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REVUE INTERNATIONALE DE LA CROIX-ROUGE

Débat humanitaire : droit, politiques, action

INTERNATIONAL REVIEW OF THE RED CROSS

Humanitarian Debate: Law, Policy, Action

Mission de la Revue internationale de la Croix-Rouge

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

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

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

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

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

Mission of the International Review of the Red Cross

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

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

- The *Review* is a specialized journal on international humanitarian law, intended for both an academic and a more general readership. It endeavours to promote knowledge, critical analysis and development of the law. 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.

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Éditorial

Les contributions publiées dans ce numéro de la Revue ont pour objet de susciter une réflexion sur le droit international humanitaire en Asie. L'Asie ? Un immense continent, d'une diversité à la fois enrichissante et déconcertante. Trop grande et trop diverse pour être « traitée » d'une manière uniforme. Il en est de même du droit international humanitaire : une notion qui couvre aujourd'hui une multitude de problèmes et de questions de toutes sortes. Il n'est pas possible de les aborder toutes dans le cadre d'un tel survol. Et il n'est notamment pas possible d'examiner les réponses que les différentes civilisations et cultures asiatiques apportent à ces questions. Personne n'en voudra au rédacteur de la Revue d'avoir dû faire des choix. Le programme de ce numéro essaie donc de jeter un peu de lumière sur l'une ou l'autre des interrogations que pose le droit international humanitaire dans l'Asie contemporaine, de susciter l'intérêt pour les problèmes causés par sa mise en œuvre en Asie et de soulever quelques questions qui invitent à poursuivre la démarche.

La Revue a invité plusieurs auteurs renommés et originaires de différentes parties de l'Asie à livrer leurs réflexions sur la position du droit international humanitaire sur ce continent. Nous leur sommes reconnaissants d'avoir accepté notre invitation. À côté de ces universitaires, juristes ou militaires qui ont coopéré avec la Revue pour ce numéro, plusieurs collaborateurs du CICR ont, eux aussi, écrit leur analyse de problèmes qu'ils ont eux-mêmes choisis. Délégués chevronnés du CICR, ils ont tous acquis une grande expérience pendant de longs séjours en Asie, parfois dans plusieurs zones de conflit. Nous espérons que la présentation, côte à côte, de réflexions d'auteurs

originaires de différents pays asiatiques, d'une part, et de l'expérience de délégués du CICR ayant un lien particulier avec l'Asie, d'autre part, intéressera le lecteur.

Les Nations Unies ont proclamé l'année 2001 « Année des Nations Unies pour le dialogue entre les civilisations ». Les textes rassemblés dans ce numéro veulent aussi être une contribution à une meilleure connaissance des civilisations. Savoir plus précisément comment le droit international humanitaire est perçu dans une des grandes régions du monde est d'autant plus nécessaire que l'universalité de certaines valeurs à la base de cette branche du droit est parfois mise en doute par des considérations issues de civilisations ou de cultures régionales. C'est le cas dans certaine partie de l'Asie... et sans doute aussi ailleurs. Quelles conclusions en tirer ?

Dans sa contribution *Global norms and international humanitarian law: An Asian perspective*, le professeur Ramesh Thakur s'est prononcé sur le sujet : « Ce n'est pas parce que des préceptes moraux varient d'une culture à l'autre que des personnes appartenant à des cultures différentes ne partagent pas certaines valeurs. » (Traduction CICR.) Il n'y a rien à ajouter à ces propos – c'est un excellent point de départ pour développer une notion d'universalité qui tienne compte de la diversité du monde, tout en réaffirmant les valeurs fondamentales que le droit international humanitaire a pour but de protéger.

Comme de coutume, ce numéro inclut également plusieurs contributions hors thème. Dans la rubrique Croix-Rouge et Croissant-Rouge notamment, le lecteur trouvera trois textes de collaborateurs du CICR qui s'expriment tous (et à titre personnel) sur des questions importantes qui préoccupent actuellement le CICR.

LA REVUE

Note from the Editor

The articles in this issue of the Review are intended to stimulate reflection on international humanitarian law in Asia today. Asia is of course a vast continent, and bewilderingly diverse — too vast, and too diverse, to be “dealt with” as a whole. The same is true of international humanitarian law, a notion that currently covers a great multitude of problems and questions. It would be impossible to address them all within the confines of the present survey, or to examine how all the different cultures and civilizations of Asia respond to them. No one will hold it against the editor of the Review that he has had to make some choices. The purpose of this issue is to try and shed some light on a few of the questions raised by international humanitarian law in Asia today, to arouse interest in the problems posed by the implementation of the law in Asia and to broach a number of issues that call for further discussion.

The Review asked several well-known authors from various parts of Asia to share their thoughts on the situation of international humanitarian law on their continent. We are grateful to them for having accepted. In addition to these academics, lawyers and military officers who have contributed to the present issue, a number of ICRC staff members have examined various problems of their own choosing. As seasoned delegates, they have all acquired extensive experience during long periods in Asia, where many of them have served in several conflict areas. We hope that this juxtaposition of points of view — those of authors from various Asian countries, on the one hand, and those of ICRC delegates who enjoy a special relationship with Asia, on the other will be of interest to the reader.

The United Nations has declared 2001 the United Nations Year of Dialogue among Civilizations. The articles in this issue also have a contribution to make in that respect. It is all the more important to understand how international humanitarian law is perceived in one of the great regions of the world as the universal nature of certain of its underlying values is sometimes called into question by considerations specific to regional cultures and civilizations. Such is the case in some parts of Asia, and doubtless elsewhere too. What conclusions can be drawn from this?

In his article entitled Global norms and international humanitarian law: An Asian perspective, Professor Ramesh Thakur says: "Because moral precepts vary from culture to culture, this does not mean that different peoples do not hold some values in common." This statement is an excellent point of departure for building up a concept of universality that takes account of the diversity of our world while reaffirming the basic values which international humanitarian law seeks to protect.

As is the custom, this issue includes a number of articles on other topics. Our Red Cross and Red Crescent section thus contains three contributions from ICRC staff members who express their personal opinions on various issues of major concern to the ICRC today.

THE REVIEW

The ICRC in Asia: Special challenges?

by

JEAN-MICHEL MONOD

Asia. An immense continent. Breathtakingly diverse in civilization, history and way of life. Where do its boundaries lie? The Pacific islands and the Mediterranean? This is a continent with no recognized frontiers. The following observations relate to what most people think of as Asia, leaving out the Middle East and Iran, but including Central Asia. This is the definition the ICRC uses for structuring its operations in this region.

The 1970s and 1980s were particularly difficult years in East and South-East Asia, owing to the emergence or continuation of major armed conflicts there. With the legacy of the Korean and Vietnam wars and of Pol Pot's rise to power in Cambodia, the start of the Timor crisis and the serious problems in Mindanao (southern Philippines), not forgetting the 1965 Indonesia crisis and the smouldering conflicts in Laos and Burma (now Myanmar), East and South-East Asia have been the scene of never-ending upheavals with far-reaching consequences: divided Korean families, Vietnamese Boat People, Cambodian refugees, hundreds of thousands of people displaced almost everywhere, plus victims of anti-personnel mines and other explosive devices. All against the backdrop of ideological confrontations born of the Cold War. Such was the grim reality throughout that period for victims and humanitarian workers alike.

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Soviet Central Asia was still unknown territory for international organizations, whether governmental or non-governmental. Meanwhile, the unresolved Kashmir conflict, the Afghan war and the bloody clashes in Sri Lanka were transforming the whole of Asia, from Afghanistan to the Pacific, into one great battlefield.

So how much could the humanitarian agencies do? How widely did the parties to those conflicts accept humanitarian work as carried out by the ICRC, neutrally and impartially, favouring confidential dialogue over public condemnation, yet seen all too often as Western and hence capitalist — because virtually all the donations which made it possible came from the West — or even as Christian? Compared with the enormity of the task, opportunities for action were limited indeed.

The ICRC in Asia during the Cold War

The Communist governments refused to accept the ICRC during the Korean and Vietnam wars. As a result, it did not play a decisive role in providing protection either for the civilian population, for prisoners of war or for other detainees. Similarly the ICRC was unable to do its humanitarian work in Laos during the war there or in Cambodia during the Pol Pot era. It was not allowed to operate during the vicious 1965 clampdown in Indonesia, and only much later did our delegates obtain permission to visit the tens of thousands of detainees scattered across the archipelago. The ICRC was expelled from East Timor when Indonesia took control of the territory in December 1975, only returning — with great difficulty — three years later. In Cambodia, the Vietnamese military intervention in 1978 enabled humanitarian work, primarily the distribution of relief supplies, to take place there for a short period between 1979 and 1981. Activities then became severely restricted in the interior of the country, and eventually were limited to the Thai side of the border until 1990, when humanitarian agencies were finally able to resume credible operations in north-western Cambodia. By contrast, protection and assistance operations in Mindanao (Philippines) were generally quite successful and have had to be maintained — unfortunately for those affected — to this day, the level of activity varying with the intensity of the conflict.

The situation in southern Asia and Afghanistan was not much easier. While both India and Pakistan eventually acknowledged the applicability of the four Geneva Conventions to their 1965 and 1971 conflicts with reasonably good grace, they did nothing to open up the region to humanitarian organizations during all the periods of tension between the “official” international armed conflicts. Access was not granted until 1995, when visits began to certain places of detention in the Indian part of Kashmir. They were and are, moreover, of benefit only to the detainees, and not to the civilian population as such. This situation certainly restricted the ICRC’s ability to act during the summer 1999 Kargil clashes.

In Afghanistan, the Soviet invasion of 27 December 1979 did not allow humanitarian activities to be deployed as they should have been. The commando-style incursions of the “French Doctors” based in Pakistan were an exception. While their impact in terms of tangible effects for the victims of the conflict is open to discussion, they did have the virtue of focusing the world’s attention on the Afghan conflict. Those expeditions, which often included journalists, helped to arouse quite unique media interest in the conflict, a continuing interest shown to this day in the coverage of the Taliban phenomenon. Most humanitarian work, however, had to stop short at the border — mainly the Pakistan side of it — and was confined to assisting refugees. Not until 1987 was the ICRC really able to launch a full-scale operation to assist various categories of conflict victims inside Afghanistan itself (wounded, prisoners and amputees).

The Sri Lankan authorities refused the services of the ICRC during the first part of the Sinhalese/Tamil conflict (1983–1989). The final phase of the Sinhalese/Sinhalese conflict (October 1989) between the government and the Janatha Vimukti Peramuna (JVP) had been reached before they opened the door, and only when the ethnic conflict resumed in May/June 1990 was the ICRC authorized to help the victims, after so many years had been wasted.

What lies behind these difficulties?

The inability of the ICRC to do more for the victims of conflict in Asia during the entire Cold War period is, in our opinion,

due to a number of factors. As we shall see, some of them have little to do with the ideological differences of the period.

- Humanitarian work, especially that of the West, generally did not go down well with the Communist (i.e. totalitarian) regimes and their allies. This factor was not specific to Asia, however, as it affected Cuba and the former Soviet Union as much as it did North Korea and China.
- For as long as it lasted, the East–West divide had a direct impact on the humanitarian policies of the donor countries. Their primary aim was to demonstrate the bankruptcy of the system by encouraging entire sections of the population to leave their countries of origin (e.g. Vietnam, Cambodia and Afghanistan), and to paint the other side even blacker by promoting humanitarian action in the immediate vicinity of the conflict. Today, conflicts have largely lost their ideological connotation, and those same donor countries, in an effort to protect themselves from the economic consequences of having to accommodate waves of refugees (there being little talk these days of resettlement in third countries), urge incipient refugees to stay in their war-torn country — they thus become internally displaced persons instead — and ask the humanitarian agencies to work on the spot so that war victims do not leave their homes. In this way the civilian population and humanitarian workers alike are exposed to additional danger.

Other, more specifically Asian considerations should also be taken into account.

- In general — though generalizations are risky when talking about half the population of the world — Asian society tends to emphasize the group rather than the individual, whereas classic Western humanitarian action takes the reverse approach. This is one source of the divergence between Asian and Western ideas on human rights, a concept with which international humanitarian law is all too often equated.
- The nationalism of certain peoples and their representatives — very pronounced in some cases and sometimes the result of a traumatic colonial period — coupled with the process of building a nation, mingles with a legitimate pride at belonging to some of the most

ancient and glorious civilizations in the world, compared to which Western organizations — however humanitarian — can appear paltry and presumptuous.

- Many countries were or still are in transition to democracy, struggling against opposition and subjected to outside interference along the way. There is no escaping the fact that the ICRC may be seen as instrumental in bringing this outside interference to bear. Furthermore, the vast majority of conflicts in Asia were and still are internal in nature, which means that the ICRC is in a weaker legal position when asking to work in the conflict zone than it would be in an international conflict.
- Religion is yet another factor. While all religions have compatible — if not the same — fundamental humanitarian concepts, humanitarian action as we know it does not fit in naturally with Buddhism (viz. the aloofness of the Sri Lanka Buddhist clergy from Western humanitarian action), nor with certain forms of Islam or Hinduism.
- One aspect specific to the Red Cross and Red Crescent in Asia is the weakness of its internal structures. Apart from a regional group set up by the National Societies of the ASEAN States, there are no regional structures capable of reinforcing the impact of the Movement in general or of the ICRC in particular, despite the fact that here, as elsewhere, membership of the Red Cross or Red Crescent is often seen as prestigious (or at least the holding of senior posts in these organizations is regarded as such) and that Asia has some of the oldest National Societies in the world.
- Rapid economic progress has also created an even wider gap between certain populations, their leaders, and the reality of the suffering caused by conflicts. As a result the sense of solidarity needed to support humanitarian action effectively is reduced.
- One corollary to the previous point is undoubtedly the low level of financing provided by the Asian countries in general for multilateral humanitarian agencies, a phenomenon that predates the recent economic crisis and is not restricted to the poorer countries.
- The number of governments influenced or directly run by the military also reduces the impact of international humanitarian action.

- Owing to several of the above factors, the whole region has a particularly poor record in terms of ratifying the treaties that make up international humanitarian law. Neither India, Pakistan, Sri Lanka, Indonesia nor Japan have ratified the Protocols additional to the Geneva Conventions, nor have the various recent treaties on such topics as mines met with much enthusiasm, either in those countries or in China. And this list of such countries is far from complete.
- The size of certain Asian countries, with their major impact on their neighbours' points of view, is yet another factor; no one can seriously expect to exert any real pressure — economic or humanitarian — on China, India or even Indonesia.
- The phenomenon of large numbers, a result of runaway demographics, has another side to it. When 250,000 die in Bangladesh in a single cyclone, or 15 million people are affected by a flood in India, the sufferings of the victims of armed conflicts, often fewer in number, are perceived less sympathetically.

The post-Cold War period

Obviously, the end of the Cold War has not affected all the factors listed, but it has made a difference in certain contexts and has allowed the humanitarian community to establish its credentials. This, in turn, has started to change the behaviour of certain parties.

The Vietnamese withdrawal from Cambodia, which opened the way to the Paris agreements, was one of the turning points. The peacekeeping operation and subsequent repatriation of the Cambodian population waiting across the border in Thailand remain a copybook example: the UN troops really did have a negotiated peace to keep, even though not all parties had actually signed the document; and the humanitarian agencies could organize the return of the civilian population to a country that had been destroyed but in which armed conflict had basically ceased, except in certain areas held by the Khmer Rouge. The last chapter in that story was not written until many more years had passed and their notorious leader Pol Pot had died.

Conversely, it has not so far been possible to arrange for the permanent repatriation of the Afghan refugees, because no negotiated solution to the conflict has yet been found. The end of the Cold

War merely led to the withdrawal of one player — the former Soviet Union — without diminishing the ability of the remaining parties to tear each other apart. On the other hand, this new situation did allow the humanitarian organizations to operate on a wide scale across the country, at least until the emergence of armed international fundamentalist groups based in Afghanistan and the international community's at times knee-jerk reactions to the rise of the Taliban somewhat sidelined the war there.

Easier access in Central Asia (mainly in Tajikistan) is directly related to the break-up of the Soviet Union, but while the presence of humanitarian workers in the region is already a victory in itself, a number of the subjects the ICRC would like to discuss, such as the protection of detainees, are not yet really on the agenda (except in Kyrgyzstan and Uzbekistan).

It is difficult to believe that when Sri Lanka opened up to the ICRC at the end of 1989 this had anything directly to do with the major world events of the day. The granting of access to the ICRC (the UNHCR having preceded us two years earlier to run a repatriation programme for Tamil refugees in Tamil Nadu) is probably more a successful outcome of the organization's operational humanitarian diplomacy. Ten years on, that success is unfortunately still not complete, both because hundreds of thousands of civilians are displaced by the fighting every year, and because neither side takes prisoners — or very few.

This "humanitarian breakthrough" in Sri Lanka certainly helped open up Kashmir five years later, an advance all the more important to the ICRC as it was not yet used to dealing with countries the size of India. Such countries have no real need of the ICRC's image to resist possible political and diplomatic attacks in various multilateral fora as to the manner in which they conduct hostilities.

Gaining access to Myanmar four years later was quite another story, and was the result of ten years of discussions in an unreal atmosphere. This step was all the more important for having been taken against the initial wishes of the donor countries which, yet again, preferred to see the situation in terms of black and white; the ICRC's actions introduced a shade of grey that did not suit everyone.

This was a good demonstration of the ICRC's independence, showing that it endeavours to gain access to the real victims, wherever they are and whatever the fashionable views may be.

The first conclusion we can draw, therefore, is that while the ICRC has become more readily accepted in certain specific contexts in Asia over the last ten years, the general attitude there towards humanitarian work is only changing slowly. To take one example, it was impossible to do anything for separated Korean families until 15 August 2000, the date on which things started to move thanks to a combination of various types of pressure applied to North Korea and the political courage of certain leaders. We have only to look at the perils of Indonesia where, despite the clear value of the work carried out by the humanitarian agencies in recent years, the attitude of certain — especially former — military leaders, accentuated by the traumatic effect of losing East Timor so rapidly, places the lives of humanitarian personnel in jeopardy, not to mention those of actual and potential victims all across the archipelago.

With regard to East Timor, it would be too simple to see the international operation as an unmitigated political and humanitarian success. Certainly, the crisis and its solution — if it holds — have added to Indonesia's current disarray. It should be recognized that the Indonesian authorities — and, to some extent, the population — were genuinely surprised by the result of the referendum on independence, so comprehensive had the disinformation on East Timor been for years past. The ICRC was in a privileged position, as it had been the only international organization present there during the twelve years of Indonesian administration. All those with whom it had spoken knew what was happening, but were careful not to share their knowledge with others, even within the government. The build-up of bitterness and rancour engendered primarily by the measures imposed by the IMF, which set in motion the process that finally led to the fall of President Suharto, and the subsequent reaction of the international community which forced Indonesia to accept foreign soldiers on what it regarded as its national territory, are two important factors in the spiral of violence suffered by East Timor in 1999. They are perhaps among the hidden reasons for the otherwise incomprehensible forced

migration of the population to West Timor.

Second conclusion: acceptance of humanitarian activities is slowly gaining ground, and at the same time the number of open conflicts is not getting any smaller. On the other hand, both in Asia and elsewhere, their underlying character and causes are changing. Religion and ethnic origin are replacing the old ideologies, but do not necessarily make humanitarian work any easier.

Final remarks

The degree to which the basic rules of international humanitarian law are applied and the behaviour of the combatants, be they regulars or members of opposition groups, are neither better nor worse in Asia than in the rest of the world. However, a highly developed sense of sovereignty and an instinctive mistrust of offers of help from a humanitarian organization such as the ICRC or any other humanitarian organization for that matter — two typical features encountered in our work in Asia — reinforce the feeling of a culture gap and slow down progress. These very real obstacles have been the main reasons for the long and difficult negotiations that have almost always preceded the launching of ICRC protection and assistance activities.

Whose fault is it? The ICRC cannot simply hide behind the universality of humanitarian values, leaving the ball in the combatants' court. A greater willingness to listen and a higher degree of empathy would appear to be the *sine qua non* of successful humanitarian action in Asia. The continued internationalization of the ICRC's administration — as opposed to the all-Swiss composition of the governing body, the Committee itself, a guarantee of its independence from any government — can only help. But internationalization limited to the West is not a complete solution, and it is essential that we find a means of opening up more to the countries of the south in order to render the ICRC better able to carry out its mandate. And internationalization is no magic formula. In an increasingly global world, the independence of a humanitarian agency from political influence will remain one of the most important factors in ensuring the success of its work. It is up to all of us to say this loud and clear.



Résumé

L'action du CICR en Asie pose-t-elle des défis particuliers ?

par JEAN-MICHEL MONOD

L'Asie est un continent immense, d'une diversité étonnante, qui ne permet pas de généralisation superficielle. Toutefois, l'action humanitaire du CICR dans les différentes régions de l'Asie a rencontré des réactions et des obstacles semblables, tant pendant la guerre froide que depuis la fin de celle-ci. L'auteur (qui dirige les activités opérationnelles du CICR en Asie) passe en revue les différentes situations de conflit qui ont nécessité des opérations de protection et d'assistance du CICR – de la guerre de Corée au conflit à Timor-Est. Il conclut que le respect du droit international humanitaire dans les conflits en Asie n'est ni meilleur ni pire qu'ailleurs dans le monde. En revanche, un sentiment de souveraineté exacerbé et une méfiance instinctive vis-à-vis d'une organisation humanitaire telle que le CICR – perçue comme appartenant au monde occidental – ne facilitent pas le contact. L'auteur en appelle aux humanitaires pour qu'ils fassent preuve d'une meilleure écoute et d'une empathie pour les différentes civilisations et cultures d'Asie, afin d'être mieux acceptés, le moment venu.

Global norms and international humanitarian law: an Asian perspective

by

RAMESH THAKUR

International humanitarian law is defined as “the principles and rules regulating the means and methods of warfare as well as the humanitarian protection of the civilian population, of sick and wounded combatants and of prisoners of war”.¹ As such, international humanitarian law is on the one hand something more and of a higher order than norms. On the other hand, it is of a lower order and of a lesser scope in coverage than other parts of international law. In this article, I shall explore aspects of contemporary international humanitarian law and international norms as an Asian commentator.

