matière d'acceptation ou de refus de l'assistance humanitaire[32]. Divers motifs ont été donnés, qui justifieraient le refus de l'État territorial et qui ne seraient dès lors pas arbitraires. Par exemple: (a) l'offre ou son exercice n'est pas politiquement neutre, c'est-à-dire ne répond pas aux critères de non-discrimination, d'impartialité et de neutralité; ou encore, l'humanitaire n'est qu'un prétexte[33]; (b) les victimes ne sont pas innocentes[34]; (c) l'aide n'est pas réellement utile, par exemple parce qu'elle porte sur des denrées qui ne manquent pas[35]; en cas d'offres (trop) nombreuses, le refus total ou partiel de certaines d'entre elles peut se recommander[36]; (d) l'aide est destinée, en période de conflit armé, à des combattants adverses[37]; (e) une situation d'urgence fait défaut[38]; (f) de manière plus problématique, les « intérêts nationaux vitaux commandant le refus de l'aide, ont été ajoutés[39]. Au contraire, il a été dit que les motifs suivants ne justifient pas un refus et seraient arbitraires: (a) protection du prestige de la souveraineté; (b) protection du droit interne, de l'honneur national, de l'orientation politique du gouvernement; (c) intérêts du régime en place; etc.[40]. Comme on le voit, l'arbitraire est une clause générale qui permet à divers chefs d'interdiction de venir faire corps

31 Voir Joerg Paul Müller, *Grundrechte in der Schweiz*, 3e éd., Stämpfli, Berne, 1999, pp. 467 et 468.

32 Voir, en général, *Annuaire de l'Institut de droit international*, vol. 70-I, pp. 412 et 413 (Schindler); *ibid.*, p. 476ss (Rapporteur Vukas); *ibid.*, p. 559ss (Rapporteur Vukas).

33 *Annuaire de l'Institut de droit international*, vol. 70-I, p. 420 (Orrego Vicuña).

34 *Annuaire de l'Institut de droit international*, vol. 70-I, p. 420. L'exemple des colons juifs donné par M. Schermers s'appliquerait-il ici? Voir *Annuaire de l'Institut de droit international*, vol. 70-I, p. 446.

35 *Ibid.*, p. 562 (Rapporteur Vukas).

36 *Annuaire de l'Institut de droit international*, vol. 70-II, p. 178 (Ress), pagination non définitive.

37 *Annuaire de l'Institut de droit international*, vol. 70-II, p. 164 (Cassese), pagination non définitive.

38 Cf. Schindler, *op. cit.* (note 11), p. 696.

39 *Annuaire de l'Institut de droit international*, vol. 70-I, p. 562 (Rapporteur Vukas).

40 *Annuaire de l'Institut de droit international*, vol. 70-I, p. 563 (Rapporteur Vukas).

avec elle sans tomber dans l'ornière de l'exhaustivité, qui n'aurait pas sa place ici. L'interprétation générale se dégageant de ce qui précède est qu'il faut restreindre considérablement la liberté de l'État territorial de refuser l'aide. L'arbitraire est, dans ce contexte, un standard très strict, très exigeant. Il est peut-être même possible de dire que, jusqu'à un certain point, l'arbitraire est présumé par le droit tant que l'État territorial n'a pas publiquement donné des raisons de refus convaincantes[41]. Comme on le voit, les travaux de l'Institut ont contribué, sur ce point, à un affinage important de ces notions, souvent utilisées de façon très vague dans les travaux scientifiques récents.

*Quid* si l'État territorial refuse arbitrairement l'aide ? L'Institut a estimé dans un premier temps, dans la droite ligne de la résolution de Saint-Jacques-de-Compostelle (1989)[42], que des contre-mesures pacifiques demeurent possibles, mais qu'elles ne doivent pas inclure l'utilisation de la force, sauf si celle-ci est autorisée par l'organe international compétent, à savoir le Conseil de sécurité des Nations Unies. Toujours dans la droite ligne de la résolution de 1989, il a été rappelé que le droit d'adopter des contre-mesures pacifiques est en la matière un droit *erga omnes* ou plutôt *omnium*. Un membre a proposé de subordonner le droit de contre-mesures pacifiques à la tentative préalable de soumettre la question litigieuse aux Nations Unies ou à l'organisation régionale compétente[43], mais cette position n'a pas fait l'objet de débats et n'a pas été acceptée. Lors de la session de Bruges, la majorité des membres de la plénière a cependant estimé que l'Institut ne devrait pas prendre position sur la sanction des obligations matérielles contenues dans la résolution. Cette majorité a estimé préférable de formuler les obligations de fond tout en laissant la question de la sanction aux règles du droit international général, automatiquement applicables. Dès lors, et malgré une opposition forte, le paragraphe 4 de l'article 8, qui codifiait les contre-mesures pacifiques, a été supprimé. Il ne faut toutefois pas voir dans cette suppression un affaiblissement substantiel du texte. En effet, le droit international général

41 Voir M. Cassese, *Annuaire de l'Institut de droit international*, Vol. 70-I, p. 535.

42 Article 2, paragraphe 2 : « Sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies en cas de violation des obligations assumées par les membres de l'Organisation, les États, agissant individuellement ou collectivement, sont en droit d'adopter, à l'égard de tout autre État ayant enfreint l'obligation énoncée à l'article premier, des mesures diplomatiques, économiques et autres, admises par le droit international et ne comportant pas l'emploi de la force armée en violation de la Charte des Nations Unies. Ces mesures ne peuvent pas être considérées comme une intervention illicite dans les affaires intérieures de l'État. »

43 *Annuaire de l'Institut de droit international*, Vol. 70-II, p. 164 (Cassese), pagination non définitive.

continue à s'appliquer, si bien que le contenu de la clause supprimée demeure, car il relève du droit coutumier. Les paragraphes 2 et 3 réservent les droits et prérogatives des Nations Unies, notamment ceux du Conseil de sécurité en vertu du Chapitre VII. Il est désormais accepté que le Conseil, conformément à sa pratique de la dernière décennie, puisse qualifier des situations de désastre humanitaire comme une « menace contre la paix» au sens de l'article 39 de la Charte des Nations Unies. Cela lui permet d'adopter des mesures coercitives, y compris autoriser l'utilisation de la force pour acheminer l'aide humanitaire.

• Article 9

L'article 9 touche au droit international pénal. Il rappelle que le fait d'attaquer intentionnellement, en connaissance de cause, des personnes et des biens impliqués dans l'assistance humanitaire constitue un crime international. En outre, il appelle les États à traduire les personnes accusées d'un tel crime devant une juridiction compétente, qu'elle soit interne ou internationale. L'Institut demande aux États d'exercer leur compétence pénale: l'appel va en premier lieu vers la création de chefs d'incrimination pénale situés au plan du droit interne; et en second lieu vers la mise en œuvre effective de ceux-ci.

Jusqu'à quel point pourrait-on, dans le cadre des devoirs en cause, se fonder directement sur le droit (coutumier) international pour affirmer la punissabilité d'un acte et fonder la compétence pénale universelle? Il n'y a pas de certitude[44]. En effet, le droit international n'a jusqu'ici incriminé ce type d'attitudes qu'en matière de conflits armés. Or, la résolution a une portée plus large. D'où l'appel de l'Institut pour une incrimination au niveau interne, qui reflète cette approche plus large.

La résolution parle dans ce contexte de « violations graves» du droit international. Il n'est pas impossible que cette expression cherche à refléter celle des « infractions graves», consacrée en cas de conflit armé international par les Conventions de Genève et le Protocole additionnel I. Dans ce cas, il se pourrait que l'Institut ait cherché à suggérer une compétence pénale universelle pour toutes les infractions visées par la résolution.

On peut d'ailleurs signaler que cet appel à la compétence universelle s'inscrit dans le sillage d'un mouvement international très vaste qui, depuis

44 Même si on admettait l'incrimination sur la base du droit coutumier, le caractère non écrit de celui-ci pourrait s'avérer insuffisant au regard des exigences strictes d'une loi pénale (principe de légalité) telles que peut les établir le droit interne.

quelques années, a considérablement étendu le cercle des actes soumis à ce principe répressif[45]. Cependant, si l'on considère la pratique effective des États, force est de constater que la compétence universelle est très rarement exercée. Les législations nationales qui la prévoient de manière assez large, en particulier la législation belge, ont d'ailleurs récemment été amendées dans un sens plus restrictif, exigeant désormais, pour qu'elle soit exercée, des liens de rattachement minimaux avec le territoire. Faut-il s'en étonner ? Une chose est en effet de déclarer au niveau international que les États *peuvent* exercer leur compétence pénale universellement, comme on le fait le plus souvent (compétence universelle facultative)[46]. Cela ne coûte rien, et on peut multiplier de telles déclarations à l'envi, en étant assuré moralement de servir de cette manière l'ordre public international. Au niveau étatique, les choses se présentent autrement. Les organes des poursuites des États ne connaissent guère que l'ordre public interne ; l'ordre public international est pour eux une notion abstraite et largement fumeuse. De surcroît, ces organes ont déjà une charge de travail qui les amène au bord de la rupture. Ils disposent de moyens financiers de plus en plus limités pour faire face à des dossiers de plus en plus nombreux et, souvent, de plus en plus complexes. Il est aisé de comprendre que, dans de telles conditions, ces organes ne vont guère se préoccuper de crimes de nature « politique » commis à l'autre bout du monde, et avec lesquels ils n'ont pas de liens, la société nationale n'ayant par ailleurs pas subi de dommage. Ces dossiers sont, de plus, hautement sensibles et très difficiles à instruire. Dès lors, ce n'est que lorsqu'il y a un intérêt tangible (par exemple, punition de criminels de la Seconde Guerre mondiale, par l'effet médiatique et moral) que de tels dossiers vont être instruits. Tout cela milite certainement en faveur d'une justice pénale internationale pour les crimes internationaux. Il y a là une promesse d'efficacité plus grande.

• Article 10

L'article 10, inséré lors de la session de Bruges, constitue une clause de sauvegarde assez typique. L'objet direct de la clause est donc de préserver, de ne pas empiéter, mais aussi de renvoyer aux règles spéciales (*leges speciales*) qui

45 Voir par exemple encore le Protocole II (1999) à la Convention de La Haye pour la protection des biens culturels (1954), art. 16, par. 1, lettre c.

46 Une compétence pénale universelle obligatoire pour les États n'existe que rarement et dans le contexte de devoirs conventionnels ; les plus célèbres sont ceux qui sont liés aux « infractions graves aux quatre Conventions de Genève de 1949 : articles 50/51/130/147 Conventions I-IV.

peuvent exister en la matière. À la lettre (a), le renvoi est fait au droit des conflits armés. Celui-ci contient toute une série de règles particulières obligeant l'État territorial à fournir ou à accepter une assistance humanitaire en faveur des personnes protégées (civiles): c'est le cas, par exemple, des articles 17, 23, 38, 55 et 59 de la IVe Convention de Genève de 1949; des articles 69 et 70 du Protocole additionnel I de 1997 aux Conventions de Genève; ou encore des articles 14 et 18 du Protocole additionnel II (1977). À la lettre (b), un renvoi est fait à des «règles du droit international régissant l'assistance humanitaire dans des situations particulières». Il s'agit d'une règle résiduelle, réservant toutes les autres règles particulières, en dehors du droit des conflits armés. Le rapporteur en a expliqué la portée en ces termes: «*The phrase 'in specific situations' was a reference to those existing international instruments which already sought to govern certain aspects of humanitarian assistance in peacetime, for example the* Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations *adopted in 1998. He assured the Members that there would be many more such instruments since the United Nations, the Red Cross and other organizations were always developing them.*»[47]

En d'autres termes, il s'agit d'éviter de donner à penser que le présent texte déroge, en les affaiblissant, aux obligations plus précises et plus hardies qui peuvent exister dans des autres textes juridiques applicables. Cette clause de sauvegarde établit, dès lors, que le principe applicable est *generalia specialibus non derogant.*

## Conclusion

L'Institut, par ses travaux sur l'assistance humanitaire, a apporté une contribution utile, et sur certains points importante, à l'établissement et au développement du droit en cette matière délicate. La portée large des droits qu'il affirme, le droit subjectif à une assistance, les devoirs différenciés des sujets passifs grevés par les devoirs, la portée du principe du consentement de l'État territorial, les précisions quant au refus arbitraire de l'aide, la disposition relative à la sanction pénale, sont autant de dispositions normatives dont l'intérêt pour les divers acteurs internationaux est certain. Il reste à voir désormais dans quelle mesure les indications de l'Institut influeront sur la pratique et quels problèmes, éventuellement nouveaux, celle-ci va rencontrer dans cette *unfolding adventure* de l'humanitaire – qui n'est autre que l'*unfolding adventure* de l'humanité sur cette Terre.

47 *Annuaire de l'Institut de droit international*, vol. 70-II, p. 197, pagination non définitive.

## Annexe:

## Résolution «L'assistance humanitaire» adoptée par l'Institut de Droit international à sa session de Bruges (2003)

Article I – *Définitions*

Aux fins de la présente Résolution:

1. L'expression «assistance humanitaire» désigne l'ensemble des actes, activités et moyens humains et matériels relatifs à la fourniture de biens et de services d'ordre exclusivement humanitaire, indispensables à la survie et à la satisfaction des besoins essentiels des victimes de catastrophes;

(a) Le terme «biens» désigne notamment les denrées alimentaires, l'eau potable, les fournitures et l'équipement médicaux, les abris, les vêtements, le couchage, les véhicules, ainsi que tous les biens nécessaires à la survie et à la satisfaction des besoins essentiels des victimes; ce terme n'inclut en aucun cas les armes, les munitions ou tout autre matériel militaire;

(b) Le terme «services» désigne notamment les moyens de transport, les services de recherche, les services médicaux, l'assistance religieuse, spirituelle et psychologique, les services de reconstruction, de déminage, de décontamination, d'aide au retour volontaire des réfugiés et des personnes déplacées, et tout autre service indispensable à la survie et à la satisfaction des besoins essentiels des victimes;

2. L'expression «catastrophe» désigne les calamités qui mettent en danger la vie, la santé, l'intégrité physique, le droit de ne pas être soumis à des traitements cruels, inhumains ou dégradants, d'autres droits fondamentaux de la personne humaine, ou les besoins essentiels de la population, que ces calamités soient

- d'origine naturelle (comme les tremblements de terre, les éruptions volcaniques, les tempêtes, les pluies torrentielles, les inondations, les glissements de terrain, la sécheresse, les incendies, la famine ou les épidémies),
- d'origine technologique et provoquées par l'homme (comme les catastrophes chimiques ou les explosions nucléaires), ou
- causées par la violence ou les conflits armés (comme les conflits armés internationaux et internes, les troubles ou les violences internes, les activités terroristes).

3. L'expression «victimes» désigne les groupes de personnes dont les droits humains fondamentaux sont menacés ou la satisfaction des besoins essentiels n'est pas assurée dans des situations de catastrophe;

4. L'expression «État affecté» désigne l'État ou l'entité territoriale où l'assistance humanitaire est nécessaire;

5. L'expression «État ou organisation assistant(e)» désigne l'État ou l'organisation intergouvernementale, ou l'organisation non gouvernementale nationale ou internationale impartiale, qui organise, fournit ou distribue l'assistance humanitaire.

Article II – *Droit à l'assistance humanitaire*

1. Le fait de laisser les victimes de catastrophes sans assistance humanitaire constitue une menace à la vie et une atteinte à la dignité humaine et, par conséquent, une violation des droits humains fondamentaux.

2. Les victimes de catastrophes ont le droit de demander et de recevoir une assistance humanitaire. L'assistance peut être sollicitée, au nom des victimes, par des membres du groupe, les autorités locales et régionales, le gouvernement de l'État affecté et par des organisations nationales ou internationales.

3. L'assistance humanitaire doit être offerte et, en cas d'acceptation, distribuée sans discrimination reposant sur des motifs prohibés, compte étant dûment tenu des besoins des groupes les plus vulnérables.

Article III – *Responsabilité principale de l'État affecté*

1. L'État affecté a le devoir de prendre soin des victimes de catastrophes sur son territoire et exerce, par conséquent, la responsabilité principale dans l'organisation, la fourniture et la distribution de l'assistance humanitaire. Il lui appartient en conséquence de prendre les mesures nécessaires pour prévenir les détournements de l'assistance humanitaire ainsi que d'autres abus.

2. Toute autre autorité, qui exerce sa juridiction ou un contrôle *de facto* sur les victimes de catastrophes (par exemple, en cas de déliquescence de l'autorité gouvernementale), a le devoir de leur fournir l'assistance humanitaire nécessaire et est également investie de tous les autres droits et devoirs incombant à l'État affecté aux termes de la présente Résolution.

3. Lorsque l'État affecté n'est pas en mesure de fournir une assistance humanitaire suffisante aux victimes relevant de sa juridiction ou soumises à son contrôle *de facto*, il doit solliciter l'assistance des organisations internationales compétentes ou des États tiers.

Article IV – *Droit d'offrir et de fournir une assistance humanitaire*

1. Les États et les organisations ont le droit d'offrir une assistance humanitaire à l'État affecté. Une telle offre ne doit pas être considérée comme une immixtion illicite dans les affaires intérieures de cet État, dès lors qu'elle présente un caractère exclusivement humanitaire.

2. Les États et les organisations ont le droit de fournir une assistance humanitaire aux victimes se trouvant sur le territoire des États affectés, sous réserve du consentement de ces derniers.

Article V – *Devoirs relatifs à l'assistance humanitaire*

1. Tout État devrait, dans toute la mesure du possible, offrir une assistance humanitaire aux victimes situées dans les États affectés par des catastrophes, sauf lorsque l'octroi d'une telle assistance reviendrait à compromettre gravement sa propre situation économique, sociale ou politique. Les catastrophes affectant les États voisins devraient faire l'objet d'une attention particulière.

2. Les organisations intergouvernementales doivent offrir une assistance humanitaire aux victimes de catastrophes dans le respect de leurs mandats et règles constitutives.

3. L'État ou l'organisation assistants ne peuvent s'immiscer en aucune manière dans les affaires intérieures de l'État affecté.

4. Les États et les organisations assistants, et en particulier les organisations non gouvernementales, doivent prendre les dispositions nécessaires pour empêcher le détournement de biens ou d'autres abus graves (tels que le trafic illicite de personnes, d'armes ou de drogues prohibées) par le personnel placé sous leur responsabilité.

Article VI – *Devoir de coopérer*

1. Les États et les organisations assistants doivent coopérer avec les autorités du ou des États affectés dans l'organisation, la fourniture et la distribution de l'assistance humanitaire.

2. Dans le cas d'une catastrophe qui menace le territoire et la population de plus d'un État, ou qui survient dans un État et menace le territoire et la population d'un autre État, ces États doivent coopérer en vue d'en minimiser les conséquences.

Article VII – *Devoir de faciliter l'assistance humanitaire*

1. Les États doivent faciliter l'organisation, la fourniture et la distribution de l'assistance humanitaire octroyée par d'autres États et organisations. Ils doivent accorder à ces derniers notamment les droits de survol et d'atterrissage, les moyens de télécommunication et les immunités nécessaires. Les missions d'assistance humanitaire doivent être exemptées de toute mesure de réquisition, de restriction aux importations, aux exportations et au transit et de droits de douane sur les biens de secours et les services. Lorsque des visas ou des autorisations sont nécessaires, ils doivent être fournis rapidement et gratuitement.

2. Les États devraient adopter les lois et règlements et conclure les traités bilatéraux et multilatéraux nécessaires à la disponibilité des facilités susmentionnées en ce qui concerne l'assistance humanitaire.

3. Les États affectés doivent permettre au personnel humanitaire d'avoir accès pleinement et librement à toutes les victimes et assurer la liberté de circulation et la protection du personnel, des biens et des services fournis.

Article VIII – *Devoir des États affectés de ne pas rejeter arbitrairement une assistance humanitaire offerte de bonne foi*

1. Les États affectés ont l'obligation de ne pas refuser de façon arbitraire et injustifiée une offre de bonne foi, exclusivement destinée à fournir une assistance humanitaire, ou l'accès aux victimes. Ils ne peuvent, en particulier, refuser cette offre ou cet accès si un tel refus est susceptible de mettre en danger les droits humains fondamentaux des victimes ou si ce comportement revient à violer l'interdiction d'affamer les populations civiles en tant que méthode de guerre.

2. En cas de refus de l'offre d'assistance humanitaire ou de l'accès aux victimes, les États ou les organisations qui offrent l'assistance peuvent, s'ils estiment qu'un tel refus peut entraîner une catastrophe humanitaire plus grave, demander aux organes des Nations Unies qui traitent des problèmes humanitaires ainsi qu'aux autres organisations internationales, universelles ou régionales, compétentes d'envisager de prendre les mesures appropriées, conformément au droit international et à leurs règles constitutives, afin d'amener l'État affecté à s'acquitter de ses obligations.

3. Si le refus d'accepter une offre d'assistance humanitaire faite de bonne foi ou de permettre l'accès aux victimes entraîne une menace à la paix et à la sécurité internationales, le Conseil de sécurité peut prendre les mesures nécessaires en vertu du Chapitre VII de la Charte des Nations Unies.

Article IX – *Protection du personnel et des installations engagés dans l'assistance humanitaire*

1. Le fait de mener intentionnellement des attaques contre le personnel, les installations, les biens ou les véhicules impliqués dans une action d'assistance humanitaire est une violation grave des principes fondamentaux du droit international.

2. Si ces violations graves sont commises, les personnes accusées doivent être traduites devant toute juridiction interne ou internationale compétente.

Article X – *Rapport avec d'autres règles du droit international*

La présente Résolution est sans préjudice:

- des principes et règles du droit international humanitaire applicables en cas de conflit armé, et notamment des Conventions de Genève de 1949 sur la protection des victimes de guerre et des protocoles additionnels de 1977; et
- des règles du droit international régissant l'assistance humanitaire dans des situations particulières.

# Humanitarian Assistance in Armed Conflict

## Conference of the Luxemburg Group*
## 24-25 May 2004
## Graduate Institute of International Studies, Geneva

### Introduction

Following the first conference on "Transatlantic Relations and the Challenges of Globalization" on 24-25 October 2003 in Schengen,[1] the Luxembourg Group held a second conference on "Humanitarian Assistance in Armed Conflict" on 24-25 May 2004 in Geneva. Both conferences are part of a series of conferences on "International Cooperation and Conflict in the Post-September 11 World". Within the framework of this project, a third conference will be organized on "Transatlantic Relations: How Do We Make the UN and Multilateralism Effective?" on 13-14 September 2004 in Washington D.C.

The Luxembourg Group is composed of the University of Luxembourg, the Graduate Institute of International Studies (HEI), Geneva, and the Centre for Transatlantic Relations at Johns Hopkins' Paul H. Nitze School of International Studies (SAIS), Washington D.C. (on behalf of the American Consortium on European Studies). This series of conferences is placed under the High Patronage of His Royal Highness the Grand Duke Henri de Luxembourg, who initiated the project.

Approximately 70 participants attended the second conference, including scholars, international civil servants, political and socio-economic

* The present report has been prepared by Yasmin Naqvi, Research Assistant at the Graduate Institute for International Studies, and Adrian Pabst, Research Assistant at the Luxemburg Institute for European and International Studies.

professionals, young researchers and students from over 25 countries. The aim was fourfold: (i) to bring academic research and analysis to bear on pressing issues of transatlantic relations; (ii) to contribute to renewed transatlantic dialogue; (iii) to initiate academic cooperation among the members of the newly founded Luxembourg Group; and (iv) to encourage students and young scholars to undertake research on issues linked to transatlantic relations.

In the course of five discussion sessions and on the basis of papers and panel presentations, the conference dealt with five major topics:

(i) the historical background, contemporary issues and prospects regarding interventions on humanitarian grounds;
(ii) multiple tasks and multiple faces of humanitarian assistance;
(iii) humanitarian assistance, criminal law enforcement and human rights;
(iv) protecting the protectors — the role of the military in humanitarian assistance; and
(v) sustainable assistance to the victims of armed conflicts and post-conflict nation-building.

## Intervention on humanitarian grounds: History, issues and prospects

### Introduction

The first part of the conference addressed predominantly the historical, institutional and conceptual background of humanitarian assistance in armed conflicts. The chair, Prof. Andrea Bianchi (HEI), stressed in his introductory remarks that humanitarian assistance is a multifaceted phenomenon that lies at the interface of law, politics, economics and ethics.

### Lead speakers

• **Davide Rodogno (Fonds National de la Recherche Scientifique, Suisse): "Humanitarian interventions and the standards of civilization: Europe and the Ottoman Empire 1815-1911"**

The thrust of this paper was that military interventions on "humanitarian" grounds are by no means a wholly new phenomenon. Instead, such interventions have a history in the West whose origins can be traced back as far as the late eighteenth century. From this history emerge structures of thought and practice which in the nineteenth century gave rise to the first political and legal practice of humanitarian interventions. To revisit the

recent history of such interventions is to shed some light on contemporary forms of humanitarian assistance. In particular, it turns out that humanitarian interventions today are distinct yet related phenomena which share at least three crucial features with such interventions in the past: first of all, they invoke notions of civilization and a common right of humanity, secondly, they manifest the pervasiveness of self-interest, and thirdly, they are deeply affected by the rules of the international system in which they occurred.

In theory, interventions on humanitarian grounds in the nineteenth century took place as a response to the violation of the common right of humanity (*droit commun de l'humanité*) and took the form of collective action on the part of "law-abiding" States. In practice, however, such interventions amounted to military campaigns launched by European States in retaliation against atrocities committed towards fellow Christians. In essence, countries which considered themselves to be civilized, and part of the so-called family of nations, e.g. the British Empire, invaded countries considered to be uncivilized or half-civilized, e.g. the Ottoman Empire, in defence of a Christian minority. The normal pattern of events was as follows: if there was turmoil followed by crimes against fellow Christians, the European concert would intervene, at first diplomatically, then militarily. After coming to the rescue of Christians, there would be a ceasefire secured by European forces and monitored by European commissioners, who would also oversee pro-Western reforms.

The rise of interventions on grounds of "humanity" followed three historical developments: the abolition of the slave trade, European colonization of Asia and Africa, and the emergence of the notion of "civilization" in international politics and law, especially the right to intervene on account of the supremacy of European civilization over allegedly inferior civilizations. This simultaneously marked continuity and change vis-à-vis the past. With the exception of the nineteenth century "scramble for Africa", "humanitarian" intervention did not result in outright colonization. However, all actions were also in the self-interest of the intervening countries. Similarly, the process was not exclusively driven by economic or political motives but involved international law. Certain legal experts in the nineteenth century held that the right to intervene on the grounds of humanity was justified where collective action, based on the need to uphold fundamental "common" values of humanity, could be taken by "civilized" States against an "uncivilized" State committing atrocities. However, the reforms and innovations in international law did not extend the same rights to all countries, but

constituted amendments to the Westphalian settlement in such a way as to legitimize foreign intervention in nominally sovereign States.

The significance of humanitarian interventions was the emergence of a moral crusade, characterized by self-confidence and zeal, which was enhanced by secular modernization. This recovered zeal was both religious and ethnic, in that actions were particularly directed against Islam and there was a total disregard for the suffering of non-Christian, non-White populations, e.g. the non-intervention at the time of Russian anti-Semitic pogroms and the killings of Turks in Central Asia. However, if a "humanitarian intervention" threatened peace and stability in Europe, and if the self-interests of European powers were not sufficiently jeopardized by the actions of the "uncivilized" State, European powers did not intervene, even if fellow Christians were massacred. This was the case when atrocities were being committed against the Armenians during the late nineteenth and early twentieth century.

At least two themes emerge from this historical account: first of all, the inherent moral ambiguity of military interventions on humanitarian grounds, including the dubious claim of the intervening States to be acting in the common interest, and, secondly, the pervasiveness of national self-interest in international affairs.

**• Ramesh Thakur (United Nations University, Tokyo): "The United Nations and the Responsibility to Protect"**

The second presentation was centred on how the United Nations (UN) should respond to the triple dilemma that characterizes international relations-complicity, inaction and illegality. The recent events involving Rwanda, Kosovo and Iraq illustrate this dilemma. First of all, to respect national sovereignty at all times is to risk being an accessory to humanitarian tragedies or to violations of inalienable individual and collective human rights codified in international and universally binding law. Secondly, to argue that only the UN Security Council can authorize interventions is to risk inaction due to the failure of the Council as a whole or due to an individual veto. Thirdly, to use force without UN authorization is to violate international law. In some sense, this triple dilemma raises one and the same problem: how to put an end to serious violations of international law by States at the domestic level through military intervention while at the same time outlawing and criminalizing war as a tool of unilateral State policy.

In the face of this triple dilemma and the underlying problem, and in response specifically to Secretary-General Kofi Annan's "challenge of

humanitarian intervention", the Canadian government set up a commission which produced a report entitled *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. In essence, the report seeks to affirm both the priority of national sovereignty and the legitimacy of international intervention. The main conceptual means of achieving this is to reconfigure the relation between rights and duties or prerogatives and responsibility by bringing about three changes in the current political and legal situation. First of all, a change in conceptual language is advocated — away from "humanitarian intervention" to the "responsibility to protect". The reason is that the language of humanitarian intervention and assistance has led to terrible instances of either inaction (Rwanda) or action (Kosovo) or a combination of both (Somalia), as well as to conceptual and policy aberrations, perhaps best captured by the oxymoron "humanitarian bombing". The reconceptualization of the problem serves to shift the focus from the rights of States to the rights of victims and thereby to approach the issue from the standpoint of the responsibility of States, rather than the authority of States.

The second goal, in the wake of both Kosovo and Iraq, is to internationalize the issue. The idea is not to elevate the UN over and above national sovereignty and national governments, but to establish it as the ultimate arbiter in the event of national and trans-regional failure. The Commission expressed the double belief that all sovereign States have the responsibility to protect populations and, should this responsibility not be assumed, it falls to the international community. In short, only if a State is unwilling or unable to assume it, or is itself the perpetrator of crimes, does the responsibility to protect pass to others. So the point is to reaffirm at the same time the priority of the national level and the link with the international level.