An important preliminary point to note is that all three concepts in the equation — Asia, international humanitarian law and general international law — remain, as concepts, essentially contested. A second preliminary comment, equally significant in terms of its political ramifications, is that all three concepts are essentially non-Asian in origin and frames of reference. This does not mean that they lack validity or relevance in this part of the world. It does mean that, to the extent that norms and laws are mechanisms for regulating the social

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behaviour of human beings interacting with one another as organized groups, the socio-political construction of Asia, global norms and international humanitarian law cannot simply be dismissed. The argument must instead be confronted, addressed and to the extent possible answered.

In the age of colonialism, most Asians became the victims of Western superiority in the organization and weaponry of warfare. The danger today, I argue, is that they could continue to be the objects but not the authors of norms and laws that are supposedly international. But a world order in which Asians and other developing countries are *norm-takers*, while the Western countries are the *norm-setters* and *-enforcers*, will not be viable because the division of labour is based neither on comparative advantages — Asia, no less than other continents, is home to some of the world's oldest civilizations with their own distinctive value-systems — nor on equity. The risk is under-appreciated because the international discourse in turn is dominated by Western, in particular Anglo-American, scholarship.² Asian and African voices are largely silent.

The Western roots of international humanitarian law and global norms

Of the three concepts — Asia, international humanitarian law and general international law — the first is the least problematic despite having its roots in Europe. Asia is a geographical construct (hence its unproblematic politics) devised by Europeans to differentiate the self from the other. In some minds the distinction is sharpened to “us civilized insiders” versus the “heathen outsiders”. In reality the continent is far too diverse in virtually all respects — language, scripts, religion, culture, politics, economics, legacies of literary and philosophical discourse — to connote much practical content as a collective entity. Arguably, “West” Asians have more in common with

¹ *Basic Facts about the United Nations*, United Nations, New York, 1998, pp. 267-268.

² For yet another recent documentation of this, see Ersel Aydinli and Julie Mathews, “Are the core and periphery irreconcilable? The

curious world of publishing in contemporary international relations”, *International Studies Perspectives*, December 2000, pp. 289-303.

Europeans than with "East" Asians. It is difficult to trace a sense of common Asian identity either among the people or the cultural, political or commercial élites. Asia simply does not have the theory, history or practice of European integration. Asians lack the sense of regionalism that is evident, in however rudimentary a form, among Africans and Latin Americans. In other words, of all the inhabited continents Asia is the only one that does not have a sense of constituting one distinct identity. It is not surprising, therefore, that Asia has the least developed pan-continental institutions (political, economic, even sporting) of any of the inhabited continents.

International humanitarian law³

To the extent that Asians are bound by shared institutions, laws and norms, they are at the international rather than the continental level. International society is anarchic but not lawless. Anarchy indicates the absence of central government; *society* indicates the existence of shared norms and values.⁴ Most norms and principles of international law are obeyed most of the time by most States.

The radically different roots of international humanitarian law are to be found in the tradition of *just war*, which focused not simply upon the circumstances leading to the initiation of hostilities (*jus ad bellum*) but also on the conduct of hostilities themselves (*jus in bello*).⁵ This tradition, expressed most forcefully in Hugo Grotius's *De Jure Belli ac Pacis* (1625), was amenable to justification in both religious and secular terms, and found resonance in the political traditions of other faiths, such as Islam. Yet in its concrete form international humanitarian law was very much a product of the Enlightenment, which

³ This subsection is adapted from Ramesh Thakur and William Maley, "The Ottawa Convention on landmines: A landmark humanitarian treaty in arms control?", *Global Governance*, July–September 1999, pp. 275–277.

⁴ The classic statement of the apparent paradox remains that of Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Macmillan, London, 1977.

⁵ See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1992, and Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, Weidenfeld & Nicolson, London, 1983.

witnessed the rise of individualism as a counterpoint to the potency of *raison d'État* as sufficient justification for the unconstrained use of force. With regard to humanity in warfare, until the decisive shifts in social values, economic activity and political structures which came in the late eighteenth and early nineteenth centuries the “barbarous” East, as represented in literature by notorious figures such as Tamerlane, had no reason to feel morally inferior to the “civilized” West, whose leaders during the Thirty Years’ War showed an equal indifference to the sufferings of foot soldiers and non-combatants.

A watershed event in the law’s development, although its full significance became clear only in retrospect, was the Battle of Solferino of 1859. Fought by the Austro-Hungarian Empire and the Kingdom of Sardinia against France, the battle would have disappeared into the oblivion of obscure footnotes had it not been witnessed by a young Swiss businessman, Jean-Henry Dunant, who captured its horrors in a powerful memoir.⁶ Dunant became the driving force behind the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. He devoted his energies to the establishment of what is now the International Red Cross and Red Crescent Movement, which continues to play a major role in the development and dissemination of international humanitarian law. Other hands took up the task of developing instruments to regulate the conduct of war, and two major streams of law developed:⁷ the *Law of The Hague*, taking its name from the First and Second Hague Peace Conferences held in 1899 and 1907 which resulted in a number of treaties and declarations concerned with the conduct of hostilities; and the *Law of Geneva*, taking its name in particular from the 1864 Convention and subsequent treaties adapting the law to changed circumstances and culminating in the four Geneva Conventions of 12 August 1949 on the protection of war victims. The *Law of Geneva* deals with the wounded, sick and shipwrecked, prisoners of war, and

⁶ Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986.

⁷ Frits Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1991, pp. 8–18.

There is, of course, a significant overlapping of these streams; see Geoffrey Best, *War and Law since 1945*, Oxford University Press, 1994, pp. 183–184.

protected civilians, and even imposes limitations on what is permissible in armed conflicts “not of an international character”.⁸

Treaties are a major source of international humanitarian law and are recognized as such in Article 38, paragraph 1, of the Statute of the International Court of Justice. Underpinned by the principles set out in the 1969 Vienna Convention on the Law of Treaties, their force derives from their reflecting the free consent of States to be bound by particular rules. Such consent no more compromises the sovereignty of the State than entering into a contract compromises the autonomy of an individual: it simply reflects the societal as opposed to the anarchical dimension of the international system.

Another important source is custom. One of the most famous passages in the laws of armed conflict — the so-called *Martens Clause* — is generally regarded as a codified statement of customary law, and as set out in the Preamble to the 1907 Hague Convention respecting the Laws and Customs of War on Land provides that inhabitants and belligerents “remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”. Furthermore, two of the most important principles governing the conduct of hostilities, namely *proportionality* and *discrimination*, are fundamentally customary in character,⁹ although they have been reflected in the shape of various codified texts.

Custom has typically been traced back to two elements: a pattern of behaviour on the part of States, and a psychological dimension (*opinio juris sive necessitatis*). Analysts also recognize the possibility of “instant custom”, in which evidence of a sufficiently powerful *opinio juris* can compensate for the absence of long-standing State practice. Resolutions of the UN General Assembly are clearly candidates for attention in this respect: almost three decades ago, Richard Falk

⁸ For a compilation of relevant instruments, see Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War*, 3rd ed., Oxford University Press, 2000.

⁹ See the views of the majority of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, and 35 ILM 814.

highlighted them in arguing for "a trend from consent to consensus as the basis of international legal obligations".¹⁰ More recently, the expression "soft law" has emerged as a way of describing the prescriptions contained in such resolutions. It is a useful expression for characterizing rules which are technically non-binding as a matter of international law, but secure a high level of compliance.¹¹ The international system is replete with such rules, and while clothed in legalistic form, their efficacy derives from extra-legal considerations. Yet they are no less potent on this account. D. W. Greig has argued that such technically non-binding norms should be labelled "soft rules", and that the term "soft law" should be reserved for provisions which are technically binding, but give rise to obligations which are "vague or inchoate".¹² Again, "soft law" in Greig's sense is not necessarily without effect in international relations: it may play a role in setting standards which States should attempt to honour if they are not to meet with disapproval (muted or vocal) from other States or from interest groups within their own territory.

It should also be noted that while States can exempt themselves from customary legal prohibitions by pointing to a sustained pattern of objection, this will not protect them from being deemed to have committed violations of a peremptory norm of general international law (*jus cogens*), which Article 53 of the 1969 Vienna Convention on the Law of Treaties defines as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Linehan has argued that the norms which attract the clearest support for status as *jus cogens* "are the prohibition on the use of force, the right to self-determination and the prohibitions against genocide, racial discrimination, slavery, and piracy on the high seas".¹³

¹⁰ Richard A. Falk, *The Status of Law in International Society*, Princeton University Press, 1970, p. 177.

¹¹ Paul C. Szasz, "General law-making processes", in Christopher C. Joyner (ed.), *The United Nations and International Law*, Cambridge University Press, 1997, pp. 32–33.

¹² Donald W. Greig, "Sources of international law", in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi (eds), *Public International Law: an Australian Perspective*, Oxford University Press, Melbourne, 1997, p. 86.

¹³ Jan Linehan, "The law of treaties", *ibid.*, p. 107.

Norms and law

Thus international law and international norms provide mutual underpinnings to each other. International law as we know it was a product of the European States system. As argued above, even international humanitarian law has its roots essentially in Europe. The status of law is not as clear-cut in international relations as it is in domestic systems. What then of norms? At its simplest, there is a binary divide in meaning. A norm can be defined statistically to mean the pattern of behaviour that is most common or usual; that is to say, to refer to the "normal curve". Or it can be defined ethically, to mean a pattern of behaviour that should be followed in accordance with a given value system; that is to say, to refer to the moral code of a society. In some instances, the two different meanings may converge in practice; in most cases, they will complement or supplement each other; but in others, they may diverge quite markedly. For example, corruption among public officials and politicians is ubiquitous and pervasive in many countries, so much so that citizens who have to engage in dealings with the government become part of the web of corruption as bribe givers. And yet, simultaneously, there is among the people almost universal revulsion at the level of institutionalized corruption in the country. In other words, corruption is the norm in the statistical sense of the word, while in the ethical sense the norm is the very opposite, public probity.

Whichever definition we choose to adopt between the *is* and the *ought*, it is clear that norms and laws are alternative mechanisms for regulating human and social behaviour. Moreover, their role and efficacy change at different levels of social and political organization. *At the local level*, norms are far more important. Village society is governed principally by norms — that is what it makes it a society. *At the national level*, in modern societies laws take over from norms. But there must be a degree of congruence between the laws enacted by a parliament and the prevailing values — norms — of that society. Otherwise, not only will the laws be disregarded; habitual disobedience to particular laws will engender a more generalized disrespect for the system of laws, for the principle of a polity being governed by laws and all its players — rulers as well as citizens — being subject to

the rule of law. For example, the net effect of the ban by the Western-influenced elite in India upon centuries-old social practices among Hindus, such as dowry and caste discrimination, was to divorce the legal system from everyday behaviour rather than change entrenched social practices. At the *regional* level, norms are more important than laws. At the *international* level of analysis, finally, both norms and laws, including “soft” laws, are at work in shaping the behaviour of different classes of players.

The most effective form of behaviour regulation is complete convergence between laws and norms, for example with regard to murder. Conversely, the most problematic is when there is near-total dissonance, as with corruption, dowry and caste in India. We shall return to the implications of this proposition for our present discussion.

The Ottawa Treaty as an example

Because we have dealt with this subject elsewhere,¹⁴ I do not propose to discuss at length here the implications of the Ottawa Treaty banning the manufacture, transfer and use of anti-personnel landmines.¹⁵ Briefly, our argument is that the Ottawa Treaty makes more sense as a normative advance in international humanitarian law than as an arms control treaty. It purports to ban an entire class of weapons already in general and widespread use. As such it is without precedent in the history of arms control and disarmament. But it is also fatally flawed from the point of view of an arms control regime. This is so with respect to adherents: States that are among the most relevant to the landmines issue, including China, India, Pakistan and the United States, are not party to the treaty. It is just as true with respect to verification machinery: the Ottawa Treaty contains no monitoring, inspection and compliance clauses. What the Ottawa Treaty seeks to do, and succeeds in doing, is to establish a new norm against landmines. And it

¹⁴ *Op. cit.* (note 3), pp. 273–302.

¹⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of

Anti-personnel Mines and on their Destruction, 18 September 1997.

anathematizes this class of weapons by pointing to the inhumane nature of the damage wrought by them when used *as designed to be used* (much like cigarettes). They are victim-activated, they cannot tell a soldier from a child, they cause injuries years after conflicts have ended, and so on. That is, they are contrary to international humanitarian law.

The example of the Ottawa Treaty begs the question of the process by which norms emerge and are globalized. How are they articulated and consolidated? Who interprets them, and who has the right to monitor them to ensure and, if necessary, enforce compliance? We know very little about the answers to these questions. Certainly the fact that the Ottawa Treaty was negotiated outside the United Nations Conference on Disarmament in Geneva, the world's only authentic and duly authorized standing multilateral forum on arms control, affected its legitimacy in the minds of some Asian leaders. Equally important, since they were not involved in drafting the clauses of the treaty, will they consider themselves morally bound by its prohibitory *norms*? And if they do not, then what are the implications for the efficacy of the Ottawa Treaty in general?

The *norm-setters* behind the Ottawa Treaty were Canada, Norway and Austria. Norm generation by Western middle powers was reinforced by standard-setting by the UN Secretary-General when he endorsed the Ottawa process as the negotiating track and the convention which resulted from it. Asian nations were essentially consumers, neither producers nor retailers, of the new norm. The Canadians, for example, led the effort to proselytize Asian countries through two major back-to-back conferences and workshops in the region in July 1997 in Sydney and Manila.¹⁶

Human rights as a global norm

Part of the reason for the gathering strength of the anti-nuclear movement in the early and mid-1980s lay in the feeling that the two superpowers held the fate of humanity hostage to their bilateral relations. The logic of nuclear deterrence gave humanity the right to voice its preferences about the nuclear equation: "no

¹⁶ I had the privilege of chairing the four-day conference in Sydney.

annihilation without representation". International humanitarian law is concerned with protection of the humanitarian norm in the midst of armed conflict. What if the war itself is being fought over humanitarian norms?

Before that question can be answered, it must be contextualized within the broader global human rights norm. The Charter of the United Nations is the embodiment of the international political and moral code. It encapsulates the international consensus and articulates best-practice international behaviour by States and regional and international organizations. In 1948, conscious of the atrocities committed by the Nazis while the world looked silently away, the United Nations adopted in 1948 the Universal Declaration of Human Rights. On a par with other great historical documents like the French Declaration of the Rights of Man and the American Declaration of Independence, this was the first *international* affirmation of the rights held in common by all.

The Universal Declaration is a startlingly bold proclamation of the human rights norm. The two 1966 Covenants¹⁷ added force and specificity, affirming both civil-political and social-economic-cultural rights without privileging either. Together they mapped out the international human rights agenda, established the benchmark for State conduct, inspired provisions in many national laws and international conventions, and provided a beacon of hope to many whose rights had been snuffed out by brutal regimes.

A right is a claim, an entitlement that may neither be conferred nor denied by anyone else. A human right, owing to every person simply as a human being, is inherently universal. Held only by human beings, but equally by all, it does not flow from any office, rank or relationship.

The idea of universal rights is denied by some who insist that moral standards are always culture-specific. If value relativism were to be accepted *in extremis*, then no tyrant — Adolf Hitler, Josef Stalin,

¹⁷ International Convention on Economic, Social and Cultural Rights, and International Convention on Civil and Political Rights, both of 16 December 1966.

Idi Amin, Pol Pot — could be criticized by outsiders for any action. Relativism is often the first refuge of repressive governments. The false dichotomy between development and human rights is usually a smoke-screen for corruption and cronyism. Relativism merely requires an acknowledgement that each culture has its own moral system. Government behaviour is still open to evaluation by the moral code of its own society. Internal moral standards can be congruent with international conventions. Because moral precepts vary from culture to culture, this does not mean that different peoples do not hold some values in common. Few if any moral systems proscribe the act of killing absolutely under all circumstances. At different times, in different societies, war, capital punishment or abortion may or may not be morally permissible. Yet for every society, murder itself is always wrong. All societies require retribution to be proportionate to the wrong done. Every society prizes children, the link between succeeding generations of human civilization; every culture abhors their abuse.

The doctrine of national security has been especially corrosive of human rights. It is used frequently by governments, charged with the responsibility to protect citizens, to assault them instead. Under military rule, the instrument of protection from without becomes the means of attack from within.

An argument sometimes invoked for a policy of “See Nothing, Hear Nothing, Do Nothing” is that an activist concern would merely worsen the plight of victims. Prisoners of conscience beg to disagree. It is important to them to know that they have not been forgotten.¹⁸ Lack of open criticism is grist to the propaganda mill of repressive regimes.

The United Nations — an organization of, by and for member States — has been impartial and successful in a standard-setting role, selectively successful in monitoring abuses, but feeble in

¹⁸ Nelson Mandela notes in his autobiography, for instance, that sanctions were the best lever to force changes on South Africa's apartheid regime, and even in the early 1990s he was still urging the US Congress not to loosen US sanctions as favoured by the Bush Administration; Nelson Mandela, *Long Walk*

to Freedom, 1994, paperback ed., Abacus, pp. 697–699. He was unhappy that “[e]ven during the bleakest years on Robben Island, Amnesty International would not campaign for us on the ground that we had pursued an armed struggle”. *Ibid.*, p. 734.

enforcement. Governments usually subordinate considerations of UN effectiveness to the principle of non-interference.

The modesty of UN achievement should not blind us to its reality. The 1948 Universal Declaration embodies the moral code, political consensus and legal synthesis of human rights. The world has grown vastly more complex in the fifty years since. The simplicity of language belies the passion of conviction underpinning them: its elegance has been the font of inspiration down the decades, its provisions comprise the vocabulary of complaint. Activists and non-governmental organizations (NGOs) use the Human Rights Declaration as the concrete point of reference against which to judge State conduct. The 1966 Covenants require the submission of periodic reports by signatory countries, and so entail the creation of long-term national infrastructures for the protection and promotion of human rights. United Nations efforts are greatly helped by NGOs and other elements of civil society. NGOs work to protect victims and contribute to the development and promotion of social commitment and enactment of laws reflecting the more enlightened human rights culture.

Between them, the UN and NGOs have achieved many successes. National laws and international instruments have been improved, many political prisoners have been freed and some abuse victims have been compensated. The United Nations has helped also by creating the post of a High Commissioner for Human Rights who has given the UN campaign a human face and a more public profile. The most recent advances on international human rights, like the Ottawa Treaty banning landmines and the Rome Treaty establishing the International Criminal Court,¹⁹ are the progressive incorporation of wartime behaviour within the prohibitory provisions of international humanitarian law.

Not quite universal

And yet — of the 51 founding members of the United Nations in 1945, only eight were geographically Asian: China, India,

¹⁹ Rome Statute of the International Criminal Court, 17 July 1998.

Iran, Iraq, Lebanon, Philippines, Saudi Arabia and Syria. As can be seen, of these only three are from Asia proper (the others belonging more to the Middle East than Asia in political terms). Even from within this tiny group of three, one (India) was still a British colony. If the UN Charter articulates the “global” political norm of its time, then why should Asians feel bound by it? Today, Asia accounts for more than half the world’s population. But Asian countries make up only 26 per cent of the UN membership, and only 20 per cent of the UN Security Council’s membership.²⁰ Thus the organization under-represents Asian countries, and seriously under-represents Asian peoples. Once again, therefore, why should UN-sourced “global” norms be construed as having binding effects on Asian internal and international behaviour?

Asians are neither amused nor mindful at being lectured on universal human values by those who failed to practice the same during European colonialism²¹ and now urge them to cooperate in promoting “global” human rights norms. The displacement and ethnic cleansing of indigenous populations was carried out with such ruthless efficiency that the place of settler societies like Australia, Canada and the United States in contemporary international society is accepted as a given. The superiority of Western ways has remained a constant theme over the past few centuries, only the universal truths of Christianity have been replaced by the universal rights of humankind. Mahatma Gandhi, asked what he thought of European civilization, is said to have replied, “I think it is a very good idea”. Gandhi of course had a pronounced sense of mischief. But the story, even if apocryphal, serves to illustrate the resentment of people whose societies are backed by centuries of civilization against presumptuous preaching by

²⁰ For a discussion of the origins, evolution and limitations of geographical representation in the United Nations, see Ramesh Thakur (ed.), *What is Equitable Geographic Representation in the Twenty-first Century?*, United Nations University, Tokyo, 1999.

²¹ The seat of Europe today is Brussels. For a recent account of the scale of humanitarian atrocities committed by Belgium in its African colony, see Adam Hochschild, *King Leopold’s Ghost*, Houghton Mifflin, Boston, 1999.

Westerners.

Western countries, including America, are quite happy to use Amnesty International reports as a lever with which to nudge other countries on human rights. But they are outraged at the idea that their own human rights record, for example with respect to the racial bias in the death penalty, might merit independent international scrutiny. The major Anglophile outpost in Asia is Australia. At the same time as many Australians preach universalism to Asians, Australia rejects the right of the United Nations or any outsider to comment on the plight of Aborigines. Between 1910 and 1970, 100,000 Australian aboriginal children were taken from their families and placed in white foster homes. The goal was to wipe out the 40,000-year-old Aboriginal culture through detribalization: assimilating the children into European civilization while the adults died out. The result was dispossession, dislocation and devastation of Australia's first inhabitants.

The official inquiry into the "stolen generation", chaired by Judge Sir Ronald Wilson, President of the Human Rights Commission, listened to the stories of 535 aborigines and received written submissions from another 1,000.²² The 689-page report into the sorry saga used a UN definition — the deliberate extermination of a culture of one group through the forcible transfer of its children to another group — to conclude that the policy was one of genocide. The collective pain inflicted on two generations of Aborigines adds to the distress over their current plight. Their life expectancy is significantly lower than that of other Australians; their infant mortality is four times higher; they are grossly over-represented in the prisons; too many die in custody.

The report is compelling, painful, even harrowing. Many children were used as free labour or sex objects by those responsible for rescuing them from their primitive culture. Rape, child abuse, beatings and mental breakdowns were commonplace. One family engaged in ritual grieving over its stolen child every sunrise for 32 years. Publication of the report provoked shame and controversy. It avoided

²² *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children*

from Their Families, Human Rights and Equal Opportunity Commission, Sydney, 1997.

assigning guilt, preferring healing to retribution. Opposition leader Kim Beazley broke down and wept in parliament at the memory of the case studies. The government reacted angrily to the emotive charge of genocide and rejected the recommendations for an official apology, reparation and an annual "sorry day". In 2000, the government threatened to curtail cooperation with UN human rights agencies and inquiries because of their presumptuousness in investigating human rights in Australia. When Australians preach to Asians on human rights, they revive memories of the White Australia policy on immigration, whose structural continuity can be seen in parts of detention practices of illegal immigrants to this day.²³

Australia is not alone in acting as though only non-Westerners should be targets of norms that are supposedly universal. Which rights that Westerners hold dear would they be prepared to give up in the name of universalism? Or is the concept of universalism just a one-way street — what we Westerners have is ours, what you heathens have is open to negotiation? Similarly, where is the borderline between universal norms of environmental, labour and children's rights protection, and disguised trade protection measures (i.e., non-tariff barriers)?

In other words, even if we agree on universal human rights, the question remains of the agency and procedure for determining what they are, how they apply in specific circumstances and cases, what the proper remedies might be to breaches, and who decides, following what rules of procedure and evidence. With world realities as they are today, the political calculus — relations based on military might and economic power, not to mention the nuisance value of NGOs — cannot be taken out. As far as many Asians are concerned, *that* is the problem.

²³ See Amin Saikal, "Afghans are mistreated in Australia", *International Herald Tribune*, 4 January 2001.

From human rights to “humanitarian intervention”

The problem becomes more intractable when we slip across from human rights to armed intervention for humanitarian reasons. In international affairs, intervention can be defined broadly to mean just about anything that is done or said about an independent political entity by someone who is not a member of that entity. Or it can be defined narrowly to mean coercive interference by one State in the affairs of another State through the employment or threat of force. In medicine, it is commonly used to describe action taken to arrest and cure pathological conditions. In law-enforcement, it is an accepted part of the repertoire of community policing. In humanitarian crises, “low-level” humanitarian intervention to help with emergency relief and assistance, as indeed epitomized by the ICRC, is welcome and uncontroversial. At the high-politics end of international security, however, the term is used pejoratively to connote action that is illegitimate within the prevailing legal or normative order. Together, the two (range of meanings and impermissibility) produce the strange result that nations agree that intervention is unlawful, but disagree on what precisely is intervention.

Contrary to what many European governments claimed, the application of a right of “humanitarian intervention” in Kosovo was not self-evidently (self-righteously?) based in law or morality. During the Security Council debate on Kosovo in 1999, for example, the Sino-Russian draft resolution condemning bombing by the NATO forces was defeated by a vote of 12 to 3. Yet the Indian Ambassador claimed that since China, Russia and India had opposed the bombing, the representatives of half of humanity were opposed to the action.

Contemporary norms prohibit ill-treatment of citizens by their own States. But they also prohibit interference in the internal affairs of States. The UN Charter reflects this inherent tension between the intervention-proscribing principle of State sovereignty and the intervention-prescribing concern with human rights. For four decades after the signing of the Charter, State sovereignty was privileged almost exclusively, with the one significant exception of apartheid in southern Africa.

Venerable commentators assert that “[i]ntervention has become the new norm [in] a climate in which non-intervention appears as a dereliction of duty, requiring explanation, excuse or apology”.²⁴ The assertion can be challenged both on empirical and doctrinal grounds. Claude’s claim is surely easy to refute empirically. In 1999, intervention took place in just two cases (Kosovo and East Timor) from a universe of several where it could have been justified across Asia and Africa. Even East Timor is an arguable example. Since Indonesia’s annexation had not been legally recognized by the UN, the international community could not legally be said to have intervened in internal Indonesian affairs.

But what of Claude’s claim with regard to the ethical meaning of norms? Can we separate power politics from decisions that were made in Kosovo? The Kosovo campaign was a very good illustration of how different norms can come into conflict, and of the lack of institutional mechanisms for resolving such tension in the existing world order. The Security Council is the core of the international law-enforcement system. The precedent of having launched an offensive war without its prior authorization remains deeply troubling.

The doctrine of national sovereignty in its absolute and unqualified form, which gave rulers protection against attack from without while engaged within in the most brutal assault on their own citizens, has gone with the wind. But we cannot accept the doctrine that any one State or coalition can decide when to intervene with force in the internal affairs of other countries, for down that path lies total chaos. War is itself a major human tragedy: hence the paradox of armed intervention that can unleash still more all-round destruction. The use of force to attack a sovereign State is an extreme measure that can be justified only under the most compelling circumstances regarding the provocation, the likelihood of success — bearing in mind that goals are metamorphosed in the crucible of war once started —

²⁴ Inis L. Claude, “The evolution of concepts of global governance and the State in the twentieth century”, paper delivered at the annual conference of the Academic Council on the United Nations System

(ACUNS), Oslo, 16–18 June 2000. Claude does note, however, that the new norm “has been no less challenged in principle and dishonored in practice than was the old norm of non-intervention”.

and the consequences that may reasonably be predicted. Moreover, the burden of proof rests on the proponents of force, not on the dissenters.

Critics argued that NATO acted illegally in terms of its own constitution, the UN Charter, State practice, and on prudential grounds. This line of argument was articulated most forcefully by China, Russia and India (as well as Serbia). Under the UN Charter, States are committed to settling their disputes by peaceful means (Article 2, paragraph 3) and refraining from the threat or use of force against the territorial integrity or political independence of any State (Article 2, paragraph 4). Furthermore, Article 53, paragraph 1, empowers the Security Council to "utilize ... regional arrangements or agencies for enforcement action under its authority. *But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council*", with the exception of action against enemy States during the Second World War (emphasis added).

Neither the UN Charter nor the corpus of modern international law incorporates the right to armed intervention for humanitarian motives. State practice in the past two centuries, and especially since 1945, provides no unquestionably genuine case of such intervention. Moreover, on prudential grounds, the scope for abusing such a right is so great as to argue strongly against its creation. According to the weight of legal opinion and authority, the prohibition on the use of force has become a peremptory norm of international law from which no derogation is permitted and NATO was not permitted to contract out at a regional level. In this view, in circumventing the anticipated Security Council veto NATO repudiated the universally agreed rules of the game when the likely outcome was not to its liking. The prospects of a world order based on the rule of law are no brighter. The overriding message is not that force has been put to the service of law, but that might is right.

Over the course of the twentieth century, the international community placed many legislative, normative and operational fetters on the rights of States to go to war without international authorization. Progress was slow, difficult and protracted. After the Second

World War, the focus of all such efforts was centred on the United Nations. The Kosovo war was a major setback to the cause of slowly but steadily outlawing the use of force in solving disputes except under UN authorization. The argument that NATO had no intention to set a precedent is less relevant than that its actions were interpreted by others as having set a dangerous precedent.

NATO leaders argued that military action outside the UN framework was not their preferred option of choice. Rather, NATO's resort to force was a critical comment on the institutional hurdles to effective and timely action by the United Nations. The lacuna in the architecture of the security management of world order that was starkly highlighted by the NATO bombing needs to be filled. While NATO action was not explicitly authorized by the United Nations, it was an implicit evolution from UN resolutions, and certainly not prohibited by any UN resolution. NATO's campaign against Serbia took place in the context of a history of defiance of UN resolutions by Yugoslav President Slobodan Milosevic. Serbian atrocities in Kosovo challenged some of the cherished basic values of the United Nations. Had Milosevic been allowed to get away with his murderous campaign of ethnic cleansing, the net result would have been a fundamental erosion of the idealistic base on which the UN structure rests.

Over the years, the Security Council had become increasingly specific in focusing on human rights violations by the Milosevic regime, not by both sides; and increasingly coercive in the use of language threatening unspecified response by the international community. The Russian and Chinese draft resolution of March 1999 condemning NATO action received the support of only one other member of the Security Council, Namibia; the remaining 12 members voted against it. (Although India was granted permission to speak in the debate, it was not at that time a member of the Security Council.) Moreover, the Security Council had relied progressively on NATO as its enforcement arm in the Balkans over the 1990s. Its actions in Kosovo were thus a logical extension and evolution of a role already sanctified by the Security Council. NATO action was not a regression to old-style balance-of-power politics, but a progression to new-age community of power. After all, in values, orientation and finan-

cial contributions, some of the NATO countries, for example Canada and the northern Europeans, represent the best UN citizen-States.

Faced with the controversy arising from different first principles, we come back to the same set of operational dilemmas: who decides, by what right and authority, following what rules of procedure and evidence, that atrocities have been committed requiring external intervention? How do we weigh in the balance the costs of not doing anything against the international and long-term consequences of going to war without due process?

If NATO can do so with regard to Kosovo without authorization by the Security Council, then why not the Arab League with regard to Palestine today? To say that they lack the power or military capacity to do so is to say that might is right. Similarly, would we accept former or present Israeli leaders being put on trial for crimes against humanity by a tribunal that was set up essentially by the Arab League, funded by them and dependent on them for collecting crucial evidence through national intelligence assets and for enforcement of arrest warrants? How plausible is the argument that the decade-old sanctions on Iraq are responsible for one of the great human atrocities of our times — more deaths than caused by all the weapons of mass destruction throughout the twentieth century,²⁵ in violation of the laws of war requirements of proportionality and of discrimination between combatants and civilians?²⁶ Who is to decide the answer to this question and, if the answer is in the affirmative, what is to be done against the perpetrators?

Many Asian countries are former colonies who achieved independence on the back of extensive and protracted nationalist struggles against the major European powers. The party and leaders at the forefront of the fight for independence helped to establish the new

²⁵ John Mueller and Karl Mueller, "Sanctions of mass destruction", *Foreign Affairs*, May/June 1999, pp. 43–53.

²⁶ See Joy Gordon, "A peaceful, silent, deadly remedy: The ethics of economic sanctions", *Ethics & International Affairs*, Vol. 13, 1999, pp. 123–142; Drew Christiansen and Gerard F. Powers, "Economic sanctions and just-war doctrine", in David Cortright and George A.

Lopez (eds), *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World*, Westview, Boulder, 1995, pp. 97–120; Albert C. Pierce, "Just war principles and economic sanctions", *Ethics & International Affairs*, Vol. 10, 1996, pp. 99–113; and Adam Winkler, "Just sanctions", *Human Rights Quarterly*, Vol. 21, 1999, pp. 133–155.

States and shape and guide the founding principles of foreign policies. The anti-colonial impulse in their world view was instilled in their countries' foreign policies and survives as a powerful sentiment in the corporate memory of the Asian élites. For most Westerners, NATO is an alliance of democracies and as such a standing validation of the democratic peace thesis. For most Asian ex-colonies, however, the most notable feature of NATO is that it is a military alliance of former colonial powers: every former European colonial power is a member of NATO. It is simply not possible to understand the strength of India's reaction to the 1999 war in Kosovo without first appreciating the significance of the trauma of historical input: countries that in previous centuries had carved up Africa and Asia were now carving up central Europe and pursuing familiar policies of divide-and-leave. NATO and Europe do not own the copyright on moral outrage. For many Asians, the norm of non-intervention remains a moral imperative, not simply a legal inconvenience to be discarded at the whim and will of the West. They were morally outraged at its violation by NATO in 1999.

The reason for much disquiet around the world about NATO military action in Kosovo was not because those countries' abhorrence of ethnic cleansing is any less. Rather, it was because of their preference for an order in which principles or values are embedded in universally applicable norms, and the rough edges of power are softened by institutionalized multilateralism. Even Japan, the staunchest of US Asian allies, neither condemned (because it understood the provocation) nor condoned (because it was unhappy with the circumvention of the UN) NATO bombing.

United Nations and norm generation

The Kosovo war brought to a head the risk of the world's pre-eminent international organization and indispensable power marching down separate paths with potentially fatal consequences for world order. In today's unstable world full of dangerous and complex

²⁷ These issues are explored in full detail in Albrecht Schnabel and Ramesh Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention: Selective*

Indignation, Collective Action, and International Citizenship, United Nations University Press, Tokyo, 2000.

conflicts, we face the painful dilemma of being damned if we do and damned if we don't.²⁷

- To respect sovereignty all the time is to be sometimes complicit in human rights violations.
- To argue that the UN Security Council must give its consent to armed intervention on humanitarian grounds is to risk policy paralysis by handing over the agenda to the most egregious and obstreperous.
- To use force unilaterally is to violate international law and undermine world order.

The bottom-line question is this: faced with another Holocaust or Rwanda-type genocide on the one hand and a Security Council veto on the other, what would we do? Because there is no clear answer to this poignant question within the existing consensus as embodied in the UN Charter, a new consensus on external armed intervention is urgently needed. Logically, there are five alternatives:

- Any one country/coalition can wage war against a country or group outside the coalition — a recipe for international anarchy.
- Only NATO has such a right with respect to launching military action against a non-NATO country — a claim to unilateralism and exceptionalism that will never be conceded by Asia and the “international community”.
- Only NATO has the right to determine if military intervention, whether by NATO or any other coalition, is justified against others outside the coalition. Such a position is implicit in the argument by some European leaders and commentators that NATO's actions in Kosovo cannot be construed as having set a precedent. The assumption underlying the claim is both demonstrably false, as argued above with respect to Russian actions in Chechnya, and almost breathtakingly arrogant in setting up NATO as the final arbiter of military intervention by itself or any other coalition.
- A regional organization can take military action against one of its errant members (e.g. the Organization of African Unity against deviant OAU members, or NATO against deviant NATO members) if they have agreed in advance to such rules of the game for governing internal relations, but not against non-members.

- Only the United Nations can legitimately authorize armed intervention.

The fourth and fifth options pose the fewest difficulties. The urge for humanitarian intervention by powerful regional organizations outside their own area of operations must be bridled by the legitimating authority of *the* international organization. The only just and lasting resolution of the challenge to intervene on humanitarian grounds would be a new consensus proclaimed by the peoples of the world through their governments at the United Nations and embodied in its Charter.

Intervention that is authorized by the United Nations entails the presumption of legitimacy, that which is not so authorized bears the presumption of illegitimacy. But there are exceptions to both parts of the proposition. In the United Nations system, the normative centre of gravity is the General Assembly, but the geopolitical centre of gravity and the enforcement body is the Security Council in which the Asian peoples are grossly under-represented. The preferences of the two can be at odds.

There is an additional caveat. In national systems, bills passed into law by the legislature and actions of the executive arm of government can be found, by judicial review, to violate constitutionally guaranteed rights of citizens. In principle, Security Council resolutions could similarly violate the rights of member States guaranteed by the UN Charter. But there is no mechanism to hold the Security Council to independent international judicial account for its actions. Given the unrepresentative nature of the Council, there are occasional tremors of apprehension among developing countries about the potential for the UN, which they see as the best protection that the weak have against the strong in international affairs, to become instead the instrument for legitimating the actions of the strong against the weak. Thus, authorization by the United Nations is not a sufficient condition of international legitimacy. Conversely, it may not even be a necessary condition: simply because the UN has not authorized it does not mean that a particular intervention in any given instance is automatically illegitimate. But the overwhelming majority of such cases over time will be deemed to be illegitimate.

Conclusion

International humanitarian law neither develops nor operates in a vacuum. It has to be placed within its particular temporal and political contexts. In particular, norms and international law are the two end points on the continuum along which international humanitarian law needs to be located. The threshold of the new millennium is also the cusp of a new era in world affairs. The business of the world has changed almost beyond recognition over the course of the last one hundred years. There are many more players today, and their patterns of interaction are far more complex. The locus of power and influence is shifting. The demands and expectations made on governments and international organizations by the people of the world can no longer be satisfied through isolated and self-contained efforts. The international policy-making stage is increasingly congested as private and public non-State players jostle alongside national governments in setting and implementing the agenda of the new century. The multitude of new players adds depth and texture to the increasingly rich tapestry of international civil society.

In today's seamless world, political frontiers have become less salient both for international organizations, whose rights and duties can extend beyond borders, and for member States, whose responsibilities within borders can be held to international scrutiny. The gradual erosion of the once sacrosanct principle of national sovereignty is rooted today in the reality of global interdependence: no country is an island unto itself any more. Ours is a world of major cities and agglomerations, with nodes of financial and economic power and their globally wired transport and communications networks. Cumulatively, they span an increasingly interconnected and interactive world characterized more by technology-driven exchange and communication than by territorial borders and political separation.

In a world in such a state of flux, there are problems enough with efforts to provide philosophical underpinnings to global norms. The difficulties multiply when we move to the operational realm of giving policy shape and content to them. Yet the difficulties must somehow be overcome if we are to make the transition from the culture of impunity for crimes against humanity of yesteryear towards a culture of accountability.

Norms are effective as a behaviour-regulating mechanism

only if they are accepted as legitimate by the target player — whether Israel, India, Japan or the USA. We, as the international community, need in every particular instance either:

- to forge a genuine normative consensus; or
- to make realistic assessments of our capacity to coerce recalcitrant players versus their capacity to break out of the constraining regime.

Rules and regulations that have already attained the status of binding provisions of international humanitarian law do not need the same requirement of internalization by the intended target countries. But there is the very grave danger that “cherry picking” articles of international humanitarian law or of other parts of international law to suit one’s partisan interests of the day will undermine respect for the principle of world order founded on law. That is to say, the normative consensus on which law rests will begin to fray and the international order will risk collapsing. The dangers of this are magnified because of the potentially competing and conflicting norms and principles at play on most controversial/important issues, such as landmines, nuclear weapons or intervention for humanitarian reasons.

In many Asian minds, there is bemusement at the confusion. But there is also resentment that, yet again, Asians seem to be consigned to being norm-and-law-takers, not setters. Many of the twentieth-century advances in globalizing norms and international law have been progressive and beneficial. However, their viability will be threatened if developing countries are not brought more attentively into the process of norm formation, promulgation, interpretation and articulation; that is, made equal partners in the management of regimes in which international norms and laws are embedded.

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Résumé

Normes universelles et droit international humanitaire : perspective asiatique

par RAMESH THAKUR

La communauté internationale, telle qu'elle est organisée actuellement, est l'œuvre des pays occidentaux. Ainsi, parmi les 51 États qui ont fondé les Nations Unies en 1945, on ne compte que huit États du continent asiatique. Il en est de même du droit international humanitaire moderne et codifié : c'est un « produit » occidental. Certes, les États asiatiques acceptent les valeurs à la base des traités de droit humanitaire, mais l'auteur attire notre attention sur les divergences de vues qui peuvent surgir dans le choix des moyens utilisés pour leur mise en œuvre. En parlant de l'action humanitaire, il faut se rappeler que ce sont souvent d'anciens États coloniaux qui en assurent activement la promotion. Les frontières disparaissant, il faut trouver de nouvelles justifications aux règles internationales, dont celles du droit international humanitaire. Il est urgent d'associer à ce processus les pays qui n'y participaient pas jusqu'à ce jour, à savoir, les pays en développement. Un nouveau consensus pourra ainsi se faire jour qui renforcera les fondements du droit international humanitaire.

The Asian values debate and its relevance to international humanitarian law

by

ALFRED M. BOLL

A lively debate throughout the 1990s on the universal nature of rights and values, and whether these are compatible with the values and concepts of rights common to Asian peoples, has attracted the attention of politicians and scholars in Asia and elsewhere. Although this “Asian values debate” has subsided in recent years, it has incited controversy in many respects. Its political, economic, social, cultural and moral ramifications, its substance, its name, the characterization of the issues, and even the identity and position of many of the individuals who have chosen to take a stand on it or on issues they see as inextricably related, have provoked clashes.¹ In fact, to qualify the discussions on “Asian values” as a “debate” might even be seen by some as a demonstration of unacceptable bias. It is nevertheless submitted that there has indeed been a “debate” over the existence, nature and ramifications of “Asian values”, as related to “Western values”. Moreover, the rhetoric has at times been so intense that onlookers from the sidelines might even

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have felt a certain dizziness akin to that of spectators at a world-class tennis match, whose heads are constantly swivelling back and forth from serve to return.

It is neither the author's intention to define Asian values, nor to take part in the debate, however it may be labelled, although to submit thoughts intended to be dispassionate about it might justifiably be considered an endeavour in which only the naive or reckless might engage. This brief comment is compiled by a non-Asian (though at present living in Australia, but whether Australia is a part of Asia has also been the subject of debate), who has had the privilege of working and living in different parts of Asia for several years and who claims no expertise in the subject. Likewise, it must be recognized that even an attempt at dispassionate analysis may be considered impossible owing to any author's inherent bias, whether cultural or otherwise. Nonetheless, references to what others have published or stated about Asian values should not be construed as taking sides. Similarly, the citation, or not, of high-profile persons linked to the Asian values debate is not meant to indicate support for, or rejection of, their positions. Nor is this comment in any way a summary of the debate itself.

The issue

The debate on Asian values has taken place both within and outside Asia, Asian values having been contrasted to "Western values", and its relevance is clearly evident in terms of the broader issue of the respective duties of States and individuals to one another. It thus also has a bearing on the protection of the individual and States' obligations in that regard. No matter how the issues surrounding Asian values are characterized, it is clear that those values are, or have become, relevant to the broader discussions on human rights concepts and international human rights law. As such, it must be asked what relation they bear to international humanitarian law, to the protection that law

¹ There is even an argument which maintains that the values claimed are those of nineteenth-century Great Britain, propagated by a Singaporean elite, and not necessarily

indigenous to Asia, or not to Singapore. Michael Backman, "Asians and Victorian values", *Far Eastern Economic Review*, 30 March 2000, p. 32.

provides for the individual in the context of armed conflict and to the duties it imposes on States.

The debate has at least two important implications for international humanitarian law: on the one hand, in terms of that law's significance for and implementation in Asia; and, more generally, for the discussions on cultural or value-based influences on the nature or application of the law. It thus seems to raise questions for international humanitarian law in black-letter legal terms, as a body of law which is universal in scope, but also in moral or societal terms, in relation to the law's claim to reflect common interests and ideas. Questions as to the extent to which underlying societal or cultural values shape or create legal regimes are also inherently related to ideas of justice and its sources. But regardless of whether the claim that international humanitarian law is a common human denominator is based either on purely practical and/or pragmatic reasons related to the efficient conduct of warfare, or on more idealistic ones related to fundamental standards of conduct *vis-à-vis* fellow human beings, the Asian values debate is relevant to how we interpret the underlying consensus which created the law, and to its application in all settings and parts of the world.