The third goal is to define effective, legitimate action, i.e. not a blueprint for intervention but the parameters to come to a decision on a case-by-case basis. The crucial elements for this sort of decision-making and for this sort of action are "due process" and "due authority". The Commission's idea is to modify the focus: whereas the traditional approach to "humanitarian intervention" has hitherto focused on the rights and prerogatives of intervening States, the new approach based on the "responsibility to protect" focuses on how to alter the power relations between perpetrator and victims and then to embed protection in long-term institutions. The point is to suspend sovereignty temporarily, not to abrogate it permanently by way of regime change.

In what ways might the new approach based on the "responsibility to protect" overcome recent problems related to (non-)intervention? In the face of both violations of international law at the domestic level and international illegality, the Commission has sought to "reaffirm the central, indispensable and irreplaceable role of the UN in authorising any military intervention in today's world". This is because the UN is considered to be an indispensable font of international authority and it is therefore preferable to improve its operation rather than to seek alternatives. The Commission also believes that international action is warranted if two sets of conditions are fulfilled: if there is just cause, right intention, last resort, proportionality and reasonable prospects of success, and if operational principles which guide intervention are respected.

This raises the question of what to do if the Security Council fails to act and thereby fails to fulfil its responsibility to protect, e.g. in Rwanda. New possibilities would need to be explored, such as taking up the issue in the General Assembly where majority votes are operative, as was recommended in the "Uniting for peace" resolution of 1950, or strengthening possibilities of regional and trans-regional initiatives, e.g. enabling African or Asian-led missions. What is clear to the Commission is that unilateral actions are to the detriment of both the UN and national sovereignty, because they undermine the UN and risk lapsing into irresolvable and intolerable contradictions: elevating one instance of national sovereignty over another (that of the invading State over and against that of the invaded State) without any genuine proof (weapons of mass destruction); moral superiority on the one hand and descent into barbarity on the other (Abu Ghraib); excessive attention focused on some countries (Afghanistan, Iraq) at the expense of others (Sudan, Congo, Burundi, Liberia, etc.); holding tyrants accountable while demanding immunity for one's own armed forces; etc.

Seeking to counter the threat of multilateral inaction or unilateral action, the Commission reckons that its work is an illustration of a potential new international consensus on intervention, binding together national sovereignty and international responsibility. If the needs and the calls for intervention have not gone away and will not do so, and if there remains a gap between the need for humanitarian protection and the ability of outsiders to provide effective help, then the choice is no longer whether to intervene or not, but how to intervene: multilaterally *versus* unilaterally, legally *versus* illegally. The ultimate aim must be to enhance both security and humanity; the new symbol is East Timor, not Rwanda.

## Panel presentations

Prior to the panel presentations and discussions, the chair, Prof. Andrea Bianchi, highlighted four issues for debate. First of all was the Schmittian distinction between legality and legitimacy, especially in terms of the decision to intervene individually or collectively in sovereign countries. Secondly, the context of the UN Charter provision to outlaw war and the possible need to amend or reform this post-Second World War paradigm. Thirdly, the extent to which international law is equipped to deal with emergency situations, and the instruments at the disposal of the international community to take prompt action. Finally, whether and if so to what extent the international community can be said to be characterized by a commonality of values.

The first panel speaker was Dr Cornelio Sommaruga, member of the International Commission on Intervention and State Sovereignty (ICISS). He pointed out that humanitarian action is first and foremost protection, assistance being a tool for protection, and underscored the conceptual innovation of the report in question. To replace the traditional concept of "humanitarian intervention", the report puts forward the concept of the "responsibility to protect", and in place of the "right to intervene", it sets out the responsibility to act if a sovereign State fails in its duty and to help rebuild failed and failing States. The report stresses the responsibility to prevent — to prevent inaction or unilateral pre-emptive action that does not address the medium and long-term consequences. More specifically, with respect to humanitarian action, the idea of the Commission is to shift from a certain cult of immunity to international legitimacy: at the centre of this new approach is a broader concept of security — human security — that encompasses not only military security (extended to include interventions directed against both actual and anticipated effects of State action) but also securing life, dignity and fundamental freedoms of the human person, all of which are best guaranteed by sovereignty. However, grounds for a "just cause" do not include racism, discrimination or the overthrow of democratically elected governments. Any military intervention must also fulfil the criteria of proportionality and of a "reasonable prospect of success", namely a realistic transition from the combat to the post-conflict stage in order to alleviate suffering and to reconstruct the war-ravaged State. To be effective, all these changes require something like a code of conduct for the wielding of veto power within the Security Council. The overriding aim must be the effective protection of the human being from domestic as well as international atrocities, in an effort to match reality to rhetoric.

Professor Georges Abi-Saab (HEI) made five remarks concerning international law:

(i) A strictly legal principle or rule regulating "humanitarian intervention", now allegedly in the process of revival, never existed before the UN Charter. This is because, at least until the Kellogg-Briand Pact of 1928, the prevailing doctrine was the "theory of indifference", i.e. that international law was "indifferent" to, hence does not prohibit, resort to war. "Humanitarian intervention", as a doctrine, pertained to the rhetoric of political and moral justification for exercising a legally non-prohibited faculty, i.e. resort to war in certain situations.
In contrast the UN Charter, in its Article 2.4, has decreed a comprehensive prohibition of the individual use of force (whether by one or more States), except in self-defence, but leaving aside collective action in the name of the international community, which is a totally different matter. If there is one principle or rule of contemporary international law of which the peremptory or *jus cogens* character is universally recognized, it is this rule. This means that there is no way of modifying it (for example by introducing a new exception to it), except by establishing "a subsequent norm of general international law having the same character", i.e. a norm which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". This condition is well nigh impossible to fulfil, particularly for the introduction of a new "humanitarian intervention" exception.

(ii) The term "intervention" is often loosely used, particularly by American writers, as synonymous with the use of force. But "intervention" can also be by other means, economic, political or even legal, as long as they amount to trespassing on what is by international law an exclusive jurisdiction of the State. This is the sphere of "domestic jurisdiction" or the defensive representation of sovereignty. But sovereignty is not static, and whatever matter the State consents to subject to an international obligation is no longer a matter of domestic jurisdiction. Human rights are the prime example of such an evolution. Thus, intercessions by States and international organizations in the case of human rights violations do not constitute acts of intervention. This does not mean that States can individually resort to force in the name of human rights, in disregard of Article 2.4 of the Charter. But what States cannot do individually, they may be able to do collectively in the name of the international community, through the mechanisms of the UN.

Indeed, not all use of force constitutes "intervention". For in addition to self-defence (an exception to the individual use of force), the Charter provides for collective measures, which are coercive measures and which include military means. But to regulate their use the Charter has taken the precaution of centralizing the decision-making process in the hands of the Security Council, at three separate stages, through all of which it has to pass: (a) a decision in the form of a "finding" or a "determination" that there is a "threat to peace, a breach of peace or an act of aggression..."; (b) a decision on what measures need to be taken to face up to it; and (c) a decision as to the "means of execution" of these measures, either by using the UN's own resources (which never materialized), or by giving mandates to member States or regional organizations.

(iii) In the post-Cold War euphoria of the early 1990s, the Security Council adopted a broad interpretation of "threats to peace" to cover humanitarian emergencies, thus opening the way for it to take "collective measures" in such situations.

However, towards the end of the decade a widespread perception of a renewed paralysis of UN mechanisms allegedly led the North Atlantic Treaty Organization (NATO) to intervene in Kosovo outside the UN framework. Hence the dilemma cited by Kofi Annan in his speech to the General Assembly on 20 September 1999 in the wake of that crisis, and of which he said that it "(...) must not be between Council unity and inaction in the face of genocide — as in the case of Rwanda (...) and Council division, and regional action, as in the case of Kosovo". But this is a false dilemma, if one goes by those two examples. For what was lacking in Rwanda was not the possibility of authorization by the Security Council, but the political will of member States to commit troops for collective action. Conversely, in Kosovo the possibilities for negotiations were not exhausted before resorting to unilateral action. And in any case, if the Security Council was blocked, there remained the untried possibility of going to the General Assembly under the "Uniting for peace" resolution.

(iv) The ICISS Report entitled *The Responsibility to Protect* has much to commend it, inasmuch as it seeks to enlarge the scope of collective action through proper UN channels by placing emphasis on prevention and peace-building and on recourse to the General Assembly if the Security Council is paralysed. It would, however, be highly objectionable if it is meant to be an "intervener's chart" — as it appears from

the outside — in that it does indicate two cases (large-scale loss of life or ethnic cleansing) providing "just cause" for military intervention, which seems to include individual use of force by one or more States and without UN authorization.

(v) But what is wrong with using force, even without UN authorization, in order to avert or halt such atrocities? It is intervening in the name of humanity, while refusing to submit to the UN's judgment and evaluation as to the existence of a humanitarian emergency and the need to resort to the extreme measure of use of force in order to face up to it. If the Security Council is blocked by the veto, the General Assembly is more open and much more representative of humanity. But if two thirds of the Assembly does not view a situation as a humanitarian catastrophe, how can anyone still claim that a reason exists to intervene militarily without being highly suspect of pursuing personal interests in the guise of serving humanity?

Prof. Keith Krause (HEI) also stressed the idea that sovereignty is an elastic, dynamic concept because inalienable individual rights hold supreme sway and national sovereignty is a conditional state conferred by the international community. Furthermore, a purely legalistic approach ignores important legal norms and processes, raising the question of who can speak in the name of the international community: if neither a single individual State nor the UN Security Council are the universal guardian of human rights, then this role falls perhaps to a "minimum coalition of the willing" to vouchsafe multilateralism and intervention. Even if it is clear from practice that there are no generally accepted rules of intervention, military action cannot be ruled out, on condition that it is accompanied by a willingness to foster human rights and build institutions, involving both the local population and the international community. Such actions represent State-making and reflect a larger-scale process of social engineering, creating new dilemmas. On the whole, there are no viable principles of non-intervention and interventionist practices evolve as part of the larger Westphalian liberal project on how States should treat their citizens and those of other countries.

### Discussion

In the course of the discussion, questions mainly related to three subjects:

(i) Can particular cases enable us to derive general principles and, if so, what principles? This is particularly pertinent in the aftermath of 9/11, when case-by-case decisions have been replaced by the overriding

campaign of the so-called "war on terror" and by the new doctrine of pre-emption.

(ii) Is the relation between national sovereignty and individual rights a genuine tension or a false dichotomy?

(iii) Intervention and UN decision-making processes:
- With or without the consent of local authorities?
- Who authorizes and conducts interventions, especially in the light of the increasing privatization of actions?
- If vital interests of UN Security Council member States are at stake, they should abstain, according to the UN Charter (Art. 27.3), but this has never been practised; changes to veto-wielding powers should therefore be considered, which an enlarged Security Council would make even more complex.

In their replies, the panel members agreed that there is no simple solution to the question of intervention. Some considered that the main challenge is to reconfigure authorized interventions by way of including the UN General Assembly and the country concerned by the intervention. This is crucial, since within the General Assembly national interest cannot lead to a veto, unlike the Security Council where, for example, China vetoed the prolonging of the UN mandate in Macedonia because the latter had recognized Taiwan. It was suggested that a veto which thwarts a peremptory norm of international law should not be considered valid. The General Assembly might not be perfect, but no other single organization or system of rules is superior: legitimacy requires rules, and organizations like NATO do not command universal respect but instead are seen as defending the narrow self-interest of the major former colonial powers. There was disagreement on "unilateral" interventions. While some supported member States taking action if the Security Council fails to act, others made the point that the Security Council fails to act in the majority of cases, making such an exception nonsensical.

### Multiple tasks and multiple faces of assistance

In session two the chair, Prof. Andrew Clapham (HEI), opened the discussion by noting that the military is increasingly being asked to do things in the humanitarian arena which it is ill-equipped to do. To clarify roles, it must be asked what sort of mandate should be given to international and non-governmental organizations. Furthermore, by entrusting the UN with multiple tasks in the face of complex emergencies, are we issuing a mandate that is impossible to fulfil?

In this session, the focus was on the nature and operation of assistance. One of the most fundamental problems is a confusion of tasks: both military and civilian institutions engaging in humanitarian assistance are being asked to assume responsibilities they are neither supposed nor qualified to perform. Four participants in such activities can be distinguished: the UN, national governments, the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs). Perhaps more than any other participant, the UN faces multiple tasks, which amount to multiple and frequently conflicting mandates:

(i) authorizing the use of force;
(ii) peace-enforcement under UN authorization;
(iii) peace-keeping under UN mandate;
(iv) arranging for humanitarian assistance during and after conflicts;
(v) imposing sanctions and organizing aid programmes (e.g. "oil for food"); and
(vi) overseeing reconstruction.

Lead Speaker: David Rieff, Journalist, New York Times Magazine

There are manifold grounds for scepticism as to the feasibility and purpose of humanitarian assistance in armed conflict. First of all, if there is no genuine commonality of values, then the very existence of the international community is questioned. This is not to deny the existence of an international order (dominated by the United States of America (US) and the Bretton Woods institutions) and of international structures (above all the UN), but organizations like NATO illustrate the absence of common values. Secondly, if there is no genuine international community, then it is either impossible or impracticable, or both, to match rhetoric to reality because the question is: "whose" rhetoric? "Whose" reality? Thirdly, there is confusion in the very term "humanitarian intervention", for "intervention" is equivalent to war, whereas "humanitarianism" is about alleviating suffering (referring to the fundamental principles of the ICRC and *Médecins sans Frontières* (MSF)).

Fourthly, humanitarian action ought not to be part of some grand global project but instead more modest and limited. Like other "master ideas", humanitarian assistance risks being hijacked by some completely different agenda. Either agencies like the United Nations Development Programme (UNDP), which focus on development aid, have also engaged in humanitarian relief but with objectives altogether different to those of the

ICRC or MSF; or bellicose democracies like the US have reclaimed humanitarian action, only to outsource and subcontract actual operations to private, multinational companies, as both the State and the market view the humanitarian sector as a lucrative business. One of the main problems is that most funding originates from States, which resort to humanitarian assistance as a preferred form of justifying military interventions, in other words a form of "soft power".

All these trends leave humanitarian assistance exposed to the twofold assault by States, which have reined in the independent players, and by corporations, which compete with humanitarian organizations for government funding and contracts. But humanitarian assistance has also suffered from misguided expectations on the part the "humanitarians" themselves, who have moreover given in to the new ideology of the human rights' movement that has acted like a quasi-colonial power. Conclusion: humanitarian assistance should refocus on its original mission.

### Panel presentations

According to Agnes Callamard, an independent consultant on humanitarian and human rights affairs, Rieff's diagnosis of the humanitarian sector is broadly correct, but there are different explanations and perspectives. While it is true that a tendency away from the original mission of relief aid to human rights activities has indeed occurred, it is also true that the debate on how to recover the original mission is largely self-referential. For instance, the dominant message of the heroic Western intervener saving the lives of hapless victims has not been challenged. Yet it sustains images, jargons and practices that borrow heavily from the military sector and is both problematic and inappropriate to address the present and current challenges confronted by humanitarian agencies. The call for reclaiming humanitarianism is not being associated with the beneficiaries of humanitarian assistance or the crisis-affected communities, as subjects of the humanitarian universe. Yet the nature of the relationships between the relief organizations and disaster-affected populations and their perceptions of each other are central to humanitarian actions and to redefinition of the humanitarian ethos. Instead of taking its moral cue from those suffering and surviving crisis situations, as suggested by Hugo Slim, the humanitarian ethos remains defined through and by one single player: the intervener.

With the events surrounding 11 September 2001 and the US-led intervention in Iraq, this *modus operandi* is no longer tolerated. Humanitarian crises have been exposed as eminently muddy and political. This exposure

has involved lifting the veil of the independent, technically superior, neutral and compassionate intervention that humanitarian players had taken great care to draw over their actions. With 9/11 in the background, the veil has been replaced by the cloak of the "dangerous other", with the other being largely defined as anyone who does not look, think or act like oneself.

The humanitarian machinery is not geared to this context. It is still functioning on the assumption that disasters and emergencies are something on the margins of human existence, divorced from "normal" life, and that there are, somewhere far away, helpless victims in need of a heroic (Western) intervener. The humanitarian system is still clinging to the compassionate veil in a fashion that has become increasing self-referential.

Missing from the current soul-searching exercises is the actual engagement with the meaning and praxis of accountability. Humanitarian agencies can no longer assume their moral duty unilaterally. Instead, those affected must be genuinely involved in shaping the contours of the humanitarian response, mutually and reciprocally. Failure to do so brings into discredit any morally justified enterprise, including the humanitarian one.

The humanitarian sector has reached such a stage. It must find ways to function outside an imperialist benevolent model, or else it will confront increasing levels of intolerance against humanitarian action and deadly attacks.

Dennis McNamara, Inspector General at the Office of the United Nations High Commissioner for Refugees (UNHCR), corrected what he took to be a number of misperceptions. First of all, UNHCR has had multi-functional tasks since its creation in 1951, and not just recently. Neither the mandate nor the ambition has expanded; what has expanded is the sheer scope of needs in terms of refugees, displaced populations and victims of war or of natural disasters. Secondly, what has also changed significantly is not the aspiration, but the political and security context in which humanitarian assistance operates, since the work in conflict areas today is utterly different on account of the change in the technological nature of warfare. Thirdly, while independent organizations have always been easy targets, the most serious failure has been that of State responsibility, both individual and collective.

This is not to say that the UN system is not problematic, but it is to say that it reflects the problems of the international system of nation-States. Fourthly, the single biggest obstacles to effective humanitarian assistance are the simultaneous militarization, politicization and privatization of humanitarian action, which have destroyed much of the independence of the humanitarian sector and undermined efforts to establish minimum

benchmarks for intervention. These three phenomena have also produced the wrong sort of division of labour, where the military, rather than effectively securing a post-conflict situation, are requested to help rebuild the country and assume policing activities. A degree of political realism is needed so that conscious decisions about when the military should not be involved in humanitarian work may be made.

Prof. David Sylvan (HEI) argued that any fears of over-politicization are misplaced. The notion of humanitarian relief is inherently political and should be responded to as such. Moreover, given the scale of the problems and the thin dividing line between "humanitarian" problems and "normal" problems of hunger, disease, etc., the only solution is to governmentalize the problem via some kind of State-like action at the international level. An analogy may be made here with the failure of humanitarian organizations at the domestic level in the nineteenth century. The one thing those organizations did then was to put the issue on the agenda for State action, and the one thing that humanitarian relief agencies can do now is to put the issue on the agenda for State-like action and thus, in effect, to propagandize for their own incapacity.

### Discussion

The questions and discussion were concerned with four key topics:

(i) the politicization of humanitarian assistance;
(ii) the militarization of humanitarian assistance;
(iii) the privatization of humanitarian assistance; and
(iv) the need to "governmentalize" humanitarian assistance.

One point that was repeatedly made was the importance of striking the right balance between different tasks, military or civilian, idealistic and pragmatic. The main challenge for the humanitarian sector is and remains how to escape the trap of either being co-opted or becoming irrelevant — for instance, the UN serving as some "after-sales service provider to the US". There was strong disagreement as to the best way forward. While many maintained that a return to more exclusively humanitarian activities was necessary (leaving to others the public advocacy of human rights and issues of nation-building), others contended that there is a vast silent majority of peoples across the globe who agree with aid and the underlying liberal values.

The bone of contention was whether the dominant political and economic model — in short, neo-liberalism — constitutes a viable and desirable vision for those in receipt of aid, and whether there is not a risk of utter self-

complacency. So the point of stripping back agencies to their original mission is to engage in emergency relief aid, not in some grand ideological project; to specialize in what they are most competent at, and not to run after donors' aid. The problem is the structure of funding: because the European Union (EU) and the Europeans have backed away, UNHCR depends increasingly on one donor and is therefore subject to huge political pressures. Another problem lies in the mix of motives on the part of the military involved in humanitarian missions; while the military may be used to provide security for humanitarian organizations, this should not be under the cover of "winning hearts and minds". On the other hand, it was argued that the dichotomy between power and principles should not be too sharply drawn, and that most military actions are a combination of striving towards a higher goal and of physical coercion.

To the question whether there are any successful examples of humanitarian assistance, it was suggested that Sierra Leone and Mozambique could be seen as such and that it is essential not to confuse political, military and humanitarian crises. Afghanistan and Iraq are by no standards humanitarian crises, but Darfur in Sudan is. In terms of funding, it is the member States that are calling the shots: funding determines work, so Africa is being neglected because there is a clear lack of willingness on the part of the donor governments.

To the question as to what, if any, legal principles could guide humanitarian aid, some panellists responded that principles are preferable to discretionary action, but the fact is that there are not as yet any well-defined, circumscribed norms, except for the fundamental principles of the International Red Cross and Red Crescent Movement. The crucial challenge is to devise norms that are not self-referential and also to unpack principles such as independence and neutrality to test how they should function in real life situations, e.g. when negotiating access. However, other panellists questioned the inherent link between emergency relief aid and legal norms and principles. They advocated instead a new pragmatism that breaks with the new human rights idealism and puts pressure on national donor governments in such a way that they do not spend their entire funds on political and military crises (like the United Kingdom on Afghanistan and Iraq), but redirect their efforts to more traditional emergency relief and development aid.

## Address: "International criminal law and humanitarian assistance"

Judge Theodor Meron (President, International Criminal Tribunal for the former Yugoslavia)

There has been tremendous progress in the evolution of institutions, rules and practices in international criminal law in recent years. First of all, 1993 saw the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), which today is composed of 14 permanent judges, 9 *ad litem* judges and an Appeals Chamber. Similar tribunals have been set up for international crimes in Rwanda, Sierra Leone and Cambodia, etc. The development of the international criminalization of humanitarian law (IHL) has strengthened humanitarian assistance, for example, by criminalizing the prohibition of starvation and by imposing limits on States' ability to refuse humanitarian aid. The Rome Statute of the International Criminal Court (ICC) has been a most important development in this regard. It builds on the customary law of the Geneva Conventions and other efforts to prevent humanitarian workers from being the target of attacks. Such attacks on the UN, the ICRC and the civilian population inevitably weaken respect for humanitarian law and provide a pretext for parties to derogate from obligations under IHL. Indeed, since 1992, more than 210 UN personnel have been killed and more than 260 kidnapped.

From the perspective of international criminal law, one of the main difficulties is to define what humanitarian assistance is. While there is debate at the margins, it is possible to define it as a set of efforts aimed at providing supplies that are essential to survival. Humanitarian assistance generally involves some kind of transfer of aid from the occupying power to the occupied population. This aid is administered in emergency situations, frequently by NGOs, and the beneficiaries are civilians. A second difficulty is to define who is a target of attacks. Article 8 of the Rome Statute, which lists the war crimes over which the ICC has jurisdiction and was drawn up in the wake of experiences in both Somalia and Sudan, includes the crime of "intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". The ICC will have to decide which missions will fit in with the definition of "humanitarian assistance". Although certain protections already exist for UN personnel and humanitarian workers in

existing treaties, this provision clearly provides the basis for the prosecution of persons launching such attacks. It is also the first instrument to protect relief personnel in internal conflicts. The Statute for the Special Court for Sierra Leone has a similar provision. Taken together, these instruments indicate a general consensus that deliberate attacks against humanitarian assistance missions constitute a war crime.

Furthermore, the deliberate starvation of the civilian population is also a war crime under the Rome Statute, including wilfully impeding relief supplies as provided for under the Geneva Conventions. However, what is disappointing is the fact that this provision applies only to international conflicts. Despite international condemnation of that practice, it remains a war crime only when committed during an international armed conflict. Such behaviour may nonetheless be prosecuted when committed during an internal conflict if it amounts to genocide or a crime against humanity.

In terms of the crime of genocide, it is increasingly being accepted that starvation may fall into the category specified by Article II(c) of the Genocide Convention, which defines genocide as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The cases before the International Criminal Tribunal for Rwanda (ICTR) concerning *Akayesu* and *Kayishema* seem to support this view. Therefore, attacks on humanitarian missions could be considered as acts of genocide in internal conflicts, provided the requisite intention can be proved. Often, however, such attacks have other motivations, such as trying to weaken the resolve of international organizations or terrorizing international workers. But the criminalization of the behaviour is tied to the intention towards the beneficiaries. In any case, an excessive invocation of genocide will only serve to devalue the concept.

It may also be argued that attacking humanitarian workers could amount to a crime against humanity under Article 7.2 (b) of the Rome Statute, which provides that "'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Here the crime is not directly harming humanitarian missions, but harming the beneficiaries of such aid. While there is no need to prove the intention of destroying a particular beneficiary group in whole or in part (as for genocide), there is a need to show that these conditions were calculated to destroy a part of the population.

In terms of protecting humanitarian assistance workers, it is true to say that criminalization does not solve the problem of attacks on such workers. Beyond international criminal law, what is needed is a renewed commitment to international ethics and notions and practices of chivalry in belligerency, e.g. by removing any international and national political and cultural barriers and thereby also some of the cultural or religious legitimacy for such acts. By treating those who commit such attacks as war criminals, the international community will be reaffirming the work of the UN and the ICRC as a matter of law and morality.

### Humanitarian assistance, criminal law enforcement and human rights

The chair, Prof. Vera Gowlland (HEI), raised various key questions at the beginning of the session: what do we mean by humanitarian assistance? What kinds of assistance are we talking about? Should the question be looked at from the point of view of State responsibility vis-à-vis humanitarian assistance?

Lead Speaker: Prof. Louise Doswald Beck (HEI)

This topic may be approached from the perspective of the responsibility of the State with regard to the armed conflict on its territory and the responsibility of third States. In both IHL and human rights law, there is a requirement for States to ensure that their populations are provided for. This obligation covers both the direct provision of humanitarian aid and receiving it from outside sources. A question that arises therefore is: has the international community shifted responsibility by passing resolutions in multilateral fora insisting on the provision of humanitarian assistance by humanitarian organizations?

In terms of IHL, obligations exist for the provision of medical treatment to both the military and civilians, and of food and water to the civilian population. Intentional starvation of the civilian population was traditionally not seen as a major problem. In 1977, at the Diplomatic Conference, delegates decided to improve the law so as to counter this method of warfare. Additional Protocol I accordingly prohibits deliberate starvation, including deliberately destroying supplies, and also obliges States to grant access to relief supplies, subject to security conditions. Starvation is similarly prohibited in Additional Protocol II, although there is no provision in it stipulating that access must be allowed to relief supplies. It is generally accepted that these new rules have become part of customary law. The UN has some

practice of criticizing methods of warfare that result in starvation, but has passed a very large number of resolutions criticizing States for not giving access to relief suppliers, including in non-international armed conflicts. This practice indicates that such a rule (that States must allow the supplying of relief) has become a part of customary international law.

Under human rights law, certain derogations are possible in times of pubic emergency. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) makes it clear, however, that the right to life is non-derogable. Human rights bodies have taken this right to include not only the prohibition to kill, but also the obligation for States to undertake positive measures to protect life. The prohibition of inhuman treatment is also non-derogable, and has been interpreted as covering the withholding of treatment from detained persons. However, the most relevant instrument is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which does not provide for any derogations whatsoever. This covenant requires every State party to take steps to achieve progressively the full realization of the rights recognized therein, including the right to food and the right to health. While States remain reluctant to accept their obligations, despite their treaty character, a committee was set up in 1985 which receives State reports and adopts General Comments to give specific content to the obligations under the covenant. In this regard, General Comment 3 stated that some rights must be immediate, such as the right to non-discrimination. Furthermore, if any group of persons are deprived of fundamental rights, this constitutes a *prima facie* failure of the State to respect its obligations. By intimating that States must use "all available resources" to fulfil their obligations under the covenant, the need for States to accept relief supplies is reinforced.

General Comment 12 concerning the right to food lays down that States must not prevent people from getting food by their own efforts and contains an obligation to facilitate access to food, thus mirroring the obligation in IHL. If persons are unable to obtain adequate food, States must ensure that it is provided directly. A distinction must be made between a genuine inability of a State to fulfil its obligations and an unwillingness to do so. By refusing aid from the international community, a State would be seen as being unwilling, rather than unable, to fulfil its obligations under the covenant and could be held responsible. General Comment 14 on the right to health highlights the need to have health care available without discrimination and the obligation to respect this right, and thus not deliberately prevent people from having access to such care. From this, the rule can be

derived that States must not use nuclear or biological weapons in armed conflicts and must not restrict access to medical care, as to do so is a violation of IHL. It also implies that States must allow relief organizations to provide health care.

Is there a duty for non-belligerent States to provide humanitarian aid under IHL? No such rule would appear to exist in treaty or in customary law. Common Article 1 of the Geneva Conventions requires all States parties to respect and ensure respect for the rules contained therein, but this generally means that States must endeavour to ensure that other States do not violate their obligations. Under the Rome Statute, the International Criminal Court has jurisdiction over the war crime of wilfully impeding relief supplies, but only when it is committed during international armed conflicts. However, a serious violation of IHL is deemed to be a war crime, and Security Council resolutions condemning such acts would seem to show that this behaviour, whenever committed, is such a serious violation. Under the principle of permissive universal jurisdiction, therefore, any State could indict someone for not allowing such relief. The question of whether a person from a third party State could be held individually criminally responsible for not allowing the provision of aid remains a question for discussion. There does seem to be a lack of clarity about third States' obligations in terms of humanitarian assistance. The inability of victims to make individual petitions under ICESCR is another weakness in the enforcement of humanitarian obligations. So in short, there is a gap between the internationally recognized duty to provide relief in both international and national conflicts and the effectively enforceable duty of care on the part of third States.

### Panel presentations

According to Jelena Pejic (ICRC), it would appear that recent events have led to a blurring of the distinction between the law regulating recourse to force (*jus ad bellum*) and that governing the way in which force is used (*jus in bello*), in the sense that the perceived "justness" of intervention has sometimes led to the *de facto* suspension of human rights law or to the "relaxing" of certain obligations under international humanitarian law (IHL). It should be made clear that, despite any moral justifications for intervention, once armed force is used IHL becomes fully applicable. With regard to the debate on humanitarian intervention, she remarked that at the latest International Conference of the Red Cross and Red Crescent, a reference to the concept of human security was removed from the draft declaration because some delegations felt that the concept could be stretched to include the right of humanitarian intervention,

which they opposed. Referring to the "back-to-basics" approach advocated by some participants, she said that it is important to know exactly what it means in terms of law, mandates or guiding principles. If it refers to international law, then it is ill conceived because it seems to suggest that the law is sufficient as it stands. If it refers to mandates, it is not clear how international regulation of NGO mandates would affect the mandates of existing organizations. Moreover, the "back-to-basics" approach seems to advocate a reductionist view of the ICRC's mandate as encompassing just basic protection and assistance. The mandate of the ICRC, however, is not based solely on the Geneva Conventions or the Additional Protocols, but also on the Statutes of the Red Cross and Red Crescent Movement, including the important Article 5, which provides the organization with a "right of initiative". If the said approach refers to the guiding principles of the ICRC, then it is equally ill conceived, because only the principle of impartiality is laid down in the Geneva Conventions. Other fundamental principles such as neutrality and independence are principles of the Red Cross and Red Crescent Movement. Not all organizations working in conflict zones are neutral and not all should be so. It is therefore not advisable to lump all humanitarian organizations and human rights and development agencies together.