Asian values have been defined as putting emphasis on a consensual approach, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic State and the primary role of government in economic development, linked to the premise that "there are values and patterns of behaviour that are common to Asian countries and peoples".² In contrast,

² Han Sung-Joo, "Asian values: An asset or a liability", in Han Sung-Joo (ed.), *Changing Values in Asia — Their Impact on Governance and Development*, Japan Center for International Exchange, Tokyo, 1999, p. 4. This volume is a compilation of articles examining "the interrelation of changing values and domestic governance with the foreign policy behavior and international relations of countries in the Asia Pacific region". *Ibid.* p. vii. Each writer (there are articles on China, Japan, South Korea, Indonesia, Malaysia, the Philippines, Singapore, Australia and Europe)

was asked to address various questions from a national perspective, such as the values being contested in society, how socio-economic change is affecting basic values and styles of governance, how such issues relate to the political influence of different groups, the effects on foreign relations, whether governments project values into foreign affairs, or whether governments feel that other countries are projecting values which must be defended against. — The claim that there are shared Asian values has also been a factor in developing relationships among Asian

"Western values" have been associated with transparency, accountability, global competitiveness, a universalistic outlook and universal practices, and an emphasis on private initiatives and the independence of the private sector.³

In his article "Asian values: An asset or a liability",⁴ from which the above definitions are taken, Professor Han Sung-Joo asserts that Asian values, which have been held up as the driving force behind Asia's rapid economic development in recent decades, have been used by politicians and scholars for various purposes: to respond to Western criticism of Asia; to legitimize a regime in power or a political system; to protect tradition against perceived detrimental Western influence; as an academic source of enquiry related to rapid economic development; as a source of conflict with the West (many in the West claiming that "Asian values" are in fact values not limited to Asia); and to counter "western emphasis on areas such as human rights and the environment [as] unwarranted interference at best, and revealing ulterior motives at worst".⁵ The author then proceeds to ask whether the same values which were claimed to have produced an Asian economic miracle are also the cause of the economic downturn of the late 1990s in Asia. He cites one school of thought which proposes that the same Asian values which created economic advantage "during the early industrialization and pre-globalization stage of development, have actually impeded these Asian countries in adjusting to the new age of

nations: in an opening speech to a meeting of ASEAN, the Indian Prime Minister P. V. Narasimha Rao cited shared Asian values as a source of common ground. See Rodney Tasker, "Foreign relations: Rao's look-east policy", *Far Eastern Economic Review*, 22 April 1993, p. 16.

³ Han Sung-Joo, *op. cit.* (note 2), p. 7.

⁴ *Ibid.*, p. 3.

⁵ *Ibid.*, pp. 3 and 9.

⁶ *Ibid.*, p. 4. In an interview with *Time* magazine, Singapore's Senior Minister Lee Kuan Yew cites a different historical background and social values as having made for fast growth, and blames the economic collapse on "a lack of systems, especially the

rule of law". To the correspondent's statement that what the Minister had labelled "Confucianism" was the Western way of doing business, he responded "[i]f it is the best way of doing business, it doesn't matter where it comes from. All durable cultures must uphold honesty, otherwise a society will not survive." Terry McCarthy, "In defense of Asian values", *Time*, 16 March 1998, p. 40. In contrast, Malaysia's Prime Minister Dr Mahathir Mohamad blamed economic troubles on Western speculators and governments. See "Rumpus in Hong Kong", *The Economist*, 27 September 1997, p. 17. See also "Asian values revisited: What would Confucius say now?", *The Economist*, 25 July 1998, p. 23.

interdependence and globalization.”⁶ Agreeing that there are also differences in specific values in the Asian region,⁷ Professor Han concludes that:

“[w]hether these values play a positive or negative role seems to depend on a particular country’s stage of development, as well as how specific values within the basket of so-called Asian values are selected and combined. In a globalized world where goods, services and capital move uninhibited across national borders, Asian values can be a liability unless they adapt to the requirements of transparency, accountability, and limitless competition. It is impossible to predict what future role Asian values will play. As in the past, it will depend very much on how societies and governments apply values to the challenges they face.”⁸

For the purposes of our discussion, the most relevant argument as regards the uses made of Asian values and the related debate cited by Professor Han is that they serve as a bulwark against a Western emphasis on human rights which is not “Asian”, and which either constitutes meddling by outsiders or their use of discourse about human rights to further purposes which are inimical to Asian interests.⁹

⁷ The last British Governor of Hong Kong, Chris Patten, argues that Asia’s diversity means that generalization about the region’s values is not possible, as philosophical, religious, governmental and economic points of departure vary radically from place to place. Chris Patten, *East and West*, Macmillan, London, 1998, pp. 157-160. On the view that notions of “Asia” as a region reflect in fact an inherently European view of the world, see Alan Dupont, “Is there an ‘Asian way?’”, *Survival — the IISS Quarterly*, Vol. 38, No. 2, 1996, pp. 13-33.

⁸ *Op. cit.* (note 2), p. 8. In a 1994 opinion, *The Economist* summed up the debate as: “The argument over ‘Asian values’ is not about whether the tide of history may now be

moving east after 500 years of moving west (though that may well be happening), nor about an impending ‘clash of civilisations’. It is about how to organise any rich, modern society late this century and early next; and about how to strike a balance anywhere between freedom and order, and between government responsibility and individual and family responsibility”. *The Economist*, 28 May 1994, p. 13.

⁹ See Li Xiaorong, “‘Asian values’ and the universality of human rights”, *Business and Society Review*, No. 102/103, 1998, p. 81, and Joanne R. Bauer/Daniel A. Bell (eds), *The East-Asian Challenge for Human Rights*, Cambridge University Press, Cambridge and New York, 1999.

In his article "Rights, duties and responsibilities", Professor Yash Ghai of the University of Hong Kong states that:

"[t]he rise of Asian values as a political doctrine can be traced to the end of the cold war. Its most active proponents were Singapore and Malaysia.¹⁰ It came into prominence to challenge what was claimed to be the attempts of the West to establish its global intellectual and cultural hegemony by imposing Western notions of rights under the guise of universalism."¹¹

The author explores the development of the Asian values debate in the context of the ideological confrontation between former communist States and the West, the former stressing social and economic rights, the latter civil and political rights. He argues that the West's representation of the collapse of many communist governments as a victory of democracy and human rights was also used to further Western advantage in various spheres, specifically to define and secure political relationships, even justifying international intervention. Many States were not overly enthusiastic about this approach and its potential consequences for authoritarian political systems, but also for competitiveness in international trade, owing to their particular economic policies. Their response was a direct cultural attack on the assertion that human rights are universal, countering "Western rights" with "Asian values" and a claim that Asia's economic and social success is based on Asian values, just as the economic crisis and moral decadence

¹⁰ It should be noted that there has been debate on these issues within Singapore and Malaysia, e.g. the reaction in 1992 by a nominated member of the Singaporean Parliament, Professor Walter Woon, to an argument by the government that Mandarin Chinese is an essential medium for transmission of desirable cultural values among Singapore's Chinese, and a statement by the Information Minister that the number of [Singaporean] Chinese who speak English at home was disturbing. The professor labelled the claimed gulf between Asian and Western values as "dangerously simple-minded", maintaining

that "good values" can be transmitted in any language. "Teaching old values", *The Economist*, 28 November 1992, p. 31.

¹¹ Yash Ghai, "Rights, duties and responsibilities", in Josiane, Cauquelin, Paul Lim, Birgit Mayer-König (eds), *Asian Values — An Encounter with Diversity*, Curzon Press, Richmond, Surrey, 1998, pp. 20-21. This volume compiles essays on values using a thematic approach, i.e. on Buddhism, Confucianism, Islam, Hinduism, colonialism, business practices, and social/economic class. It attempts to tackle the question whether Europe and Asia share common values.

of the West are the result of its preoccupation with rights.¹² Professor Ghai places China outside these arguments, noting that the Chinese response to issues of human rights has been national sovereignty and maintaining that human rights is an issue which depends on each country's unique situation and does not come within the purview of the international community. Although Professor Ghai rejects what he calls the "doctrine of Asian values",¹³ he goes on to examine the argument that rights-based regimes promote confrontation and conflict, and that duty-based regimes promote harmony and consensus.¹⁴

If it is difficult to point to practical consequences of the Asian values debate itself, the amount of literature and comment that it has provoked is voluminous (though perhaps not always substantive).¹⁵

¹² This is the view of the (then) top civil servant at the Singaporean Foreign Ministry, Mr Kishore Mahbubani. "Asian values: The scourge of the West", *The Economist*, 22 April 1995, p. 34.

¹³ "There is no particular coherence in the doctrine of Asian values. Its intellectual roots are weak, and it shifts its ground as expediency demands. Although it is perceived as and intended to be an attack on human rights, it is in fact concerned with ethics and the organization of society, and does not engage directly with the nature of human rights. It sets up false polarities and has a dubious theory of causation with which it seeks to attack the notion of rights. The doctrine of Asian values seeks to achieve various objectives. It seeks to differentiate Asia from the West, and indeed to show the superiority of the former over the latter. Through this differentiation, it seeks to disapply norms of rights and democracy. It claims to fight the gospel of governance by 'demonstrating' distinct cultural foundations of Asian capitalism and markets, which unlike the West, are not dependent on legal norms and independent judiciaries, but the ties of family and kinship and the trust they generate. It aims to strengthen Asian solidarity by posing (a false) unity." *Op. cit.* (note 11), p. 25.

¹⁴ *Ibid.*

¹⁵ For example, one product of the "Asian values" debate is a proposal that in addition to liberalism and socialism there is an ideological and cultural third force, labelled "patriarchalism". "Patriarchalism... both assumes the naturalness of inequalities in the social relations between people and justifies these by reference to the respect due to a benevolent father or father-figure who exercises a 'joint right'." The author suggests "a revival of the human rights project on a more equal civilisational basis that, because it assumes the hybrid nature of all societies, is neither Occidental nor Orientalist, might yet become possible". Anthony Woodiwiss, *Globalisation, Human Rights and Labour Law in Pacific Asia*, Cambridge University Press, Cambridge, 1998, p. 2. — The "Asian values" debate has also provoked national introspection in Australia, e.g. a study focusing on cultural differences in terms of how people in the Asian region, including Australia, think about common problems or societal norms or standards. It examines areas such as business ethics, education, labour relations, national security, and citizenship, in addition to human rights, democracy, the media and government. From an Australian examination of Asian values, Australia's engagement with

Questions regarding the extent to which we can compare the morals or values of different cultures or societies, insofar as they shape our understanding of the world, right and wrong, justice and injustice, and the appropriate relationship between the individual and the State, are, however, clear, and claims in relation to "Asian values" would seem to have tapped a deep vein of thought, emotion and conviction.

In an anthropological analysis of values and social controls of certain groups in South Asia, Christoph von Fürer-Haimendorf introduces his study by noting that observance from the outside is not necessarily conducive to an understanding of the nature of the event being observed.¹⁶ Without an understanding of the underlying cultural, moral and ethical framework in which the event is taking place, correct conclusions about thinking and behaviour cannot be drawn. As an example of how concepts of morality and propriety differ from one culture to another, he uses the illustration of a Tibetan audience viewing Verdi's opera *Don Carlo*. The scene in which a son confesses his love for his new young stepmother obviously sets the stage for ultimate tragedy in the eyes of Western audiences, whereas a Tibetan audience would not understand the controversy: for them, in traditional terms, there is nothing aberrant in the sharing of one wife by father and son.¹⁷

Von Fürer-Haimendorf goes on to discuss the problem of the relativity of morals, and the variety of interpretations drawn from comparative studies of societies. He concludes however that:

"[a]n understanding between different societies across cultural barriers is explicable only if we assume the existence of something approximating to a common moral language shared by the

Asia "will not so much excite as alleviate anxieties about core values and national identity". In an attempt to define what values are "Australian", comparison is said to facilitate the recognition of "core values" in Australian society, labelled "the liberal ideological package... [which is a] product of a long history, in some cases reaching back through the Enlightenment and Renaissance in Europe, and further still to the origins of the Christian

and classical tradition. In this sense, Australian society cannot be regarded as young." Anthony Milner/Mary Quilty (eds), *Australia in Asia: Comparing Cultures*, Oxford University Press, Melbourne, 1996, pp. 11-12.

¹⁶ Christoph von Fürer-Haimendorf, *South Asian Societies: A Study of Values and Social Controls*, East-West Publications, London, 1979, p. 1.

¹⁷ *Ibid.*

whole of humanity. The existence of such a common language does not mean that all societies use it to express identical moral ideas, but only that there is intuitive agreement on certain basic concepts, essential for any discourse on moral problems."¹⁸

To return to the Asian values debate, and assuming that the above-cited postulate applies to "values" or ideas of "rights" used as part of the debate, we must ask whether international humanitarian law falls into a category of "intuitive agreement on certain basic concepts" or some form of universality, or whether it represents values not shared by all, especially in its relation to human rights.

The case of international humanitarian law

To attempt an answer, we must first be clear about the relationship between international humanitarian law and human rights, and fit the Asian values debate in appropriately. In essence, the notion of human rights is about political, societal and economic relationships, that is, the relationship between the individual and the collective, the individual and society, or most importantly in most cases, the individual and the State.¹⁹

One notion of human rights, that is, the relationship between the individual and the larger community, can be based on a world view dictated by a philosophy, a religion, an economic construct or cultural or social values. Thus there are notions of the proper or "natural" relationship between the individual and the State and/or collective embedded in Confucianism,²⁰ Marxism, Christianity, Islam, a free market philosophy and indeed all philosophies, which can be compared and contrasted. Such a list arguably includes Asian values.²¹

¹⁸ *Ibid.*, p. 12.

¹⁹ On the notions of human rights and international humanitarian law and their relationship, see Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *IRRC*, No. 293, March-April 1993, pp. 94-119, and Christophe Swinarski, *Introdução ao Direito Internacional Humanitário*, Comitê Internacional da Cruz Vermelha e Instituto Interamericano de Direitos Humanos, Brasília, 1993, pp. 22-24.

²⁰ See William Theodore de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Harvard University Press, Cambridge, 1998.

²¹ For a discussion of culture in relation to human rights ideas in Asia, see "Cultural sources of human rights in East Asia: Consensus building toward a rights regime — A Conference Report", *Human Rights Dialogue*, Carnegie Council on Ethics and International Affairs, New York, 1996.

Another notion of human rights is that embedded in any national legal system. Laws define a certain relationship between the individual and society, or the individual and the State. A third notion of human rights is that embodied in certain international treaties, commonly known as international human rights law. This body of law is separate from international humanitarian law, although containing areas which overlap with it.

To compare international humanitarian law with the international law of human rights is not only feasible, but has been done in many ways, for it is a comparison of systems of protection of the individual established by the international community or by States in their mutual relations, namely international humanitarian law which applies in situations of armed conflict and which cannot be suspended at any time, and international law of human rights which applies at all times, but of which certain treaty provisions can be suspended under well-defined conditions.²²

Each system of protection reflects a certain view of the relationship between States and individuals. International humanitarian law does not entitle individuals to claim rights, rather it places States and other parties to armed conflicts under constraints and obligations designed to protect people not taking part in hostilities. It creates individual criminal responsibility for crimes. Conversely, international human rights law does give individuals rights, often backing them up with recourse to mechanisms for national or international enforcement of those rights. The greatest difference between the two systems is their definition of the scope of protection required for the individual. They sometimes overlap: both agree that murder, torture and cruel and inhuman treatment and punishment are prohibited at all times, and that individuals have the right to judicial guarantees, to a fair trial and to humane treatment. But international humanitarian law says nothing about free speech, freedom of the press, elections, representative government, and so on, areas which are often the subject of international human rights treaties. International humanitarian law

²² See also (in Chinese) Zhu Wen-Qi, *Outline of International Humanitarian Law*, Peter Chan Publishers, Hong Kong, 1997, pp. 103-112.

overlaps with international human rights law in its most fundamental terms: while people and governments might disagree — and the international treaties do disagree — on what constitutes a human right, in the Geneva Conventions all the world's nations have agreed on what might be called the *most basic human rights* in times of armed conflict. It is in this sense that international humanitarian law might be called the “least common denominator” with regard to the obligations of the State toward individual human beings, albeit in crisis situations where the survival of the State or of its internal order may be at stake.

Of course, the provisions of international humanitarian law can also be compared to notions of human rights as expressed by States in their national laws. However, suffice it to say that all Asian States have ratified the four 1949 Geneva Conventions on the protection of war victims (although in this region ratification of the 1977 Additional Protocols has admittedly been slower than in many parts of the world), and that the Conventions are thus part and parcel of all Asian national expressions of the relationship between the individual and the State or, in other terms, of human rights in armed conflict.

Likewise, international humanitarian law might be examined to determine whether or not it embodies what has been defined as Asian values expressing the proper relationship between the individual and the State. This is a far more momentous task, as it involves looking beyond international humanitarian law as simply black-letter rules, and into the underlying consensus and philosophical world view which incites States to place limits on their conduct when having recourse to armed force. Do the reasons of Asian States for making laws of war differ from those of non-Asian States?

While we cannot in this context examine the customs and laws of war in ancient Asia, there is quite a substantial amount of literature and studies which maintain that the essential principles of international humanitarian law are as old in Asia as in Europe, if not much older, and that the principles which led to the establishment of these laws emanate from a perception of warfare which has been common to mankind through the ages. As in every country, differences in the levels of implementation of these ideas can be seen in the various Asian countries, and it would be incorrect to argue that the same specific

rules can be found historically throughout Asia. But examples of their similarity abound.

In his article on protection of victims of war, "Traditional Asian approaches: The Chinese view", Professor Zhu Li-Sun demonstrates not only that in ancient China customary rules relating to the conduct of war mirror those contained in the Geneva Conventions, but also that humanitarian ideals and values which shaped the ancient Chinese laws of war are enshrined in today's body of international humanitarian law.²³ This is confirmed by Dr Zhu Wen-Qi in his Chinese-language manual of international humanitarian law, who even cites evidence of this law in the China of 4,000 years ago.²⁴ The development of rules of conduct in war is of course different from country to country, and merits specific examination in each case.²⁵ Likewise, the specific reasons behind the development of this law in Asia, whether out of a pragmatic desire for post-war advantage, or versus or complementary to an ideological, political or philosophical framework, merits further study. No attempt will be made here to answer these questions, or to determine whether modern Asian States have professed the same reasons for adherence to international humanitarian law and to what extent this adherence can be traced to past practice.

Concluding remarks

Whatever the reasons for the historical development of rules of conduct in war and modern-day adherence to them, it is clear that in essence the Asian values debate, with the course it has taken, does not threaten the legitimacy in relation to Asia or otherwise of the international system of protection established in the Geneva Conventions. Asian States are no different from the rest of the world in

²³ Zhu Li-Sun, "Traditional Asian approaches: The Chinese view", in D. W. Greig (ed.), *Australian Year Book of International Law*, Vol. 9, 1985, p. 143.

²⁴ *Op. cit.* (note 22), pp. 31/32.

²⁵ See the collection of articles (including those on China, Japan, Malaysia and India) in Greig, *op. cit.* (note 23). See also *Traditional*

Laws of War in Indonesia, Centre for Study on Humanitarian Law, Faculty of Law, Trisakti University, Jakarta, 1999; Mutoy Mubiala, "African States and the promotion of humanitarian principles", *IRRC*, No. 269, March-April 1989, p. 93; Yadh Ben Ashoor, "Islam and international humanitarian law", *IRRC*, No. 215, March-April 1980, pp. 59 ff.

their strong statements of support for international humanitarian law and their levels of implementation. Recent declarations by various Asian governments that they are moving toward ratification of the 1977 Additional Protocols also support the opinion that there is no discrepancy between Asian States' views of the proper scope of international humanitarian law and the provisions of the various humanitarian conventions. In this sense the use of Asian values to assert the contrary would perhaps even constitute an affront to Asian countries.

The analysis in moral terms, or in terms of values, leads to the same conclusion. Whether or not one supports it, the thesis (or theses) of Asian values does not detract from the claim that international humanitarian law reflects common interests and ideas in the most important way, namely in practice. When concerned with protecting victims of the use of armed force, be they wounded or captured members of armed forces, the populations of occupied territories or civilians not taking part in hostilities, all that matters is the underlying practical consensus on humanitarian law in actual application. Pundits may quarrel over the rest, but when deeds match words, the question is whether there was indeed an argument in the first place.



Résumé

Le débat sur les valeurs asiatiques et sa signification pour le droit international humanitaire

par ALFRED M. BOLL

Au cours des années 90, une controverse a vu le jour en Asie sur la question de savoir si les valeurs à la base de codifications universelles sont nécessairement compatibles avec les valeurs acceptées et respectées dans les différentes régions de ce continent. Plus particulièrement et à titre d'exemple, les conventions internationales relatives aux droits de l'homme sont censées exprimer des valeurs reconnues sur le plan universel. Les Asiatiques doivent-ils de ce fait les accepter automatiquement dans cette forme ? Ces valeurs dites « universelles » ne sont-elles pas pour la plupart d'origine occidentale ? — Il apparaît qu'une prééminence des valeurs asiatiques est notamment postulée pour certains aspects de la vie sociale qui sont propres à l'Asie, dont l'ordre interne des États et l'économie. Le droit international humanitaire, par contre, a toujours trouvé des principes équivalents dans les traditions et coutumes ancestrales des différentes nations asiatiques. Par ailleurs, les règles essentielles du droit international humanitaire représentent le plus petit dénominateur commun des règles de droit à respecter dans les conflits pour que l'homme soit protégé contre la violence et l'abus de pouvoir ; à ce titre, elles sont également en harmonie avec les valeurs reconnues en Asie.

International humanitarian law: an Indo-Asian perspective

by
V. S. MANI

Humanitarian law applicable in armed conflict must be as old as armed conflict itself. Resort to arms is, by and large, a demonstration of that barbaric aspect of human nature which led political philosophers like Thomas Hobbes to assume that human life in “the state of nature” is “solitary, selfish, nasty, brutish and short”, and argue in favour of a *Leviathan* — an all-powerful sovereign State. The irony of it is, however, that the State, which has over the years come to establish a civilized internal system for the maintenance of law and order and strives for the welfare of the community, behaves on the international plane downright “selfish, nasty, and brutish” in its dealings with other States, often throwing to the winds the high ideals, the moral precepts and the principles of humanity which it swears by and seeks to uphold within its national society.