In fact, what recent events and legal developments demonstrate is that the two crucial issues are enforceability and political will. In order to ensure compliance with IHL outside of the criminal realm, there are three types of rules which parties to a conflict should abide by: (1) preventive rules (for example, complying with the rules of the conduct of hostilities so that the due distinctions are made between civilians and the military, including preventing forced displacement and protecting the environment and civilian objects); (2) rules on humanitarian assistance (if the preventive rules are not successfully applied) such as providing relief for the civilian population and ensuring the security of humanitarian personnel; and (3) individual and collective relief for persons in the power of a party to the conflict, whether interned or detained. Importantly, the ICRC Study on Customary Law of IHL is likely to show that the rules governing the provision of relief are practically the same in international and non-international armed conflicts. Criminal law is unlikely to be the best way of enforcing IHL because it is always an *ex post facto* measure. More needs to be done to ensure compliance during armed conflicts.

It appears that the problem of enforceability of IHL lies less in a lack of mechanisms than in the lack of political will to utilize existing instruments. A new mechanism, such as a commissioner or commission on IHL to hear

individual complaints of violations thereof, has been suggested. But it may be asked why such a new mechanism would be any more successful than existing ones, such as the International Fact-Finding Commission, which is in danger of falling into abeyance. The real question, therefore, is how can political will be generated in this regard?

Prof. Marco Sassoli (University of Geneva) argued that there continues to be a primacy of State consent and State action notwithstanding innovative interpretations of international legal provisions. Although international customary law can overcome the need for State consent under treaty law, can custom be created simply by the practice of States passing resolutions in the face of State inaction on the ground? The selectivity of State support for rules of IHL undermines its credibility. At the criminal level, even though international customary law has eliminated *de jure* absolute State sovereignty, States do not follow suit and are thereby undermining the *de facto* application of the universal jurisdiction already in place. In the case of Switzerland, for instance, prosecution on grounds of a violation of international criminal law can only take place if there is a genuine link between the person in question and Switzerland; since a recent change in legislation the mere physical presence on Swiss territory (e.g. consulting one's banker) is no longer sufficient. Similarly, Belgium has been forced to amend its law on universal jurisdiction, and Spain has reinterpreted its legislation to limit what was universal jurisdiction to passive personality jurisdiction. The International Criminal Court (ICC) is symbolically important, but to really get results in international criminal law, national prosecutions are vital.

Criminalization may facilitate the return to peace in countries recovering from conflict by individualizing the punishment of wrongdoers (and thereby avoiding collective punishment resulting from sanctions, for example). However, it is equally important to stress that criminalization is not a miracle solution and represents only one response to socially violent behaviour. This is because, first of all, criminalization only ever has a preventive effect if the probability of being caught and prosecuted is high, which currently it is not. Secondly, the perception of legitimacy of the prosecuting forum is essential in the society of the accused. The ICC is an important step in this regard. The ICTY, for example, enjoys little legitimacy in the eyes of many in Belgrade and therefore has little effect within Serbian society. The ICC needs to stand as a symbol of international justice, while national courts do the actual job of prosecuting.

In a similar vein, Nicholas Howen (International Commission of Jurists) claimed that there is a need in the present environment to reaffirm

basic principles and to reject pragmatism with regard to "how much" human rights law and IHL should be respected in a given situation. In particular, he drew attention to the specificity of military justice (which Clemenceau had defined as that which is to justice what military music is to music). The main problem with military justice is the absence of independence and impartiality of the process. Furthermore, in relation to the revelation of abuses by US soldiers and private contractors in Iraq, it could be seen that traditional human rights checks and balances from the moment of arrest, right through to detention and trial or release, are being ignored. Although there is a well-formed body of human rights standards, the current approach is to pick and choose, thereby elevating exception as the new rule. Such an environment makes situations such as the mistreatment of prisoners in Iraq much more likely to occur. Respecting fundamental human rights standards, such as the right to habeas corpus and guaranteeing detainees' access to the outside world, would reduce these kinds of risks. The pragmatic approach to human rights which says that a little bit of human rights is sufficient is ill-advised and legally wrong; while IHL may modify human rights during armed conflicts, it does not suspend them; they continue to apply.

### Discussion

The discussion concentrated on the usefulness of the "back-to-basics" approach and on the division of duties and tasks between organizations that deal with human rights and those that deal with humanitarian assistance. Many humanitarian organizations are taking on human rights issues because they are attractive to donors. The problem is: how can an organization be impartial and humanitarian if it is also reporting on human rights violations and taking political sides? On the other hand, human rights organizations want to be become humanitarian because everything is becoming contractual. Hence the autonomy of all players is being curtailed by the nature of donations, which nowadays tend to be short-term contracts rather than long-term grants. A further question is whether international public or international contractual law might be effective alternatives to hold non-State players accountable. Most panellists argued that war is simply becoming too fashionable and that State compliance with international law is becoming increasingly selective. If States lose sight of the fundamental rule prohibiting recourse to the use of force, the rest is "just window-dressing".

What is needed, therefore, is to strengthen both the individual right to petition and international tort law to hold private contractors accountable for their acts. More specifically, among alternative law enforcement mechanisms

there are provisions in public international law, due diligence rules and laws that regulate the delegation of State responsibility to private contractors. It was also stressed that Security Council resolutions granting immunity to troops and private contractors are a serious step back in efforts to secure human rights and humanitarian assistance through international legal provisions.

On the question of operating procedures, it was asked whether the ICRC should review its working principles (especially confidentiality) in view of the fact that the mistreatment of prisoners in Iraq only stopped once the media got their hands on the leaked ICRC report. Furthermore, since the bomb attack on the ICRC in Baghdad, should not the ICRC consider compromising certain principles, like that of not accepting armed escorts, in order to ensure that it can continue working in all environments? To these questions, it was replied that as long as the ICRC feels that results are being achieved through its confidential dialogue with a State party, it will continue pursuing this avenue. Moreover, to have expected the ICRC to speak out publicly only about prisoner abuse in Iraq does not take into account the way in which the ICRC reacts to situations in other detention centres around the world. Regarding security, as a general rule the ICRC would not accept armed escorts, but would contemplate the temporary use of such escorts in very specific situations, such as when its relief operations are threatened by banditry.

### Protecting the protectors: the role of the military in humanitarian assistance

The chair, Prof. Victor-Yves Ghebali (HEI), remarked that Somalia provided a paradigmatic illustration of the problem of the military being involved in humanitarian missions, as well as the need for protection in volatile environments. He also underscored the relevance of subcontracting a permanent member of the Security Council to carry out military assistance, e.g. France during the 1994 genocide in Rwanda. Finally, he asked panellists the basic question of whether humanitarian assistance can be or has been prevented by the military.

#### Lead Speaker: Mark Laity (former Special Adviser to the Secretary-General of NATO and now a consultant to SHAPE, speaking in a personal capacity)

From the perspective of NATO the title of the present subject would be challenged: the protectors are not only the humanitarian workers, because soldiers regard themselves as protectors as well, not least since the end of the Cold War and the change in the nature of conflicts. This change

means that most, if not all, military interventions are also peace support operations (e.g. Bosnia, Kosovo and Afghanistan), at least as far as NATO's interventions are concerned. NATO missions now involve such tasks as the protection of aid convoys and the stabilization of post-conflict situations. This has been a challenge to both NATO and NGOs, some of which had an anti-military instinct largely based on their experience of non-NATO armies. Initially, when western armies first deployed in Bosnia, some NGOs found it difficult to accept them and to work with and alongside these forces. However, mutual experience in the Balkans has changed this; the recognition that the military can often give an added value to the work of NGOs is leading to increasingly good cooperation. This cooperation has come about as a result of pragmatism on both sides and a confluence and continuity of shared interests, e.g. the construction of refugee camps in Kosovo.

However, it is also true to say that the positive climate generated in the Balkans has changed since 9/11 for a number of reasons. First of all, the interventions in Afghanistan and Iraq did not have the same level of international acceptance. While NGOs accepted with reservations that there was a just cause in Afghanistan, there was far more antipathy towards the conflict in Iraq. NGOs cover a huge range of causes and views, and the fact that many were critical of the occupation of Iraq does affect their willingness to cooperate or coordinate with the Coalition. Secondly, the way in which wars are fought has changed. In peace support operations there is an integration of all sorts of different dimensions beyond straightforward warfare, for instance "winning hearts and minds" and including the delivery of humanitarian assistance during and after the hostilities. This blurs the traditional clear-cut lines, and when stabilization and support for the civilian authority is a military task it is simply unrealistic to think that the military should not get involved on the fringes of humanitarian work if such work is part of the mission's success.

A good example is institutions like the Provincial Reconstruction Teams (PRTs) in Afghanistan. These are not traditional military units but have a variety of functions, which may give NGOs the feeling the PRTs are moving onto the NGOs' turf. We do need to respect each other's roles, but in these more complex scenarios we also need an intelligent approach to each other's concerns. Nor should anyone pretend that somehow NGOs are above the conflict. Ideally relief aid should be directed impartially to the victims of conflicts, yet NGOs know that in reality this does not always happen; it can even fuel a conflict when those fighting grab the aid. Sometimes aid has even been given to fighters in order to ensure that aid convoys can pass. On the part of the military, aid may be given benevolently, but in a "targeted"

way to ease political problems, leading to accusations of the politicization of aid. The speaker argued that, however unwelcome they may be, aid did have political dimensions and it was naïve not to realize this.

A further dilemma is that NGOs have an understandable stake in being seen to be independent, yet at the same time require security in order to dispense aid, which raises the question of the nature and extent of military escorts. The UN and NGOs prefer area security to escorted convoys, in order to minimize contact with the military, but in lawless areas such as parts of Afghanistan it is impossible for the military to guarantee area security. Another problem is that in some of the recent conflicts aid agencies are seen by terrorist and extremist groups as being linked with western political agendas and are therefore seen as "legitimate" targets for terrorist groups. In other words, the NGOs' view of themselves as independent apolitical providers of aid and assistance, who are above the conflict, is not accepted by some of those involved in the fighting who do not recognize their neutrality. This is a growing problem. All these tendencies demonstrate the increasing tension between the need for security and the need for independence.

### Panel presentations

Michel Arrion (European Commission) explained that humanitarian assistance is a mixed competence, both in terms of national and European policies and between European institutions. The Commission implements a European humanitarian policy, while the EU Member States continue implementing their national humanitarian policy. There is so far no specific legal basis in the various European treaties, so humanitarian assistance has been dealt with as part of external relations and development cooperation, but the new constitution may well provide the desired legal framework within which to organize and implement EU humanitarian assistance. European humanitarian assistance is based on the fundamental humanitarian principles, as defined by a 1996 Regulation. While neutrality is mentioned in the preamble to the Council Regulation on humanitarian assistance, a majority of member States rejected the reference to neutrality in operative provisions, but the draft text of the new EU Constitution finally does refer to this principle. It must be noted, though, that in practice it can be schizophrenic: one and the same European Commissioner would suspend development aid for a developing country, only then to grant humanitarian assistance to the victims in that same country.

However, using humanitarian aid to further political goals is not an acceptable practice. For example, the European Commission objected to the practice of the Coalition forces in Afghanistan dropping pamphlets saying that

aid would be given in exchange for information. Military operations disguised as humanitarian missions are dangerous and ill-advised, confusing the populations receiving assistance and putting the lives of aid workers at risk. Military protection of humanitarian workers should only be provided in a limited manner and only at the request of the respective organization. A reinforced common security and defence policy is desirable, not to create a political, legal and institutional framework for humanitarian interventions but for the sake of a clearer division of labour between different EU institutions. The objective should be to distinguish between relief aid, development aid and long-term solutions to the underlying problems. In this sense, humanitarian assistance should not be seen as crisis management but as ad hoc targeted help that provides essential supplies for the victims of conflicts. The latter are — or should be — the prime beneficiaries of protection. However, a more fundamental question is the nature and operation of donation and funding, which should focus on values of impartiality and neutrality and which should again be long-term commitments.

Colonel Bruno Roesli from the Swiss Army held that the prime role for the military is the establishment, creation and expansion of a safe and secure environment. The planning, management and actual execution of humanitarian assistance should be done by civilian humanitarian agencies whenever the situation allows. Especially at the start of an international intervention, situations may occur in which the integrated coordination of all military and civilian activities, including relief for the civilian population, has to be provided by the military. Such was the case in Kosovo in mid-1999, when KFOR (Kosovo Force, the NATO-led international force in Kosovo) had to contend with a complete breakdown of local law and order and vital civilian infrastructures, and international organizations were only gradually building up their own structures and capabilities. However, this period of military-dominated management should remain the very rare exception. In order to smooth the way for cooperation between military and civilian players in complex emergencies, every effort should be made to bridge the existing culture gap between them. Everyone involved in multinational crisis management and humanitarian assistance is still struggling with the strategic implications of 9/11. Existing guidelines for civil-military cooperation in humanitarian assistance have proved to fall conceptually short of existing and emerging requirements. Rather than trying to formally negotiate new guidelines, which are prone to being already outdated when signed, an institutional, regular and structured civil-military dialogue was advocated.

Hugo Slim from the Centre for Humanitarian Dialogue in Geneva argued that there is inevitable ambiguity between military and humanitarian

players — throughout history people trying to be humanitarian have required the use or protection of armed force, while soldiers have often felt it necessary to carry out humanitarian acts. Secondly, all military forces have humanitarian responsibilities and must take them seriously, which is to say that soldiers should be humane and compassionate in warfare and that they are bound by obligations under the rules of the law of war. He also cautioned against excessively simplistic oppositions and categorizations. There is not only NATO and the West on one side and everyone else on the other side: the players can also be mandated or non-mandated troops, belligerent or entrusted with peace missions; there can be insurgents as well as government counter-insurgents, not to forget the increasing number of private military companies. Other criteria can cut across all these categories.

Moreover, it is indispensable to distinguish the wide range of different roles that all these different players can take on. They include:

(i) area security, i.e. securing an environment and thereby enabling humanitarian organizations to access certain areas;
(ii) close protection of vulnerable groups and humanitarian workers and organizations;
(iii) providing and distributing aid; and
(iv) providing logistics to enable others to distribute aid.

The predominant considerations raised by the question whether to protect the protectors seem to be as follows: motives, legitimacy, competence, perception, and the risks involved in the so-called phenomenon of "cross-dressing". All are complicated by overlapping motives. On the one hand, NGOs have sometimes happily joined with brutal military forces (e.g. Mozambique, Sandinistas in Nicaragua). On the other hand, there are conflicting moral values at work, for instance with respect to insurgency and counter-insurgency. At other times, humanitarian organizations and the military have the same goals, such as providing food, water and shelter.

In his presentation, Balthasar Staehelin (ICRC) argued that in an increasingly polarized world, humanitarian actors face the danger of being both instrumentalized and rejected. The legitimacy of humanitarian actors is linked to their strict adherence to an impartial — and as regards the ICRC — an independent and neutral approach. If humanitarian action is used as a tool to further a political and/or military agenda, humanitarian actors become the target of the adverse party to a conflict. The growing insecurity of humanitarian actors today underlines the imperative need to separate humanitarian from political and military action, not to integrate it! In this light, the ICRC is opposed to concepts such

as the PRTs: they constitute a dangerous blurring of lines where military and humanitarian actors appear without clear distinction and where the delivery of aid is at times made dependent on the local communities' collaboration with war efforts. This violates the principles of impartiality and neutrality and may eventually lead to rejection of humanitarian aid or aid workers.

Humanitarian and military actors should co-exist — clearly distinct — with mutual respect for the respective mission. Military actors play a key role in the implementation of IHL: their compliance with the law leads to a positive impact in humanitarian terms. Also, the creation of a stable and secure environment, arms collection and overseeing demobilisation are all military tasks greatly contributing to improving the situation in humanitarian terms. There may be times when non-military actors are unable to deliver aid and where military actors have to step in. But this should be a last resort since the military are neither trained nor equipped to do so.

The ICRC follows an approach based on its strict adherence to the principles of the Red Cross and Red Crescent Movement. The principle of independence entails that it refuses to be part of the "political toolbox", while the principle of neutrality ensures an ongoing dialogue with all parties to the conflict without blame or fault for political stances being ascribed. Impartiality remains the principle by which unconditional assistance is provided, depending on needs alone.

The war in Iraq can serve as an illustration to show what this concretely meant. The ICRC decided to remain present and operational in Iraq during the war and maintained a close dialogue with all parties including the former Iraqi government. This strictly neutral and independent approach, exclusively centred on the protection and assistance needs of war victims on all sides, enabled the ICRC to enjoy the trust of the warring parties, which was a precondition for many vital operations. To give but one example: in March 2003, when Basra was surrounded by UK troops but the Iraqi governor was still in power, ICRC teams managed to operate across the front-lines to repair the main pumping-stations which averted a major health crisis. Tragically, in summer and autumn 2003, the ICRC suffered deliberate attacks against its personnel and its delegation in Baghdad. It decided nevertheless to stick to its approach which excludes resorting to military protection, even if that meant adopting a more discreet approach including the temporary closure of its offices in Baghdad and Basra to the public. The ICRC security concept relies on its acceptance by and dialogue with all actors of violence in a given context. Where this acceptance is lost, the ICRC strives to restore it. Certain elements are in the hands of the ICRC,

but the overall direction humanitarian action will take may well affect its capacity to resist the vicious circle of instrumentalization and rejection.

### Discussion

In the first part of the discussions, the speaker spelled out his view on the role of aid organizations. Asked whether the tension between independence of, and support for, aid organizations is not only at the operational level but also at the strategic level because donor States have an overt political agenda and tailor their funding accordingly, he maintained that the neutrality of all aid organizations is fast being eroded, however much they wanted to preserve it. This even applied to the ICRC despite its continuing firm adherence to that concept, for which it was hugely respected within NATO. He argued that the traditional freedom of NGOs to work in conflict zones depended on everyone involved, including the various factions, accepting the "rules of the game", but that some of the new terrorist and fundamentalist groups did not accept the idea of neutrality and actually targeted aid organizations — he wondered whether neutrality could survive. He also suggested that some NGOs were more political than they liked to admit, with their own agendas sometimes tailored to competing for funds with other aid organizations, which could also lead to a lack of coordination among such organizations. More generally, faced with a question about neutrality and the Western stance towards the Bosnian Serbs, he contended that the ICRC was rigorously apolitical, whereas other aid organizations were less so in practice.

Other panellists challenged this interpretation, arguing instead that political agendas and funding on the part of States have forced aid organizations to compete for funds and to take sides. However, this has not entailed any relinquishing of neutrality, independence or impartiality with respect to their fundamental stance. Maintaining neutrality while needing to "confront the truth" is difficult, they said, but there is no evidence that NGOs are not trying to make the principle work.

There was also disagreement between panellists on whether and, if so, to what extent early coordination in pre-conflict situations can avoid problems of delivering humanitarian assistance in post-conflict situations. Some argued that this is inherently problematic because it takes the conflict almost for granted and makes it quasi-inevitable, never mind the impossibility of planning for highly contingent events. Others, however, held that such coordination can be tremendously helpful, e.g. in the aforesaid case of Basra in Iraq. The question is: what do you discuss and with whom? The ICRC had very productive contacts with both Iraqi and Coalition forces before, during

and after the conflict. The European Commission had also begun coordination talks as early as possible in the lead up to the conflict. What is crucial is confidentiality and trust of all the parties involved. Better organization and coordination between NGOs at this stage would also be helpful.

The problem of the irrelevance of IHL when there is a great disparity between the size and strength of the parties to a conflict was raised. Such inequalities tend to lead to temptation for the weaker side to resort to unlawful methods of warfare, such as perfidy. For guerrillas, strict compliance with the rules of IHL means leaving themselves open to a likely defeat. How are such belligerents to be persuaded to obey the rules of combat? The panel answered that justifications put forward by the weaker parties for recourse to unlawful methods of warfare tend to lapse into arguments based on *jus ad bellum*. Nonetheless, there have been some examples of guerrillas being able to induce the stronger party (the government armed forces) to change policy, for example Hezbollah convincing Israel to leave Lebanon. It was also suggested that the application of Additional Protocol I would solve some of the problems associated with recourse to perfidy. It should also be recognized that guerrillas are increasingly waging wars against civilians, in breach of the basic protection that is the essence of IHL. These unresolved problems with regard to the application of IHL to asymmetrical conflicts highlight the fundamental question of whether armed struggle is always the best means to resolve a dispute.

### Sustainable assistance to the victims of armed conflicts and post-conflict nation-building

The chair of the final session, Bertrand Ramcharan, Acting High Commissioner for Human Rights (OHCHR), set out some of the central questions and issues with regard to sustainable assistance to victims and post-conflict nation-building:

(i) the distinction between national capacity and international assistance;
(ii) the need to marshal national capacity;
(iii) the importance of a rallying vision (*vision rassemblante*) for nation-building;
(iv) how should international interest in national scenarios be sustained once a conflict has subsided;
(v) how should assistance be drawn down from core areas;
(vi) how should assistance needs be monitored as the situation evolves;
(vii) how should humanitarian imperatives be sustained in the face of dwindling resources.

Lead Speaker: Alvaro de Soto (UN)

De Soto argued that humanitarian assistance and nation-building are — or at least should be — unrelated and that it is preferable to speak of post-conflict peace building, rather than nation-building. This has been UN policy at least since the 1992 report *Agenda for Peace* on enhancing the UN's capacity for preventive diplomacy, peace-making and peace-keeping. This report defines peace-building as a "set of activities with view to ensuring that a conflict will not recur". In practical terms such activities include, at their core, the building up of civilian institutions so as to ensure that channels are provided for addressing grievances that in the past have led to armed uprising or confrontation. Many if not most internal conflicts arise because of authoritarian or exclusionary policies.

However, the inclusive approach advocated by the UN can create clashes, to the extent that some objectives directly conflict with others. For instance, in the case of El Salvador, the International Monetary Fund (IMF) and the World Bank (WB) helped design stabilization and structural adjustment programmes that involved substantial cuts in public spending, the lowering of public deficits as well as the restructuring of national debt. Yet at the same time, effective peace-building required higher public expenditure, *inter alia* by way of "soft loans".

Whatever the problems may be, it is clear that there is no genuine alternative to an approach that includes all players on which viable settlements rely, as evinced by the relative success of this approach in post-conflict situations as varied as Guatemala, Bosnia and Kosovo. For instance, the proliferation of players in Bosnia's post-conflict scenario inspired the "4-pillar" solution in Kosovo. One of those pillars in Kosovo was humanitarian assistance, which was not formally part of the post-conflict settlement in the core sense of reintegrating former combatants and creating an institutional framework to mediate future tension. During the negotiations over the reunification of Cyprus, the UN brought in the IMF and potential donors to show the Cypriots that the international community would be there for them should the settlement go forward.

The point is not to confuse humanitarian assistance and peace-building, but to concentrate on specific needs at particular moments in time: the first step is to involve the international community in terms of conflict prevention, which continues to be radically insufficient in both nature and scope. Secondly, if there is a situation of internal conflict or inter-State war, there is of course no alternative to humanitarian assistance. But this assistance is in no way part of the same settlement or toolbox as peace-building and

reconstruction. The reason is that the effectiveness of humanitarian assistance is not as dependant on inclusiveness, consensus and common values as peace-building. The latter is always some form of social engineering, requiring a consensual approach that brings in all relevant players and also requiring political direction. Referring to Isaiah Berlin, Alvaro de Soto remarked that not all human values are necessarily convergent, and that it is therefore a matter of political choice which values to adopt, defend and promote.

### Panel presentations

In her presentation, Esther Brimmer, Deputy Director of the Centre for Transatlantic Relations, Johns Hopkins University SAIS, focused on four issues:

(i) the multifaceted dimension of sustainable assistance;
(ii) transatlantic relations and sustainable assistance;
(iii) post-conflict conduct and legitimacy; and
(iv) recovering conflict prevention.

First of all, regarding sustainable assistance, she argued that early planning and provision of funds are absolutely central to the outcome. This is because economic and social needs begin to arise early in conflict situations, when it is infinitely more difficult to devise strategies. Assistance, if it is to be sustainable, requires funding at an appropriate level: for instance, US funding for Afghanistan was a priority in 2002, but there were no provisions for it in the 2003-2004 draft budget until Congress forced the Bush Administration to redeploy funds. What this also highlights is the importance of continuous political support and the right division of labour: who does what and when. At least two key questions arise: is there some continuum between relief and development aid? Is it more politically sustainable that the UN subcontracts operations to coalitions of national governments or regional organizations or that the UN conducts operations directly?

Concerning transatlantic relations, she said that there is a balance to be struck between bilateral and multilateral approaches to conflict management. While there is no blueprint for intervention, it is clear that the use of as many channels as possible provides more mileage. Among the many questions, she drew particular attention to the following two: how to bring about the necessary political will to intervene and to engage in sustainable assistance? How to back advocacy of intervention with the required resources, i.e. how to match funds to rhetoric? Also, is it possible to recover the engagement for peace-keeping after recent events (pointing out that the US is unlikely to engage in more peace-keeping after Iraq)? She argued that there are times when military

force is appropriate; the question remains: when are those times? As for post-conflict conduct and legitimacy, three factors determine whether assistance is and remains legitimate: the rule of law, a continuous balance between bi- and multilateral approaches and the impact of different policies on peace-building. For instance, in recent times humanitarian assistance has been undermined by human rights abuses and democracy in Iraq has been undermined by abuses — torture — at Abu Ghraib. On the latter issue, Ms Brimmer emphasized that the mistreatment of prisoners is morally reprehensible, nor is it, moreover, a pragmatic step towards improving the situation in Iraq. Finally, the Iraq campaign has also permanently undermined efforts to recover conflict prevention as a means to give reality to the concept of protection. Among those supportive of multilateral engagement, there need to be decentralized networks working on the problems and able to think about them creatively, undisturbed by present political pressures.

Mona Rishmawi (OHCHR) explained that the issue of the sustainability of assistance raises major challenges for an institution like the OHCHR. To address this issue, it should be acknowledged at the outset that situations such as those taking place in Afghanistan and Iraq demonstrate that recent conflicts are continuous and complex; it is therefore difficult to structure operations along the traditional concepts of post-conflict peace-making, peace-keeping and peace-enforcement. Also the attacks against the UN headquarters in Iraq on 19 August 2003, added a new dimension to the UN's ability to deploy staff in many places because of the perception in some quarters that the UN lacks neutrality. This has led to serious problems with staff security.

Three human rights issues were considered by Rishmawi to be of particular relevance to the subject of this panel: protection, international justice and justice reform. Victims of conflict ultimately want enhanced physical protection. They first look towards their own government for protection. They address the international community in order to push governments to respect human rights, ease restrictions and reverse repressive policies. When this fails, victims often urge the international community to act further. Here, victims often talk about international presence and rarely about military intervention, as civilians usually fear the consequences of even the most benign wars. Partially in response to these calls, the Security Council now almost routinely includes a human rights component in almost every peace mission. In some situations, the Security Council has also responded by giving peace-keepers an explicit protection mandate, as was the case for the situation in the Democratic Republic of the Congo. The main issue is the

political will to do something meaningful about a situation. The situation currently unfolding in Sudan's Darfur region poses particular problems in this area.

Another challenge is how to assist societies in addressing past, present and future human rights violations. There are major concerns regarding the capacity of local mechanisms, particularly the judiciary, to address in a fair, impartial and efficient manner vast magnitudes of human rights violations. Many judiciaries are seriously weakened before and during conflicts. In fact, the inability of national conflict resolution mechanisms to effectively address individual and group grievances is amongst the most frequent root-causes of conflict.

Recent years have witnessed the evolvement of several post-conflict "justice" and truth and reconciliation mechanisms. We have seen the creation of two *ad hoc* tribunals, at least five mixed or hybrid tribunals, the establishment of the International Criminal Court as well as about forty truth and reconciliation processes. There are many questions surrounding how these choices are made. Is the process nationally or internationally led? Are national societies presented with options or fixed views? Who really takes these decisions? How does international justice affect national justice? What kind of legacy does international justice leave behind and how much national judiciaries benefit from the international approach? The OHCHR is currently developing some tools to assist societies to enhance their knowledge regarding the challenges, processes and options in this area.

Another challenging area is that of justice reform. In the so-called post-conflict phase, the international community rushes to "reform" what is often seen to be a dysfunctional justice sector. Most of the approaches in this area are donor-driven. Emphasis is placed on rehabilitating buildings, furniture, and equipment that suffered from the conflict. Effort is also invested in reforming national laws and constitutions. But sometimes, substantive legal reforms are carried out unnecessarily and without an adequate understanding of the legal system itself. National models rather than international experiences are promoted and shared especially by bilateral donors. Justice reforms becomes a tool for third party influence. When the funding decreases, justice reform becomes less attractive. In addressing these issues, it must be acknowledged that justice reform requires some long-term perspectives. There is a need to influence not only laws and rules, but also attitudes and behaviours. The OHCHR is investing in developing techniques to help map out national justice systems, providing some benchmarks for reform and for monitoring the performance of such justice systems during and after the reform phase.

Franklin Thévenaz (Swiss Agency for Development and Cooperation (SDC)) explained that the concept of sustainable assistance was new for

many states. Previously, one talked only about emergency relief. The new concept involves notions of prevention, preparedness, rehabilitation and advocacy. It is a sobering statistic that 40 per cent of countries emerging from conflicts will lapse back into conflict, the percentage being 60 per cent for Africa. The road to sustainability is fraught with difficulty and therefore there is a constant need to provide assistance and protection to populations undergoing such transitions. We have, it seems, entered into an age where everything seems possible and acceptable, an environment that started to be in place before 9/11. When crises occur, every actor is present, e.g. in Kosovo, after the return of the civilian population, there were 520 NGOs working on the ground. In addition, there is a need to balance national capacity with international assistance. When a natural disaster occurs, 95 per cent of people are assisted by local assistance. There is a need, then, to concentrate on capacity-building. Meanwhile, interest at the international level needs to be sustained to secure long-term financing.

### Discussions

At the beginning of the discussions the chair, Bertrand Ramcharan (UNHCR), raised the following questions: in Bosnia, the UN Secretary-General's Special Envoy was in charge of peace-making, peace-keeping and humanitarian assistance at the same time: can one compartmentalize these tasks? Concerning the relation between humanitarian assistance and peace-building, how far apart are concept and reality? Is it not incumbent upon national decision-making bodies to devise peace-building strategies? Other panellists also focused on the relation between pre- and post-conflict situations, arguing that it is simply wrong to destroy all existing structures and institutions in the hope of building peace and reconciliation. This is because at least some existing structures are functional and therefore indispensable to stable, pacified post-conflict situations: for instance, except for the presidential decrees, the Iraqi legal system was good and there were over 50,000 well-trained lawyers. To destroy this system is to deprive the country of valuable resources.

A second focus of debates was the possibility to revive the idea of a UN standing army, which could intervene in places like Darfur and secure an international protective mandate. It was widely agreed that there will be no such army under the sole authority of the UN Secretary-General in the foreseeable future because no UN member State is as yet prepared to delegate sovereignty in this way. However, what might be politically feasible is something like an international police force that helps to secure a post-conflict situation, or a rapidly deployable observation force.

The problem of women being exploited in post-conflict societies under the control of peace-keepers was the third focus of the debates. It was said that since the UN operations in Sarajevo and Kosovo, a change in the culture of peace-keeping was emerging. The Secretary-General had issued a bulletin providing clear guidelines on the subject. Furthermore, the growing awareness of anti-trafficking laws was putting pressure on peace-keepers to protect women vulnerable to sexual exploitation.

On the issue of the role of justice in post-conflict societies, a question at the outset was how mindful should efforts to restore justice be of those trying to make peace? In the Democratic Republic of Congo, for instance, should the UN wait for the outcome of the peace process before deciding whether to refer an investigation to the ICC? It was suggested that policymakers should be mindful of such efforts, but should not give them undue precedence over all other principles important for peace-building. Instruments of justice can "hover in the background" during peace negotiations. The real question is: when do tribunals become appropriate? In El Salvador, there was no judiciary which could have dealt with cases such as those brought before the Truth Commission. Justice could have been achieved only through an ad hoc international tribunal, which no one had contemplated at the time. The Commission on Historical Clarification in Guatemala was specifically enjoined not to name names, but was able to recommend that a number of people be banned from the army or political positions. In addition, consideration should be given to the right to compensation for violations of rights, e.g. in Iraq. From the point of view of the OHCHR, breaking the cycle of impunity and bringing those responsible for egregious violations of human rights to justice will help to facilitate the return to peace. Well thought out processes need to be in place to improve justice systems in the wake of conflict.

It was likewise stressed that a properly functioning legal system requires a stable political environment and a dynamic economy that can help match principles to practices. In this connection, it was suggested by one participant that "sustainable" should mean "self-sustainable" rather than a sustained operation of the international community in a particular context. One of the issues that were discussed was how to counterbalance the priorities of the G7, the World Bank, the IMF and the World Trade Organization (WTO) with the requirements of peace-building, also at the stage of peace negotiations. Rather than seeking alternatives, the panellists agreed that the UN provides by far the best umbrella for such all-inclusive and all-encompassing negotiations and the implementation of peace settlements.

# L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie (1954-1962)

FRANÇOISE PERRET*

## De l'insurrection à l'indépendance

Dans la nuit du 1er novembre 1954, une série d'attentats secouaient trente localités différentes en Algérie, tandis qu'un communiqué du Front de Libération nationale (FLN) révélait l'existence d'une organisation de lutte armée capable de mener des actions coordonnées sur l'ensemble du territoire algérien. Cette « nuit de la Toussaint » allait marquer le début de huit années de luttes fratricides qui devaient conduire à l'indépendance de l'Algérie.

Il ne s'agissait pas d'un coup de tonnerre dans un ciel bleu. La France avait conquis l'Algérie sans dessein colonial clair. En Algérie même, les communautés musulmane et européenne menaient une cohabitation difficile, celle de communautés qui n'avaient pas appris à partager le même destin.

La défaite de juin 1940 avait témoigné de l'affaiblissement de la France. Succès des Alliés, le débarquement anglo-américain du 8 novembre 1942 en Algérie et au Maroc avait été perçu par les musulmans comme un nouvel abaissement de la métropole. Trop timides, les ouvertures du Comité français de Libération nationale avaient suscité le dédain des nationalistes algériens, alors qu'elles étaient violemment rejetées par les colons. Le 8 mai 1945, à l'heure même où la capitulation allemande mettait fin à six années de guerre en Europe, des émeutes éclataient à Sétif. La répression, disproportionnée, laissa de profondes blessures qui persuadèrent nombre de leaders algériens que l'égalité des droits, promise par la France, était un leurre et qu'il n'y avait d'autre issue que l'indépendance de leur patrie.

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Le 7 mai 1954, la capitulation du camp retranché de Dien Bien Phu donnait une nouvelle preuve de la faiblesse et de l'isolement de la France et démontrait l'efficacité d'une lutte révolutionnaire impliquant la mobilisation de toute la nation. L'exemple était donné. Dans le cours de l'été, un groupe de jeunes militants issus du Parti du peuple algérien décide de passer du combat politique à la lutte armée.

Comme en 1945, les attentats du 1er novembre 1954 provoquent une réaction disproportionnée des forces françaises. Pour la France, en effet, l'Algérie, conquise dès 1830, est une terre française, peuplée de plus d'un million de colons français, qu'il n'est pas question d'abandonner. Mais le FLN, qui a pris l'initiative de l'insurrection, entend poursuivre le combat jusqu'à l'indépendance de l'Algérie. Dans ces conditions, la lutte sera acharnée et le FLN, qui n'hésite pas à exécuter des Algériens accusés de collaborer avec la France, ralliera de plus en plus de partisans parmi la population algérienne, alors qu'en France une partie de l'opinion et certains hommes politiques arriveront progressivement à la conviction que la guerre est inutile et que l'indépendance de l'Algérie est inéluctable, après celle accordée en mars 1956 à la Tunisie et au Maroc. Mais une partie de l'armée et la grande majorité des colons ne peuvent envisager la perspective d'une Algérie indépendante, ce qui conduira la France au bord de la guerre civile.

Ces années de guerre, qui aboutissent à la proclamation de l'indépendance de l'Algérie le 3 juillet 1962, sont marquées par le tragique enchaînement des attentats provoquant la répression, suivie de nouveaux attentats entraînant une répression de plus en plus dure avec pour résultat toujours plus de victimes dans les deux camps.

Dès le printemps 1955, les autorités françaises proclament l'état d'urgence et déportent dans des *« camps d'hébergement »* les personnes qu'elles soupçonnent de sympathie pour le FLN; celui-ci multiplie les attentats contre les Européens, qui constituent des *« groupes anti-terroristes »*. Le FLN se dote aussi d'une structure politique: du 20 août au 5 septembre 1956, se réunit clandestinement le *« Congrès de la Soummam »* (vallée de la Kabylie) qui crée le *« Conseil national de la révolution algérienne »* (CNRA) comptant trente-quatre membres, ainsi qu'un *« Comité de coordination et d'exécution »* (CCE) de cinq membres.

Des contacts sont pris clandestinement au Maroc entre des émissaires français et les dirigeants du FLN. Toutefois, le 22 octobre 1956, l'avion qui ramène de Rabat à Tunis cinq chefs du FLN – Ahmed Ben Bella, Hocine Aït Ahmed, Mohamed Boudiaf, Mohamed Khider et Mostefa Lacheraf – est

intercepté par l'aviation française; les cinq occupants sont incarcérés en France.

Dix jours plus tard, Israël, la France et le Royaume-Uni se lancent dans l'expédition de Suez. Si, pour Israël, l'objectif principal est de détruire les bases des *« fedayin »* palestiniens à Gaza et dans le Sinaï et, pour l'Angleterre, de reprendre le contrôle du Canal de Suez, que l'Égypte avait nationalisé quelques semaines auparavant, la France entend surtout priver le FLN de son principal appui extérieur en renversant le président Nasser, perçu comme la figure de proue du nationalisme arabe et comme le principal soutien de l'insurrection algérienne. L'expédition se termine par un fiasco humiliant pour les anciennes puissances coloniales. Sous la double pression des États-Unis et de l'Union soviétique, la France et l'Angleterre sont contraintes de retirer leurs troupes. Le FLN peut désormais compter sur un soutien accru de l'Égypte.

En Algérie l'insurrection ne cesse de s'amplifier et gagne les villes. Vétéran de la guerre d'Indochine, le général Salan est nommé commandant en chef en Algérie, alors que le général Massu, commandant de la 10e division de parachutistes est chargé de rétablir l'ordre à Alger. Le 7 janvier 1957, les *« paras »* prennent possession d'Alger; ils entrent dans la casbah le 13 et arrêtent 1500 suspects. Mais les bombes ne cessent d'exploser dans différents quartiers de la ville; la *« bataille d'Alger »* continue et ce n'est qu'en septembre 1957 que les parachutistes parviennent à maîtriser la situation. Pourtant la guérilla se poursuit, notamment dans les Aurès et en Kabylie; l'armée française recrute des *« harkis »* (soldats algériens) dans tout le pays; la répression se durcit et des populations entières sont confinées dans des *« centres de regroupement »*.

Dès 1958, les dirigeants du FLN établissent le centre de ralliement de l'Armée de libération nationale (ALN) sur sol tunisien, près de Sakiet Sidi Youssef. Le 11 janvier 1958, des soldats français tombent dans une embuscade de l'ALN aux confins algéro-tunisiens; quinze d'entre eux sont tués, un est blessé et quatre sont faits prisonniers. Le 8 février, l'armée française bombarde Sakiet Sidi Youssef; le président de la République tunisienne, Habib Bourguiba, rappelle son ambassadeur à Paris et réclame le retrait des troupes françaises de l'ensemble du territoire tunisien, y compris de la base aéronavale de Bizerte, que la France avait conservée et après la fin du protectorat.

Dans les mois qui suivent, les affrontements entre l'armée française – avec laquelle collaborent près de 20 000 harkis – et l'ALN s'intensifient. Le 10 mai 1958, pour protester contre l'exécution de plusieurs de ses militants en Algérie, le FLN exécute trois soldats français qu'il détient. Cette exécu-

tion provoque une très vive émotion. Le 13 mai, les Français d'Algérie organisent une gigantesque manifestation à Alger, au nom de *« l'Algérie française »* ; alors qu'à Paris, la Quatrième République traverse une nouvelle crise ministérielle, les généraux Massu et Salan constituent un *« Comité de Salut Public »*, qui prend le pouvoir en Algérie. Le 15 mai, le général de Gaulle annonce qu'il est prêt à *« assumer les pouvoirs de la République »* ; le 29, le président de la République, René Coty, annonce au Parlement qu'il a fait appel au général de Gaulle pour former le prochain gouvernement. Ainsi, le putsch du 13 mai sonne le glas de la Quatrième République, dont l'autorité était minée par des crises gouvernementales incessantes, la défaite d'Indochine et son incapacité à rétablir l'ordre en Algérie.

Le 17 septembre 1958, au Caire, le FLN décide la création du *« Gouvernement provisoire de la République algérienne »* (GPRA), présidé par Ferhat Abbas. Dans les jours qui suivent, le GPRA est reconnu par la Tunisie, le Maroc, la Syrie, le Liban et l'Égypte.

Cependant, les attentats se multiplient en France comme en Algérie. Le 3 octobre 1958, à Constantine, de Gaulle annonce un ambitieux programme de développement économique et social de l'Algérie pour les 5 années à venir, le « Plan de Constantine ».

Le 19 décembre 1958, Salan quitte l'Algérie. Il est remplacé par le général Challe qui remporte d'importants succès militaires contre l'ALN durant les premiers mois de l'année 1959.

Pourtant, le 16 septembre 1959, de Gaulle dévoile son plan d'autodétermination de l'Algérie et propose la *« paix des braves »*. Cette annonce plonge dans la stupeur les colons, qui avaient fait appel à de Gaulle au nom de l'Algérie française et qui voient dans l'autodétermination les prémisses d'un abandon; elle déçoit également les militaires, qui avaient la conviction de pouvoir l'emporter sur le terrain. Le 22 janvier 1960, de Gaulle destitue Massu, qui avait critiqué sa politique; les Français d'Algérie entament une grève générale, mais de Gaulle ne se laisse pas fléchir et confirme qu'il poursuivra la politique devant conduire à l'autodétermination.

Le 24 avril 1960, le général Challe est destitué à son tour et, le 14 juin, dans une allocution télévisée, de Gaulle renouvelle ses offres de paix. De mai à juillet 1960, les autorités françaises libèrent plus de 3500 personnes internées dans des *« camps d'hébergement »*. Le 20 juin, le GPRA annonce qu'il est prêt à négocier. Les premières négociations franco-algériennes se déroulent à Melun du 25 au 29 juin, mais c'est un échec et, dès septembre, les attentats reprennent en force à Alger.

De Gaulle se rend en Algérie du 9 au 13 décembre 1960; il est acclamé par les Algériens et conspué par les Européens. Durant cette visite, les affrontements entre les deux communautés font plus de 100 morts, dont une écrasante majorité de musulmans.

Le 8 janvier 1961, les Français de la métropole approuvent massivement par référendum le principe de l'autodétermination de l'Algérie. Rentré clandestinement en Algérie après s'être réfugié en Espagne, le général Salan prend la tête des partisans de l'Algérie française et crée, avec un groupe d'officiers et l'ancien dirigeant des étudiants d'Alger, Pierre Lagaillarde, *« l'Organisation de l'armée secrète »* (OAS).

Fin janvier 1961, de Gaulle charge Georges Pompidou, alors membre du Conseil constitutionnel, de renouer secrètement, en Suisse, les négociations avec le FLN. Le 30 mars 1961, le gouvernement français annonce l'ouverture des pourparlers d'Evian pour le mois d'avril. Le Premier ministre, Michel Debré, ordonne une trêve unilatérale en Algérie.

Le 22 avril 1961, les généraux Challe, Salan, Jouhaud et Zeller prennent le pouvoir à Alger. Le *« putsch »* échoue car les soldats du contingent refusent de le soutenir, alors qu'en France, les forces armées restent loyales au gouvernement. Les généraux Challe et Zeller se rendent; Salan et Jouhaud entrent dans la clandestinité.

Le coup de force du 22 avril n'empêche pas la reprise des négociations, qui débutent effectivement à Evian le 20 mai 1961. La France annonce le maintien de la trêve unilatérale et de la libération de 6000 militants du FLN. Cependant, les pourparlers sont rompus le 13 juin sans qu'on soit parvenu à un accord. L'OAS et le FLN poursuivent leurs attentats; dès décembre 1961, l'OAS tient pratiquement Alger.

Après différents contacts secrets, les négociations reprennent le 7 mars 1962 et les accords d'Evian sont signés le 18 mars 1962. Le cessez-le-feu en Algérie entre en vigueur le lendemain.

Le 8 avril, la population de la métropole approuve massivement l'accord d'Evian. Cependant, durant les mois d'avril, mai et juin, les Européens fuient l'Algérie en masse.

Le 1er juillet 1962, la population algérienne se prononce à la quasi-unanimité pour l'indépendance, qui est proclamée le 3 juillet.

## L'action du CICR

### Premières missions en Algérie et au Maroc

Au début de l'année 1955, le CICR, qui a déjà un délégué honoraire[1] en Algérie, Roger Vust, offre ses services au gouvernement français afin de pouvoir entreprendre une action humanitaire en Afrique du Nord. Cette démarche est effectuée par le délégué du CICR à Paris[2], William Michel, qui adresse, le 1er février 1955, une lettre au président du Conseil des Ministres, Pierre Mendès France, dans laquelle il lui propose que le CICR puisse: « *exercer sur les territoires de l'Algérie, du Maroc et de la Tunisie, certaines de ses activités traditionnelles ci-dessous énumérées:*

1. *Recevoir communication de la liste nominative des personnes arrêtées à la suite des événements (condamnés, prévenus, éventuellement suspects).*
   *En outre, le Comité international de la Croix-Rouge estimerait désirable que la famille des détenus puisse, si ce n'est pas déjà le cas, avoir à bref délai communication du fait de leur détention.*
2. *Être autorisé à visiter les lieux d'internement et de détention où se trouvent ces personnes, étant entendu que l'objet de ces visites serait strictement limité au régime de la détention et n'en concernerait aucunement les motifs. Il serait souhaitable que le délégué du Comité international pût, au cours de ces visites, s'entretenir sans témoin avec les détenus. Il va de soi que ce délégué ne manquerait pas d'exposer, s'il y avait lieu, aux autorités compétentes les constatations qu'il aurait pu faire à la suite de ses visites.*
3. *Faciliter et au besoin organiser – vraisemblablement – avec le concours de la Croix-Rouge française, l'échange de correspondance entre les détenus et leurs familles ou la Croix-Rouge. Cela peut se faire, par exemple, au moyen des formules de messages Croix-Rouge, de caractère exclusivement familial, en usage depuis bien des années dans divers pays.*
4. *Étudier et aménager une éventuelle distribution aux détenus de certains secours (matériels ou intellectuels) cela sans doute avec le concours de la Croix-Rouge française.*

1 Un délégué honoraire du CICR est un citoyen suisse résidant dans un pays étranger où il travaille généralement pour une entreprise suisse et auquel le CICR demande de lui rendre divers services par exemple: prises de contacts avec des personnalités, visites de détenus, distributions de secours, etc.

2 Le CICR maintient une délégation à Paris depuis la Libération notamment pour les visites et l'assistance aux prisonniers de guerre allemands poursuivis ou condamnés pour des délits commis durant l'occupation. Le 16 novembre 1954, un représentant du CICR avait approché le président de la Croix-Rouge française au sujet des événements en Algérie, mais cet entretien n'avait débouché sur aucun résultat. Le CICR avait donc décidé de charger le chef de sa délégation à Paris de prendre contact avec le chef du gouvernement français.

5. *Étudier dans les mêmes conditions une éventuelle action d'assistance en faveur des familles des détenus ou internés que les événements, les privant de leur soutien naturel, peuvent avoir mises en difficulté* ».

Le délégué termine sa lettre en précisant que l'action du CICR s'exercerait dans un but strictement humanitaire et ne donnerait lieu à aucune publicité[3].

Le 2 février, le président du Conseil, Pierre Mendès France, fait savoir au CICR que le gouvernement français autorise ses délégués à se rendre en Algérie et au Maroc pour y visiter les lieux de détention avec la possibilité de s'entretenir sans témoin avec les détenus[4].

« *Présidence du Conseil* *Paris, le 2 février 1955*

*Cher Monsieur,*

*J'ai bien reçu la lettre du 1er février dans laquelle vous me confirmez les demandes que vous m'aviez faites verbalement le 31 janvier au sujet des questions nord-africaines qui préoccupent le Comité international de la Croix-Rouge.*

*J'ai étudié avec soin vos diverses demandes et j'ai l'honneur de vous communiquer ci-dessous, point par point les décisions qui ont été prises par le Gouvernement.*

1. *Pour des raisons d'ordre public évidentes, le Gouvernement français ne peut pas vous communiquer la liste nominative des personnes qui ont été arrêtées à la suite des événements qui se sont produits en Afrique du Nord. La liste de ces personnes ne présenterait d'ailleurs, pour vous, aucun intérêt pratique, car elle subit des modifications fréquentes, la plupart des personnes en question étant rapidement remises en liberté, tandis que d'autres peuvent être éventuellement arrêtées. Pour les mêmes raisons, je ne puis vous communiquer la liste des membres des familles des détenus. Ces familles – contrairement à ce que paraît impliquer votre lettre – sont d'ailleurs exactement averties de l'arrestation et du lieu de détention des personnes que les autorités de police ou de justice estiment devoir maintenir en état d'arrestation.*
2. *Le Gouvernement français est disposé à autoriser des représentants de votre Comité à se rendre en Algérie et au Maroc pour y visiter les lieux de détention, étant entendu que l'objet de ces visites serait strictement limité, comme vous le suggérez vous-même, au régime de la détention. Le Gouvernement donnera des instructions pour que vos délégués puissent, s'ils le désirent, s'entretenir sans témoin avec les détenus.*

3 ACICR, B AG 200 (3), Lettre du chef de la délégation du CICR en France, William Michel, au président du Conseil des Ministres, Pierre Mendès France, 1er février 1955.

4 ACICR, B AG 200 (3), Lettre de Pierre Mendès France au chef de la délégation du CICR en France, 2 février 1955.

*Je pense que vous ne manquerez pas ensuite de faire part au Gouvernement français des constatations auxquelles vos délégués auraient pu procéder. Le séjour de vos délégués en Algérie et au Maroc me semble devoir être d'une durée limitée et ne devrait pas excéder un mois.*

3. *Vous proposez, par ailleurs, de faciliter l'échange de correspondance entre les détenus et leur famille. Tout en vous remerciant de cette proposition, je dois vous indiquer qu'elle me paraît sans objet, les détenus pouvant correspondre dans le cadre d'une réglementation qui tient compte des considérations humanitaires qui inspirent votre suggestion. Vous pourrez d'ailleurs procéder à la vérification de ce point lors des visites visées plus haut, sous le N° 2.*
4. *Je vous serais reconnaissant de me faire connaître avec plus de précision, la portée de la suggestion que vous voulez bien faire par ailleurs, concernant la distribution de certains secours matériels ou intellectuels aux détenus. Il va de soi que l'Administration française est disposée à recevoir et à transmettre aux bénéficiaires les secours que la Croix-Rouge pourrait désirer leur faire parvenir.*
5. *L'Administration française est également à votre disposition pour donner suite à la proposition que vous pouvez bien faire concernant l'assistance aux familles des détenus ou des internés. Je serais heureux de recevoir de vous toutes précisions sur ce point.*

*J'ai pris bonne note de ce que l'action, que votre Comité international se propose de mener en Afrique du Nord, ne donnera lieu à aucune publicité. C'est à cette condition, en effet, que, sans présenter aucun inconvénient, elle est de nature à réaliser l'effet bienfaisant que vous en attendez.*
*J'adresse copie de la présente lettre à Monsieur le Résident Général de France à Rabat et à Monsieur le Gouverneur Général de l'Algérie. Je vous laisse le soin de vous mettre en relation avec eux quant à la suite pratique qui lui sera donnée.*
*Veuillez croire, cher Monsieur, à mes sentiments les plus dévoués.*

*(signé) P. Mendès France »*

Dans le cadre du conflit algérien, les visites aux détenus constituent l'élément essentiel de l'action du CICR et elles s'effectueront toutes selon le même processus: les délégués commencent par prendre contact avec les autorités françaises locales pour établir la liste des lieux à visiter et les modalités de leurs déplacements qu'ils effectueront avec un officier de liaison. Arrivés dans le lieu de détention – camp d'internement ou prison – les délégués s'entretiennent avec le commandant, puis ils visitent les installations (dortoirs ou cellules, cuisines, sanitaires, cachots, etc.) et s'entretiennent sans témoin avec les détenus de leur choix. Cet entretien est le point crucial de la visite car c'est le plus souvent à ce moment-là que les délégués peuvent constater l'existence d'éventuels mau-

vais traitements; un délégué médecin participe d'ailleurs systématiquement à ces entretiens afin de vérifier l'état de santé des détenus et, le cas échéant, l'exactitude des allégations de sévices subis. A l'issue de la visite, les délégués ont un entretien final avec le commandant; ils lui font part de leurs constatations et, le cas échéant, lui proposent certaines améliorations. Cette pratique est conforme à celle que le CICR a suivie depuis la Première Guerre mondiale[5].

La visite terminée, les délégués font généralement parvenir des secours aux détenus et ils établissent un rapport relatant de manière précise et détaillée les constatations qu'ils ont faites ainsi que les mesures qu'ils recommandent aux autorités d'adopter pour améliorer le sort des captifs. Ils envoient ce rapport au siège du CICR à Genève, qui le transmet aux autorités françaises à Paris, avec une lettre de couverture dans laquelle il attire l'attention du gouvernement sur les améliorations qu'il conviendrait d'apporter au régime de détention et, le cas échéant, sur les cas de mauvais traitements constatés par ses délégués.

Une première mission, composée du chef de la délégation du CICR en France, William Michel, et de deux délégués, Pierre Gaillard et Jean-Pierre Maunoir, se rend au Maroc du 23 février au 30 mars 1955 afin d'y effectuer une série de visites des lieux de détention où sont internés des Algériens. Au cours de ces visites, qui portent sur 41 établissements regroupant environ 2000 personnes, les délégués du CICR reçoivent l'autorisation de s'entretenir sans témoin avec les détenus de leur choix.

Du 14 mars au 18 avril 1955, les délégués du CICR entreprennent la visite des prisons en Algérie mais ils se heurtent à de grandes difficultés: la plupart des détenus arrêtés en raison des événements sont encore des prévenus; ils dépendent donc des juges d'instruction et, pour chaque visite, les délégués doivent obtenir une autorisation de ces magistrats, ce qui s'avère long et difficile, d'autant plus que certains juges ne sont pas prêts à accorder aux délégués du CICR l'autorisation de s'entretenir sans témoin avec les détenus sous interrogatoire. Cependant, au cours de cette mission, les délégués parviennent à se rendre dans 43 établissements pénitentiaires. A l'issue de ces visites, le CICR communique les rapports de ses délégués à l'autorité détentrice, c'est-à-dire au gouvernement français[6].

5 Sur la pratique du CICR en matière de visites de lieux de détention, on pourra se reporter à l'ouvrage de François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, seconde édition, Genève, CICR, 2000, pp. 102-110, 202-205 et 665-759.

6 ACICR, B AG 225 (12) Rapport sur les visites de lieux de détention effectuées au Maroc et en Algérie par les délégués du CICR (23 février - 18 avril 1955).

### Démarches auprès des autorités françaises et des représentants de l'insurrection

Durant le deuxième semestre de l'année 1955, les événements d'Algérie prenant une tournure de plus en plus grave, le CICR engage de nouvelles démarches auprès du gouvernement français afin de pouvoir envoyer sur place une seconde mission[7]. Simultanément, il s'efforce de nouer des contacts avec des personnalités proches des nationalistes algériens afin d'attirer leur attention sur l'obligation faite à chacun de respecter les règles fondamentales du droit international humanitaire[8].

C'est finalement avec des représentants de la révolution algérienne au Caire qu'un délégué du CICR, David de Traz, parvient à entrer en contact en février 1956; à cette occasion, de Traz informe ses interlocuteurs des activités du CICR en Algérie et il insiste auprès d'eux pour qu'ils fassent respecter par leurs partisans les principes des Conventions de Genève de 1949, en particulier les dispositions de l'article 3 commun aux quatre Conventions de Genève[9].

A la même époque, le chef de la délégation du CICR à Paris, William Michel, rencontre un représentant du FLN[10].

Le 23 février 1956, la délégation algérienne au Caire adresse au délégué du CICR, David de Traz, une lettre signée:

*« Pour le Front de Libération Nationale : Mohamed Khider*
*Pour l'Armée de Libération Nationale : Ahmed Ben Bella »*

Dans cette lettre, les signataires s'engagent à appliquer les dispositions des Conventions de Genève à tous les *« prisonniers de guerre français »* pris par l'ALN, *« sous réserve de réciprocité de la part du Gouvernement de la République Française »*[11].

Cette réserve revêt une importance capitale car la France ne reconnaît pas l'applicabilité des quatre Conventions de Genève du 12 août 1949 au conflit algérien; en effet, ces Conventions concernent les conflits armés internationaux et, pour la France, le conflit algérien est un conflit non inter-

7 ACICR, B AG 200 (3), Procès-verbal de l'entretien entre le conseiller technique d'Edgar Faure à la Présidence du Conseil et Roger Gallopin, directeur exécutif du CICR, 27 août 1955. ACICR, B AG 200 (3), Procès-verbal de l'entretien entre le conseiller technique d'Edgar Faure et William Michel, 2 septembre 1955. ACICR, B AG 200 (3), *«Le Comité international de la Croix-Rouge et les événements de l'Afrique du Nord»* janvier 1956 - Note n° 1, D. 425.

8 ACICR, B AG 200 (3), Note de Pierre Gaillard, 5 septembre 1955.

9 ACICR, B AG 200 (3), Radiogramme de David de Traz au CICR, 16 février 1956.

10 ACICR, B AG 200 (3), Note de William Michel, 16 février 1956.

11 ACICR, B AG 200 (12), Lettre de la délégation algérienne au Caire à David de Traz, 23 février 1956.

national auquel ne pourrait s'appliquer que l'article 3 commun aux quatre Conventions de Genève.

En fait ce n'est que le 23 juin 1956 que, par la voix de Guy Mollet, alors président du Conseil, le gouvernement français reconnaîtra officiellement l'applicabilité de l'article 3 au conflit algérien. Mais les Algériens, qui veulent affirmer le caractère international du conflit, réclament l'application de l'ensemble des quatre Conventions de Genève.

L'enjeu est de taille, surtout en ce qui concerne la responsabilité individuelle du combattant. En effet, dans les conflits internationaux, le soldat est perçu comme un instrument de l'État; il n'encourt donc pas de responsabilité individuelle pour le fait d'avoir combattu, pour autant qu'il se soit conformé aux lois et coutumes de la guerre. En revanche, dans les conflits non internationaux, l'État se réserve le droit de réprimer la rébellion en utilisant les instruments du droit pénal; dès lors un insurgé peut être condamné pour le seul fait de sa participation aux hostilités. Cette mise en œuvre du droit pénal fournit à l'État d'importants moyens de répression mais elle présente le risque d'effacer toute distinction entre les combattants qui respectent les lois et coutumes de la guerre et ceux qui ne les respectent pas.