The seminal problem of all law, and hence of international humanitarian law, is the yawning gap between precepts and practice. That the precepts are ingrained in the accumulated wisdom of all human civilizations is beyond dispute. All civilizations have converged in their acceptance of them. All that the Battle of Solferino of 1859 and Henry Dunant’s Red Cross movement have done in prompting such a widespread compassionate response has principally been to revive, intensify, build upon and sustain, on a continuous basis, those traditional precepts. Recognition of this fact is important for several

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reasons. First and foremost, the precepts of international humanitarian law belong to the whole of humanity, both politically and culturally. They are not only products of the nascent European civilization of the post-Westphalian era. While Hugo Grotius spoke of *temperamenta ac belli* (humane moderation during war) in the early seventeenth century, the wise men of India and China discoursed on it some five thousand years ago. Secondly, the famous *Martens clause* lays down the principle (which, it is submitted, must be elevated to the position of a *jus cogens*, i.e. a peremptory norm of international law from which no derogation is permitted, within the meaning of Article 53 of the 1970 Vienna Convention on the Law of Treaties) that “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.¹ This principle, now thus crystallized for us, has developed as part of the evolution of human civilization down the ages. It emphasizes the universality of the essence of international humanitarian law. Finally, for that reason alone, compliance with “the elementary considerations of humanity”² is both a moral as well as a legal duty of the parties to an armed conflict — nay, it is the most natural thing to do between human beings.

It is therefore pertinent to search for and identify the roots of the principles of international humanitarian law in all great civilizations of the world. Hence this excursus into the historical foundations of the principles of that law in the Indian civilization through the ages, relating them to the contemporary era. It must be noted, however, that

¹ Art. 1, para. 2, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Indeed, the *Martens clause* seeks to cover the ground, if any, left open by the various international agreements, so that no party to an armed conflict can avoid international responsibility by arguing with impunity that its impugned actions were not specifically prohibited, and were hence permitted,

under international treaty law. But in the process, it has established a basic principle of international law.

² The International Court of Justice, in the *Corfu Channel* case, spoke of “certain general and well recognized principles, namely elementary considerations of humanity, even more exacting in peace than in war”. *I.C.J. Reports 1949*, p. 22. See also its reiteration in the *Nicaragua* case, *ICJ Reports 1986*, p. 112.

since the Indian civilization is no exception with regard to the general gap between precepts and practice, the emphasis will be placed on the precepts, not on aberrations in practice.³ Indeed, bad and ruthless rulers are no monopoly of any particular civilization.

The present study traces the evolution of humanitarian principles through the evolution of the Indian polity from antiquity through medieval and colonial times to the modern era.

Ancient India (up to AD 711)

In the early, pre-Vedic, period, when Indian society was organized in tribal communities, war between communities was "normal", with no holds barred.⁴ Yet in many parts of India, the process of war was divided into five stages: 1. seizure of the enemy's cattle; 2. mobilization for invasion; 3. bombardment of the enemy fortress; 4. actual fighting; and 5. victory. The seizure of cattle was an advance warning of an attack, and gave civilians and non-combatants time to seek shelter.

As society began to stabilize and became more and more politically and socially organized during the Vedic period, the Vedas, the Sastras and the epics of *Ramayana* and *Mahabharata* started prescribing or assuming the existence of laws and customs of war. There were two kinds of war: *dharmayuddha* (righteous war) and *adhyarmayuddha* (unrighteous war). A righteous war was fought for a righteous cause. Except for Kautilya's prescriptions, most other early publicists recorded a general theoretical agreement on banning illegitimate methods of warfare: "A war for righteous cause must be righteously conducted."⁵

3 In order to establish the State practice in support of a principle, the ICJ would not expect "complete consistency" on the part of States. "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct

inconsistent with a given rule should generally have been treated as *breaches* of that rule, not as indications of the recognition of a new rule." *Nicaragua case, ICJ Reports 1986*, p. 98.

4 See generally K. R. R. Sastry, "Hinduism and international law", *Recueil des Cours, Académie de droit international, The Hague*, Vol. 117 (1966-I), pp. 503-614, pp. 567 ff.

5 See Jawaharlal Nehru, *The Discovery of India*, 5th reprint, Signet Press, Calcutta, 1948, p. 108.

While the idea of non-violence (*ahimsa*) is found in the Scriptures, it was largely ignored, except for the defiant, normative contribution of Buddhism. Yet the impact of Buddhism was so great that it converted Emperor Asoka (273–232 BC), the greatest king of his time, to the faith of non-violence. In Nehru's words: "Unique among the victorious monarchs and captains in history, he [Asoka] decided to abandon warfare in the full tide of victory."⁶ But Asoka remains an exception to this day, although his conduct offered the most powerful challenge to the moral legitimacy of the many opportunistic rules of warfare propounded by Kautilya, his grandfather's stern mentor. In terms of humanitarian law, Asoka represents the earliest incarnation of the principle of non-use of force in international relations that is now enshrined in Article 2, paragraph 4, of the United Nations Charter.

Many ancient texts such as the *Ramayana*, the *Mahabharata*, the *Agni Purana*, and the *Manu-smṛti* embody a number of ethical precepts that emerged in ancient India.⁷ These precepts may be categorized according to four principal aspects of armed conflict as we identify them today: 1. methods of warfare; 2. means or weapons of war; 3. treatment of persons *hors de combat* (i.e. those who, as wounded or as prisoners, have been placed out of action); and 4. treatment of civilians. The main requirements of some of these precepts are given below.

Methods of warfare

The credo of the ancient sages appears to have been that "a war for a righteous cause must be righteously conducted". Combat must be between two warriors similarly placed. A warrior in armour should not fight with another without similar protection. Warriors should fight only with equals. A king should fight only with a king. A

⁶ *Ibid.*

⁷ This paper places general reliance on Nehru, *ibid.*; Sastry, *op. cit.* (note 4); and Nagendra Singh, *India and International Law*, New Delhi, 1969. See also J. C. Chacko, "India's

contribution to the field of international law concepts", *Recueil des Cours*, Académie de droit international, The Hague, Vol. 93 (1958-I), pp. 121-218.

cavalry soldier should fight only with a cavalry soldier, not with a chariot-borne warrior. He whose weapon has been broken, whose bowstring has been cut or who has lost his chariot should not be struck.

A principle of proportionality seems to have existed with regard to the use of weapons. Nagendra Singh quotes a stanza from the *Mahabharata* highlighting the restraint shown by Arjuna who refrained from using the *Pasupastra* (a “hyperdestructive” weapon granted to him by Lord Siva, the god of destruction), because warfare then was restricted to conventional weapons. Such use of unconventional weapons “was not even moral, let alone in conformity with religion or the recognized laws of warfare”.⁸

There should be no deception in methods of warfare. However, a famous deviation, justified by the “righteousness” of war, was the trick played by Yudhishtira on Drona by naming an elephant after the latter’s son, Aswathama, killing it and then shouting aloud that Aswathama had been killed in war — and this led to the defeat of a heartbroken Drona. Fighting with concealed weapons amounted to treachery and was condemned. Only Kautilya has openly disagreed with this precept.⁹ According to the *Mahabharata*, it was customary to fight only during the day, and cease fighting at sunset until daybreak.

Weapons of war

The principle that the use of weapons causing unnecessary suffering was prohibited was recognized in ancient India. Poisoned or barbed arrows were forbidden. The main aim of the use of weapons was to weaken the enemy and place its warriors *hors de combat*, but not to massacre them with gay abandon. A classic demonstration of this was given during Rama’s war with the demon king, Ravana, when

⁸ Nagendra Singh, *ibid.*, p. 6.

⁹ Kautilya’s *Arthasastra*, R. Samasastry (transl.), 5th ed., Mysore, 1956, Books X to XIV. See a typical statement: “He who is possessed of a strong army, who has succeeded

in his intrigues, and who has applied remedies against dangers, may undertake an open fight, if he has secured a position favourable to himself; otherwise a treacherous fight.” *Ibid.*, p. 394.

Rama forbade his brother, Lakshmana, to use a weapon of war which would have destroyed the entire enemy race, including those who did not bear arms, "because such destruction *en masse* was forbidden by the ancient laws of war even though Ravana was fighting an unjust war with an unrighteous objective and was classed as a devil-demon himself and hence could be considered outside the then world of civilization".¹⁰ This example is entirely relevant in the context of contemporary debates on nuclear weapons.

Treatment of non-combatants and prisoners of war

There were copious rules relating to the treatment of persons who were not directly involved in the war or who were captured as prisoners of war. Enemy non-combatants, such as charioteers, mahouts (elephant drivers), war musicians or priests, should not be fought with. A panic-stricken foe or an enemy on the run should not be followed in hot pursuit. Guards at the gates should not be killed.

A weak or wounded man, or one who has no son, should not be killed. He who surrendered or was defeated should not be killed, but captured as a prisoner of war and treated with dignity. A wounded prisoner should either be sent home or should have his wounds medically treated. There is an oft-cited instance apparently related to the Macedonian King Alexander's invasion of India in the summer of 326 BC. Alexander, after a hard-fought war, defeated the Indian King Paurava (Poros) and took him prisoner. When he asked the latter how he expected to be treated, Paurava advised him: "Act like a king". So impressed was Alexander by the valour and courage of the Indian king that he not only returned his kingdom to him but also added some more territories to it, and gained a faithful friend.¹¹

Treatment of civilians and civilian objects

The ancient texts lay great emphasis on the protection of civilians and civilian objects from the adverse impact of warfare. A

¹⁰ Nagendra Singh, *op. cit.* (note 7), p. 5. He cites *Ramayana*, Yuddha Kanda, sloka 39.

¹¹ *Ibid.*, pp. 7-8.

peaceful citizen walking along a road, or engaged in eating, or who has hidden himself, and all civilians found near the scene of battle should not be harmed.

Fruits, flower gardens, temples and other places of public worship should be left unmolested. Protection of civilians is the *leit-motif* in most texts. Even Kautilya, who otherwise so characteristically deviates from the majority of texts with regard to the conduct of war, emphasizes the need to protect civilians and their way of life. Hence his wise counsel chiefly stemming from the rationale of pragmatism or utilitarianism, rather than idealism:

“When a fort can be captured by other means, no attempt should be made to set fire to it; for fire cannot be trusted; it not only offends gods, but also destroys the people, grains, cattle, gold, raw materials and the like. Also the acquisition of a fort with its property all destroyed is a source of further loss.”¹² And again:

“The territory that has been conquered should be kept so peacefully that it might sleep without any fear... By the destruction of trade, agricultural produce, and standing crops, by causing the people to run away, and by slaying their leaders in secret, the country will be denuded of its people.”¹³

Indeed, as Jawaharlal Nehru, the eminent Indian historian, notes, it was a common practice in ancient times for the warring parties to enter into formal agreements with the headmen of self-governing village communities, undertaking not to harm the harvests in any way and to give compensation for any injury unintentionally caused to the land.¹⁴ Wars were usually fought on plains, away from inhabited areas.

Medieval India (AD 711-1600)

While the ancient traditions of Hinduism and Islam forbade the committing of excesses during war, seldom were limits placed in actual practice on methods and means of warfare. The Hindu and

¹² Samasastry, *op. cit.* (note 9), Book XIII, Chapter IV, p. 434.

¹³ *Ibid.*, p. 433.

¹⁴ Nehru, *op. cit.* (note 5), p. 105.

Muslim versions of the just war doctrine were interpreted in a partisan way to permit, nay even mandate, total elimination of the non-believer. Invaders such as Mahmud of Ghazni, Mohammad of Ghaur, Nader Shah of Persia, and Timur of Samarkand (Tamerlane) invaded India mainly to plunder her riches, and therefore their military campaigns were marked by senseless pillaging, looting, destruction and slaughter. Ala-ud-Din Khalji's incursions into southern India were associated with "the sack of cities, the slaughter of the people and the plunder of temples".¹⁵

Such was the mood of those times. Yet their history also records dazzling instances of chivalry. From the State practice of the Ranas of Chittoor, in Rajasthan, Nagendra Singh cites some examples of the release of prisoners of war. In AD 1437, Maharana Kumbha of Chittoor defeated Sultan Mahmud Khilji and brought him captive to Chittoor. Khilji remained a prisoner for six months; thereafter he was set free without ransom. Again, Maharana Sanga defeated Mahmud Khilji II, the King of Malwa and took him prisoner. Subsequently, he set him free, "loaded him with gifts and reinstated him on the throne".¹⁶

There were other instances as well. In AD 1526, when Ibrahim Lodi, Sultan of Delhi, was defeated by Raja Ram Chand and made prisoner, the Raja honoured him by seating him on the throne. Nagendra Singh also notes another "well-known classic example" (one of the "romantic anecdotes of Indian history") of the conduct of the young Mughal emperor, Humayun, soon after the historic Battle of Panipat in 1526. Sultan Ibrahim Lodi and Vikramajit, the ruler of Gwalior, were killed in the battle. The wives and children of the Raja of Gwalior had been left in the Agra Fort and the Mughal army captured them. Hearing of this, Prince Humayun intervened, treated them with courtesy, and protected them from their captors.¹⁷

¹⁵ R. C. Majumdar, A. C. Raychaudhuri and Kalikinov Datta, *An Advanced History of India*, Macmillans, Madras, 1988 (reprint), p. 298.

¹⁶ Nagendra Singh, *op. cit.* (note 7), p. 8.

¹⁷ *Ibid.*, pp. 8-9. The royal captives, in order to show their gratitude, presented Humayun with jewels and precious stones.

Some treaties concluded at the end of a war contained provisions relating to the repatriation of prisoners of war. Nagendra Singh cites a treaty between the Sultanate of Bahmini and the Vijayanagara Empire in the south. After several decades of war, the two kingdoms concluded a treaty in AD 1367 whereby, "being reproached by the ambassadors of Vijayanagara for indiscriminate massacre of Hindu women and children, Muhammad Shah [Bahmini Sultan] 'took oath, that he would not, hereafter, put to death a single enemy after a victory and would bind his successors to observe the same line of conduct' ". From that time onwards, "it has been the general custom in the Deccan to spare the lives of prisoners in war, and not to shed blood of an enemy's unarmed subjects".¹⁸ Although it is doubtful if such was "the general custom in the Deccan" following the treaty, the treaty represents an illustration, albeit rare, of the moral authority of humanitarian law amidst the clash of arms.

Colonial era (1498-1945)

The era of European colonization began with Vasco da Gama's landing at the Port of Kozhikode on 27 May 1498. European colonialism represented an oriental version of the Dark Ages. It negated all that the composite Indian civilization stood for. The European colonizers refused to apply to Asia and its princes what little international law they had developed in Europe. Indeed, they argued that the rules of international law applied only in Europe.¹⁹

¹⁸ *Ibid.*, p. 10.

¹⁹ K. M. Panikkar quotes Burroes, a Portuguese historian, who said: "It is true that there does exist a common right of all to navigate the seas and in Europe we recognize the rights which others hold against us; but the right does not extend beyond Europe and therefore the Portuguese as Lords of the Sea are justified in confiscating the goods of all

those who navigate the seas without their permission." K. M. Panikkar, *Asia and Western Dominance: A Survey of the Vasco da Gama Epoch of Asian History 1498-1945*. London, 1959 (8th reprint 1970), p. 35. Burroes' blatant statement comes in justification of the plunder and massacre by Vasco da Gama of Muslim pilgrims returning from Mecca. This occurred during his second voyage to India.

All wars throughout human history have violated the humanitarian law precepts. But colonialism was founded literally on the blood of Asians and Africans. Colonial history was replete with instances of wanton killings, plundering, looting, destruction and devastation, displaying unparalleled cruelty and impunity.

In its struggle for independence India experienced several such inhuman acts of repression (including the Jallianwalla Bagh massacre of 1919). Since the days of Robert Clive, the British colonial army had never had any dearth of General Dyers. It will therefore suffice to cite just one instance of the colonial administration's wanton use of force and inhumane attitude. The 1857 uprising and the British response to it revealed extraordinary depths of inhumanity. The last Mughal emperor, Bahadur Shah Zafar, was taken prisoner and deported for life to Rangoon (now Yangon, Myanmar). His sons and grandson were killed instantly by their British captors after they were taken prisoner, on an unproved charge of murdering Englishmen. In the words of G. B. Malleson, an English historian, "a more brutal or a more unnecessary outrage was never committed. It was a blunder as well as a crime."²⁰ The scene at Delhi, upon entry of the British troops in September 1857, was described by the British-run *Bombay Reporter* as follows: "All the city people found within the walls when our troops entered were bayoneted on the spot; and the number was considerable, as you may suppose when I tell you that in some houses forty or fifty persons were hiding."²¹ In Jawaharlal Nehru's words describing the horror of the British retaliation to the revolt, based on the accounts of British historians: "The days of Timur and Nadir Shah were remembered; but their exploits were eclipsed by the new terror, both in extent and length of time it lasted. Looting was allowed for a week, but actually lasted for a month, and it was accompanied by wholesale massacre."

In several cities such as Allahabad, Kanpur and Lucknow, "bloody assizes" were held by British soldiers and civilians, and they, with or without any assizes at all, slew Indians regardless of age or sex.

²⁰ Quoted in Nehru, *op. cit.* (note 5), p. 778.

²¹ *Ibid.*, p. 777.

Even volunteer parties went into districts with amateur executioners.²² Indeed, a legal technician may not consider the British to have been *legally* bound by any European humanitarian law — the first Red Cross Convention took shape only in 1864. Principles of British constitutional law perhaps did not apply to British colonies either, except when the British Parliament willed so. And there was no “commercial” reason for the British Parliament to have willed it then.

The standard of compliance by the Indian rulers of the colonial era with humanitarian laws was, by and large, better than that of the British, although there were also some rulers who recognized no limits to the use of force, the maltreatment of subjugated people or the besieging and plundering of cities. A few powerful rulers were known for exemplary conduct in their treatment of their enemies and the civilian population. Krishnadeva Raya of Vijayanagara, in a war with King Gajapati Prataparudra of Orissa in 1514, captured the latter’s fortress of Udayagiri and took his uncle and aunt as prisoners of war, but treated them with due honour.²³ Chhatrapati Shivaji, the most powerful of the Marathas in the early seventeenth century, respected women, mosques and non-combatants, did not permit the slaughter of humans after battle, and released with honour the captured enemy officers and men. “[T]hese surely are no light virtues”, says historian H. G. Rawlinson.²⁴

Save for such silver linings, which were few and far between, the colonial period was indeed the Dark Ages in terms of India’s cultural and civilizational continuity.

The modern era (since 1947)

Since its accession to independence, India has charted for itself an independent foreign policy. Jawaharlal Nehru, the architect of that policy, proclaimed a year before independence:

²² *Ibid.*, p. 270.

²³ Majumdar, *op. cit.* (note 15), p. 363.

²⁴ Quoted in *ibid.*, p. 515. These virtues of Shivaji were appreciated even by his hostile critics, such as Kafi Khan.

“We propose, as far as possible, to keep away from the power politics of groups, aligned against one another, which have led in the past to world wars and which may again lead to disaster of an even vaster scale. We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere and lead to conflict and war...”²⁵

Article 51 of the Constitution of India, 1950, enjoins the State to “endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another...”²⁶ Article 253 of the Constitution empowers the Indian Parliament to enact any law in order to implement any treaty or agreement to which India is a party, or even any decision of an international conference, notwithstanding anything contained in the Constitution in respect of distribution of legislative competence between Parliament and State (provincial) legislatures.

India became party to the 1949 Geneva Conventions for the protection of war victims in 1950 (it has not yet become party to the 1977 Additional Protocols), and incorporated them into its statute book through the Geneva Conventions Act, 1960. The Statement of Objects and Reasons made by the government while introducing the bill for this enactment explained that the enactment was required because it was expected of India as a party to the Conventions to provide for:

²⁵ Jawaharlal Nehru's broadcast speech on the All India Radio, 7 September 1946, reproduced in *The Hindustan Times* (New Delhi), 8 September 1946, and *The Hindu* (Madras), 9 September 1946. Nehru was speaking in his official capacity as the Vice-President of the Interim Government of India. Nehru's speech has since been reproduced under the title “Free India's role in world affairs”, in Surjit

Mansingh, *Nehru's Foreign Policy, Fifty Years On*, New Delhi, 1998, pp. 19-24.

²⁶ For more on Indian law and practice of incorporation of treaties into domestic law, see V. S. Mani, “Effectuation of international law through the municipal legal order: the law and practice of India”, *Asian Year Book of International Law*, Vol. 5, 1995, pp. 145-74.

- punishment of “grave breaches” referred to in Article 50 of the First Geneva Convention and equivalent articles of the succeeding Conventions;
- conferment of jurisdiction on our courts to try offences under these Conventions, even when committed by foreigners outside India;
- extension of the protection given under the existing law to the emblem of the red cross and to the two other emblems, namely, the red crescent on a white ground and the red lion and sun on a white ground;
- procedural matters relating to legal representation, appeal, etc.²⁷

The Act is in five chapters. The first chapter deals with preliminaries such as the title, extent and commencement of the Act, and definitions. It clarifies that the Act provides for punishment of grave breaches of the Conventions, committed by “any person” “within or without India”. The second chapter incorporates punishment of offenders committing grave breaches of the Conventions and the jurisdiction of courts to deal with the breaches. The punishment encompasses death or life imprisonment for wilful killing of a protected person, and imprisonment for fourteen years for other offences. The Act specifies the level of civil court (Chief Metropolitan Magistrate in Bombay, Madras or Calcutta, or a Court of Sessions in other places) to exercise jurisdiction under the Act.²⁸ However, court-martial proceedings under the Army Act of 1950, Air Force Act of 1950 and the Navy Act of 1957 are explicitly excluded from the application of the Act.²⁹

²⁷ See *Gazette of India 1959, Extraordinary, Part I, section 2*, p. 1098, quoted in M. K. Balachandran, “Principles of international humanitarian law in the Indian Constitution and domestic legislation”, *Bulletin on International Humanitarian Law and Refugee Law*, Vol. 1, New Delhi, 1996, pp. 67-100, esp. p. 74. Balachandran’s is one of the very few

studies on the Indian law on international humanitarian law.