Pour tenter de sortir de cette impasse, les délégués du CICR s'efforceront d'obtenir que les combattants du FLN pris les armes à la main au cours de combats avec l'armée française bénéficient de la même protection que celle garantie aux prisonniers de guerre par la Troisième Convention de Genève du 12 août 1949. Le but de ces démarches est que la France renonce à poursuivre devant ses tribunaux les combattants qui portent les armes ouvertement.

### Nouvelles missions en Algérie

Au début de l'année 1956, le CICR n'a toujours pas reçu du gouvernement français l'autorisation d'envoyer une nouvelle mission en Algérie; le président du CICR, Léopold Boissier, se rend alors à Paris où il est reçu, le 26 mars, par le président du Conseil des Ministres, Guy Mollet, qui accueille favorablement la proposition que des délégués du CICR visitent les lieux de détention d'Algérie[12]. Le 6 avril 1956, le gouvernement français annonce au CICR qu'il accepte l'envoi d'une nouvelle mission en Algérie. L'objet de cette mission sera de:

12 ACICR, A PV C1, Procès-verbal du Conseil de la Présidence du CICR, 29 mars 1956.

«1. *Visiter les camps d'hébergement ou d'éloignement dans lesquels ont été rassemblés les internés administratifs;*
2. *Entreprendre les visites des lieux de détention où se trouvent les personnes poursuivies à la suite des événements.*
*Selon l'usage, les délégués du Comité international de la Croix-Rouge pourront, au cours de leur visite aux personnes visées à l'alinéa précédent et au présent alinéa, s'entretenir sans témoin avec elles.*
3. *Le cas échéant, prévoir une distribution de secours (matériels ou intellectuels) aux détenus;*
4. *Proposer aux autorités françaises compétentes telle autre action humanitaire qui pourrait paraître opportune*».

En outre, cette autorisation est donnée sous les réserves et précisions suivantes:

«1. *L'activité de la mission revêtira le caractère, non d'une enquête, mais d'une visite d'ordre strictement humanitaire, à l'exclusion de toute recherche sur la situation juridique des intéressés;*
2. *Les secours devront être distribués par des organismes français agréés par le Gouvernement;*
3. *Les constatations et conclusions des membres de la mission seront communiquées aux seules autorités françaises; elles ne feront en aucun cas l'objet de rapports publics*»[13].

Cette autorisation enferme l'action du CICR dans un cadre relativement étroit, mais elle n'en représente pas moins un élargissement substantiel par rapport à l'article 3 commun aux quatre Conventions de Genève de 1949.

Ainsi, du 12 mai au 28 juin 1956, cinq délégués du CICR: Claude Pilloud, René Bovey, Pierre Gaillard ainsi que les docteurs Gailland et Willener visitent en Algérie 61 centres d'hébergement et lieux de détention répartis sur tout le territoire algérien. Au cours de ces visites les délégués sont autorisés à s'entretenir sans témoin avec des détenus, qui leur révèlent l'existence d'autres camps: les «*centres de tri et de transit*» qui dépendent de l'administration militaire et où les prisonniers restent parfois plusieurs mois, soumis à des interrogatoires pouvant aller jusqu'à la torture; les délégués s'efforcent alors d'obtenir l'autorisation de visiter également ces centres qui sont répartis dans de nombreux secteurs militaires relevant chacun d'un officier supérieur différent, ce qui complique beaucoup leurs démarches. Le CICR ne

13 ACICR, B AG 251 (12), Lettre du président du Conseil, Guy Mollet, au CICR, 6 avril 1956.

donne aucune publicité à la mission de ses délégués, mais, le 23 juin, Guy Mollet en fait état publiquement dans un discours prononcé à la Maison de l'Amérique latine à Paris; il déclare à cette occasion que, conformément à l'article 3 commun aux quatre Conventions de Genève, le gouvernement français a autorisé des délégués du CICR à visiter en Algérie des camps d'hébergement et des lieux de détention[14].

Du 16 octobre au 3 novembre 1956, Pierre Gaillard et le docteur Gailland effectuent une nouvelle mission en Algérie au cours de laquelle ils visitent 6 camps d'hébergement. En mai-juin 1957 et en novembre 1957-février 1958, ces deux délégués se rendent dans 115 camps d'hébergement et lieux de détention en Algérie. Ils parcourent ainsi tout le pays et profitent des contacts qu'ils ont noués avec les autorités militaires et des relations de confiance qu'ils ont établies avec nombre d'entre elles pour négocier l'octroi d'un statut spécial aux combattants pris les armes à la main.

Le 19 mars 1958, le général Salan, commandant en chef des forces françaises en Algérie, donne l'ordre de créer des camps spéciaux pour les combattants de l'Armée de Libération nationale (ALN) pris les armes à la main. Bien que son instruction précise que ces captifs ne seront pas considérés comme des prisonniers de guerre, le régime qui leur est appliqué doit s'apparenter désormais à celui des prisonniers de guerre. La note précise en effet qu'il s'agit d'accorder aux captifs un traitement *« aussi libéral que possible, et de le faire savoir »*. Par cette décision – dont on ne saurait sous-estimer l'importance – les autorités françaises renoncent à traduire systématiquement devant les tribunaux les membres de l'ALN pris les armes à la main: *« Les propositions de traduction devant les tribunaux seront systématiquement évitées, sauf pour ceux qui ont commis des exactions ou qui font preuve d'un fanatisme susceptible de nuire à l'évolution favorable de l'état d'esprit de l'ensemble »*[15].

14 ACICR, B AG 251 (12), Mission du CICR en Algérie – Mai-juin 1956 – Rapport présenté à Guy Mollet, président du Conseil. ACICR, B AG 251 (12), Note de Pierre Boissier, délégué du CICR en France, au CICR, 26 juin 1956. *RICR*, N° 452, août 1956, pp. 441-442. Entretiens de Pierre Gaillard avec Françoise Perret, janvier-février 1992.

15 ACICR, B AG 225 (12), Commandement supérieur des armées, 10e Région militaire, Note de service du 19 mars 1958; *Le CICR et le conflit algérien*, Genève, CICR, 1963, ronéographié, p. 8. Le lien entre le sort réservé aux insurgés en cas de capture et leur comportement au combat ressort nettement de la note de service du 19 mars 1958 du général Salan, ordonnant la création de camps d'internés militaires pour les insurgés pris les armes à la main. Sous le titre *« Idées générales »*, cette note expose en effet les considérants suivants:

*« Les rebelles acculés au combat font très souvent preuve d'un acharnement qui conduit à leur extermination. Cette obstination est moins la manifestation d'un esprit de sacrifice mis au service d'une cause considérée comme sacrée que le résultat d'une préparation psychologique efficace.*

*L'interrogatoire des prisonniers fait, en effet, ressortir que les «moudjahidines» sont avertis de façon pressante, au cours de leur instruction, des dangers qu'ils courent, en cas de reddition, les troupes françaises mas-*

La création de ces centres d'internement répondait aux démarches du CICR demandant que les combattants pris les armes à la main bénéficient d'un statut particulier, analogue à celui des prisonniers de guerre protégés par la Troisième Convention de Genève. Il s'agissait par ce biais d'établir une distinction entre les combattants qui avaient porté les armes ouvertement et ceux qui recouraient à des attentats destinés à semer la terreur parmi les populations.

En décembre 1958, au cours d'une nouvelle tournée de visites portant sur 16 lieux de détention, Pierre Gaillard et le docteur Gailland se rendent dans deux centres d'internement militaire; à l'occasion de leur visite, les autorités militaires libèrent dix combattants algériens.

A la même époque, deux autres délégués, William Michel et Jean-Pierre Maunoir, visitent des Algériens arrêtés en France et détenus au centre administratif de Vadenay (Seine-et-Marne)[16]. En mars, juin et novembre 1959, des délégués visitent 4 camps d'internés algériens en France ainsi que des prisons à Paris et en province, dont notamment le Fort Liedot, sur l'île d'Aix, où ils rencontrent des chefs du FLN: Ben Bella, Khider et Aït Ahmed.

### Poursuite des contacts avec des représentants du FLN

Cependant le CICR s'efforce de maintenir le dialogue avec des personnalités nord-africaines afin d'obtenir notamment la possibilité de venir en aide aux militaires et civils français détenus par les insurgés. Il donne pour instruction à David de Traz d'effectuer des démarches en ce sens auprès de la délégation du FLN au Caire[17]. En date du 24 avril 1956, de Traz écrit à

*sacrant les prisonniers après torture ou, dans le cas le plus favorable, les faisant traduire devant les Tribunaux qui les condamnent automatiquement à la peine de mort.*

*Les coupures de certains journaux français et étrangers, abondamment cités par les radios rebelles et étrangères, permettent d'appuyer très efficacement cette propagande.*

*La crainte ainsi entretenue donne aux bandes un mordant qu'il importe d'entamer dans toute la mesure du possible, dans le but de réduire nos pertes.*

*Un moyen d'y parvenir est d'accorder aux prisonniers un traitement aussi libéral que possible et de le faire savoir».*

Le général Salan se plaçait dans une perspective d'efficacité militaire. Les démarches par lesquelles le CICR avait recommandé l'adoption de cette mesure se situaient, elles, dans la perspective d'assurer un meilleur respect des lois et coutumes de la guerre, ce que reflète aussi la note de service du 19 mars 1958 qui dispose: *« Les propositions de traduction devant les Tribunaux seront systématiquement évitées, sauf pour ceux qui ont commis des exactions... »*

16 *Rapport d'activité 1956*, pp. 43-44. *Rapport d'activité 1958*, pp.8-9. *RICR*, N° 464, août 1957, pp. 438-439. *RICR*, N° 471, mars 1958, p. 153. *RICR*, N° 476, août 1958, pp. 405-408. *RICR*, N° 481, janvier 1959, pp. 24-25. *RICR*, N° 482, février 1959, pp. 68-70.

17 ACICR, B AG 251 (12), Lettre de Roger Gallopin à David de Traz, 10 avril 1956.

Mohamed Khider, représentant du FLN, pour l'informer de la nouvelle mission des délégués du CICR en Algérie et lui demander les listes des prisonniers détenus par l'ALN ainsi que l'autorisation, pour des délégués du CICR, de les visiter[18].

Mais, le 4 juin, lors d'une réunion au siège du FLN au Caire, Ben Bella informe le délégué du CICR que les conditions dans lesquelles les hommes du FLN se battent en Algérie – absence de positions de repli et obligation de se déplacer sans cesse à la recherche d'abris de fortune – rendent une telle visite quasi impossible[19].

Ainsi, les démarches tentées par le CICR auprès de la délégation du FLN au Caire afin de secourir les Français tombés aux mains des insurgés semblent momentanément vouées à l'échec. En outre le FLN ne communique pas au CICR les listes des Français qu'il détient.

Le CICR décide alors de prendre contact avec des représentants du FLN au Maroc; David de Traz en informe Mohamed Khider qui approuve cette initiative et remet à de Traz une lettre d'introduction pour un représentant du FLN à Tanger[20].

David de Traz part donc pour le Maroc le 3 octobre 1956 alors que le délégué du CICR resté au Caire, Edmond Müller, poursuit ses contacts avec la délégation du FLN qui lui laisse à nouveau espérer que des délégués du CICR pourront prochainement rencontrer des prisonniers aux mains de l'ALN[21].

Lors de sa mission à Tanger et Tétouan, David de Traz s'entretient avec des représentants du FLN qui lui promettent qu'il pourra rencontrer des prisonniers détenus par l'ALN dès que ceux-ci auront pu être rassemblés sur sol marocain, soit d'ici un ou deux mois.

Le 11 décembre 1956, un délégué du CICR à Paris, Pierre Boissier, visite Ben Bella à la prison de la Santé; à cette occasion, ce dernier lui déclare qu'il croit à la possibilité d'une visite du CICR aux prisonniers détenus par le FLN sur sol marocain.

En mars 1957, Claude Pilloud rencontre des dirigeants du FLN au Maroc et leur remet un lot de médicaments d'une valeur de 10 000 francs suisses. Il essaie à nouveau d'obtenir l'autorisation pour le CICR de visiter les prisonniers détenus par le FLN soit au Maroc, soit en Algérie et il reçoit cer-

18 ACICR, B AG 251 (12), Lettre de David de Traz à Mohamed Khider, 24 avril 1956.

19 ACICR, B AG 251 (12), Lettre de Edmond Müller (délégué du CICR au Caire) au CICR, 7 juin 1956.

20 ACICR, B AG 200 (12), Note de Jean-Pierre Maunoir, 3 octobre 1956.

21 ACICR, B AG 251 (12), Notes de Edmond Müller au CICR, 10 et 17 octobre 1956.

taines assurances à ce sujet; le CICR envoie donc en avril 1957, au Maroc, deux délégués, Jean-Pierre Schoenholzer et un médecin, qui ont pour mission de tenter de visiter des prisonniers détenus par le FLN mais, à la fin du mois de mai 1957, ces visites n'ont toujours pas pu se réaliser et les deux délégués rentrent à Genève. Cependant, le CICR reste en contact avec les représentants du FLN, notamment au Caire, au Maroc et en Tunisie et leur soumet plusieurs propositions tendant à faire respecter les règles fondamentales du droit international humanitaire, notamment l'article 3 commun aux quatre Conventions de Genève de 1949[22].

### Création du « Croissant-Rouge algérien »

Lors de la mission de David de Traz au Maroc, en octobre 1956, ses interlocuteurs l'informent de leur décision de créer un *« Croissant-Rouge algérien »* et, le 10 janvier 1957, un communiqué du journal du FLN, *Résistance algérienne*, annonce la création du *« Croissant-Rouge algérien »*; le 14 mars 1957, le président de ce Croissant-Rouge, Omar Boukli Hacène, demande la reconnaissance officielle de sa Société par le CICR; le 29 avril 1957, le CICR l'informe qu'il ne peut reconnaître le *« Croissant-Rouge algérien »* car celui-ci ne remplit pas les conditions de reconnaissance approuvées par la XVII^e^ Conférence internationale de la Croix-Rouge, réunie à Stockholm en 1948, notamment celle qui stipule que la Société nationale doit exercer son activité sur le territoire de l'État dont elle porte le nom et qui doit, lui, être indépendant[23]. Cependant le CICR se déclare prêt à entretenir des relations de travail avec le *« Croissant-Rouge algérien »* pour l'accomplissement de tâches humanitaires[24].

22 ACICR, B AG 210 (12-51), Procès-verbal d'entretien entre Pierre Boissier et Ahmed Ben Bella, 11 décembre 1956. ACICR B AG 200 (12), Le CICR et les événements d'Afrique du Nord – Résumé chronologique arrêté au 27 juin 1957.

23 Selon les Statuts de la Croix-Rouge internationale, approuvés par la XVIII^e^ Conférence internationale de la Croix-Rouge, réunie à Toronto en 1952, le CICR a notamment pour rôle de reconnaître toute Société nationale nouvellement créée ou reconstituée répondant aux conditions de reconnaissance en vigueur. La première de ces conditions, fixées par la XVII^e^ Conférence internationale de la Croix-Rouge, réunie à Stockholm en août 1948, dispose que la Société postulante doit être constituée sur le territoire d'un État indépendant où les Conventions de Genève sont en vigueur. Le CICR est lié par les conditions adoptées par la Conférence internationale. Son rôle est celui d'un notaire qui s'assure que les conditions sont effectivement remplies. En revanche, le CICR est prêt à collaborer, sur une base pragmatique, avec toute Société de la Croix-Rouge ou du Croissant-Rouge qui respecte les Principes fondamentaux de la Croix-Rouge et du Croissant-Rouge, qu'elle soit ou non formellement reconnue.

24 ACICR, B AG 251 (126), Rapport de mission de David de Traz, 25 octobre 1956. ACICR, B AG 122 (12), Lettre du CICR à Omar Boukli Hacène, 29 avril 1957. ACICR, B AG 200 (12), Note de David de Traz, 30 juillet 1957.

Le 22 mai 1957, Ferhat Abbas se présente au siège du CICR pour y accréditer le docteur Ben Tami en tant qu'agent de liaison du *« Croissant-Rouge algérien »* auprès du CICR. Tout en refusant une accréditation formelle du représentant d'une Société nationale qu'il ne peut pas reconnaître, le CICR accepte de correspondre avec le docteur Ben Tami pour tout ce qui concerne la Société qu'il représente. Mais le *« Croissant-Rouge algérien »* n'admet pas le refus du CICR de le reconnaître et, en juin 1957, il adresse au CICR une lettre dans laquelle il conteste vigoureusement cette prise de position[25].

Dans les mois qui suivent, le *« Croissant-Rouge algérien »* multiplie les démarches pour être admis à participer à la XIXe Conférence internationale de la Croix-Rouge qui doit se tenir à La Nouvelle Delhi; il n'y sera pas invité mais le sort de la population algérienne y sera largement évoqué et fera l'objet d'une résolution (voir ci-dessous).

### Des secours pour les Algériens réfugiés au Maroc et en Tunisie

Depuis l'accession du Maroc à l'indépendance, le 2 mars 1956, des civils algériens – en majorité des femmes, des enfants et des vieillards – qui fuient les combats, se réfugient sur sol marocain.

Ces populations se replient en catastrophe et leur situation ne tarde pas à devenir très difficile. Au printemps 1957, les délégués du CICR qui se rendent sur place évaluent le nombre de ces réfugiés, établis par groupes disséminés tout au long de la frontière algéro-marocaine, à environ 40 000.

Grâce notamment aux dons qu'il reçoit à cet effet de plusieurs Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, le CICR décide d'entreprendre une action de secours en faveur de ces réfugiés. Avec l'accord des autorités marocaines, les délégués du CICR leur distribuent régulièrement des vivres et des vêtements.

Des civils algériens se sont également réfugiés en Tunisie – indépendante depuis le 20 mars 1956 – et, en juin 1957, les autorités et le Croissant-Rouge tunisiens sollicitent l'aide du CICR en leur faveur. Le délégué du CICR envoyé sur place constate la présence de quelque 5000 réfugiés dans la région frontalière et, dès la mi-août, le CICR organise, en collaboration avec le Croissant-Rouge tunisien, des distributions de vivres puis de vêtements et de couvertures à ces réfugiés[26].

25 ACICR, B AG 200 (12) Le CICR et les événements d'Afrique du Nord – Résumé chronologique arrêté au 27 juin 1957. ACICR, B AG 200 (12), Note de Claude Pilloud, 23 mai 1957.

26 *RICR*, N° 468, octobre 1957, pp. 551-553.

A la fin de l'année 1957, le sort des Algériens réfugiés en Tunisie et au Maroc préoccupe l'ensemble du Mouvement de la Croix-Rouge et du Croissant-Rouge; la XIX^e^ Conférence internationale de la Croix-Rouge, réunie à La Nouvelle Delhi du 28 octobre au 7 novembre, adopte à l'unanimité la résolution suivante:

*« La XIX^e^ Conférence internationale de la Croix-Rouge,*
*considérant qu'un nombre important d'Algériens, en grande partie composé de femmes, d'enfants et de personnes âgées, fuyant les événements d'Algérie, se sont réfugiés en Tunisie et au Maroc,*
*considérant que la majeure partie de ces réfugiés, dont le nombre augmente chaque jour, sont dans un état de dénuement total; que l'approche de l'hiver, rigoureux en Afrique du Nord, va encore aggraver l'existence de cette masse humaine déjà sans abri, peu ou mal nourrie, insuffisamment vêtue et dépourvue de tous moyens de lutter contre les maladies,*
*considérant que l'assistance fournie par les Gouvernements tunisien et marocain, le Comité international de la Croix-Rouge, le Croissant-Rouge tunisien, ainsi que par d'autres Associations animées de l'esprit Croix-Rouge, s'avère insuffisante à écarter le grave danger qui menace l'existence de ces innocentes victimes de la guerre,*
*estime que seul un effort d'ordre international et à l'échelle mondiale est en mesure de faire face aux besoins énormes que nécessite l'assistance à apporter à ces centaines de milliers d'êtres humains,*
*guidée par l'esprit humanitaire qui a constamment animé l'action des Associations qui la composent et dont elles ont si souvent fourni une preuve admirable dans des cas analogues,*
*lance au monde un pressant appel pour que des efforts semblables soient entrepris et réalisés en faveur des réfugiés algériens »*[27].

Forts de cette résolution, le CICR et la Ligue des Sociétés de la Croix-Rouge lancent, le 10 décembre 1957, un appel conjoint en faveur des réfugiés algériens au Maroc et en Tunisie.

Pendant l'hiver 1957-1958, le CICR assure la distribution aux Algériens réfugiés en Tunisie de secours réunis par le Haut Commissariat des Nations Unies pour les Réfugiés. Il mène cette action conjointement avec la Ligue des Sociétés de la Croix-Rouge et avec le concours des autorités et du Croissant-Rouge tunisien. Lors du bombardement de Sakhiet Sidi Youssef

27 Résolution XI, *XIX^e^ Conférence internationale de la Croix-Rouge, La Nouvelle Delhi, octobre-novembre 1957, Compte rendu*, pp. 169-170.

par l'aviation française, le 8 février 1958, il se trouve qu'une distribution est en cours à cet endroit. Les camions de secours du CICR sont endommagés lors de ce bombardement, qui provoqua, selon le président Bourguiba, la mort de soixante-dix civils tunisiens, dont plusieurs enfants[28].

A partir du 15 mars 1958, le Croissant-Rouge tunisien prend la responsabilité de l'aide aux réfugiés algériens, action qu'il poursuit avec la Ligue.

Durant l'année 1958, le CICR poursuit également ses distributions de secours aux Algériens réfugiés au Maroc; à partir du mois de décembre, la responsabilité de cette action est reprise par le Croissant-Rouge marocain qui la poursuit avec la Ligue[29].

### L'aide aux populations déplacées

Depuis 1957, les délégués du CICR en Algérie sont autorisés à procéder à des distributions limitées de secours d'urgence à des populations déplacées à l'intérieur de l'Algérie[30].

En été 1959, selon les informations recueillies par les délégués du CICR, le nombre des personnes déplacées en Algérie atteint un million. La Croix-Rouge française a mis sur pied des équipes itinérantes d'infirmières qui s'efforcent notamment de secourir les enfants; le CICR soutient cette action en remettant des vêtements, des vivres et des médicaments à la Croix-Rouge française; ses délégués assistent régulièrement aux distributions de secours.

En janvier et en novembre/décembre 1960, les délégués du CICR se rendent à nouveau en Algérie pour y organiser, avec la Croix-Rouge française, des distributions de secours dans les centres de regroupement. Cette action se poursuit et se développe en 1961 et 1962[31]. Lors des missions qu'ils

28 En raison de la disproportion entre les dommages purement matériels qu'il a subis et les pertes subies par la population tunisienne, le CICR renonce à demander une réparation au gouvernement français; pourtant ce dernier décide de lui verser une indemnité.

29 Résolution XI adoptée par la Conférence de La Nouvelle Delhi. *Rapport d'activité 1957*, pp. 8-14. *Rapport d'activité 1958*, pp. 11-12. *Rapport d'activité 1959*, pp. 10-12. *RICR*, N° 470, février 1958, pp. 85-86. *RICR*, N° 471, mars 1958, pp.141-142. *RICR*, N° 473, mai 1958, pp. 278-280. *RICR*, N° 476, août 1958, pp. 410-412. *RICR*, N° 482, février 1959, pp. 70-73. *RICR*, N° 486, juin 1959, pp. 308-309. *RICR*, N° 494, février 1960, pp. 89-90. ACICR, A Pl, Procès-verbaux des séances plénières de l'Assemblée du CICR, 13 février, 6 mars et 1er mai 1958. ACICR, A Pl, Procès-verbal de la séance plénière de l'Assemblée du CICR, 3 juin 1959.

30 *RICR*, N° 476, août 1958, p. 409.

31 *Rapport d'activité 1959*, pp. 12-13; *Rapport d'activité 1960*, pp. 17-19; *Rapport d'activité 1961*, pp. 19-20; *Rapport d'activité* 1962, p. 10. *RICR*, N° 487, juillet 1959, pp. 341-342. *RICR*, N° 488, août 1959, p. 398. *RICR*, N° 590, octobre 1959, pp. 504-505. *RICR*, N° 494, février 1960, pp. 90-91. *RICR*, N° 504, décembre 1960, p. 687. *RICR*, N° 505, janvier 1961, pp. 20-22. *RICR*, N° 512, août 1961, p. 388. *RICR*, N° 518, février 1962, p. 85. *RICR*, N° 519, mars 1962, p. 137. *RICR*, N° 520, avril 1962, pp. 176-177. *RICR*, N° 521, mai 1962, p. 245.

effectuent en Algérie, les délégués du CICR se rendent avec des infirmières de la Croix-Rouge française dans les centres de regroupement répartis sur tout le territoire algérien; ces infirmières se déplacent dans des camions Croix-Rouge aménagés en dispensaires ambulants où elles prodiguent leurs soins à la population; à l'occasion de leurs visites, elles distribuent les secours mis à disposition par le CICR. Parallèlement à l'action des infirmières, les sections locales de la Croix-Rouge française organisent des distributions de secours dans les lieux de regroupement que les équipes itinérantes n'ont pas visités; les délégués du CICR participent régulièrement à ces distributions qui prennent de plus en plus d'ampleur car le nombre des déplacés ne cesse de croître; en 1962 il est évalué à un total de 2 200 000 personnes, en majorité des femmes et des enfants, réparties dans quelque 2000 centres.

### Libération de prisonniers détenus par l'ALN

Au début de l'année 1958, pour la première fois, un délégué du CICR est autorisé à visiter des prisonniers détenus par l'ALN: le 30 janvier 1958, Jean de Preux, venu de Tunis, visite, sur sol algérien près de la frontière tunisienne, quatre prisonniers français capturés dans la région. Le CICR n'a pas demandé l'autorisation des autorités françaises pour effectuer cette visite; il s'est contenté d'informer les autorités militaires sur place en leur suggérant de *« fermer les yeux sur le passage clandestin de la frontière par ses délégués »*.

Ce passage de la frontière par un délégué dans une semi-clandestinité constitue, à notre connaissance, un fait sans précédent dans l'histoire du CICR. Il s'explique vraisemblablement par les enjeux politiques d'alors et les positions opposées qui étaient celles des parties au conflit:

le FLN prétendait contrôler une portion du territoire algérien et revendiquait à ce titre une forme de reconnaissance internationale;

la France affirmait contrôler tout le territoire algérien, tout en reconnaissant que la *« Ligne Salan »* (ligne militaire longeant la frontière tunisienne) ne s'appuyait pas exactement sur la frontière algéro-tunisienne mais se trouvait un peu en retrait.

Dans ce contexte, si le CICR avait demandé aux autorités françaises l'autorisation d'envoyer un délégué dans une portion de territoire algérien contrôlée par le FLN, celles-ci n'auraient eu d'autres choix que de refuser.

Or l'enjeu humanitaire était important puisqu'il s'agissait de rencontrer quatre prisonniers français jamais visités jusqu'alors, d'où le risque pris par le CICR.

Le 20 octobre 1958, l'ALN décide de libérer les quatre prisonniers visités au début de l'année; ils sont remis à deux délégués du CICR au siège du Croissant-Rouge tunisien.

Le 4 décembre, huit militaires français capturés par l'ALN sont remis aux délégués du CICR, à Rabat, au siège du Croissant-Rouge marocain.

Outre ces libérations, le CICR obtient de l'ALN que les prisonniers qu'elle détient puissent lui envoyer des messages qu'il transmettra à leurs familles. Ainsi, au cours de l'année 1958, le CICR reçoit 169 messages de prisonniers français. Il reçoit également des listes de prisonniers détenus par le FLN.

Le CICR reste en contact régulier avec le FLN et, le 20 février 1959, à Oujda, ville marocaine proche de la frontière algérienne, six prisonniers français sont libérés au cours d'une cérémonie organisée au siège de la section locale du Croissant-Rouge marocain; ils sont remis à deux délégués du CICR qui les conduisent immédiatement à l'aérodrome d'Oujda, où les attend le consul de France qui les fait rapatrier.

Les 15 et 18 mai 1959, suite à de nombreuses démarches du CICR auprès du GPRA, le FLN libère, dans la nature, en Kabylie, quinze prisonniers français – dont six civils – et un ressortissant suisse – qui étaient détenus dans le maquis kabyle depuis des mois; aucun représentant du CICR n'assiste à cette libération qui, pour des motifs de sécurité militaire, ne peut évidemment s'effectuer que dans la clandestinité.

Durant les mois qui suivent, le CICR obtient encore quelques libérations de personnes captives de l'ALN et, à la fin de l'année 1959, le total des personnes libérées par l'ALN s'élève à quarante-cinq[32].

### Violations des Conventions de Genève

Au cours de tous les conflits dans lesquels il intervient, le CICR est saisi de protestations relatives à des violations des Conventions de Genève. Dès le début de la guerre d'Algérie ce phénomène prend une ampleur considérable.

En juin 1957, Robert Lacoste, ministre résident à Alger, demande à Pierre Gaillard de visiter le village de Melouza où 300 Algériens auraient été massacrés par le FLN. Gaillard demande des instructions au président du CICR, Léopold Boissier, qui lui enjoint de ne pas y aller. Dans une note verbale adressée au gouvernement français, le CICR explique ce refus dans les termes suivants:

*« Conformément à sa tradition, sanctionnée par les Conférences internationales de la Croix-Rouge, le CICR est toujours prêt à recevoir toutes plaintes relati-*

32 *Rapport d'activité 1958*, pp. 9-10. ACICR, A PV C1, Procès-verbal de la séance du Conseil de la Présidence du CICR, 23 janvier 1958. *RICR*, N° 470, février 1958, pp. 84-85. *RICR*, N° 472, avril 1958, p. 192. *RICR*, N° 476, août 1958, pp. 408-409. *RICR*, N° 479, novembre 1958, pp. 617-618. *RICR*, N° 481, janvier 1959, pp. 24-25. *RICR*, N° 482, février 1959, pp. 70-71. Bugnion, *op. cit.*, pp. 522-523.