²⁸ This level of courts in India has ordinary jurisdiction to try serious criminal offences.

²⁹ Section 7 of the Act. This almost confers on the armed forces’ top brass the privilege of deciding whether the jurisdiction of the ordinary court should be precluded.

The third chapter provides for the procedure of trial of protected persons and certain other persons, including the requirements of notice and legal representation. The fourth chapter seeks to protect the red cross and other emblems from abuse and provides for penalties there of.

The final chapter deals with matters like the cognizance of offences under the Act and the power of the Government of India to make rules under the Act. A crucial provision, however, is section 17, which specifically forbids courts to take cognizance of any offence under the Act except on a complaint by the Government or of an officer duly authorized, thereby preventing the application of the Act against the government or its agencies.

The Geneva Conventions Act does not seem to have been an adequate piece of legislation incorporating India's international humanitarian law obligations into domestic law.³⁰ The Supreme Court of India clearly noted some of the limitations of the Act in *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa* as follows:

"To begin with, the Geneva Conventions Act gives no specific right to any one to approach the court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear...

"...It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Conventions. The Conventions are not made enforceable by government against itself nor does the Act give a cause of action to any party for the enforcement of

³⁰ For a good critique of the Act, see Balachandran, *op. cit.* (note 27).

Conventions. Thus there is only an obligation undertaken by the Government of India to respect the conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.³¹

The Supreme Court's jurisprudence has, since 1977, undergone a sea-change, *inter alia* in matters of human rights or fundamental rights in the language of the Indian Constitution: in situations which reveal serious inadequacies in the Indian law, the human rights provisions in the Constitution have since then been interpreted and applied by the Court in harmony with developments in international law, without waiting for the legislature to formally amend domestic law. The Constitution of India makes some of the fundamental rights available to "all persons", not merely to Indian nationals. Thus in the *Chakma Refugees* cases³² the Supreme Court of India specifically held that the Article 21 guarantee of the right to life and personal liberty is applicable to foreigners as well, and that the Indian State has an obligation to protect the life and personal liberty of even refugees if they have been admitted into the Indian territory. As applied by the Indian Supreme Court, Article 21 encompasses the whole gamut of protection of the person and dignity of an individual, and the reference to "personal liberty" covers most essentials of criminal jurisprudence.

³¹ Decided on 26 March 1969, reported in *All India Reports 1970 Supreme Court* 329, as also in *Supreme Court Reports 1970*, pp. 87-102. This case bore upon the issue of applicability of the Geneva Conventions to Goa as an "occupied territory". The Court held the Conventions and the Act inapplicable as the wartime occupation had ceased with the cessation of armed conflict.

³² *National Human Rights Commission v. State of Arunachal Pradesh*, reported in (1996) 1 *Supreme Court Cases* 742; *State of Arunachal Pradesh v. Khudiram Chakma*, reported in (1994) *Supp. 1 Supreme Court Cases* 615; *Louis De Raedt v. Union of India*, reported in (1991) 3 *Supreme Court Cases* 554.

In the light of the human rights jurisprudence of the Indian judiciary, however, the Geneva Conventions Act along with the rest of the armed forces legislation referred to above awaits revision.³³

Concluding remarks

South Asia in general, and India in particular, can rightly be proud of its cultural heritage. The basic principles of international humanitarian law are an intrinsic part of that heritage. They have at times been dimmed, but never diminished as central to it, and are found intermingled with the ethos of each passing historical era.

India, as the largest democracy in the world, is rightly expected to live up to these principles. The Indian legal and institutional framework, based on respect for fundamental rights, is extremely conducive, sensitive and responsive to the implementation of the principles of international humanitarian law. Indeed, the Indian laws, such as the 1960 Geneva Conventions Act, need to be brought in line with these general cultural and constitutional contours of the Indian polity.

India's armed forces have by now established a proud and enviable record of compliance with the dictates of international humanitarian law, to which their Military Manual by and large conforms. The various engagements across India's borders, as well as those under the aegis of the United Nations in which India's peacekeeping forces participated, have largely demonstrated this compliance.

One of the important aspects of the 1949 Geneva Conventions, and hence of the Act of 1960, is that specific procedures are laid down for the execution of these treaties. At least two of the provisions found in common in some or all of them may be high-

³³ The Indian judiciary has, however, been in the habit of making sure that the court martial proceedings conform to the human rights standards of the Indian Constitution. Thus, for instance, the Supreme Court of India held in *S. N. Mukherjee v. Union of India*, (1990) 4 *Supreme Court Cases* 594, para. 42:

"This Court under Article 32 and the [State] High Courts under Article 226 [of the Constitu-

tion] have, however, the power of judicial review in respect of proceedings subsequent thereto [i.e., in respect of the court martial proceedings] and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error."

lighted. First, each party to an armed conflict has an obligation, acting through its commanders-in-chief, to “ensure the detailed execution” of each of the Conventions, and “provide for unforeseen cases, in conformity with the general principles of the present Convention”.³⁴ Secondly, States party to these treaties have undertaken, “in time of peace as in time of war, to disseminate [the texts of the Geneva Conventions] as widely as possible in their respective countries, and in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population”.³⁵ It is heartening to note that the Indian armed forces have taken meaningful steps towards implementation of these solemn international undertakings, which are now part and parcel of Indian law.

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³⁴ First Convention, Article 45, Second Convention, Article 46.

³⁵ First Convention, Article 47, Second Convention, Article 48, Third Convention, Article 127, and Fourth Convention, Article 144.

Résumé

Droit international humanitaire : une perspective indo-asiatique

par V. S. MANI

Par son analyse de l'histoire indienne, l'auteur démontre que les principes humanitaires font partie de l'héritage intellectuel et culturel de toutes les civilisations. Loin d'être une exclusivité de l'Occident européen, les principes fondamentaux du droit international humanitaire ont des racines profondes en Inde également. L'auteur rappelle des règles et la pratique en matière humanitaire observées au cours de différents conflits du passé, de l'Antiquité jusqu'à l'époque moderne. Dans la seconde partie de son essai, V. S. Mani examine la législation actuellement en vigueur en Inde pour la mise en œuvre des Conventions de Genève de 1949. Par ailleurs, il souligne l'importance du travail de diffusion entrepris au sein des forces armées indiennes afin de mieux faire connaître les règles de base du droit international humanitaire au personnel militaire.

Le droit international humanitaire au Timor oriental : entre théorie et pratique

par

BERTRAND LEVRAT

Depuis 1975, le Timor oriental est à l'ordre du jour de la communauté internationale¹. En 1999, suite à un scrutin organisé par les Nations Unies sur la question de l'autonomie de ce territoire, il a sombré dans un chaos d'une rare violence. Les yeux du monde se sont alors tournés vers cette île et face à l'urgence, la communauté internationale s'est précipitée au secours de cette population en détresse. De nombreuses questions juridiques complexes se sont posées alors et continuent de se poser aujourd'hui par rapport au droit international applicable aux Timorais.

Les lignes qui suivent analysent la situation juridique au regard du droit international humanitaire, de 1975 à nos jours. Tout en nous concentrant sur les événements récents qui ont secoué « l'île du santal blanc », nous passerons en revue le statut du Timor oriental – après son annexion par l'Indonésie, après l'arrivée d'une force multinationale et aujourd'hui, sous la responsabilité des Nations Unies –,

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celui des personnes réfugiées à Timor-Ouest, ainsi que celui des militaires pro-indonésiens capturés par la force multinationale et dont certains sont encore détenus par l'ONU.

27^e province ou territoire occupé ?

Un peu d'histoire

En 1974, la «révolution des œillets» précipite le démembrement de l'empire portugais. Le 24 juillet 1974, le Conseil d'État du Portugal approuve une loi réformant la constitution et reconnaissant le droit à l'autodétermination et à l'indépendance du Timor oriental, qui n'est plus considéré comme une «province d'outre-mer». Dans ce cadre, le gouvernement portugais promulgue une loi qui prévoit la fin de la souveraineté portugaise pour octobre 1978. Différents groupes luttent alors pour le pouvoir et le FRETILIN (*Fronte Revolucionario de Timor Leste Independiente*)² proclame l'indépendance de «la République démocratique du Timor oriental» le 28 novembre 1975. Le 7 décembre 1975, l'Indonésie intervient militairement au Timor oriental³ et, tout en niant sa participation à cette action⁴, permet aux partis opposés au FRETILIN de prendre le pouvoir en décembre 1975. Quelques mois plus tard, en mai 1976, ces partis demandent l'incorporation du Timor oriental à la République d'Indonésie. Le 17 juillet 1976, le président indonésien promulgue une loi prévoyant l'incorporation du Timor oriental à la République d'Indonésie, en tant que 27^e province du pays⁵.

1 Rés. 3485 (XXX) de l'Assemblée générale des Nations Unies du 12 décembre 1975.

2 Les soldats portugais d'alors, tous natifs de l'île, rejoignent les rangs du FRETILIN qui contrôle la quasi-totalité de la partie portugaise de Timor, alors que deux groupes adverses, l'UDT (*Uniao Democratica de Timor*) et le MAC (*Movimento Anti-Comunista*) préparent une contre-offensive à partir de Timor-Ouest, avec le soutien actif de l'Indonésie. R. Clark, «The «decolonization» of East Timor and the UN norms on Self-determination», *The Yale Journal of World Public Order*, Vol. 7 : 2, 1980, p. 5.

3 À cet égard, la Cour internationale de Justice est sans équivoque : «... les forces armées indonésiennes sont intervenues au Timor oriental». *Affaire relative au Timor oriental* (Portugal c. Australie), arrêt du 30 juin 1995, C.I.J. Recueil 1995, p. 96.

4 Les villes de Dili et de Baucau auraient été «libérées» par des forces de l'UDT avec l'appui de «volontaires» indonésiens envoyés sur place à la demande de la coalition anti-FRETILIN. Clark, *op. cit.* (note 2).

5 Lettre du représentant permanent de l'Indonésie au secrétaire général des Nations Unies concernant la question du Timor oriental, du 25 janvier 1989, doc. A/44/941.

Les affrontements armés ouverts entre le FRETILIN et l'armée indonésienne se poursuivent jusqu'en 1979, puis les combats continuent sous la forme d'actes de guérilla sporadiques et limités dans l'espace.

Le Portugal, tout en rejetant la proclamation d'indépendance par le FRETILIN et affirmant sa qualité de Puissance administrante, dénonce l'intervention de l'Indonésie, qu'il qualifie d'acte d'agression.

L'Assemblée générale des Nations Unies condamne, le 12 décembre 1975, l'invasion par les forces indonésiennes et demande leur retrait immédiat⁶ afin « de cesser de violer l'intégrité territoriale du Timor portugais (...) et de permettre au peuple du territoire d'exercer librement son droit à l'autodétermination et à l'indépendance »⁷. Le Conseil de sécurité, utilisant la même terminologie que la résolution de l'Assemblée générale, condamne à son tour l'invasion⁸. Le 1^{er} décembre 1976, l'Assemblée générale refuse expressément l'allégation selon laquelle le Timor oriental a été intégré à l'Indonésie, « dans la mesure où la population du territoire n'a pas été en mesure d'exercer librement son droit à l'autodétermination et à l'indépendance »⁹. En décembre 1978, elle affirme « la légitimité de la lutte du peuple du Timor oriental » en vue de réaliser son droit à l'autodétermination et à l'indépendance¹⁰.

Avec le temps toutefois, le soutien apporté à la cause du peuple timorais par la communauté internationale s'est progressivement érodé. Les principaux voisins de l'Indonésie ont toléré l'annexion de fait et l'Australie a même reconnu officiellement la souveraineté de l'Indonésie sur Timor oriental. Les résolutions de l'Assemblée générale sont quant à elles adoptées avec des majorités de plus en plus faibles. En 1982, une résolution adoptée par 50 voix contre 46, avec 50 abstentions, demande au secrétaire général d'engager des

6 Rés. 3485 (XXX) du 12 décembre 1975.

7 *Idem*.

8 Rés. 384 (1975) du 22 décembre 1975 et rés. 389 (1976) du 22 avril 1976.

9 Rés. 31/53 (1976). Voir aussi rés. 32/34 (1977) 28 novembre 1977 qui reprend les mêmes points.

10 Rés. 33/39 (1978).

consultations avec toutes les parties impliquées en vue de trouver une solution au problème timorais¹¹.

Depuis, l'Indonésie et le Portugal négocient sous l'égide des Nations Unies sans cependant arriver à trouver une solution aux problèmes de fond liés à l'autodétermination du peuple timorais et au statut du Timor oriental. Pour permettre au secrétaire général de poursuivre ses efforts en vue d'une solution dans un contexte aussi favorable que possible, et pour ne pas risquer de voter sur une résolution dont le résultat serait incertain, l'Assemblée renvoie l'examen de la question d'année en année. Les Nations Unies n'accepteront jamais formellement l'annexion du Timor oriental par l'Indonésie.

Il est paradoxal de constater que l'ONU, qui a tant œuvré pour la décolonisation, demande au Portugal « en tant que puissance administrante » de coopérer avec l'Organisation des Nations Unies en conservant sa tutelle dans le cadre du Chapitre XI de la Charte des Nations Unies¹².

En 1995, la Cour internationale de Justice rappelle dans son arrêt sur le Timor oriental que, pour le Portugal et l'Australie, « le Territoire du Timor oriental demeure un territoire non autonome et son peuple a le droit à disposer de lui-même »¹³. Il est intéressant de noter que dans son exposé des faits, la Cour mentionne expressément que « [d]epuis ce retrait, c'est l'Indonésie qui occupe le Territoire et les Parties reconnaissent que celui-ci est demeuré sous le contrôle effectif de cet État »¹⁴.

Quant au droit international humanitaire applicable

Au regard du droit international humanitaire, il ne fait pas de doute que l'intervention indonésienne en 1975 constituait un conflit armé mené par les forces armées d'un État sur le territoire d'un autre État, ce qui entraîne l'application des quatre Conventions de Genève pour la protection des victimes de la guerre du 12 août 1949¹⁵.

¹¹ Rés. 37/30 (1982).

¹² Voir à cet égard Jean-Marc Sorel, « Timor oriental – Un résumé de l'histoire du droit international », *RGDIP*, n° 1, 2000, p. 39.

¹³ *Loc. cit.* (note 3), par. 31 et 37, pp. 103, 105 et suiv.

¹⁴ *Ibid.*, par. 13, p. 96.

¹⁵ Art. 2 commun aux quatre Conventions de Genève du 12 août 1949.

En effet, l'Indonésie et le Portugal sont des États souverains, parties aux Conventions de Genève¹⁶. Le fait que l'État dont le territoire a été envahi n'ait pas fait usage de ses forces armées pour résister aux troupes indonésiennes ne change en rien son caractère de conflit armé, en vertu de l'article 2, alinéa 2 commun aux quatre Conventions de Genève. Il en résulte que le contrôle du territoire par l'armée indonésienne qui fait suite à cette invasion est une occupation déclenchant l'applicabilité au territoire du Timor oriental de la (quatrième) Convention de Genève relative à la protection des personnes civiles en temps de guerre¹⁷.

La IV^e Convention de Genève est construite sur l'axiome selon lequel les parties au conflit doivent veiller à ce que, malgré l'occupation ou la guerre, les ressortissants du territoire occupé ou les étrangers vivant sur le territoire d'une partie au conflit puissent continuer à mener une vie aussi normale que possible, dans le respect de leurs lois, de leur culture et de leurs traditions¹⁸.

L'intégration du Timor oriental à l'Indonésie, en tant que 27^e province est une annexion au regard du droit international, l'occupation n'entraînant aucun transfert de souveraineté¹⁹. En effet, en vertu de l'article 47 de la IV^e Convention, « [l]es personnes protégées qui se trouvent dans un territoire occupé ne seront privées, en aucun cas ni d'aucune manière, du bénéfice de la présente Convention (...) en raison de l'annexion [par la Puissance occupante] de tout ou partie du territoire occupé ». Ce n'est qu'en cas de reconnaissance par la communauté internationale de l'annexion que la IV^e Convention cesse de s'appliquer²⁰. Or, comme nous l'avons vu précédemment, à l'exception d'une minorité d'États, cela n'a pas été le cas.

16 L'Indonésie a accédé aux Conventions de Genève le 30 septembre 1958 et le Portugal les a ratifiées le 14 mars 1961.

17 Voir Arrêt Timor oriental, *loc. cit.* (note 3), p. 96.

18 Réunion d'experts sur les problèmes généraux d'application de la IV^e Convention de Genève, Rapport du CICR, 27-29 octobre 1998, p. 3.

19 Éric David, *Principes du droit des conflits armés*, 2^e éd., Bruylant, 1999, p. 454 et suiv.

20 Jean Pictet (éd.) *Commentaire de la Convention de Genève relative à la protection des civils en temps de guerre*, CICR, Genève, 1956, p. 70. Voir aussi P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed., Routledge, London/New York, 1997, pp. 151-154, et D. J. Harris, *Cases and Materials on International Law*, 5th ed., Sweet and Maxwell, London, 1998, pp. 218-227.

En vertu de l'article 6, alinéa 3 de la IV^e Convention, «[e]n territoire occupé, l'application de la Convention cessera un an après la fin générale des opérations militaires; néanmoins, la Puissance occupante restera liée pour la durée de l'occupation – pour autant que cette puissance exerce les fonctions de gouvernement dans le territoire en question – par les dispositions des articles suivants de la présente Convention: 1^{er} à 12, 27, 29 à 34, 47, 49, 51, 52, 53, 59, 61 à 77 et 143».

La fin générale des opérations militaires s'entend, d'après le Commentaire (publié par le CICR) de la IV^e Convention de Genève²¹, par «le dernier coup de canon. Il y a cependant un certain nombre d'autres facteurs dont il faut tenir compte. Lorsque la lutte se déroule entre deux États, la fin des hostilités peut être assez facilement fixée: elle découle soit d'un armistice, soit d'une capitulation, soit d'une *debellatio* pure et simple. On doit admettre que, dans la plupart des cas, la fin générale des opérations militaires sera la fin complète de la lutte entre tous les intéressés». La lutte entre les forces armées indonésiennes et les forces armées portugaises n'a jamais eu lieu. En ce qui concerne la résistance timoraise, principalement celle du FRETILIN, ses actions militaires deviennent de plus en plus sporadiques, voire progressivement inexistantes face à la répression militaire exercée par l'occupant²².

Au regard de l'article 6, la IV^e Convention ne s'applique donc pas dans sa totalité²³. Toutefois, cette règle peut être interprétée par rapport à l'évolution du droit en la matière. En particulier, le Protocole I additionnel aux quatre Conventions de Genève, en son article 3, lettre b), étend l'application des Conventions de Genève aux territoires occupés jusqu'à la fin de l'occupation. Ne restreignant plus l'applicabilité de certaines dispositions de la IV^e Convention après un certain délai, cette nouvelle disposition marque l'évolution du droit humanitaire en ce qui concerne son application dans le temps. Comme le relève le Commentaire du CICR aux Protocoles additionnels: «La fin de l'occupation, qui peut intervenir longtemps après le début de cette occupation, résultera de divers éléments de fait

²¹ Commentaire, *ibid.*, p. 69.

²³ Voir également Commentaire, *op. cit.*

²² Voir J.-M. Balencie/A. de La Grange, (note 20), pp. 69-70.
Mondes rebelles, Michalon, 1999, p. 983.

ou de droit, selon que l'issue en sera la libération du territoire ou son incorporation dans un ou plusieurs États conformément au droit du peuple ou des peuples de ce territoire à disposer d'eux-mêmes. L'occupation n'affecte pas en tant que telle le statut juridique du territoire occupé, ainsi que le rappelle l'article 4»²⁴.

Bien que l'Indonésie ne soit pas partie aux Protocoles additionnels de 1977, on peut considérer, à notre avis et au vu de l'évolution du droit international humanitaire, que l'ensemble de la IV^e Convention de Genève est applicable au Timor oriental. Les conséquences pour son applicabilité aux forces de la Force internationale au Timor oriental (INTERFET) et de l'Administration transitoire des Nations Unies au Timor oriental (ATNUTO) sont examinées plus loin.

Autonomie ou indépendance ?

La chute du président Suharto, le 21 mai 1998, sur fond de crise tant économique que de politique interne, précipite les événements. Dès juin 1998, le nouveau président de l'Indonésie, Youssef Habibie, se déclare prêt à réfléchir à la question d'un « statut spécial » pour le Timor oriental. En janvier 1999, l'Indonésie déclare qu'elle envisage une possible indépendance du territoire en cas de rejet du principe d'autonomie. Le 5 mai 1999, le Portugal et l'Indonésie signent un accord sous l'égide des Nations Unies²⁵. Fondé sur le droit à l'autodétermination du peuple timorais, cet accord prévoit de soumettre la question à une consultation populaire, organisée et supervisée par l'ONU²⁶.

Dans sa résolution du 7 mai 1999, le Conseil de sécurité rappelle les résolutions 1514 (XV), 1541 (XV) et 2625 (XXV) de l'Assemblée générale, soulignant ainsi que la question du droit à l'autodétermination et à l'indépendance du Timor oriental doit être prise en compte dans le cadre de la recherche d'une solution pour le

²⁴ Y. Sandoz/C. Swinarski/B. Zimmermann (éd.), *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, CICR/Martinus Nijhoff, Genève, 1986, p. 68.

²⁵ A/53/951-S/1999/513.

²⁶ L'accord rappelle les rés. 1514 (XV), 1541 (XV) et 2625 (XXV).

territoire²⁷. Dans cette résolution, le Conseil de sécurité « sait gré au Secrétaire général de son intention d'établir aussitôt que possible une présence des Nations Unies au Timor oriental, en vue de contribuer à l'application [de l'accord du 5 mai 1999], notamment en organisant une consultation de la population du Timor oriental sur l'acceptation ou le rejet dans un cadre constitutionnel d'autonomie pour le Timor oriental, prévue pour le 8 août 1999 ».

Les deux questions proposées aux Timorais sont formulées comme suit²⁸:

« Acceptez-vous l'autonomie spéciale proposée pour le Timor oriental au sein de la République unitaire d'Indonésie ?