*ves à des violations du droit des gens ou des grands principes de l'humanité, et à les transmettre à la partie mise en cause.*

*En revanche, en ce qui concerne des demandes de constatation ou d'enquête sur ces violations, le CICR a immuablement suivi la même ligne de conduite, clairement définie dans un mémorandum publié le 12 septembre 1939 et plusieurs fois communiqué aux gouvernements. En résumé, le CICR ne peut participer, en quelque mesure que ce soit, à une procédure d'enquête sur de telles violations. A titre exceptionnel cependant, il pourrait accepter de constituer, en dehors de son sein, une commission d'enquête, à la condition que les deux parties en cause le lui demandent et qu'une telle intervention ne soit pas susceptible de compromettre son œuvre secourable ni ne risque d'attiser la haine entre les peuples».*

Enfin le CICR ajoute qu'au cours des visites de ses délégués dans les lieux d'internement en Algérie:

*«...de nombreuses personnes se sont plaintes auprès des délégués du CICR de sévices dont elles auraient été l'objet lors de leur capture ou de leur interrogatoire. Les représentants du CICR se sont bornés à enregistrer ces plaintes et à les transmettre aux autorités compétentes, le cas échéant avec leurs constatations objectives sur ce qui pouvait être des traces des sévices allégués, mais sans se prononcer sur la réalité de ceux-ci. Et le CICR s'est abstenu de publier quoi que ce soit à ce sujet puisqu'il n'avait pas été directement témoin des faits»*[33].

En été 1957, les Croissants-Rouges syrien et jordanien s'adressent à la Ligue pour l'informer que la Croix-Rouge française refuse de soigner les *«nationalistes algériens»* et les *«victimes algériennes des événements»* et que les autorités françaises empêchent les médecins de leur porter assistance[34].

La Ligue ayant communiqué ces deux lettres de protestation au CICR, celui-ci les transmet, selon la coutume établie en pareil cas, à la Croix-Rouge française qui lui répond en niant les faits allégués et en ajoutant que, bien souvent, les ambulances et le personnel infirmier de la Croix-Rouge française sont attaqués par la population indigène. Toujours selon l'usage établi, le CICR transmet cette réponse aux Croissants-Rouges syrien et jordanien[35].

Dès l'année 1958, les délégués du CICR en Algérie entreprennent des démarches auprès des autorités françaises en faveur des médecins poursuivis

33 ACICR, B AG 202 (12), Note verbale du CICR au gouvernement français, 4 juin 1957.

34 ACICR, B AG 202 (12), Lettre du Croissant-Rouge syrien à la Ligue, 22 juillet 1957. ACICR, B AG 202 (12), Lettre du Croissant-Rouge jordanien à la Ligue, 14 août 1957.

35 ACICR, B AG 202 (12), Lettre du CICR à la Croix-Rouge française, 22 août 1957. ACICR, B AG 202 (12), Lettres de la Croix-Rouge française au CICR, 6 et 19 septembre 1957.

et condamnés pour avoir soigné des insurgés. Le CICR fonde ses démarches sur l'article 18, alinéa 3, de la Première Convention de Genève ainsi que sur la Résolution XVII de la Conférence de La Nouvelle Delhi[36]. Dans la plupart des cas ces démarches conduisent à des mesures de clémence ou à des remises de peine[37].

En mai 1958, suite à l'exécution de trois soldats français par le FLN, le CICR intervient auprès du *« Comité de coordination et d'exécution »* du FLN, réuni en session au Caire, pour qu'il mette fin à de telles mesures de représailles[38]; en outre, il adresse au gouvernement français et au FLN un mémorandum les enjoignant à respecter les principes fondamentaux du droit international humanitaire.

*TEXTE DU MEMORANDUM*

*Genève, le 28 mai 1958*

*« Le Comité international de la Croix-Rouge, institution spécifiquement neutre, indépendante de toute influence nationale, raciale ou religieuse, a pour devoir essentiel de venir en aide aux victimes des conflits armés.*
*Dans son action strictement humanitaire il est guidé par les termes et l'esprit des Conventions de Genève. Son autorité est fondée sur des expériences faites et des services rendus depuis plusieurs décennies. Pour accomplir son œuvre humanitaire, il ne peut compter que sur son devoir d'initiative et sur l'accueil fait aux démarches qu'il entreprend avec toute la persuasion et la fermeté possibles. C'est ainsi qu'il est inter-*

36 *« La XIXe Conférence internationale de la Croix-Rouge,*
*considérant les efforts déjà déployés par le Comité international de la Croix-Rouge pour alléger les souffrances qu'entraînent les conflits armés de toute nature, exprime le vœu qu'une disposition nouvelle soit ajoutée aux Conventions de Genève de 1949, étendant la portée de l'article 3 de ces Conventions, afin que:*
*1. les blessés soient soignés sans discrimination, et que les médecins ne soient inquiétés en aucune manière à l'occasion des soins qu'ils sont appelés à donner dans ces circonstances,*
*2. le principe sacré du secret médical soit respecté,*
*3. il ne soit apporté à la vente et à la libre circulation des médicaments aucune restriction autre que celles prévues par la législation internationale, étant entendu que ces médicaments seront exclusivement utilisés à des fins thérapeutiques,*
*fait en outre un pressant appel à tous les Gouvernements afin qu'ils rapportent toutes mesures qui seraient contraires à la présente résolution ».* XIXe Conférence internationale de la Croix-Rouge, La Nouvelle Delhi, octobre 1957, Résolution XVII.

37 *Rapport d'activité 1958*, p. 9. ACICR, A PV C1, Procès-verbal du Conseil de la Présidence du CICR, 23 octobre 1958. Bugnion, *op. cit.*, pp. 547-548.

38 ACICR, A PV PI, Procès-verbal de la séance plénière de l'Assemblée du CICR, 4 juin 1958.

*venu dans le conflit algérien depuis 1955 avec des résultats qu'il doit malheureusement juger insuffisants.*

*Au cours de ces dernières semaines, la situation s'est encore aggravée. Aussi, animé du désir d'en atténuer certains des effets particulièrement douloureux, le CICR croit devoir suggérer au FLN ainsi qu'au Gouvernement français de s'engager envers lui à observer les règles suivantes:*

1. *L'article 3 commun aux 4 Conventions de Genève de 1949 sera intégralement respecté; (voir annexe).*
2. *En cas de capture, les membres des forces armées ne seront pas l'objet de poursuites pénales pour le seul fait d'avoir pris part à la lutte; ils bénéficieront d'un traitement humain et de toutes les garanties essentielles accordées aux prisonniers de guerre; ils pourront donner de leurs nouvelles à leurs familles et en recevoir d'elles. Leurs noms seront communiqués au CICR qui sera admis à les visiter, et, en cas de besoin, à leur remettre des secours.*
3. *Si des poursuites pénales sont engagées contre des membres des forces armées capturés en raison de crimes ou de délits qu'ils auraient commis, le CICR en sera informé et sera autorisé à suivre la procédure et à faciliter leur défense. Si des poursuites ainsi engagées ont abouti ou aboutissent à des condamnations capitales prononcées dans des formes légales par des tribunaux compétents, il sera, pendant la durée des hostilités, sursis à ces exécutions. Les condamnés continueront à bénéficier du traitement accordé aux prisonniers de guerre.*
4. *Les mesures de représailles, quels qu'en soient les motifs, seront exclues.*

*Le Comité international de la Croix-Rouge souhaite vivement que le FLN juge possible de prendre envers lui de tels engagements qu'il s'efforce d'obtenir également du Gouvernement français. Dans cette hypothèse, il prendra acte des engagements souscrits envers lui de part et d'autre et il en informera immédiatement les deux Parties.*

*Enfin, le Comité international exprime le très ferme espoir que tout acte de nature à compromettre les efforts qu'il déploie en faveur des personnes visées ci-dessus sera évité jusqu'au moment où une réponse aura pu être donnée à la présente communication et à celle qu'il adresse simultanément au Gouvernement français »*[39].

Le gouvernement français n'apprécie guère le fait d'être ainsi pratiquement mis sur le même pied que le FLN et il le fait savoir au CICR qui lui précise qu'il a rédigé son mémorandum avec la « *conviction que seules certaines décisions à prendre ou à confirmer par les deux Parties au conflit lui permettront d'aboutir à des résultats satisfaisants* » et qu'en utilisant le terme « *les deux Parties*

39 ACICR, B AG 225 (12), Mémorandum du CICR, 28 mai 1958.

*au conflit, il n'entend pas méconnaître la différence essentielle qui existe entre le Gouvernement d'un État et un groupe qui exerce une autorité de fait sans posséder un statut juridique bien défini »*[40].

En août 1959, le président du CICR, Léopold Boissier rencontre le président du GPRA, Ferhat Abbas et, lui rappelant le mémorandum du 28 mai 1958 auquel le GPRA n'a pas répondu, il lui fait part des préoccupations du CICR au sujet des civils et militaires français tombés au pouvoir de l'armée algérienne.

Ferhat Abbas l'assure alors que des instructions précises ont été données aux combattants afin que les prisonniers soient humainement traités mais le contrôle est difficile vu l'extrême dispersion des unités en constant mouvement; de plus les commandants locaux, témoins de bombardements aériens qui provoquent de graves pertes pour la population civile, sont enclins à recourir aux représailles.

Fin 1959, le CICR écrit à Ferhat Abbas dans l'espoir que le GPRA réagisse concrètement au mémorandum du 28 mai.

En janvier 1960, n'ayant toujours pas reçu de réponse précise du GPRA, le CICR envoie son délégué général pour le Proche-Orient, David de Traz, à Tunis, afin qu'il tente d'obtenir des représentants du GPRA dans cette ville une réponse satisfaisante aux propositions faites par le CICR.

Le 11 juin 1960, le GPRA informe le CICR de sa décision d'adhérer aux Conventions de Genève du 12 août 1949; sans se prononcer sur l'aspect juridique de cette adhésion, le CICR l'enregistre comme une réponse positive à son mémorandum de 1958. Il reprend donc ses démarches auprès du GPRA afin de mettre au point les mesures pratiques d'aide aux prisonniers détenus par l'ALN telles que: communications des listes nominatives de ces prisonniers ainsi que des messages familiaux et autorisations de visites de délégués du CICR. Mais ces démarches n'aboutissent à aucun résultat.

Pour tenter de débloquer la situation, David de Traz se rend à Tunis, auprès du GPRA, en février 1961 mais en vain; Pierre Gaillard retourne à Tunis en mars 1961, mais le GPRA ne s'engage toujours pas à des démarches concrètes.

Cependant le CICR maintient un contact régulier avec le représentant du *« Croissant-Rouge algérien »* à Genève et, en novembre 1961, étant toujours sans réponse du GPRA, il envoie une nouvelle mission spéciale à Tunis: elle est composée de Mme van Berchem, membre du CICR, et de

40 ACICR, B AG 200 (12), Lettre du CICR au gouvernement français, 18 juin 1958.

Pierre Gaillard; elle est reçue le 22 novembre par le nouveau président du GPRA, Ben Youssef Ben Khedda, et le vice-président du GPRA, Krim Belkacem, qui promettent aux représentants du CICR de leur communiquer les noms de cinq prisonniers français; le 30 décembre le GPRA informe le CICR qu'il va libérer deux de ces prisonniers; Pierre Gaillard va donc les prendre en charge à Tunis, d'où il les fait rapatrier en France; à cette occasion il insiste auprès du président du « *Croissant-Rouge algérien* » pour que les trois autres prisonniers puissent écrire à leur famille mais cette requête reste sans résultat[41].

### La presse française publie des rapports de visites du CICR

En Algérie, les délégués continuent à visiter les prisons, les camps d'hébergement, les centres de tri et de transit, les centres militaires d'internement, les « *centres de rééducation* » et parfois même les cellules dépendant directement des officiers de renseignement. En effet, le système de détention élaboré en Algérie par les autorités françaises est extrêmement complexe, ce qui rend la tâche des délégués d'autant plus difficile.

Du 15 octobre au 27 novembre 1959, quatre délégués effectuent en Algérie une mission au cours de laquelle ils visitent 82 lieux de détention. Conformément à ce qui a été convenu avec le gouvernement français, le CICR envoie les rapports de visites de ses délégués: à la délégation générale du gouvernement à Alger (en trois exemplaires), au ministère des Affaires étrangères à Paris (en quatre exemplaires) et au ministère de la Justice (en trois exemplaires); puis, à la demande orale du ministère de la Justice, il lui en envoie deux exemplaires supplémentaires. Suite à l'envoi de ces rapports, Pierre Gaillard et William Michel participent à une conférence interministérielle qui réunit à Paris des représentants des départements concernés ainsi que deux généraux venus expressément d'Algérie; aucun des participants ne conteste les constatations des délégués, notamment en ce qui concerne les méthodes d'interrogatoire utilisées dans certains centres.

Le 5 janvier 1960, le journal *Le Monde* publie une synthèse des rapports de la 7e mission du CICR en Algérie, montrant clairement qu'il est en possession

41 ACICR, A PV C1, Procès-verbal de la séance du Conseil de la Présidence du CICR, 27 août 1959. *Rapport d'activité 1959*, p. 12; *Rapport d'activité 1960*, p. 19; *Rapport d'activité 1961*, pp. 20-21. ACICR, B AG 200 (12), Lettre de Léopold Boissier à Ferhat Abbas, 4 décembre 1959. ACICR, B AG 200 (12), Procès-verbal d'entretien entre Pierre Gaillard et le ministre de la Santé du GPRA et le représentant du « *Croissant-Rouge algérien* » à Genève, le Dr Ben Tami, 22 novembre 1960. *RICR*, N° 495, mars 1960, pp. 122-123. *RICR*, N° 518, février 1962, pp. 71-72. Entretiens de juin à septembre 1992, entre Pierre Gaillard et Françoise Perret.

de la collection complète de ces rapports. L'article relève que *« la situation reste mauvaise dans les camps de transit et de triage où de nombreux cas de sévices et de torture sont toujours signalés »*[42]. Simultanément, *Le Monde* publie un communiqué de la Présidence du Conseil qui déclare que les missions du CICR ont reçu toutes facilités pour la visite des lieux de détention et que, si certaines erreurs ont en effet été commises, on s'efforcerait d'y porter remède; enfin le communiqué ajoute que le CICR a également constaté des améliorations de traitement[43].

Cette publication a un retentissement considérable car tout le débat politique qui divise la France à cette époque porte, précisément, sur le recours à la torture en Algérie.

A aucun moment les autorités françaises ne mettent en cause la responsabilité du CICR pour la publication de ce rapport[44] mais certains journalistes et écrivains lui reprochent de n'avoir pas, lui-même, alerté l'opinion dès qu'il a constaté des cas de torture en Algérie. Le CICR fait alors paraître le communiqué suivant:

> *« Visites de lieux de détention par les délégués du Comité international*
>
> *La publication récente, par la presse, du rapport établi par le Comité international de la Croix-Rouge à la suite de la dernière mission de ses délégués en Algérie, a provoqué des questions sur les principes qui régissent son activité dans ce domaine. Le CICR croit donc opportun de rappeler les règles que, d'une façon générale, il observe traditionnellement.*
> *Il convient tout d'abord de distinguer essentiellement entre deux situations nettement différentes: les conflits armés de caractère international, dans lesquels s'appliquent pleinement les dispositions des Conventions de Genève, et les conflits de caractère interne. Dans les conflits internationaux, le CICR s'efforce de faire procéder de façon systématique, par ses délégués, à la visite des camps et autres lieux de détention où se trouvent des prisonniers ou des internés. Ces visites constituent un des aspects essentiels de son activité car, selon de multiples témoignages reçus, elles sont hautement profitables aux captifs. L'inspection des lieux de détention, qui comporte des entretiens sans témoins avec les détenus, permet au CICR de connaître le traitement qui leur est réservé, de*

42 *Le Monde*, 5 janvier 1969, page 1.

43 *Ibidem.*

44 Selon le témoignage de l'historien Pierre Vidal-Naquet, la fuite était due à Gaston Gosselin, alors proche collaborateur du Garde des Sceaux Edmond Michelet: *«Au ministère de la Justice, occupé par Edmond Michelet de janvier 1959 à août 1961, fonctionna pendant un peu plus d'un an une équipe formée par deux anciens camarades de déportation (à Dachau) du ministre, Gaston Gosselin et Joseph Rovan. Tous deux étaient résolument hostiles aux pratiques en honneur en Algérie. Si Rovan agit de façon discrète, Gosselin n'hésita pas à provoquer des scandales, par exemple en communiquant au journaliste Pierre Viansson-Ponté le rapport sur l'Algérie du Comité international de la Croix-Rouge: ce document capital fut publié dans* Le Monde *du 5 janvier 1960.»* Pierre Vidal-Naquet, *La raison d'Etat*, Paris, La Découverte, 2002, p. 6.

*vérifier l'application des dispositions des Conventions de Genève, de renseigner avec impartialité et objectivité les Puissances intéressées, d'améliorer le sort des captifs par des démarches sur place ou des interventions auprès de la Puissance détentrice, d'orienter les actions de secours, de contrôler enfin la distribution des envois.*

*Dans une guerre internationale, des dispositions précises des Conventions de Genève donnent au CICR le droit formel de procéder à de telles visites. En revanche, dans des conflits de caractère non international, il n'existe qu'une brève disposition des Conventions de Genève enjoignant aux Parties au conflit de respecter certaines règles générales d'humanité. Les visites des délégués du CICR ne sont pas expressément prévues; cependant, cette institution est autorisée à offrir ses services aux Parties au conflit.*

*Ces offres de services tendent principalement à obtenir l'autorisation de visiter librement les camps, comme dans les cas de guerres internationales. Elles comportent l'engagement de ne communiquer les constatations faites qu'au Gouvernement qui donne l'autorisation de visite. On sait que le Gouvernement français a accueilli favorablement, dès 1955, les offres de services faites par le CICR à propos du conflit algérien.*

*Les rapports établis à la suite des visites effectuées par les délégués du CICR ne sont donc remis qu'au Gouvernement de la Puissance détentrice (dans le cas d'une guerre internationale, ils sont également transmis au Gouvernement de la Puissance d'origine des prisonniers visités). Cette discrétion est nécessaire pour que l'action du CICR soit efficace; il faut que les Autorités détentrices aient pleine confiance dans le CICR et dans ses délégués, spécialement lorsque celui-ci est admis à intervenir dans des situations relevant souvent de la seule compétence interne d'un État et où l'intervention d'autres organismes internationaux n'est pas tolérée. Cette confiance est également nécessaire par le fait que le CICR doit pouvoir librement critiquer le régime de détention et conseiller le Gouvernement intéressé à l'écart de toute polémique.*

*Le CICR ne procède donc pas à la publication des rapports établis par ses délégués. Bien entendu, les Gouvernements auxquels ces rapports sont remis sont libres de le faire s'ils le jugent bon, généralement après consultation du CICR.*

*De même, le CICR s'abstient de protester publiquement contre les actes précis attribués à telle ou telle Puissance ou à ses agents civils ou militaires. Là aussi l'expérience a montré que de telles manifestations sont sans effets réels et ne peuvent que compromettre une œuvre secourable que le CICR est souvent seul en mesure d'accomplir.*

*En revanche, celui-ci ne se contente pas de transmettre sans autre les rapports de ses délégués; il agit sans relâche auprès des autorités responsables pour que soit mis fin à des situations contraires aux Conventions de Genève ou aux principes d'humanité. De telles démarches sont répétées aussi fréquemment que les circonstances l'exigent. C'est ainsi que le CICR peut agir le plus utilement en faveur des victimes des conflits »*[45].

45 *Rapport d'activité 1959*, pp. 8-10: *Rapport d'activité 1960*, pp. 17-18. *RICR*, N° 841, juillet 1959, p. 341. *RICR*, N° 493, janvier 1960, p. 18. *RICR*, N° 494, février 1960, pp. 87-89. ACICR, A PV PI, Procès-verbal de la séance plénière de l'Assemblée du CICR, 9 janvier 1960.

Durant l'année 1960, les autorités françaises n'autorisent pas le CICR à envoyer des délégués visiter les lieux de détention en Algérie car ceux-ci font l'objet d'une réorganisation. Celle-ci est vraisemblablement consécutive aux constatations faites par les délégués et à la publication du contenu de leurs rapports. En revanche, le CICR peut poursuivre ses visites aux Algériens détenus en France.

En 1961, le CICR est à nouveau autorisé à visiter des détenus en Algérie; ses délégués y effectuent donc trois séries de visites au cours desquelles ils se rendent dans 124 lieux de détention.

Parallèlement, les délégués du CICR continuent à visiter les Algériens détenus en France. Ainsi de mars à juillet 1961, ils visitent 20 lieux de détention.

Une nouvelle série de visites en France se déroule du 5 au 20 novembre, au moment où la plupart des Algériens détenus font la grève de la faim; les délégués se rendent donc à l'hôpital de Garches où sont internés trois ministres du GPRA: Ben Bella, Aït Ahmed et Khider; à l'issue de leurs entretiens avec ces ministres, ils soumettent aux autorités françaises certaines propositions visant à améliorer le sort des détenus; elles les acceptent; le CICR en informe les détenus algériens qui décident alors de mettre un terme à leur grève de la faim.

Une dernière visite aux Algériens détenus en Algérie est effectuée en mai 1962[46].

### Un plan d'action d'urgence

Suite à la proclamation du cessez-le-feu, le 19 mars 1962, les attentats de l'OAS se multiplient dans toute l'Algérie et le délégué permanent du CICR à Alger, Roger Vust, tente de faire parvenir des secours aux blessés; il est rejoint par Pierre Gaillard qui établit, avec les autorités algériennes et le Haut-Commissaire de France, un plan d'action d'urgence, notamment pour l'assistance médicale à la population civile, les visites aux prisonniers, la recherche des disparus et les secours aux populations regroupées. A la mi-mai des équipes médicales du CICR arrivent en Algérie[47].

46 *Rapport d'activité 1961*, pp. 17-19; *Rapport d'activité 1962*, p. 9. *RICR*, N° 508, avril 1961, pp. 202-203. *RICR*, N° 516, décembre 1961, pp. 605-606. *RICR*, N° 517, janvier 1962, pp. 29-30. *RICR*, N° 519, mars 1962, pp. 130-131.

47 *Rapport d'activité 1962*, pp. 10-11. *RICR*, N° 520, avril 1962, p. 177. *RICR*, N° 522, juin 1962, pp. 294-295. *RICR*, N° 523, juillet 1962, pp. 330-332. ACICR, B AG 200 (12), Rapport de mission du Dr de Chastonay, 8 juin 1962.

### Les accords d'Evian et le sort des prisonniers

Signés le 18 mars 1962 et suivis, le lendemain, par la proclamation du cessez-le-feu, les accords d'Evian prévoient, à partir du 19 mars, un délai de vingt jours au cours duquel les parties s'engagent à libérer les prisonniers qu'elles détiennent et à informer le CICR de leur lieu de stationnement ainsi que de « *toutes mesures prises en faveur de leur libération* »[48].

A l'expiration de ce délai, les autorités françaises ont fait connaître au CICR les lieux de stationnement de 3600 prisonniers capturés les armes à la main ainsi que les mesures prises pour leur libération et pour leur retour dans leurs foyers; les libérations débutent effectivement au début du mois d'avril[49].

A la même époque, le GPRA libère trois militaires français détenus depuis le printemps 1961. Deux autres militaires français, capturés par l'ALN en février 1961, sont libérés en Kabylie et remis entre les mains de la Commission d'armistice locale, à Tizi Ouzou. Quatre autres soldats français sont libérés en juin 1962 sur sol marocain et enfin une vingtaine de légionnaires originaires de divers pays européens sont libérés avant la fin de l'année 1962.

### La recherche des personnes disparues et la visite des détenus

Cependant on reste sans nouvelles de 330 militaires français et 264 civils européens portés disparus à un moment ou à un autre du conflit[50].

Pour tenter de retrouver ces personnes, les délégués du CICR effectuent des recherches dans différentes régions d'Algérie; ils lancent régulièrement des appels à la radio en français et en arabe et s'efforcent d'obtenir le soutien des autorités algériennes dans leurs recherches.

Par ailleurs, ils visitent les personnes arrêtées en raison des troubles qui ont suivi le cessez-le-feu et obtiennent un certain nombre de libérations. Ainsi, le 13 septembre 1962, deux délégués assistent à la libération de la prison de Maison-Carrée, près d'Alger, de 25 ressortissants européens en faveur

48 Accord sur le cessez-le-feu en Algérie, signé à Evian le 18 mars 1962 (article 11), *Revue générale de Droit international public*, 66e année, vol. 3, tome XXXIII, juillet-septembre 1962, pp. 686-692; *Keesing's Contemporary Archives*, June 9-16, 1962, p. 18801.

49 *Rapport d'activité 1962*, p. 9. *RICR*, N° 520, avril 1962, p. 176.

50 *Rapport d'activité 1959*, p. 9; *Rapport d'activité 1962*, p. 10. *RICR*, N° 521, mai 1962, p. 244. *RICR*, N° 522, juin 1962, p. 289.

Il y avait également de nombreux disparus dans les rangs du FLN, mais le CICR ne fut pas mandaté pour rechercher ces disparus après l'indépendance de l'Algérie, alors qu'il fut mandaté pour rechercher les soldats et civils français dont on était sans nouvelles.

desquels ils sont intervenus depuis plusieurs semaines. Le 17 septembre, ces mêmes délégués sont autorisés à visiter 34 Européens encore détenus à Maison-Carrée; ils en dressent la liste qu'ils communiquent aux autorités françaises.

Le 25 septembre, les autorités algériennes remettent au CICR une nouvelle liste de 43 Européens récemment arrêtés et internés à Maison-Carrée; ses délégués sont autorisés à les visiter et, le même jour, ils assistent à la libération de 7 détenus européens[51].

En octobre 1962, deux délégués du CICR, Pierre Gaillard et Roger Vust, prennent à nouveau contact avec les autorités algériennes; ils rencontrent notamment le président de l'Assemblée constituante, Ferhat Abbas et le commandant en chef de l'ALN, le colonel Boumediene; ils obtiennent de leurs interlocuteurs l'assurance qu'ils les appuieront dans leur action de recherche des personnes disparues et la garantie qu'ils seront autorisés à visiter les anciens « *harkis* » détenus en Algérie.

Le 7 novembre 1962, le président du CICR adresse au chef d'État algérien, Ahmed Ben Bella, une lettre dans laquelle il lui confirme la démarche de ses délégués[52].

### Mission du vice-président du CICR en Algérie

En février 1963, l'un des vice-présidents du CICR, Samuel Gonard, se rend à Alger pour négocier avec le gouvernement algérien afin d'obtenir, notamment, l'appui des autorités pour la recherche des personnes disparues depuis l'entrée en vigueur du cessez-le-feu, soit le 19 mars 1962 et dont le nombre est évalué à près de 1500.

Au cours de cette mission, Samuel Gonard s'entretient à plusieurs reprises avec le président de l'État algérien, Ahmed Ben Bella, ainsi qu'avec des membres du Conseil des ministres. A l'issue de ces conversations, le gouvernement algérien et le CICR concluent un accord selon lequel ce gouvernement s'engage à donner toutes facilités aux délégués du CICR pour l'accomplissement de leur tâche; ils pourront notamment circuler librement sur tout le territoire algérien.

51 *Rapport d'activité 1962*, pp. 11-12. *RICR*, N° 522, juin 1962, pp. 294-296. *RICR*, N° 523, juillet 1962, pp. 332-334. *RICR*, N° 525, septembre 1962, pp. 456-457. *RICR*, N° 526, octobre 1962, pp. 502-503.

52 *Rapport d'activité 1962*, pp. 12-13. *RICR*, N° 527, novembre 1962, pp. 547-548. *RICR*, N° 528, décembre 1962, pp. 612-613.

Cet accord, entre le CICR et le gouvernement algérien, est renforcé par l'aboutissement de négociations entreprises sur le même sujet entre le gouvernement français et le gouvernement algérien.

Avant de quitter Alger, Samuel Gonard visite encore la prison de Maison-Carrée où il s'entretient librement avec de nombreux détenus – pour la plupart d'anciens « *harkis* ». Sur sa proposition, le gouvernement ordonne la mise en liberté de 111 d'entre eux[53].

### Le CICR visite les « harkis » et recherche les disparus

Dès la mi-mars 1963, se fondant sur l'accord négocié par Samuel Gonard, le CICR envoie en Algérie une mission composée d'une vingtaine de délégués et dirigée par Claude Pilloud.

Les délégués obtiennent sans difficulté l'autorisation de visiter les « *harkis* » détenus dans des prisons; en revanche ils ne sont pas autorisés à se rendre auprès de ceux qui sont détenus dans des camps militaires.

Au cours de leurs visites dans les prisons, les délégués obtiennent la libération d'un certain nombre de « *harkis* » et le CICR prête ses bons offices en vue de la négociation d'un accord entre les gouvernements algérien et français aux termes duquel la France accueillera tous les anciens « *harkis* » désireux de quitter l'Algérie.

Quant aux recherches des personnes disparues, elles s'avèrent extrêmement difficiles, notamment en raison du temps écoulé depuis les disparitions. Pourtant les délégués se rendent systématiquement dans les lieux où les disparus ont été signalés pour la dernière fois, ils interrogent les témoins éventuels et les autorités locales et obtiennent des renseignements probants pour environ 50 % des cas. Lorsqu'elles aboutissent, les enquêtes concluent le plus souvent au décès ou à une forte présomption de décès; pourtant un petit nombre de disparus sont retrouvés vivants, il s'agit notamment de personnes dont on a perdu la trace lors du rapatriement précipité des Français d'Algérie.

Samuel Gonard retourne en Algérie en juin 1963; il est reçu par le président Ben Bella qu'il informe des difficultés rencontrées par les délégués du CICR dans le cadre de leur action en faveur des « *harkis* », dont ils pensent qu'un certain nombre serait enfermé dans des camps militaires auxquels ils n'ont pas accès; Ben Bella promet alors à Gonard que les délégués pourront visiter ces camps.

53 *Rapport d'activité 1963*, pp. 7-8. *RICR*, N° 531, mars 1963, p. 138. ACICR, B AG 251 (12), Lettre de Léopold Boissier, président du CICR, à Jean de Broglie, secrétaire d'État chargé des affaires algériennes, 22 mars 1963.

A l'issue de son voyage en Algérie, Gonard arrive à la conclusion que le CICR ne doit pas y prolonger sa mission spéciale au-delà des dates initialement prévues (septembre 1963); d'éventuelles visites à des *« harkis »* dans des camps militaires ne devraient donc revêtir qu'un caractère de sondage. En fait, les délégués ne reçoivent pas l'autorisation de pénétrer dans ces camps et, lors de sa séance du 19 septembre 1963, le Conseil de la Présidence du CICR prend acte de cette situation et constate que le problème des *« harkis »* est désormais du ressort des gouvernements algérien et français.