« Rejetez-vous l'autonomie spéciale proposée pour le Timor oriental, option conduisant le Timor oriental à se séparer de l'Indonésie ? »

Pour le cas où une autonomie spéciale serait acceptée, le secrétaire général des Nations Unies avait préparé un « Cadre constitutionnel pour l'autonomie spéciale du Timor oriental », réglant les questions des compétences respectives du gouvernement central et du gouvernement de la région autonome, de l'identité et de l'immigration des Timorais de l'Est, des pouvoirs et institutions du Timor oriental, de la promotion et la protection des droits de l'homme, des relations entre le gouvernement central et le gouvernement de la région autonome, des relations de la région autonome avec d'autres entités, ainsi que du rôle de l'ONU²⁹.

En cas de victoire de l'option autonomiste, le gouvernement du Portugal devait, aux termes de l'article 5 de l'accord du 5 mai 1999, prendre les mesures nécessaires pour que le Timor oriental soit rayé de la liste des territoires non autonomes de l'Assemblée générale des Nations Unies, et retiré de l'ordre du jour du Conseil de sécurité et de l'Assemblée. Afin de mener à bien ces élections, le Conseil de sécurité décide, le 11 juin 1999, d'établir une mission de l'ONU: la *Mission des Nations Unies au Timor oriental*

27 Rés. 1236 (1999).

28 Rapport du secrétaire général, Annexe II, doc. S/1999/513.

29 Appendice à l'accord du 5 mai 1999, doc. S/1999/513, Annexe I.

(MINUTO) ayant pour mandat d'organiser et de conduire le processus de référendum³⁰.

Le 4 septembre 1999, date de la proclamation des résultats du vote, le Timor oriental sombre dans la violence. Des 800 000 habitants du territoire, 344 580 électeurs inscrits (78,5%) ont voté contre la proposition de large autonomie présentée par l'Indonésie, et donc *ipso facto* pour l'indépendance. Au total, 94 388 électeurs ont voté pour l'autonomie dans le cadre de l'Indonésie.

Dès que les résultats sont connus, des miliciens anti-indépendantistes (également appelés miliciens pro-intégrationnistes)³¹ détruisent systématiquement les habitations, pillent, tuent et violent. Plus de 250 000 civils sont contraints de fuir le territoire, alors qu'un nombre similaire se déplace à l'intérieur des terres, pour se mettre à l'abri des miliciens. Le désastre est total. Le rapport du secrétaire général des Nations Unies est à cet égard éloquent: « Depuis l'annonce des résultats de la consultation populaire le 4 septembre, les milices pro-intégrationnistes, parfois avec l'appui d'éléments des forces de sécurité indonésiennes, ont mis à feu et à sang le Timor oriental »³².

Réfugiés ou personnes déplacées?

Rapidement, la communauté internationale et les organisations humanitaires cherchent à venir en aide à la population déplacée tant à Timor-Est qu'à Timor-Ouest. Une question d'apparence simple va néanmoins se poser: les Timorais se trouvant à Timor-Ouest doivent-ils être considérés comme des réfugiés ou comme des personnes déplacées, et par là-même, sous la protection de quels instruments juridiques du droit des gens se trouvent-ils?³³

L'article 49 de la IV^e Convention de Genève prohibe les transferts forcés, en masse ou individuels, ainsi que les déportations de

30 Rés. 1246 (1999) du 11 juin 1999. Voir aussi rés. 1257 (1999) du 3 août 1999 par laquelle le Conseil de sécurité étend le mandat de la MINUTO jusqu'au 30 septembre 1999, puis au 30 novembre 1999 par la rés. 1262 (1999).

31 Voir, par exemple, rapport du secrétaire

général au Conseil de sécurité du 4 octobre 1999, doc. S/1999/1024.

32 *Ibid.*, point 3.

33 Les communiqués de presse des organisations humanitaires évitent de se référer à l'un ou l'autre des termes. Voir par exemple, HCR, 6 septembre 1999.

personnes protégées hors du territoire occupé dans le territoire de la puissance occupante et ce, quel qu'en soit le motif. Une évacuation de civils pour leur propre sécurité ou exigée par d'impérieuses nécessités militaires reste possible dans le système instauré par l'article 49, mais à plusieurs conditions. D'une part, ces déplacements ne sont autorisés qu'à l'intérieur du territoire occupé lui-même, sauf impossibilité matérielle (art. 49, al. 2) et, d'autre part, les événements décrits ci-dessus ne sauraient satisfaire les conditions exigées pour la réalisation d'une telle évacuation. De même, les destructions de biens mobiliers ou immobiliers civils sont interdites (art. 53).

Même après leur déplacement sur le territoire de la province indonésienne de Timor-Ouest, les Timorais de l'Est restent protégés par les dispositions de la IV^e Convention (d'après l'article 47). Afin de faire cesser la violation de l'interdiction de transferts forcés, les autorités indonésiennes sont tenues de permettre à ces derniers de rentrer.

Reste à examiner si les Timorais pouvaient également bénéficier du statut de réfugiés au sens de la Convention des Nations Unies relative au statut des réfugiés de 1951 et de son Protocole additionnel de 1967. Un réfugié est une personne qui « craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays (...) »³⁴.

La reconnaissance de leur statut de réfugiés soulève plusieurs difficultés, la première et non des moindres étant le fait que l'Indonésie n'est pas partie à la Convention de 1951. De plus, cet État considérant le Timor oriental comme sa 27^e province, ces personnes n'ont traversé aucune frontière internationale en allant se réfugier à Timor-Ouest. Enfin, même si plusieurs États reconnaissent le statut de réfugiés à ceux qui fuient les persécutions généralisées liées à un conflit³⁵, cette définition n'est pas acceptée par l'ensemble de la

34 Convention relative au statut de réfugiés du 28 juillet 1951.

35 Voir par exemple la Convention de l'OUA régissant les aspects propres aux problèmes

des réfugiés en Afrique (1969) ou la Déclaration de Carthage sur les réfugiés (1984).

communauté des États et ne peut dès lors pas être considérée comme de nature coutumière³⁶.

Le Conseil de sécurité, le 15 septembre 1999, a souligné dans sa résolution 1264 (1999) « qu'il appartient aux autorités indonésiennes de prendre des mesures immédiates et efficaces afin d'assurer le retour en toute sécurité des réfugiés au Timor oriental ». Il réitère également, le 8 septembre 2000, « sa profonde préoccupation devant la présence prolongée d'un grand nombre de réfugiés du Timor oriental dans des camps au Timor occidental »³⁷. Le Rapport de la Mission du Conseil de sécurité au Timor oriental et en Indonésie, du 20 novembre 2000, exprime également ses « préoccupations pour les réfugiés dans les camps du Timor occidental »³⁸.

On peut donc parler de réfugiés au sens du besoin de protection de la part de la communauté internationale et du mandat du haut commissaire des Nations Unies pour les réfugiés³⁹. Néanmoins, vu l'absence de consensus sur la détermination de leur statut de réfugié, le statut formel des Timorais originaires du Timor oriental et se trouvant à Timor-Ouest n'est à notre connaissance toujours pas clair.

Intervention de la communauté internationale

Le gouvernement indonésien, bien que réticent dans un premier temps, a non seulement consenti, le 12 septembre 1999, à accepter le déploiement de la force internationale⁴⁰, mais s'est aussi engagé à coopérer avec elle à l'exécution du mandat de celle-ci sous tous ses aspects⁴¹.

Le 15 septembre 1999, le Conseil de sécurité « prenant note du résultat de la consultation populaire, qu'il considère comme reflétant véritablement les vœux de la population du Timor oriental (...) profondément préoccupé par la détérioration des conditions de

³⁶ En particulier, selon le HCR, les pays occidentaux refuseraient d'accorder le statut de réfugié à ceux qui fuient des persécutions généralisées ou des conflits. Voir <www.unhcr.ch/un&ref/who/whois.htm#war>.

³⁷ Rés. 1319 (2000) du 8 septembre 2000.

³⁸ Doc. S/2000/1105.

³⁹ G. Goodwin-Gill, *The refugee in interna-*

tional law, 2nd ed., Clarendon Press, Oxford, 1996, p. 29.

⁴⁰ Rés. 1264 (1999) du 15 septembre 1999.

⁴¹ Rapport du secrétaire général au Conseil de sécurité du 4 octobre 1999, doc. S/1999/1024, p. 2.

sécurité au Timor oriental, en particulier par les actes de violence qui continuent d'être commis contre la population civile du Timor oriental et par le déplacement et réinstallation de très nombreux civils (...), profondément préoccupé par les attaques commises contre le personnel et les locaux de la Mission des Nations Unies au Timor oriental (MINUTO) (...), consterné par la détérioration de la situation humanitaire (...), constatant que la situation au Timor oriental constitue une menace pour la paix et la sécurité», a adopté à l'unanimité, en vertu du Chapitre VII de la Charte des Nations Unies, la résolution 1264 (1999), dans laquelle il autorise la création d'une force multinationale, l'INTERFET⁴².

Le mandat de l'INTERFET est extrêmement ample : « rétablir la paix et la sécurité au Timor oriental, protéger et appuyer la MINUTO dans l'exécution de ses tâches et, dans la limite des capacités de la force, faciliter les opérations d'aide humanitaire »⁴³. Pour cela, les États participant à la force sont autorisés à prendre « toutes les mesures nécessaires », y compris la force. Placée sous commandement australien, l'INTERFET se déploie rapidement et le 20 septembre, les premiers hommes débarquent à Timor. Le principal danger qui les guette vient des milices pro-intégrationnistes. Ces milices, actives sur le territoire du Timor oriental depuis plusieurs mois, se sont manifestées avant les élections. Depuis la proclamation des résultats du scrutin, elles donnent libre cours à une violence massive et aveugle⁴⁴.

⁴² Il s'agit d'une force autorisée par les Nations Unies, menée directement par les États au moyen de contingents demeurant sous leur commandement (comme, par exemple, l'action en Corée, l'Opération Turquoise, l'UNITAF, l'Opération Tempête du désert). Voir M. Holly Mac Dougall, « United Nations Operations: Who Should Be in Charge ? », *Revue de droit militaire et droit de la guerre*, vol. XXXIII, 1994, pp. 21-87.

⁴³ Rés. 1264 (1999) du 15 septembre 1999.

⁴⁴ Voir Human Rights Watch, *World Report 2000* : « (...) the Indonesian military was organizing, arming, and training pro-independence militia in each of East Timor's thirteen districts. Some of these militia had existed since the late 1970s; others were newly created. But the army, apparently under the leadership of the army special forces, known as Kopassus, linked them into a centrally-coordinated network with a political front organization as a way of defending «autonomy» — which came to mean not enhanced self-government but the status quo.»

La question du lien entre les milices et l'armée indonésienne

Au cours des semaines qui vont suivre le début de l'opération de l'INTERFET, des accrochages ont lieu entre les milices pro-intégrationnistes et la force internationale. Si l'INTERFET en tant que telle n'est pas partie aux Conventions de Genève, il ne fait aucun doute que chacun des États qui fournissent des contingents à la force multinationale est responsable de l'application des Conventions de Genève par ses forces. Certaines personnes seront arrêtées suite à ces accrochages et il est dès lors essentiel, pour déterminer leur statut, de se pencher sur le lien entre les milices pro-intégrationnistes et l'armée indonésienne et leur degré d'organisation.

Tant dans les rapports de l'ONU que dans ceux d'organisations non gouvernementales, il apparaît que ce lien était quasiment organique. Nous allons en citer plusieurs ci-après sans prétendre à l'exhaustivité :

Dans son *Rapport de la Mission du Conseil de sécurité à Jakarta et à Dili*⁴⁵, et son annexe *La destruction du Timor oriental depuis le 4 septembre 1999*⁴⁶, cité et approuvé par le Conseil de sécurité dans la résolution 1264, la mission du Conseil de sécurité relève sans équivoque : « Ces destructions n'ont pas été opérées par des populations civiles frustrées et angoissées. C'est le mythe que les autorités indonésiennes s'efforcent de diffuser. L'existence de liens directs entre les miliciens et les militaires ne fait plus l'ombre d'un doute et a été dûment étayée par la MINUTO au cours des quatre derniers mois. Mais l'ampleur et le caractère systématique de la destruction du Timor oriental intervenue au cours de la semaine écoulée ont révélé un nouveau degré de participation de l'armée à l'exécution de ce qui était jusque-là une opération plutôt déguisée. »

Le secrétaire général des Nations Unies, quant à lui, relève dans son rapport au Conseil de sécurité que « [d]epuis l'annonce des résultats de la consultation populaire, le 4 septembre, les milices

45 Doc. S/1999/976 du 14 septembre 1999.

46 Rapport préparé par la MINUTO, 11 septembre 1999, Annexe au doc. S/1999/976.

pro-intégrationnistes, parfois avec l'appui d'éléments des forces de sécurité indonésiennes, ont mis à feu et à sang le Timor oriental»⁴⁷.

De même, la Commission des droits de l'homme se déclare profondément préoccupée «par l'absence de mesures effectives tendant à décourager ou empêcher les violences des milices, et par la collusion qui a été signalée entre les miliciens et les membres des forces armées et de la police indonésiennes au Timor oriental»⁴⁸.

Le rapport du haut commissaire aux droits de l'homme sur la situation des droits de l'homme au Timor oriental, lui aussi, est éloquent⁴⁹: «Le personnel de la MINUTO a signalé que le 10 septembre des miliciens Aitarak avaient été autorisés à franchir librement des points de contrôle des TNI (forces armées indonésiennes – *Tentara Nasional Indonesia*) et de la police (...) Puis, le personnel de la MINUTO a vu des soldats de la TNI prêter main-forte aux miliciens qui tentaient de piller des véhicules de la mission» (par. 15). «En maintes occasions, les fonctionnaires de l'ONU au Timor oriental ont vu des miliciens commettre des actes de violence sous les yeux de policiers et de soldats fortement armés qui soit les ont laissé faire soit les ont activement aidés» (par. 16). «Dare, situé à 9 km de Dili, aurait été attaqué par des éléments des forces spéciales (Kopassus) de l'armée indonésienne» (par.18).

Dans leur rapport de mission commune à l'Assemblée générale, la rapporteuse spéciale de la Commission des droits de l'homme sur les exécutions extrajudiciaires, sommaires ou arbitraires, le rapporteur spécial de la Commission sur la question de la torture et la rapporteuse spéciale de la Commission sur la violence contre les femmes intitulent un chapitre «Responsabilité de l'État», dans lequel ils insistent sur le fait que «les informations recueillies et les témoignages entendus ne laissent pratiquement aucun doute en ce qui concerne le rôle joué directement et indirectement par les TNI et la police en appuyant, en planifiant, en assistant et en organisant les

⁴⁷ Doc. S/1999/1024 du 4 octobre 1999, par. 3.

⁴⁸ Rés. de la Commission des droits de l'homme, *Situation des droits de l'homme au Timor oriental*, para. 3 (d), 20 octobre 1999.

⁴⁹ Doc. E/CN.4/S-4/CRP.1 du 17 septembre 1999.

groupes de miliciens pro-intégration». Ils ajoutent qu'«un certain nombre de documents officiels indiquant qu'il y avait une coopération formelle entre les TNI et les groupes de miliciens ont été découverts dans les locaux du Gouvernement au Timor oriental»⁵⁰.

De même, *Human Rights Watch* et *Amnesty International*, à l'occasion de la 54^e Assemblée générale des Nations Unies, ont prononcé, le 6 octobre 1999, une déclaration faisant état de l'organisation et de la coopération entre l'armée et les milices⁵¹ : « *The militias [in the western district] were among the best organized and equipped, and their command structures in several subdistricts in Bobonaro and Covalima overlapped almost completely with that of the regular TNI forces; the fact that the militias have not been disarmed, retain considerable strength, and continue to be allowed to operate with impunity in West Timor with the support of the TNI (...); the evidence for the Indonesian army's having organized, trained, armed, and otherwise supported the militias is so overwhelming that the head of Indonesia's military intelligence admitted it freely to journalists. Kopassus officers took charge of the operation.* »

Human Rights Watch a de plus recueilli les témoignages de plus d'une centaine de Timorais à leur retour de Timor-Ouest et rassemblé sur cette base les preuves de l'implication de l'armée indonésienne – et de « *its militia proxies* » – dans la planification, la coordination et l'exécution de la politique de la terre brûlée qui a dévasté le Timor oriental⁵².

Nous arrivons donc à la conclusion que les miliciens pro-intégrationnistes ont agi de concert avec l'armée indonésienne. Ils étaient armés et organisés par cette dernière et ont agi dans le cadre d'une politique planifiée et soutenue à tout le moins par les éléments de l'armée indonésienne se trouvant au Timor oriental.

⁵⁰ Doc. A/54/660, *Situation des droits de l'homme au Timor oriental*, 10 décembre 1999.

⁵¹ Déclaration à la 54^e session de la Commission des questions politiques spéciales et de la décolonisation (Quatrième Commission) de l'Assemblée générale des

Nations Unies, Point 96 de l'ordre du jour, Question du Timor oriental, 6 octobre 1999.

⁵² *Human Rights Watch, Forced expulsions to West Timor and the refugee crisis*, December 1999, Vol. 11, No. 7 (c).

Prisonniers de droit commun ou prisonniers de guerre ?

Après cet exposé des faits, revenons au statut des miliciens engagés dans des affrontements armés avec des membres de l'INTERFET⁵³ et qui, pour certains, ont été capturés par cette force.

Sont prisonniers de guerre, au sens de la (troisième) Convention de Genève relative au traitement des prisonniers de guerre, les personnes qui appartiennent à l'une des catégories définies à son article 4. L'article 4, lettre A, chiffre premier accorde ce statut à ceux qui sont membres des forces armées d'une partie au conflit, de même qu'aux membres des milices et des corps de volontaires faisant partie de ces forces armées.

Le gouvernement indonésien ayant formellement nié, malgré l'évidence factuelle, tout lien avec les milices pro-intégrationnistes, il peut être utile de tirer un parallèle avec les principes dégagés tant par la Cour internationale de Justice que par la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) par rapport aux groupes de volontaires « qu'il serait juridiquement fondé d'assimiler à un organe du gouvernement »⁵⁴. Pour ces groupes d'individus qui n'ont pas formellement le statut d'agents de l'État et qui participent aux hostilités, la Cour a proposé un critère de contrôle effectif qui inclut les notions de dépendance et d'autorité. En effet, pour que l'État devienne une partie au conflit, celui-ci doit non seulement rétribuer

53 Rapport à l'Assemblée générale, doc. A/54/660: « Les pertes en vies humaines n'ont malheureusement pas pu être totalement évitées et six personnes, soupçonnées d'être des miliciens, ont été tuées lors d'affrontements armés avec des unités de l'INTERFET ». De même, dans *Jane's Intelligence Review*, février 2000, on lit « Following a contact between an Australian SAS patrol and a militia unit (...) INTERFET HQ spokesman Colonel Mark Kelly said: « They [the militia] were clearly employing what appeared to be a sweep-and-clear-by-fire technique when they came across the patrol's location. » An incident on 16 October saw a

six-man Australian SAS patrol ambushed by up to 20 militia near Marko (15km from the border) resulting in the deaths of three militia before the patrol was extracted by helicopter. »

54 *Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*, Fond, C.I.J., Recueil 1986, par. 109: « (...) les liens entre les contras et le gouvernement des États-Unis sont à tel point marqués par la dépendance d'une part et l'autorité de l'autre qu'il serait juridiquement fondé d'assimiler les contras à un organe du gouvernement des États-Unis ou de les considérer comme agissant au nom de ce gouvernement. »

et financer les groupes armés et coordonner ou superviser leurs actions, mais également délivrer des instructions précises relatives à la commission des actes illégaux en question⁵⁵. Si ces conditions sont remplies, ces individus sont des agents de fait de l'État.

Sur ce point, le TPIY a adopté récemment une position novatrice. En effet, il ne retient pas le critère étroit de contrôle effectif proposé par la Cour internationale de Justice et indique que des instructions spécifiques ne sont pas nécessaires: «*The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.*»⁵⁶

Ainsi, pour un groupe organisé, un contrôle général («*overall control*») sur le groupe est suffisant: «*An organised group differs from an individual in that the former normally has a structure, a chain of command and set of rules as well as the outwards symbols of authority (...). Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.*»⁵⁷

Ces agents de fait de l'État, à l'inverse des conseillers ou experts militaires, internationalisent donc le conflit en engageant l'État

⁵⁵ *Ibid.*, par. 115: « (...) la participation des États-Unis à l'organisation, à la formation, à l'équipement, au financement et à l'approvisionnement des contras, à la sélection de leurs objectifs militaires ou paramilitaires et à la planification de toutes leurs opérations demeure insuffisante (...) pour que puissent être attribués aux États-Unis les actes commis par les contras (...) toutes les modalités de participation qui viennent d'être mentionnées, et même le contrôle général exercé par eux sur une force extrêmement dépendante à leur égard, ne signifieraient pas par eux-mêmes, sans preuve complémentaire, que les États-Unis

aient ordonné ou imposé la perpétration des actes contraires aux droits de l'homme et au droit humanitaire (...) il devrait en principe être établi qu'ils avaient le contrôle effectif des opérations militaires ou paramilitaires au cours desquelles les violations en question se seraient produites.»

⁵⁶ *Le Procureur c/Tadic*, Affaire N°. IT-94-1-A, Chambre d'appel, 15 juillet 1999, par. 137.

⁵⁷ *Ibid.*, par. 120.

qui les soutient comme partie au conflit⁵⁸. Dans le cas des miliciens pro-intégrationnistes, le lien avec l'État indonésien ne fait aucun doute. Ces derniers doivent donc, en cas de capture par des soldats de l'INTERFET, bénéficier du statut de prisonnier de guerre sur la base de l'article 4, lettre A, chiffre 1 de la III^e Convention de Genève, en tant que membres de milices faisant partie des forces armées.

Subsidiairement, le chiffre 2 de l'article 4, lettre A de la III^e Convention stipule qu'ont également le droit au statut de prisonnier de guerre les membres des autres milices et les membres des autres corps de volontaires, à condition d'avoir à leur tête une personne responsable pour ses subordonnés, d'avoir un signe distinctif fixe et reconnaissable à distance, de porter ouvertement les armes et de se conformer dans leurs opérations aux lois et coutumes de la guerre.