La mission spéciale du CICR s'achève en septembre 1963, le Croissant-Rouge algérien – reconnu le 4 juillet 1963 – reprenant désormais la responsabilité de la suite des actions entreprises par le CICR[54].

Pourtant le CICR continue à recevoir des demandes de familles de *« harkis »* qui affirment que leur parent est toujours détenu en Algérie et, le 7 octobre 1963, il s'adresse à nouveau au gouvernement algérien dans l'espoir de pouvoir faire visiter par ses délégués les *« harkis »* qui seraient détenus dans des camps militaires; le gouvernement algérien répond cette fois positivement à la requête du CICR et, en janvier 1964, un de ses délégués est autorisé à visiter trois casernes, à Constantine, Kenchala et Bou-Saâda; mais il n'y rencontre aucun *« harki »*. Ses interlocuteurs lui déclarent d'ailleurs que, selon le gouvernement algérien, le problème est terminé[55]. Pourtant, à l'occasion d'une mission effectuée suite au conflit algéro-marocain, un délégué du CICR, Jacques de Heller, approche à nouveau les autorités algériennes au sujet des *« harkis »* mais il n'obtient que des réponses dilatoires. Le président du CICR écrit alors au président du gouvernement algérien pour lui demander d'autoriser ses délégués à visiter les *« harkis »* encore détenus en Algérie, mais cette lettre reste sans réponse.

L'année 1965 s'achève donc sans que le CICR puisse reprendre une action en faveur des dernières victimes du conflit algérien détenues dans leur pays[56]. Son action en faveur des anciens *« harkis »* ne débouche que sur des résultats très limités.

54 *Rapport d'activité 1963*, pp. 8-9. *RICR*, N° 532, avril 1963, pp. 178-179. ACICR, B AG 251 (12), Lettres de Léopold Boissier, président du CICR, à Jean de Broglie, Secrétaire d'État chargé des affaires algériennes, 5 avril et 20 mai 1963. ACICR, B AG 251 (12), Rapport de mission de Samuel Gonard, 28 juin 1963. ACICR, B AG 251 (12), Note de Roger Gallopin, directeur exécutif du CICR, à Georges Hoffmann, chef de la mission spéciale du CICR en Algérie, 1 juillet 1963.

55 ACICR, B AG 229 (12), Lettre de Roger Gallopin, directeur exécutif du CICR, à M. Ben Zerfa, chef de Cabinet à la Présidence, 7 octobre 1963. ACICR, B AG 251 (12), Rapport sur la mission spéciale du CICR en Algérie, 25 octobre 1963. ACICR, B AG 229 (12), Lettre du gouvernement algérien au CICR, 20 novembre 1963. ACICR, B AG 229 (12), Rapport de mission de Jacques de Heller, 29 janvier 1964.

56 ACICR, B AG 229 (12), Rapport de mission de Jacques de Heller, 22 avril 1964. ACICR, B AG 229 (12), Lettre de Léopold Boissier, président du CICR, à Ahmed Ben Bella, président de la République algérienne, 19 mai 1964.

## Conclusion

En Algérie, l'action du CICR se déroule dans le cadre d'une guerre de libération nationale marquée par le terrible enchaînement des attentats, de la répression, des représailles et de la torture. Dès lors, son but prioritaire sera d'obtenir que toutes les personnes tombées aux mains de l'adversaire soient humainement traitées. Pour cela, il multiplie les démarches auprès des autorités françaises et des chefs du FLN.

Dans ses contacts avec les autorités françaises, le CICR négocie, aussi bien à Paris qu'à Alger, avec des interlocuteurs qui disposent des moyens nécessaires pour faire respecter leurs ordres; dès lors, dans la mesure où ils acceptent les propositions du CICR, le message passe et des améliorations sont obtenues. D'ailleurs, au fil de leurs missions, la crédibilité des délégués du CICR auprès des militaires français augmente; cela se traduit manifestement par le grade de l'officier de liaison qui les accompagne; lors des premières missions, c'est un capitaine, puis un lieutenant-colonel et enfin un général avec qui les délégués ont l'autorisation d'entrer à l'improviste dans n'importe quel camp[57].

Si les démarches répétées du CICR conduisent à de nombreuses améliorations des conditions de détention et, en particulier, à l'établissement d'un statut particulier et de camps d'internement militaire pour les combattants pris les armes à la main, en revanche, ses démarches ne permettent pas de mettre un terme à la pratique de la torture lors des interrogatoires de prisonniers. La publication par *Le Monde*, le 5 janvier 1960, d'extraits du rapport de synthèse sur la septième série de visites de lieux de détention en Algérie provoque un très vif émoi et relance le débat sur les méthodes d'interrogatoire appliquées en Algérie. Toutefois, cette divulgation a son prix. Bien que les autorités françaises admettent que la fuite n'est pas imputable au CICR, il faudra plus d'une année avant que celui-ci soit autorisé à envoyer une nouvelle mission en Algérie.

Les négociations avec les dirigeants du FLN révèlent que l'action du CICR en faveur des prisonniers détenus par l'ALN se heurte à des obstacles quasi insurmontables. En effet, ils déclarent aux délégués du CICR que les conditions dans lesquelles leurs hommes se battent rendent impossible l'organisation d'une visite aux prisonniers qu'ils détiennent; en outre ils ne contrôlent pas tous leurs combattants et ne peuvent donc empêcher des actes

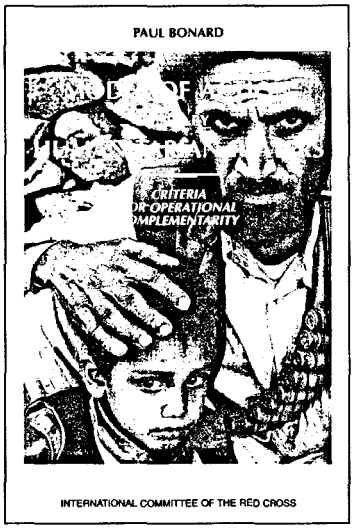
57 Entretiens de Pierre Gaillard avec Françoise Perret, janvier-février 1992.

de représailles. Cela explique que le CICR n'obtient que des résultats très limités en ce qui concerne les Français capturés par le FLN.

Un autre domaine où l'action du CICR ne parvient pas à se développer est celui de la protection des « *harkis* » aux mains des nouvelles autorités algériennes.

Parallèlement à ses démarches en faveur des diverses catégories de détenus, le CICR parvient à réaliser, avec le concours de la Croix-Rouge française, des Croissants-Rouges marocain et tunisien et de la Ligue des Sociétés de la Croix-Rouge, une importante action de secours en faveur de la population civile algérienne durement frappée par la guerre; sur ce point, le bilan de l'action est donc positif.

Étudiée plus de quarante ans après son déroulement, l'action du CICR en Algérie peut apparaître comme une action parmi tant d'autres; mais il n'en est rien; dans cette première grande guerre d'indépendance en Afrique, le CICR a fait œuvre de pionnier; dès le début du conflit, alors que le FLN était considéré par la grande majorité de l'opinion française – à l'exception de quelques artistes et écrivains célèbres – comme un mouvement terroriste, le CICR a d'emblée cherché le contact avec ses dirigeants pour tenter d'obtenir qu'ils s'engagent à respecter les principes fondamentaux du droit international humanitaire. Ainsi cette institution, si souvent qualifiée de « *bourgeoise* », n'a pas hésité à traiter avec ceux que le monde occidental honnissait pour sauver des victimes d'une guerre impitoyable. Ce précédent constituera pour le CICR une expérience précieuse pour ses interventions futures dans le cadre d'autres guerres de libération.




**Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity**

*by Paul Bonard*

On the basis of a classification of the different means of action used by humanitarian players, the author shows clearly and concisely that there are three modes of action that apply to any situation, namely "persuasion", "denunciation" and "substitution". He explains how relations among humanitarian players can be organized according to these three modes of action and how this can help them achieve complementarity and solidarity for the benefit of the victims they serve.

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# Le Comité international de la Croix-Rouge réduit les délais de protection de ses archives

JEAN-FRANÇOIS PITTELOUD*

Dans sa séance du 29 avril 2004, l'Assemblée du Comité international de la Croix-Rouge (CICR) a décidé de modifier le *Règlement d'accès aux Archives du CICR* de 1996 et de réduire les délais de protection de ses archives à 40 ans pour le délai général et à 60 ans pour le délai prolongé: elle ouvre ainsi au public les archives de la période 1951-1965.

Avec ces délais de protection raccourcis, le CICR a voulu tenir compte de l'évolution des pratiques en matière d'accès public aux archives et confirmer sa politique d'ouverture et de transparence décidée en 1996. Il réaffirme aussi sa volonté de faire connaître l'histoire du CICR, dans le droit fil du mandat de recherche confié en 1979 au professeur Jean-Claude Favez et de la publication, en 1988, d'*Une mission impossible? Le CICR, les déportations et les camps de concentration nazis*, et des nombreux travaux historiques fondés depuis 1996 sur les archives du CICR.

C'est un ensemble de près de 500 mètres linéaires supplémentaires d'archives qui sont désormais proposées à l'accès public. Elles concernent les conflits des débuts de la guerre froide et de la décolonisation: guerre de Corée (1950-1953), guerre d'Indochine (1946-1954), conflit de Suez (1956), Révolution hongroise (1956), guerre d'Algérie (1954-1962), indépendance du Congo (1960-1965), crise de Cuba (1962) et guerre civile au Yémen (1962-1964) en particulier. Elles permettent aussi l'étude de dossiers juridiques ou généraux: mise en œuvre des Conventions de 1949, révision des statuts de la Croix-Rouge internationale et de l'accord avec la Ligue (1951-1952), Conférences internationales de Toronto (1952), New Delhi (1957) et Vienne (1965).

**Annexe:** Règlement d'accès aux archives du Comité international de la Croix-Rouge

* L'auteur est archiviste adjoint du Comité international de la Croix-Rouge.

## Règlement d'accès aux archives du Comité international de la Croix-Rouge

(adopté par l'Assemblée du CICR, le 17 janvier 1996
et révisé par l'Assemblée du CICR, le 29 avril 2004)

**Préambule** – *Buts*

1. Le présent Règlement organise l'accès aux archives du CICR qui comprennent:
   - les archives des organes décisionnels de l'institution;
   - les archives des membres du Comité;
   - les archives des unités du siège;
   - les archives des délégations;
   - des archives d'autres provenances, réunies aux archives du CICR, déposées dans les archives du CICR.
2. Il s'applique, par analogie, aux archives courantes, intermédiaires ou définitives qui ne sont pas déposées dans les archives du CICR.

### Section I: Dispositions générales

**Article 1** – *Principe*

Deux catégories d'usagers ont accès aux archives du CICR aux conditions fixées par le présent règlement :
- les membres du Comité et les collaborateurs du CICR, d'une part;
- le public, d'autre part.

**Article 2** – *Limites*

Des limitations d'accès aux archives du CICR sont définies aux Sections II et III, pour chacune des deux catégories d'usagers.

**Article 3** – *Communication*

L'archiviste du CICR définit dans le *Règlement de communication des archives du CICR* les modalités pratiques de l'accès aux archives du CICR.

## Section II : Membres du Comité et collaborateurs du CICR

**Article 4** – *Membres*

1. Conformément aux articles 2, 3 et 17 du *Règlement intérieur du CICR* du 24 juin 1998, les membres du Comité ont un accès aux archives courantes, intermédiaires et définitives du CICR, quelle que soit la classification des dossiers demandés. Ils n'ont pas d'accès général aux dossiers personnels des collaborateurs.
2. Le droit d'accès de la Commission de contrôle, tel que défini dans le *Règlement* de cette commission approuvé par l'Assemblée, demeure réservé.

**Article 5** – *Collaborateurs*

1. Dans l'exercice de leurs responsabilités, les collaborateurs permanents du CICR ont accès aux archives courantes, intermédiaires et définitives classifiées «Internes» ou «Confidentielles» et soumises à un délai de protection.
2. Seule l'unité productrice ou, à défaut, l'archiviste du CICR, peuvent autoriser l'accès des collaborateurs du CICR aux archives classifiées «Strictement confidentielles». Les procès-verbaux des séances en huis clos des organes décisionnels ne sont communiqués que sur autorisation expresse du président du CICR.
3. Le droit d'accès du chef de l'audit interne, tel qu'il ressort du cahier des charges adopté par l'Assemblée, demeure réservé.

## Section III : Public

**Article 6** – *Archives publiques*

Le public a accès aux archives «Publiques» du CICR[1], sur la base de délais qui assurent qu'aucun préjudice n'en résulte ni pour le CICR, ni pour les victimes qu'il a le devoir de protéger, ni pour des intérêts privés ou publics dignes de protection.

1 Les archives classifiées «Publiques» sont inventoriées et classées par les archivistes du CICR.

Article 7 – *Archives publiques*

1. Les archives «Publiques» du CICR comprennent trois types de dossiers:
   - les dossiers généraux du CICR de plus de 40 ans, y compris les procès-verbaux des organes décisionnels;
   - les procès-verbaux de la Commission de recrutement, les dossiers personnels des collaborateurs et les dossiers sériels contenant des données personnelles ou médicales de plus de 60 ans:
     - l'accès à des renseignements individuels de nature biographique ou autobiographique, portant sur une personne identifiée, est autorisé après 40 ans: ces recherches se font par l'entremise des archivistes (cf. article 10);
     - si la personne concernée l'autorise, ce délai de 40 ans peut être raccourci;
   - les archives d'autres provenances, déposées dans les archives du CICR, sont communiquées conformément aux délais fixés par les personnes ou les institutions qui les ont déposées.
2. Les délais de communication sont à compter de la date de fermeture du dossier[2].
3. Les documents accessibles au public avant d'être déposés aux archives le restent aussi par la suite.

Article 8 – *Dérogations*

1. Le Conseil de l'Assemblée peut, avant l'expiration des délais fixés à l'article 7, accorder des dérogations pour faciliter des travaux scientifiques que le CICR lui-même souhaite voir aboutir ou pour lesquels il estime avoir un intérêt.
2. Le Conseil de l'Assemblée adopte le *Règlement des accès par dérogation aux archives classifiées.*

Article 9 – *Restrictions*

L'accès du public aux archives du CICR pourra être provisoirement retardé pour permettre les travaux de conservation nécessaires à la communication des dossiers demandés en consultation ou si aucune place de lecteur n'est disponible dans la salle de consultation.

2 Le Comité approuve le tableau des fonds «Publics» des archives du CICR tenu à jour par l'archiviste du CICR.

**Article 10** – *Émoluments*

Les recherches effectuées par des collaborateurs du CICR à la demande de personnes extérieures à l'institution sont soumises à émoluments (cf. article 7).

**Article 11** – *Usage*

L'usage des archives à des fins commerciales est interdit, sauf contrat *ad hoc* passé avec le CICR.

## Section IV : Disposition transitoire

**Article 12** – *Abrogation*

Le présent règlement remplace le *Règlement d'accès aux archives du Comité international de la Croix-Rouge* du 17 janvier 1996, dès le 1er mai 2004.

# The International Committee of the Red Cross reduces the protective embargo on access to its archives

JEAN-FRANÇOIS PITTELOUD*

On 29 April 2004, the ICRC Assembly decided to modify the Rules governing access to the archives of the ICRC of 1996 by shortening the protective embargo on access to its archives to a general period of 40 years and an extended period of 60 years. It is therefore now opening its 1951-1965 archives to consultation by the general public.

In reducing the embargo period, the ICRC is seeking to comply with current trends regarding public access to archives and is at the same time confirming its policy of openness and transparency as defined in 1996. It is also reasserting its wish to make the history of the ICRC known, in full keeping with the research mandate entrusted to Jean-Claude Favez in 1979 and the publication in 1988 of The Red Cross and the Holocaust and numerous other historical works written since 1996 using ICRC archives.

An extra 500 linear meters of archives are thus being opened to the public for the first time. They cover the conflicts of the early years of the Cold War and the decolonization period, for instance: the Korean War (1950-1953), the First Indochina War (1946-1954), the Suez Conflict (1956), the Hungarian Revolution (1956), the Algerian War (1954-1962), the Independence of Congo (1960-1965), the Cuban Crisis (1962) and the civil war in Yemen (1962-1964). They can also be used for research on legal or general topics, for example the implementation of the Conventions of 1949, the revision of the statutes of the International Red Cross and the agreement with the League (1951-1952), and the International Conferences of Toronto (1952), New Delhi (1957) and Vienna (1965).

**Annex:** Rules governing access to the archives of the International Committee of the Red Cross

* The author is Deputy archivist at the International Committee of the Red Cross.

# Rules governing access to the archives of the International Committee of the Red Cross

(Adopted by the ICRC Assembly on 17 January 1996
and revised by the ICRC Assembly on 29 April 2004)

## Introduction — *Purpose*

1. The present Rules govern access to the ICRC archives, which comprise:
   - the archives of the ICRC decision-making bodies;
   - the archives of Committee members;
   - the archives of the units at headquarters;
   - the archives of delegations;
   - archival material from other sources which are kept at the ICRC.
2. The Rules also apply, by analogy, to current records, semi-current records and closed records, which are not stored in the ICRC archives.

## Section I: General Provisions

### Article 1 — *Principle*

The present Rules lay down conditions for access to the ICRC archives by two categories of users:

- members of the Committee and ICRC staff;
- the general public.

### Article 2 — *Limitations*

The various limitations on access to the ICRC archives by each of these categories are set out in Sections II and III.

### Article 3 — *Access*

The ICRC archivist sets out the practical terms and conditions for access to the ICRC archives in the Regulations for users of ICRC archives.

## Section II: Committee members and ICRC staff

**Article 4** — *Members*

1. In accordance with Articles 2, 3 and 17 of the *Règlement intérieur du CICR* of 24 June 1998, Committee members have access to the ICRC current, semi-current and closed records, whatever the classification of those documents. They do not have general access to the personal files of ICRC staff.
2. The right of access by the Control Commission is reserved in accordance with the regulations governing its activities, as approved by the ICRC Assembly.

**Article 5** — *Staff*

1. In pursuance of their professional duties, permanent ICRC staff have access to the current, semi-current and closed records that are classified "internal" or "confidential" and are protected during a set period.
2. Only the unit that has created the document or, where this is not possible, the ICRC archivist, may authorize access by ICRC staff to archives classified as "strictly confidential". The minutes of meetings held *in camera* by the decision-making bodies may be consulted only with the express authorization of the ICRC President.
3. The right of access by the Head of Internal Audit is reserved in accordance with the terms of reference pertaining to that function, which have been adopted by the ICRC Assembly.

## Section III: Public

**Article 6** — *Public archives*

The general public has access to archives classified as "public"[1] after a set period of time, to ensure that such access will in no way be detrimental to the ICRC, to the victims that it is its duty to protect, or to any other private or public interests requiring protection.

1 The ICRC archivists describe and arrange archives classified as "public".

Article 7 — *Public archives*

1. Three types of documents are to be found in the "public" archives:
   - General ICRC files dating back more than 40 years, including minutes of the decision-making bodies.
   - The minutes of the Recruitment Commission, the personal files of staff members and the record series containing personal or medical information dating back more than 60 years.
     - Access to biographical or autobiographical information on a specific individual is allowed after 40 years; such research, however, must be carried out by an ICRC archivist (see Article 10).
     - If permission is obtained from the individual concerned, the 40-year period may be shortened.
   - Access to archival material from other sources, which has been stored in the ICRC archives, is authorized from the date set by the individuals or institutions that deposited the material at the ICRC.
2. The period after which a file becomes public is calculated from the date on which the file is closed.[2]
3. Documents that were open to consultation by the general public before being deposited in the ICRC archives remain so thereafter.

Article 8 — *Special access*

1. The Assembly Council may, before expiry of the time limits set in Article 7, grant special access to facilitate academic work which the ICRC itself wishes to see successfully completed or which it finds of interest.
2. The Assembly Council adopts the Rules governing special access to the ICRC classified archives.

Article 9 — *Restrictions*

Public access to ICRC archives may be temporarily delayed in order to permit necessary conservation work to be carried out on the documents requested, or if no space is available in the reading room.

Article 10 — *Fees*

A charge is made for research carried out by ICRC staff at the request of persons outside the organization (see Article 7).

2 The Committee approves the table of public record groups kept up to date by the ICRC archivist.

**Article 11** — *Use*

No use may be made of the archives for commercial purposes unless a specific contract to that effect has been concluded with the ICRC.

## Section IV: Entry into force

**Article 12** — *Abrogation*

The present Rules replace, as of 1 May 2004, *the Rules governing access to the archives of the International Committee of the Red Cross* of 17 January 1996.

# Futurs thèmes
# But et contenu de la *Revue*

La *Revue internationale de la Croix-Rouge* entend favoriser la réflexion sur le droit, la politique et l'action humanitaires dans les conflits armés et autres situations de violence armée collective. Publication spécialisée sur le droit humanitaire, elle cherche à promouvoir la connaissance, l'examen critique et le développement de ce droit et à contribuer à la prévention des violations des règles protégeant les droits et les valeurs fondamentaux. La *Revue* est aussi une tribune de débat sur l'action humanitaire contemporaine et elle stimule l'analyse des causes et des caractéristiques des conflits, ce qui permet de mieux comprendre les problèmes humanitaires qui en découlent.

## Structure et composition de la *Revue*

La *Revue* est composée de quatre grandes rubriques. La première contient des articles relatifs au thème du numéro en question. Des articles choisis sur le droit international humanitaire, mais ne touchant pas à ce thème, peuvent être publiés dans la deuxième rubrique, suivant leur originalité, leur importance et leur intérêt sur le plan académique. La troisième rubrique, intitulée *Notes et commentaires*, regroupe des contributions plus brèves et des commentaires sur des événements précis, la législation ou des opinions, ainsi que des critiques de livres. Tout comme les articles choisis sur le droit humanitaire, ces notes et commentaires ne sont pas nécessairement liés au thème de la *Revue* concernée. Ils visent aussi à aborder les questions d'actualité qui suscitent le débat. Enfin, la *Revue* publie des documents officiels du CICR, des rapports de conférences, etc., dans la rubrique *Faits et documents*.

## Futurs thèmes – mars 2005 à juin 2006

La liste de sujets ci-dessous présente les axes de réflexion, de débat et d'analyse des contributions à la *Revue*. Dans le cadre des paramètres de la publication, les sujets peuvent être traités dans une perspective historique, juridique, politique, militaire ou sécuritaire, psychosociologique ou humani-

taire, en adoptant un point de vue général ou régional. Les sujets d'intérêt mentionnés ci-dessous ne sont en aucune manière exhaustifs et d'autres sujets pourraient être traités en corrélation avec les futurs thèmes.

La date qui est indiquée ci-dessous pour chaque thème est celle de la publication du numéro correspondant de la *Revue*. Les articles doivent être soumis au plus tard quatre mois avant la publication, par exemple, fin février 2005 pour le numéro de juin 2005. Des informations à l'intention des auteurs et les règles de rédaction peuvent être consultées sur le site Internet de la *Revue*, à l'adresse : www.icrc.org/fre/revue

### Détention dans le contexte des conflits armés et de la violence armée collective (mars 2005)

*Délai de soumission : fin novembre 2004*

En 2005, le premier numéro de la *Revue internationale de la Croix-Rouge* sera consacré à la détention. La question de la détention dans le cadre de la lutte contre le terrorisme international et les nouvelles interrogations que soulève l'interdiction de la torture sont des sujets d'une grande actualité. Nous souhaitons donc recevoir des contributions qui – à la lumière des événements en Afghanistan et en Irak en particulier – prennent en compte les problèmes liés à la détention et au traitement des détenus par les autorités des États et par les acteurs non étatiques, notamment le phénomène des prises d'otages. La détention des femmes et des enfants reste une question très sensible, et des articles traitant de ces deux groupes de personnes seraient très appréciés.

Les problèmes suivants pourraient être analysés :

- Règles et pratique : fermer les yeux sur la torture (aspects psychologiques et sociaux de l'interdiction de la torture dans le contexte du terrorisme international et de la recherche de renseignements).
- Les méthodes d'interrogatoire et le droit international humanitaire.
- Détention et disparitions forcées.
- Vie et problèmes en milieu carcéral (sur les plans psychologique, sociologique, contexte historique).
- Les enfants et les femmes placés en détention : questions particulières.
- Détention des suspects et garanties judiciaires dans la lutte contre le terrorisme.
- Les commissions militaires (pour établir/contester le statut des détenus ; pour engager des poursuites contre des détenus considérés comme les auteurs présumés de crimes de guerre).
- Détention par les parties non étatiques à un conflit armé, notamment la « détention » d'otages.

- L'évaluation des conditions de détention: comment, par qui, quand? (Différents modes d'action de différentes organisations: coordination, influence mutuelle, efficacité)
- Les mécanismes de surveillance/suivi des conditions de détention dans les États démocratiques en période de conflit armé (commissions parlementaires d'enquête, chaîne hiérarchique, canaux d'information, etc.).

Religion et droit et action humanitaires (juin 2005)

*Délai de soumission: fin février 2005*

La religion reste un facteur essentiel dans nombre de conflits contemporains. Nous cherchons à mieux cerner les problèmes rencontrés dans la relation entre la religion, le droit international humanitaire et l'action humanitaire. Le rôle de la religion dans le développement du droit humanitaire et les valeurs religieuses qui sous-tendent ce droit, ainsi que l'influence de la religion sur le *jus in bello* sont des sujets qui présentent un intérêt particulier. En outre, des concepts comme la neutralité, l'universalité et l'impartialité – les clés de voûte d'une action humanitaire réussie – sont parfois mis en question pour des raisons religieuses et nous serions heureux de recevoir des contributions sur l'acceptation des organisations humanitaires dans différents environnements religieux, le rôle des organisations humanitaires confessionnelles et la question de la neutralité religieuse dans les conflits dits de religion.

Sujets possibles:

- Le rôle des valeurs religieuses dans le développement historique du droit humanitaire.
- Religion, fondamentalisme et droit humanitaire.
- Le rôle de la religion dans le *jus ad bellum* (en tant que dynamique de guerre ou de paix) et dans le *jus in bello* (contraintes dans les méthodes de guerre).
- Le rôle des responsables religieux dans la promotion du respect du droit humanitaire.
- L'attitude à l'égard des organisations humanitaires dans différents contextes religieux.
- Les organisations humanitaires confessionnelles.
- La neutralité religieuse dans les guerres de religion.
- L'action humanitaire indépendante dans les environnements/conflits religieux.

Armes (septembre 2005)

*Délai de soumission : fin mai 2005*

L'année 2005 sera marquée par la 60e commémoration de l'emploi d'armes nucléaires à Hiroshima et Nagasaki, la Conférence d'examen du Traité de non-prolifération des armes nucléaires, le 30e anniversaire de l'entrée en vigueur de la Convention sur les armes biologiques ou à toxines, et les préparatifs en vue de la sixième conférence d'examen de cette Convention, qui se tiendra en 2006. Alors que les armes classiques restent le principal moyen de mener la guerre, de nouvelles technologies sont mises au point par l'industrie des armements et de plus en plus employées. Nous serions heureux de recevoir des articles qui traitent des faits nouveaux dans tous ces domaines, et des contributions qui concilient les moyens nouveaux de faire la guerre et le cadre actuel du droit humanitaire. Il faut, plus particulièrement, analyser les questions relatives à ce que l'on appelle les armes « non létales », les armes à guidage de précision, les munitions hautement explosives améliorées et leur incidence sur l'interprétation des dispositions et des principes du droit international humanitaire. En outre, nous recherchons des enquêtes qui portent sur les effets des nouveaux développements sur l'environnement des conflits, les restes explosifs de guerre, la relation entre la guerre asymétrique et l'emploi des armes par les parties non étatiques, ainsi que l'utilisation potentielle des avancées dans le domaine des sciences de la vie – notamment la biotechnologie – dans la mise au point de nouvelles armes.

Sujets possibles :

- L'emploi des armes par les parties non étatiques : méthodes de guerre et obligations découlant du droit international.
- Armes à guidage de précision et munitions hautement explosives améliorées : incidence sur l'interprétation des principes du droit international humanitaire.
- Les armes dites « non létales » : les technologies nouvelles ayant des effets nouveaux sur le corps humain supposent-elles de nouveaux défis pour les normes fondamentales du droit international humanitaire ?
- Les faits nouveaux en ce qui concerne les armes : les effets sur l'environnement des conflits ; règles de fond.
- Les avancées dans le domaine des sciences de la vie : un avantage pour l'humanité ou une menace pour le droit international humanitaire ?
- Les armes nucléaires : 60 ans de dissuasion, de maîtrise des armements et de non-utilisation ? Et maintenant ?

Communication et action humanitaire (décembre 2005)

*Délai de soumission : fin août 2005*

La communication imprègne tous les aspects du droit et de l'action humanitaires. Le respect du droit humanitaire ne peut être assuré que si le contenu de cette branche du droit est connu, compris et accepté. La communication des messages du droit doit donc être adaptée aux contextes en mutation. Le rôle des médias, l'impact de la communication visuelle et l'évolution technologique appellent l'attention. Le non-respect et les violations du droit humanitaire sont portés à la connaissance du public à travers divers canaux, par le biais de la presse, des institutions politiques, humanitaires ou judiciaires. Les méthodes de communication des instances internationales (Conseil de sécurité, Assemblée générale, Tribunal pénal international pour l'ex-Yougoslavie, Tribunal pénal international pour le Rwanda, Cour pénale internationale, organes de défense des droits de l'homme) pourraient être examinées. De même, il faut comprendre les activités humanitaires pour les soutenir et les accepter. Les activités sur le terrain et leur aboutissement sont donc étroitement liés à des stratégies efficaces de communication, dont ils sont d'ailleurs tributaires. Reste à savoir comment mieux utiliser la communication pour obtenir l'accès aux zones de conflit et aux victimes et attirer l'attention sur elles afin d'améliorer leur situation.

Sujets possibles :

- La communication en tant qu'outil pour la protection des victimes.
- La communication et la mise en œuvre du droit international humanitaire.
- L'intérêt des appels publics.
- La valeur et l'impact des déclarations du Conseil de sécurité et d'autres organes.
- Promotion et perception des valeurs à travers la communication.
- Le dialogue interculturel.
- Les méthodes utilisées pour faire connaître et pour enseigner le droit et les principes humanitaires.
- Changer les perceptions/l'opinion publique à travers la communication.
- La communication visuelle (images, photographies) : « thérapie de choc » ; débat public sur la base des images : possibilités et risques.
- Communication non verbale : l'influence des événements sur la compréhension, la perception, l'opinion.
- La révolution de la technologie de l'information et son incidence sur les conflits et l'action humanitaire.

Justice transitionnelle et tribunaux pénaux internationaux (mars 2006)

*Délai de soumission : fin novembre 2005*

Plusieurs sociétés ont vécu récemment la fin d'un régime répressif ou d'un conflit armé. Veiller à ce qu'il soit rendu compte des atrocités massives ou des violations des droits de l'homme est une composante fondamentale de tout processus de réconciliation. La question de savoir comment mettre en place un système judiciaire transitionnel efficace reste au cœur d'un débat en cours. À cet égard, il est intéressant de prendre en considération les premiers travaux de la Cour pénale internationale, la pratique des tribunaux spéciaux, en particulier le Tribunal spécial irakien et le Tribunal spécial pour la Sierra Leone, et l'évolution des chambres extraordinaires au Cambodge. Nous apprécierions de recevoir des articles procédant à une analyse comparative des processus de justice transitionnelle dans différents pays et menant une réflexion sur les travaux des commissions récentes de la vérité.

Sujets possibles :

- La Cour pénale internationale et ses premiers travaux.
- Les accords bilatéraux sur les exemptions à la compétence de la Cour pénale internationale.
- Les tribunaux spéciaux (articles sur des tribunaux spécifiques).
- Réconciliation et/ou justice.

Conduite des hostilités (juin 2006)

*Délai de soumission : fin février 2006*

La réalité des conflits semble aujourd'hui changer de manière radicale en ce qui concerne la notion de combattants et celle de protection des civils. Simultanément, il faut poser la question de savoir si la définition des « objectifs militaires » a été élargie. Les assassinats ciblés sont devenus une pratique courante dans certains États, les opérations militaires secrètes se multiplient et la guerre urbaine est une nouvelle caractéristique courante des conflits asymétriques. Nous serions heureux de recevoir des articles sur ces sujets et toute autre évolution récente dans la conduite des hostilités.

Sujets possibles :

- La notion de civils et leur protection dans les conflits armés contemporains.
- L'élargissement de la définition d'« objectif militaire » : conséquences pour la protection des civils et des biens de caractère civil.
- Le problème des assassinats ciblés et questions connexes.

- La conduite des hostilités dans les conflits asymétriques : est-il impossible de respecter le droit international humanitaire ?
- La conduite des hostilités dans les conflits armés non internationaux : des règles lacunaires ?
- La guerre urbaine et les défis posés au droit international humanitaire.
- Les opérations militaires secrètes.

# Future themes
# Aim and scope of the *Review*

The aim of the *International Review of the Red Cross* is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal on humanitarian law, it endeavours to promote knowledge, critical analysis and development of this law and to contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* also offers a forum for discussion on contemporary humanitarian action and for analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate.

### Structure and composition of the *Review*

The *Review* is made up of four main sections. The first contains articles on the theme under discussion in the respective issue. Selected articles on international humanitarian law not related to that theme may be published in the second section, according to their originality, importance and academic standard. The third section, entitled *Notes and comments*, contains shorter contributions and comments on specific events, legislation or judgments, as well as book reviews. Like the selected articles on humanitarian law, these notes and comments need not necessarily be linked to the particular theme of the *Review* concerned. They are also meant to take up current issues giving rise to debate. Finally, in the *Reports and documents* section, the *Review* publishes official ICRC documents, conference reports, etc.

### Future themes — March 2005 to June 2006

The following list of topics indicates areas of reflection, debate and critical analysis for contributions to the *Review*. Within the parameters of the journal's aim, topics may be examined from a historical, legal, political, military-security, psycho-sociological or humanitarian perspective, taking either a general or a regional approach. The points of interest mentioned

below by no means exhaust the various subjects that could be addressed in relation to the future themes.

The dates given below for each theme indicate the planned dates of publication of the respective issue of the *Review*. Articles must be submitted not later than four months ahead of publication, e.g. by the end of February 2005 for the June 2005 issue. Information for contributors and guidelines for referencing can be consulted on the website of the *Review*: www.icrc.org/eng/review

### Detention in the context of armed conflicts and collective armed violence (March 2005)

*Deadline for submission: end of November 2004*

The first issue of the *International Review of the Red Cross* in 2005 will deal with detention. The question of detention in connection with the fight against international terrorism and the renewed querying of the prohibition of torture are highly topical. We therefore invite contributions which — *inter alia* in light of recent events in Afghanistan and Iraq — take into account the problems related to detention and treatment both by State authorities and by non-State parties, including the phenomenon of hostage-taking. The detention of women and children is still a particularly sensitive issue and contributions regarding these groups of persons are welcome.

The following problems could be analysed:

- Rules and practice: closing the eyes to torture (psychological and social aspects of the prohibition on torture in the context of international terrorism and intelligence gathering).
- Methods of interrogation and international humanitarian law.
- Detention and enforced disappearances.
- Life and problems in prison (psychological, sociological; historical background).
- Children and women in detention: particular issues.
- Detention of and judicial guarantees for suspects in the fight against terrorism.
- Military commissions (to establish/challenge the status of detainees; to prosecute detainees for alleged war crimes).
- Detention by non-State parties in armed conflict, including "detention" of hostages.
- Monitoring conditions of detention: how, by whom, when? (Different modes of action of different organizations: coordination, mutual influence, effectiveness).

- Mechanisms within democratic States to control/monitor conditions of detention in times of armed conflict (parliamentary commissions of inquiry, chain of command, information channels, etc.).

Religion and humanitarian law and action (June 2005)

*Deadline for submission: end of February 2005*

Religion remains a key factor in many modern-day conflicts. We aim to better identify the problems encountered in the relationship between religion and international humanitarian law and humanitarian action. Subjects of particular interest are the role of religion in the historical development of humanitarian law and the religious values underpinning it, and the impact of religion on *jus in bello*. Furthermore, concepts such as neutrality, universality and impartiality — cornerstones for the success of humanitarian action — are sometimes challenged on religious grounds and we welcome contributions dealing with the acceptance of humanitarian organizations in different religious environments, the role of faith-based humanitarian organizations and the question of religious neutrality in so-called religious wars.

Possible topics:

- The role of religious values in the historical development of humanitarian law.
- Religion, fundamentalism and humanitarian law.
- The role of religion in *jus ad bellum* (as a motivation for war or peace) and *jus in bello* (constraints in warfare).
- The role of religious leaders in enhancing respect for humanitarian law.
- Acceptance of humanitarian organizations in different religious settings.
- Faith-based humanitarian organizations.
- Religious neutrality in religious wars.
- Independent humanitarian action in religious environments/conflicts.

Arms (September 2005)

*Deadline for submission: end of May 2005*

The year 2005 will see the 60th commemoration of the use of nuclear weapons in Hiroshima and Nagasaki, the 2005 Non-Proliferation Treaty Review Conference and the 30th anniversary of the entry into force of the Biological and Toxin Weapons Convention, as well as preparations for the sixth review conference of the said convention in 2006. Whereas conventional weapons continue to be the principal means with which war is fought today, there is also an increased use or development of new technologies in

the weapons industry. We welcome articles that take account of the recent developments in all these areas and contributions that reconcile newly developed means of warfare with the current framework of humanitarian law. In particular, analysis is required of issues relating to so-called "non-lethal" weapons, precision-guided weapons and enhanced high-explosive munitions and their impact on interpretation of the provisions and principles of international humanitarian law. In addition, we are looking for inquiries that take into consideration the effects of new developments on the conflict environment, explosive remnants of war, the relationship between asymmetric warfare and the use of weapons by non-State parties, and the potential use of advances in the life sciences, especially biotechnology, for the development of new weaponry.

Possible topics:

- Use of weapons by non-State parties: asymmetric warfare and obligations under international law.
- Precision-guided weapons and enhanced high-explosive munitions: impact on interpretation of the principles of international humanitarian law.
- So-called "non-lethal" weapons: do new technologies with new effects on the human body mean new challenges for the basic norms of international humanitarian law?
- New developments with regard to weapons: effects on the conflict environment; substantive rules.
- Advances in the life sciences: benefit for humanity versus threat to international humanitarian law?
- Nuclear weapons: 60 years of deterrence, of arms control and of non-use? What now?

### Communication and humanitarian action (December 2005)

*Deadline for submission: end of August 2005*

Communication pervades every aspect of humanitarian law and action. Respect for humanitarian law can be ensured only if its content is known, understood and accepted. The communication of its messages therefore needs to be adapted to the changing contexts. The role of the media, the impact of visual communication and other technological developments call for consideration. Failure to respect that law and violations of it are likewise made known through various channels, through the press, political, humanitarian or judicial institutions. The methods of communication of interna-

tional bodies (Security Council, General Assembly, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, International Criminal Court, human rights bodies) could be examined. Similarly, people have to understand humanitarian activities if they are to support and accept them. Activities in the field and their successful outcome are thus closely linked to, and indeed also depend on, efficient communication strategies. The question is open as to how communication could better be employed as a means of obtaining access to conflict areas and victims and of drawing attention to them in order to improve their situation.

Possible topics:

- Communication as a tool for the protection of victims.
- Communication and the implementation of international humanitarian law.
- The relevance of public appeals.
- The value and impact of declaratory statements of the Security Council and other organs.
- Promotion and perception of values through communication.
- Intercultural dialogue.
- Methods of disseminating and teaching humanitarian law and principles.
- Changing perceptions/public opinion through communication.
- Visual communication (images, pictures): "shock therapy"; public debate on the basis of images: opportunities and risks.
- Non-verbal communication: the impact of events on understanding, perception, opinion.
- The information technology revolution and its impact on conflicts and humanitarian action.

### Transitional Justice and International Criminal Tribunals (March 2006)

*Deadline for submission: end of November 2005*

Various societies are currently emerging from repressive rule or armed conflict. Ensuring accountability for past mass atrocities or human rights abuses is fundamental for any reconciliation process and the question of how to implement a successful and effective transitional justice process remains the subject of an ongoing debate. In this connection it is of interest to consider the initial work of the International Criminal Court and the practice of the special tribunals, especially the Iraqi Special Tribunal and the Special Court for Sierra Leone, as well as developments in the Extraordinary

Chambers in Cambodia. In addition, we welcome contributions that provide a comparative analysis of transitional justice processes in different countries as well as reflections on the work of recent truth commissions.

Possible topics:

- The International Criminal Court and its initial work.
- Bilateral agreements on exemptions from the International Criminal Court.
- Special tribunals (articles on specific individual tribunals).
- Reconciliation and/or justice.

### Conduct of hostilities (June 2006)

*Deadline for submission: end of February 2006*

The reality of conflict currently seems to be changing radically with regard to the notion of combatants and the notion and protection of civilians. Simultaneously, the question needs to be asked whether there has been a widening of the definition of "military objectives". Targeted killings have become a common practice of some States, covert military operations are on the increase and urban warfare is now a common feature of today's asymmetric conflicts. We would be glad to receive articles on these subjects and on any other recent developments regarding the conduct of hostilities.

Possible topics:

- The notion and protection of civilians in contemporary armed conflicts.
- Widening the definition of a "military objective": consequences for the protection of civilians and civilian objects.
- The problem of targeted killings, and related issues.
- Conduct of hostilities in asymmetric conflicts: the impossibility to comply with international humanitarian law?
- Conduct of hostilities in non-international armed conflicts: insufficient rules?
- Urban warfare and the challenges to international humanitarian law.
- Covert military operations.

# 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

– **"Erasing the board": report of the international research mission into crimes under international law committed against the Bambuti Pygmies in the eastern Democratic Republic of Congo** / The Réseau des associations autochtones pygmées du Congo (RAPY) and Minority Rights Group International (MRG) – London: MRG, An MRG international report, July 2004, 28 pp.
– **Maghreb, la démocratie impossible?** / Pierre Vermeren – [Paris]: Fayard, 2004, 420 pp.

Articles

– **Ethiopian federalism: autonomy versus control in the Somali region** / Abdi Ismail Samatar – In: Third world quarterly, Vol. 25, No. 6, 2004, pp. 1131-1154.
– **HIV/AIDS, peacekeeping and conflict crises in Africa** / Paolo Tripodi and Preeti Patel – In: Medicine, conflict and survival, Vol. 20, No. 3, July-Sept. 2004, pp. 195-208.
– **Responsabilité et réparations dans le conflit des Grands-Lacs au Congo-Zaïre** / par Auguste Mampuya – In: Revue générale de droit international public, T. 108, N° 3, 2004, pp. 679-707.
– **The child soldiers of Sierra Leone: are they accountable for their actions in war?** / Mark Iacono – In: Suffolk transnational law review, Vol. 26, No. 2, Summer 2003, pp. 445-467.

### Asie – Asia

Livres – Books

– **Women silent victims in armed conflict: an area study of Jammu and Kashmir, India** / by Charu Walikhanna – New Delhi, Serials XV, 2004, 149 pp.

Articles

– **Of rivers and human rights: the Nothern areas, Pakistan's forgotten colony in Jammu and Kashmir** / Anita D. Raman – In: International journal on minority and group rights, Vol. 11, No. 1-2, 2004, pp. 187-228.
– **Sri Lanka's ethnic conflict: at a crossroad between peace and war** / Rajat Ganguly – In: Third world quarterly, Vol. 25, No. 5, 2004, pp. 903-918.

## Moyen-Orient – Middle East

### Livres – Books

– **Prisonniers de Saddam** / Matthew McAllester, trad. de l'anglais par Hélène Fabre et Odile Ferrard – Genève: Labor et Fides, Terres promises, 2004, 264 pp.

### Articles

– **Die Behandlung Internierter im Irak-Krieg: Grauzonen hinter der Kampfzone?** / Sebastian Heselhaus – In: Humanitäres Völkerrecht, 3/2004, 2004, pp. 136-143.
– **Jus in bello: occupation law and the war in Iraq** / remarks by Jean-Philippe Lavoyer... [et al.] – In: Proceedings of the 98th annual meeting of ASIL, 2004, pp. 117-124.
– **Jus in bello issues arising in the hostilities in Iraq in 2003** / by Yoram Dinstein – In: Israel yearbook on human rights, Vol. 34, 2004, pp. 1-14.
– **L'Irak, un an après** / Jean-François Daguzan... [et al.] – In: Maghreb-Machrek, N° 180, été 2004, pp. 11-78.
– **The protection of Iraqi cultural property** / Catherine Phuong – In: International and comparative law quarterly, Vol. 53, part 4, October 2004, pp. 985-998.
– **War, peace and land seizure in Palestine's border area** / Ghazi-Walid Falah – In: Third world quarterly, Vol. 25, No. 5, 2004, pp. 955-975.

## Armes – Weapons

### Articles

– **Weapons of mass destruction and the United Nations** / Jessica Tuchman Mathews – In: Global governance: a review of multilateralism and international organizations, Vol. 10, No. 3, July-Sept. 2004, pp. 265-271.

## Assistance humanitaire – Humanitarian assistance

### Livres – Books

– **Measuring the impact of humanitarian aid: a review of current practice** / Charles-Antoine Hofmann... [et al.] – London: Overseas development institute, HPG report 17, June 2004, 38 pp.
– **Perspectives humanitaires: entre conflits, droit(s) et action** / Réseau Vitoria, sous la dir. de Katia Boustany et Daniel Dormoy – Bruxelles: Bruylant: Université de Bruxelles, Collection de droit international 51, 2002, 332 pp.

### Articles

– **L'assistance humanitaire: travaux préparatoires, Bruges, 16e commission = The humanitarian assistance: preparatory work, Bruges** / rapporteur: Budislav Vukas – In: Annuaire de l'Institut de droit international, Vol. 70-1, 2002-2003, pp. 399-576.
– **L'humanitaire** / Claude Lanzmann, Bernard Kouchner... [et al.] – In: Les Temps modernes, N° 627, avril-mai-juin 2004, pp. 1-188.

– **The "responsibility to protect": is anyone interested in humanitarian intervention?** / S. Neil Macfarlane, Carolin J. Thielking and Thomas G. Weiss – In: Third world quarterly, Vol. 25, No. 5, 2004, pp. 977-992.

## Conflits, sécurité et forces armées – Conflicts, security and armed forces

### Livres – Books

– **Border and territorial disputes of the world** / ed. by Peter Calvert – 4th ed. – London: J. Harper X, 2004, 553 pp.
– **Deaths in wars and conflicts between 1945 and 2000** / Milton Leitenberg – Cornell: Cornell University, Occasional paper 29, July 2003, 52 pp.
– **La guerre imaginée** / sous la dir. de Philippe Buton – Paris: Seli Arslan, Histoire, cultures et sociétés, 2002, 254 pp.
– **La guerre n'a pas un visage de femme** / Svetlana Alexievitch; trad. du russe par Galia Ackerman et Paul Lequesne – Paris: Presses de la Renaissance, 2004, 399 pp.
– **The ethics of war and peace: an introduction to legal and moral issues** / Paul Christopher – 3rd ed. – Upper Saddle River (New Jersey): Pearson Prentice Hall X, 2004, 278 pp.

### Articles

– **Accountability problems for private military companies** / Robert Raasveldt – In: Humanitäres Völkerrecht, 3, 2004, pp. 187-189.
– **Le renouveau de la puissance aérienne** / Etienne de Durand – In: Hérodote, N° 114, 2004, pp. 17-34.
– **Looting in the context of violent conflict: a conceptualisation and typology** / Roger Mac Ginty – In: Third world quarterly, Vol. 25, No. 5, 2004, pp. 857-870.
– **Model codes for criminal justice and peace operations: some legal issues** / Bruce M. Oswald – In: Journal of conflict and security law, Vol. 9, No. 2, Summer 2004, pp. 253-275.
– **When is it right to fight?** / Gareth Evans – In: Survival, Vol. 46, No. 3, Autumn 2004, pp. 59-81.

## Droit international humanitaire – International humanitarian law

### Livres – Books

– **Manual básico de derechos humanos y derecho internacional humanitario** / Cruz Roja Española – Madrid: Cruz Roja espanola, 2003, 90 pp.
– **Repressalien im humanitären Völkerrecht** / Johannes Hebenstreit – Baden-Baden: Nomos, 2004, 210 pp. Völkerrecht und Aussenpolitik; Bd. 64 – Thèse, Faculté de droit, Salzbourg, Juin 2003.
– **The manual of the law of armed conflict** / United Kingdom, Ministry of Defence – Oxford: Oxford university press LV, 2004, 611 pp.

### Articles

– **Human rights and humanitarian law: are there some individuals bereft of all legal protection?** / remarks by Louise Doswald-Beck [and] Frits Kalshoven, Vera Gowlland-Debbas – In: Proceedings of the 98th annual meeting of ASIL, 2004, pp. 353-365.
– **International humanitarian law: should it be reaffirmed, clarified or developed?** / by Jean-Philippe Lavoyer – In: Israel yearbook on human rights, Vol. 34, 2004, 24 pp.
– **Should international humanitarian law be reaffirmed, clarified or developed?** / by Jean-Philippe Lavoyer – In: Israel yearbook on human rights, Vol. 34, 2004, pp. 35-58.
– **Should the international financial institutions play a role in the implementation and enforcement of international humanitarian law?** / Daniel D. Bradlow – In: Kansas law review, Vol. 50, No. 4, May 2002, pp. 695-729.
– **Targeting and humanitarian law: current issues** / by Michael N. Schmitt – In: Israel yearbook on human rights, Vol. 34, 2004, pp. 59-104.

## Droit international pénal – International criminal law

### Livres – Books

– **Implementing international humanitarian law: from the Ad Hoc tribunals to a permanent international criminal court** / Yusuf Aksar – London; New York: Routledge XXIV, 2004, 314 pp.
– **The International Criminal Court: how nongovernmental organizations can contribute to the prosecution of war criminals** / Juliane Kippenberg, Pascal Kambale; Human Rights Watch – [S.l.]: Human Rights Watch, September 2004, 25 pp.

### Articles

– **Accountability for war crimes: what roles for national, international, and hybrid tribunals?** / remarks by Laura Dickinson... [et al.] – In: Proceedings of the 98th annual meeting of ASIL, 2004, pp. 181-195.
– **An emerging universality of justiciable victims's rights in the criminal process to curtail impunity for state-sponsored crimes** / Raquel Aldana-Pindell – In: Human rights quarterly, Vol. 26, No. 3, August 2004, pp. 605-686.
– **Compensation for violations of the law of war and individual claims** / Natalino Ronzitti – In: The Italian yearbook of international law, Vol. 12 (2002), 2003, pp. 39-50.
– **Festigung, Fortentwicklung und Verbreitung: der Beitrag des Sondergerichtshofs für Sierra Leone zum humanitären Völkerrecht** / Simon M. Meisenberg – In: Humanitäres Völkerrecht, 3, 2004, pp. 175-180.
– **International law immunities and the International Criminal Court** / by Dapo Akande – In: American journal of international law, Vol. 98, No. 3, July 2004, pp. 407-433.
– **The customary origins and elements of select conduct of hostilities charges before the international criminal tribunal for the former Yugoslavia: a potential model for use by military commissions** / Melissa J. Epstein and Richard Butler – In: Military law review, Vol. 179, Spring 2004, pp. 68-127.

– **The overlapping between war crimes and crimes against humanity in international criminal law** / Fulvio Maria Palombino – In: The Italian yearbook of international law, Vol. 12 (2002), 2003, pp. 123-145.
– **Unlawful confinement as a war crime: the jurisprudence of the Yugoslav Tribunal and the common core of international humanitarian law applicable to contemporary armed conflicts** / Joanna Dingwall – In: Journal of conflict and security law, Vol. 9, No. 2, Summer 2004, pp. 133-179.

## Economie – Economy

### Livres – Books

– **The company of strangers: a natural history of economic life** / Paul Seabright – Princeton; Oxford: Princeton University Press X, 2004, 304 pp.

### Articles

– **La conversion économique du secteur militaire dans le monde** / Jacques Fontanel – In: Arès, Vol. 21, fasc. 1, N° 53, juillet 2004, pp. 59-73.
– **The use of regional diamonds trading platforms to access conflict zones** / Christian Dietrich – In: African security review, Vol. 13, No. 1, 2004, pp. 51-57.

## Histoire – History

### Livres – Books

– **L'Europe est-elle née au Moyen Age?: essai** / Jacques Le Goff – Paris: Seuil, 2003, 341 pp.
– **Polen, Juden, Schweizer: Felix Calonder (1921-1937): «Exilpolens» Berner Emissäre (1939-1945): Die Schweiz und Katyn (1943)** / Paul Stauffer; Nachw. von Heiko Haumann – Zürich: Neue Zürcher Zeitung, 2004, 231 pp.
– **The Colditz myth: British and Commonwealth prisoners of war in Nazi Germany** / S. P. Mackenzie – Oxford: Oxford University Press XIV, 2004, 446 pp.

## ONU, ONG – United Nations, NGO

### Livres – Books

– **NGOs at the table: strategies for influencing policies in areas of conflict** / ed. by Mari Fitzduff and Cheyanne Church – Oxford [etc.]: Rowman & Littlefield XV, 2004, 195 pp.
– **United Nations Handbook 2004/05** / Ministry of Foreign Affairs and Trade, New Zealand – Wellington: New Zealand Ministry of foreign affairs and trade, 2004/05, 412 pp.
– **We did nothing: why the truth doesn't always come out when the UN goes in** / Linda Polman; transl. by Rob Bland – London [etc.]: Penguin Books XXII, 2004, 234 pp.

## Paix – Peace

### Livres – Books

– **I premi Nobel per la pace: 1901 -2003, con rassegna filatelica** / Camillo De Luca – Bari: Uniongrafica Corcelli, 2004, 316 pp.
– **Promouvoir la paix** / Université de Paix – Bruxelles: De Boeck, Les intelligences citoyennes, 2004, 192 pp.

## Réfugiés, personnes déplacées – Refugees, displaced persons

### Livres – Books

– **Réfugiés espagnols dans l'Aude, 1939-1940: exposition présentée à Bram (juin 2004)** / Archives départementales de l'Aude – Carcassonne: Conseil général de l'Aude, 2004, 114 pp.

### Articles

– **Chechnya's internally displaced and the role of Russia's non-governmental organizations** / Mary Holland – In: Journal of refugee studies, Vol. 17, No. 3, September 2004, pp. 334-346.
– **Home for good?: challenges of return and reintegration** / by John Rogge... [et al.] – Oxford: Refugee studies centre – In: Forced Migration Review, 21, September 2004, pp. 4-45.
– **Refugee children** / Nicola Dahrendorf... [et al.] – Oxford: Oxford University Press – In: Refugee survey quarterly, Vol. 23, No. 2, 2004, 450 pp.

## Religion

### Livres – Books

– **Fitna: guerre au cœur de l'islam: essai** / Gilles Kepel – [Paris]: Gallimard, 2004, 380 pp.
– **Les dieux embusqués: une approche pragmatique de la dimension religieuse des conflits** / Jean-Nicolas Bitter – Genève: Droz XIX, Travaux de sciences sociales 200, 2003, 514 pp.

## Terrorisme – Terrorism

### Livres – Books

– **Blood from stones: the secret financial network of terror** / Douglas Farah – New York: Broadway books XIII, 2004, 225 pp.
– **The interrogator's war: inside the secret war against Al Qaeda** / Chris Mackey with Greg Miller – London: J. Murray XXVII, 2004, 484 pp.

### Articles

– **"Targeted killings" in an age of terror: the legality of the Yemen strike** / Chris Downes – In: Journal of conflict and security law, Vol. 9, No. 2, Summer 2004, pp. 277-294.

– **La «guerre mondiale contre la terreur», 2001-2004** / Bruno Tertrais – In: Politique étrangère, N° 3, automne 2004, pp. 533-546.
– **State practice, the customary law of war and terrorism: adapting old rules to meet new threats** / by Michael H. Hoffman – In: Israel Yearbook on human rights, Vol. 34, 2004, pp. 231-249.
– **The application of the fair trial guarantees to alleged terrorists in non-international armed conflicts** / Sergey Sayapin – In: Humanitäres Völkerrecht, 3/2004, 2004, pp. 152-159.

# Information for contributors

## General information: submission of manuscripts

The *International Review of the Red Cross* invites submission of articles on subjects relating to international humanitarian law, humanitarian policy or humanitarian action, provided the article has not been published, submitted or accepted elsewhere. Articles are peer-reviewed prior a decision being taken about their acceptability for publication. The decision whether or not to publish an article is made by the Editor. The *Review* reserves the right to edit articles. Notification of acceptance, rejection or the need for revision will be given within four weeks of receipt of the manuscript. In any case, manuscripts will not be returned to authors.

## Manuscript requirements

CONTENT: The manuscript should contain a title page with the name(s) of the author(s) and short biographical statement(s) (maximum 40 words); a summary; the main text; tables and figures (if any), and notes and references.

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.

LENGTH: Articles should be within 10 to 30 double-spaced printed pages (3,000 to 12,000 words). Authors are kindly requested to provide a summary, comprising 100 to 200 words.

SUBHEADINGS: Articles can include only 2 levels of subheadings. The first should be in bold, the second in italics.

NOTES AND REFERENCES: These should be in the form of footnotes. Authors should follow the *Review's* Guidelines for Referencing and Footnotes available on the ICRC website. To access this page go to http://www.icrc.org/eng/review and click on Information for contributors. There you will find a link to the Guidelines.

Manuscripts that do not fulfill the above requirements will not be considered for publication.

## Where to submit manuscripts

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.

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**e-mail:** com_pmd.gva@icrc.org

**Prix de l'abonnement annuel:**
USD 30/ CHF 40/ EUR 30
**Numéro individuel:**
USD 8 / CHF 12/ EUR 8

**Paiement sur facture uniquement**

**Conception graphique / Design:**
Kohler & Tondeux
Atelier de Création Graphique Genève

**Impression / Printing:**
Atar Roto Presse SA Genève

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*The International Review of the Red Cross / Revue internationale de la Croix-Rouge* is published four times a year, in March, June, September and December. The *Review* publishes articles in French or in English, with an abstract in the other language.

Articles appearing in the *Review* are also accessible on the ICRC Website:
http://www.icrc.org/eng/review

**Address for subscriptions:**
International Committee of the Red Cross (ICRC)
Production, Marketing and Distribution Division
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CH - 1202 Geneva, Switzerland
**F** (++41 22) 730 27 68
**e-mail:** com_pmd.gva@icrc.org

**Annual subscription rate:**
USD 30/ CHF 40/ EUR 30
**Single copy:**
USD 8 / CHF 12/ EUR 8

**Payment on receipt of invoice**

Volume 87 Number 857 March 2005

NEW FORMAT

# INTERNATIONAL REVIEW of the Red Cross

# Detention

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The first issue in March 2005 of the *International Review of the Red Cross* in its new format will be devoted to one of the core activities of the ICRC and focus on Detention. Subsequent issues will focus on other themes that are equally relevant for humanitarian law and action, namely:

**Religion**
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The *International Review of the Red Cross* is a periodical that links humanitarian action to law and policy. The aim is to promote reflection on humanitarian law, policy and action. The ambition is to be an indispensable publication for law- and decision-makers interested in humanitarian work and to serve as a reference for academic circles specialized in international humanitarian law and policy.

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Organisation impartiale, neutre et indépendante, le Comité international de la Croix-Rouge (CICR) a la mission exclusivement humanitaire de protéger la vie et la dignité des victimes de la guerre et de la violence interne, et de leur porter assistance. Il dirige et coordonne les activités internationales de secours du Mouvement dans les situations de conflit. Il s'efforce également de prévenir la souffrance par la promotion et le renforcement du droit et des principes humanitaires universels. Créé en 1863, le CICR est à l'origine du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

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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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REVUE INTERNATIONALE
DE LA CROIX-ROUGE
DÉCEMBRE 2004

INTERNATIONAL REVIEW
OF THE RED CROSS
DECEMBER 2004

VOLUME 86 N° 856

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DE LA CROIX-ROUGE/GENÈVE

ISSN 1560-7755