Ce ne sont que ces dernières conditions cumulatives de l'article 4, lettre A, chiffre 2 qui semblent avoir été retenues par les conseillers juridiques de l'INTERFET quand ils ont conclu que les miliciens pro-intégrationnistes ne répondaient pas aux exigences de structure et de commandement nécessaires pour bénéficier du statut de prisonnier de guerre⁵⁹. On peut toutefois douter du bien-fondé de l'argumentation développée par l'INTERFET pour ne pas reconnaître le statut de prisonnier de guerre aux miliciens capturés. En effet, s'il est probable que certains ont parfois agi à titre individuel, la grande majorité des exactions commises l'a été dans le cadre d'une action orchestrée et commandée par des éléments de l'armée indonésienne qui avaient donné aux milices un degré d'organisation suffisant pour parvenir à détruire la grande majorité de l'île et en déporter les habitants.

Dans les deux cas toutefois, l'article 5, alinéa 2 de la III^e Convention de Genève stipule qu'en cas de doute sur le statut du prisonnier, ce dernier devra bénéficier de la protection de la

58 *Ibid.*, par. 162 : « (...) the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the RFY. Hence (...) the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict. »

59 Kelly, Mc Cormick, Muggleton and Oswald, « Legal aspects of Australia's involvement in the International Force for East Timor », in : *RICR*, mars 2001, n° 841.

Convention jusqu'à ce que son statut soit déterminé par un tribunal compétent. Manifestement, et c'est regrettable, cela n'a pas été et n'est toujours pas le cas.

Les miliciens sont à notre sens des prisonniers de guerre. Ceux qui sont aujourd'hui encore détenus⁶⁰ doivent pouvoir bénéficier du traitement qui leur est dû. Cela n'empêche bien entendu pas leur poursuite et leur condamnation s'ils sont reconnus coupables pour les infractions graves aux Conventions de Genève qui ont été commises sur le territoire du Timor oriental. Il est intéressant de relever que leur inculpation actuelle ne fait pas état de crimes de guerre mais uniquement de crimes contre l'humanité, cela probablement pour éviter une discussion ouverte et délicate sur l'occupation et les milices lors d'un procès public. Dans le cadre d'un procès⁶¹, cette question sera pourtant probablement abordée par la défense des accusés⁶². La III^e Convention stipule de plus que les prisonniers de guerre resteront protégés par cette Convention jusqu'à leur libération⁶³.

Enfin, il est à relever que, selon le droit international humanitaire, l'Australie conserve pendant toute la durée de la détention de ces prisonniers de guerre, une responsabilité sur « tout point important » de l'application de la Convention et que ses autorités doivent remédier à la situation s'il s'avérait que la puissance à laquelle ils les ont remis manque à ses obligations, ceci jusqu'à leur libération⁶⁴.

Règles de la IV^e Convention applicables à l'INTERFET?

Il est enfin légitime de se poser la question du statut du Timor oriental au regard du droit international humanitaire entre le 20 septembre 1999, date du déploiement de l'INTERFET, et le

⁶⁰ Conférence de presse du 19 avril 2000 par le conseiller juridique adjoint de la MINUTO: «*Currently some 65 people were held in the prison in Dili, about 20 of whom were members of militias, or other individuals suspected of participating in the September 1999 violence.*»

⁶¹ Human Rights Watch, dans son «*World Report 2001*», relève à cet égard que «*[m]ost civilian treated each case as a routine homicide investigation, with no attention to the role of*

the Indonesian state or to the links among the different crimes.»

⁶² Le rapport de la Mission du Conseil de sécurité à Timor (S/2000/1105) relève à cet égard les carences du fonctionnement de la justice à Timor: «*Le système actuel ne peut poursuivre les suspects placés en détention, dont certains depuis près d'un an.*»

⁶³ III^e Convention, art. 5, al. 1.

⁶⁴ *Ibid.*, art. 12.

25 octobre 1999, date de la résolution 1272 (1999) du Conseil de sécurité créant l'ATNUTO (Administration transitoire des Nations Unies pour le Timor oriental).

Comme nous l'avons vu précédemment, le Timor oriental était un territoire occupé par l'Indonésie. Avec l'arrivée d'INTERFET, les quelques éléments de l'armée indonésienne encore basés à Dili se retirent et laissent la force multinationale gérer seule le territoire. La résolution 1264 (1999) du Conseil de sécurité autorise la force « à prendre toutes les mesures nécessaires pour exécuter son mandat ».

Comme certains auteurs l'ont relevé, la notion d'occupation est une notion qui doit se comprendre objectivement, en tant que contrôle effectif d'une zone et inclure également les territoires se trouvant sous le contrôle d'une force agissant sur mandat du Conseil de sécurité des Nations Unies⁶⁵. « *Initially, occupation was viewed as a possible by-product of military actions during war, and therefore it was referred to in legal literature as «belligerent occupation» (...) today the more inclusive «term occupation» is generally used. The emphasis is thus put not on the course through which the territory came under the foreign state's control, whether through actual fighting or otherwise, but rather on the phenomenon of occupation. This phenomenon can be defined as the effective control of power (be it one or more states or an international organisation, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.* »⁶⁶

En cas de consentement de la part du souverain à la présence de forces militaires d'un pays tiers, il ne peut en effet s'agir d'une occupation entraînant l'application de la IV^e Convention de Genève. Il est pourtant impossible de parler de consentement souverain dans le

⁶⁵ La question de l'applicabilité du droit international humanitaire aux forces sous mandat onusien est aujourd'hui reconnue. Voir notamment *Respect du droit international humanitaire par les forces des Nations Unies*, Circulaire du secrétaire général, 6 août 1999, UN doc. ST/SGB/1999/13, et à ce sujet : A. Ryniker, « Respect du droit international humanitaire par les forces des Nations

Unies », *RICR*, n° 836, décembre 1999, pp. 795-801, et R. Murphy, « International humanitarian law training for multinational peace support operations », *RICR*, n° 840, décembre 2000, pp. 953-968.

⁶⁶ E. Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, pp. 3-4.

cas du Timor oriental. En effet, la question du consentement par les Timorais à la présence de l'INTERFET est formellement impossible à résoudre. Il est certain que la vaste majorité des Timorais victimes des exactions des milices ne pouvait que souhaiter voir débarquer les soldats de la force multinationale. Toutefois, aucune autorité timoraise légitime susceptible de donner un consentement n'existait. De plus, l'urgence paraissant évidente, personne ne semble s'être soucié de demander le consentement des Timorais, qui semblait aller de soi. Le consentement de l'Indonésie, puissance occupante, ne saurait être invoqué comme un argument valable dans ce cadre.

La IV^e Convention a donc continué à s'appliquer à l'INTERFET après le départ des troupes indonésiennes.

Il existe de plus une interprétation de la IV^e Convention de Genève fondée tant sur l'esprit de la Convention que sur son texte, et sur laquelle nous aimerions nous arrêter. Cette interprétation est en effet une solution élégante à la problématique des territoires sous contrôle onusien, où les questions de *jus ad bellum* semblent prendre le dessus sur les questions de *jus in bello* lorsqu'il s'agit des règles relatives à l'occupation⁶⁷.

L'article 2, alinéa 2 stipule en effet que « la Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante (...) » (souligné par l'auteur). Les États, lorsqu'ils rédigèrent la IV^e Convention en 1949, avaient en mémoire la Seconde Guerre mondiale. Ils avaient en tête non seulement l'occupation nazie, mais également la reprise des territoires par les alliés en Europe (France, Belgique, Luxembourg, Pays-Bas) et celle des territoires d'Afrique du Nord, notamment les colonies italiennes qui sont passées sous contrôle britannique⁶⁸. Le mot « également » de la Convention concerne, selon cette interprétation, des territoires qui, comme le Timor ou le Kosovo aujourd'hui, n'ont

67 Il est à relever que bien que ne reconnaissant pas l'application *de jure* de la IV^e Convention, l'INTERFET en a appliqué les dispositions sous forme de directives.

68 Voir à cet égard Michael J. Kelly, *Public Security in Peace Operations: The Interim Administration of Justice in Peace Operations and the Search for a Legal Framework*, University of New South Wales, 1998.

pas été « conquis », mais où la IV^e Convention de Genève devrait s'appliquer *de jure*⁶⁹, vu le contrôle total du territoire et des institutions.

Avec la résolution 1272, du 25 octobre 1999, le Conseil de sécurité a décidé de mettre en place une administration transitoire (ATNUTO) en vue de la création de l'État timorais. Cette administration est en place avec l'accord, explicite cette fois-ci, des responsables timorais, des autorités portugaises, de tous les pays de la région et de la communauté internationale en général. La résolution 1272 donne à l'administration un mandat recouvrant quasiment toutes les fonctions d'un État, basé sur le chapitre VII de la Charte des Nations Unies. Notamment, l'ATNUTO a le droit d'édicter des lois, d'administrer la justice, de maintenir la loi et l'ordre, etc.

La question de l'applicabilité de la IV^e Convention de Genève au territoire du Timor oriental, sur la base de son article 2, alinéa 2 reste d'actualité. Il est certain que l'on ne ressent pas une urgence à appliquer les règles du droit international humanitaire dans des circonstances où, clairement, l'ATNUTO donne au pays une stabilité et une paix bienvenues, bien que la IV^e Convention puisse offrir un canevas utile à l'administration. Il n'empêche que les perspectives d'avenir pour le Timor ne sont pas toutes optimistes. Et, si d'ici quelques mois des affrontements armés opposaient les soldats de l'ATNUTO et des Timorais – soit des représentants des 94 388 personnes qui n'ont pas voté pour l'indépendance, soit des membres de groupes armés à l'intérieur du Timor oriental –, les questions, tant de la qualification du conflit que du statut des personnes capturées dans ce cadre, redeviendraient épineuses.

⁶⁹ La IV^e Convention, si elle avait été appliquée par l'INTERFET au-delà de son esprit et *de jure*, aurait toutefois posé quelques défis,

comme par exemple l'application du code pénal portugais de 1975.

Conclusions

On pourrait être tenté d'appliquer, dans le cas du Timor oriental, la devise selon laquelle «s'il n'y a pas de solutions, c'est qu'il n'y a pas de problèmes». Toutefois, au moment où ces lignes sont écrites, près d'une centaine de milliers de Timorais se trouvent encore de l'autre côté de la frontière⁷⁰, des prisonniers de guerre sont détenus depuis plus d'une année sans que leur statut soit reconnu et sans qu'un procès présentant les garanties d'un jugement équitable se dessine dans un avenir proche.

Les problèmes de qualifications juridiques et de droit applicable décrits dans cet article démontrent la complexité d'une situation qui a nécessité des solutions rapides et pragmatiques de la part des forces en présence. Il est à regretter toutefois que ces solutions n'aient pas été fondées sur des bases juridiques plus formelles, telles que celles données par le droit international humanitaire.

Certes, le droit international humanitaire impose des obligations aux parties, mais il donne également des droits aux victimes des conflits armés, des droits qui ne se fondent pas sur des principes généraux aux contours flous, mais sur les Conventions de Genève qui ont le mérite d'être claires et acceptées par 189 États. L'actualité nous rappelle malheureusement leur nécessité, sous la forme non pas de principes adaptables en fonction des circonstances, mais d'un ensemble de règles à mettre en œuvre et à respecter.

⁷⁰ Selon un communiqué de l'AFP du 16 janvier 2001, il reste plus de 100 000 personnes dans les camps de Timor-Ouest.

Abstract

International humanitarian law and East Timor: Theory and practice

by BERTRAND LEVRAT

East Timor has been on the international community's agenda since 1975, and the events of 1999 have attracted worldwide attention to the island's fate. This article examines some of the legal issues which are relevant for the application of international humanitarian law to the conflict over East Timor. In particular, the author examines the international status of East Timor during the Indonesian occupation and after, with the arrival of the multinational military force and the administration set up by the United Nations. The status of those civilians who took refuge in West Timor from the explosion of violence, as well as the rights of Timorese detained by the provisional administration, are also extensively discussed. The author regrets that many legal issues have not been settled in a satisfactory manner by the various players involved in the international response to the drama, although clear answers may be found in international humanitarian law applicable to the situation prevailing in East Timor.

Legal aspects of Australia's involvement in the International Force for East Timor

by
**MICHAEL J. KELLY, TIMOTHY L. H. MCCORMACK, PAUL MUGGLETON AND
BRUCE M. OSWALD**

Between 20 September 1999 and 21 February 2000, a multinational force under unified command, with Australia as the lead nation, deployed to East Timor under the authority of the United Nations Security Council.¹ The deployment of the multinational force, known as the International Force for East Timor (INTERFET), was prompted by a humanitarian crisis in East Timor resulting from a collapse in law and order. INTERFET was replaced on 23 February 2000 with a peacekeeping force under UN command forming part of the UN Transitional Authority in East Timor (UNTAET).

The deployment of the Australian Defence Force (ADF) to East Timor as the lead contingent for INTERFET posed many challenges to both ADF doctrine and capabilities. Involvement in INTERFET constituted the largest overseas deployment by the ADF

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since the Vietnam War² and occurred following a period of downsizing of the defence force accompanied by the assignment of civilians to many positions formerly occupied by military personnel. The complex operational and legal environments prevailing prior to and throughout the deployment magnified the challenges set by the size and timing of the operation.

Those with a role in creating the framework for the operation were numerous, including the *de facto* "host nation" Indonesia, the former colonial power Portugal, the United Nations itself, Australia as lead nation and all those nations actually or potentially contributing to the multinational force. It is noteworthy that no regional alliance equivalent to NATO existed to provide cohesion amongst troop-contributing nations. Consequently, ad hoc arrangements regarding command and control and other key issues were required. The overarching operational framework for the deployment was being determined at a time when the situation on the ground was both in crisis and constantly changing.

The controversial status of Indonesia's authority in East Timor itself contributed to the complexity of the multinational deployment and distinguished it from peace operations such as that in Kosovo commencing in mid-1999.³ In a series of resolutions following the 1975 Indonesian invasion and subsequent purported annexation of East Timor, the UN Security Council and General Assembly rejected Indonesian claims of sovereignty over the territory.⁴ Of the nations contributing troops to the multinational force, only the lead nation, Australia, had recognized the sovereignty of Indonesia over East Timor. Differing views on the status of Indonesia's claims to East Timor had an effect on key issues such as the drafting of the framework documents for the deployment, and the determination of

1 UN Security Council Resolution 1264, UN Doc. S/RES/1264 (15 September 1999).

2 At the height of ADF involvement in Vietnam, in excess of 8,000 Australian personnel were deployed. Over a 10-year period up to 1972, more than 60,000 Australians served in Vietnam.

3 SC Res. 1244 (1999) establishing KFOR and authorizing its deployment into Kosovo expressly recognized the sovereignty of the Federal Republic of Yugoslavia over Kosovo.

4 See, for example, GA Res. 3485(XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1982, and SC Res. 384 (1975) and 389 (1976).

the law applicable in East Timor after the multinational force was deployed.

Despite these difficulties, INTERFET's deployment has been hailed as an outstanding success. Clearly this success is attributable in large part to the commanders and troops involved on the ground in East Timor. However, we also assert here that, in part at least, that success is also due to the work of legal advisers at all levels who helped to deal with the many legal challenges that arose from the outset. In responding to those challenges there was often little precedent on which the legal officers could rely. The objective of this article is to identify and analyse the legal approach adopted to resolve some of the challenges encountered by INTERFET and, in so doing, to demonstrate the role of international law in the success of the operation. We begin with a contextual overview of the situation in East Timor prior to the deployment of INTERFET, before moving on to a series of specific legal issues.

The context for INTERFET's deployment

Pre-ballot

The island of Timor, of which East Timor forms a part, has a history dominated by colonial occupation. The Portuguese first colonized it in 1520; it was thereafter subjected until 1860 to successive colonization attempts by the Spanish, Dutch and British. However, treaties in 1860 and 1893 affirmed Portuguese sovereignty over East Timor.

Although Japanese troops occupied Timor during the Second World War, after the cessation of hostilities East Timor reverted to Portuguese possession. But in 1975 Portugal signalled its intention to withdraw from East Timor. Subsequent internal and external negotiations concerning the future of East Timor were accompanied by a decline into civil war and the emergence of two main groups. One group, *Uniao Democratica Timorese*, favoured some form of continued association with Portugal, whereas *Frente Revolucionaria Timor Lest Independence* (FRETILIN) supported complete independence. On 28 November 1975 FRETILIN issued a unilateral declaration of independence proclaiming the establishment

of the "Democratic Republic of East Timor". Other political groups in East Timor then issued a joint declaration of independence from Portugal in favour of integration with neighbouring Indonesia (which had sovereignty over West Timor following independence from The Netherlands).

On 7 December 1975 Indonesia invaded East Timor and seized control of it by force. Then on 17 July 1976 it annexed the region, proclaiming it to be its 27th province. The purported annexation of East Timor was never recognized by the United Nations but was recognized by Australia in 1979.⁵

The Indonesian military presence in East Timor met with violent opposition by FRETILIN, which conducted a campaign of insurgency. The intensity of the violence varied but included saturation bombings by Indonesian forces and the constant ambushing of Indonesian ground forces by FRETILIN fighters. A cease-fire was attempted in 1983 but was short-lived. Indonesian military action was accompanied by attempts to integrate East Timor into Indonesia, for instance by the forced movement of the local civilian population and the resettlement of Indonesian farmers in East Timor. Bahasa Indonesia was imposed as the official language in schools and the education process included a focus on the Indonesian State ideology of *Pancasila*.

Although figures are uncertain, it is estimated that tens of thousands had died in the conflict in East Timor since 1975 and that there were several hundred "disappearances". Allegations of human rights abuses by Indonesian authorities had declined after 1989 as the latter implemented a policy of "opening up" East Timor to outside scrutiny. A significant event occurred, however, on 12 November 1991 at the Santa Cruz cemetery in Dili. A parliamentary delegation from

⁵ See *Australian Yearbook of International Law*, Vol. 8, 1978-1980, pp. 281-282, for extracts of speeches by the Australian Foreign Minister on Australia's *de jure* recognition of Indonesia's incorporation of East Timor. The recent public release of Australian government documents in relation to the Indonesian invasion and subsequent purported annexation of East Timor reveal more details of the

government's thinking on the question of the extension of recognition to Indonesia's incorporation of East Timor. See "Recognition by Australia of Indonesian Incorporation of East Timor — Submission to the Foreign Minister", Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976*, Documents on Australian Foreign Policy (2000), pp. 839-40.

Portugal had been scheduled to arrive in East Timor on 4 November 1991. Pro-independence demonstrations had reportedly been planned. On 28 October 1991 two pro-independence activists who, with others, had been hiding in a church in Dili were shot and killed. The Portuguese delegation's visit was postponed and a memorial mass and march to the Santa Cruz cemetery were organized for one of the dead activists. The security forces opened fire on the crowd, killing a number of people — ten protesters, according to official figures, but about 100 East Timorese, according to other reports.

Following international condemnation, the Indonesian government established a seven-person commission of inquiry. It found that up to fifty people may have been killed and that security forces had used excessive force in responding to civil unrest. Criminal charges were subsequently brought against protesters and army and police personnel involved. Human rights groups criticized the trials of protesters for not conforming to international standards or to Indonesia's own Code of Criminal Procedure. Protesters were sentenced to between nine years' and life imprisonment, whereas security personnel received sentences of eight to eighteen months.

On 20 November 1992 Jose Xanana Gusmao, the military commander of FRETILIN, was captured by Indonesian troops. He was tried for offences including rebellion and was sentenced to life imprisonment. His sentence was apparently commuted in August 1993 by order of the Indonesian President to 20 years' imprisonment. During Gusmao's incarceration it was reported that Konis Santana was responsible for the leadership of FRETILIN.⁶

In early 1999 the then Indonesian President B. J. Habibé unexpectedly announced a dramatic change in Indonesia's policy regarding East Timor. A major element of that policy was a popular consultation, through a referendum to be held in East Timor, on the issue of integration with Indonesia. Three agreements were concluded on 5 May 1999 variously between Indonesia, Portugal and the United Nations, creating a framework for the resolution of East Timor's

⁶ Based on a contribution by Mark S. JAG Document Library, accessible at Martins, *East Timor: General Background*, <<http://www.jagnet.army.mil/jagnet>>.

future status. It was envisaged that the People's Assembly would implement the results of the popular consultation in October 1999.

The UN established the United Nations Mission in East Timor (UNAMET) to organize and conduct the popular consultation in order to ascertain whether the people of East Timor accepted or rejected a constitutional framework proposed by Indonesia.⁷ This framework provided for special autonomy for East Timor within the unitary Republic of Indonesia. President Habibie stated that the Indonesian government accepted that a vote against the proposal would be equivalent to a vote for independence for East Timor. The ballot was originally scheduled for 8 August 1999⁸ but eventually took place three weeks later on 30 August.

Post-ballot

On 4 September 1999 the UN announced the results of the ballot, namely, a 78.5 per cent vote against unity with Indonesia — effectively a 78.5 per cent vote for independence. President Habibie announced that he accepted the ballot outcome and directed Indonesian security forces to maintain order in East Timor. However, within hours of the announcement of the ballot results pro-integration militia went on a rampage in Dili and other towns in East Timor.

On 6 September 1999 Australia began evacuating its nationals in East Timor, where up to 150,000 civilians were already being displaced by the violence. On 7 September 1999 Indonesia imposed martial law in East Timor. From 8 to 12 September a UN Security Council mission travelled to Jakarta and Dili. On 10 September the UN began evacuating all but essential staff from East Timor. Australia announced that it was cancelling joint military exercises with Indonesia and that its general defence ties with Indonesia were under review.⁹

The Security Council mission reported that the violence in East Timor after the ballot could not have occurred without the involvement of large elements of the Indonesian military and police,

⁷ SC Res. 1246, UN Doc. S/RES/1246 (15 June 1999).

⁸ *Ibid.*

⁹ *The Weekend Australian*, 11-12 September 1999, p. 2.

concluding that the Indonesian authorities were either unwilling or unable to provide an environment for the peaceful implementation of the 5 May agreements. The mission also concluded that this situation had not altered with the imposition of martial law.¹⁰ On 12 September 1999 the Indonesian government agreed to accept the assistance of the international community to restore peace and security in East Timor and to implement the result of the popular consultation. Thereafter the Security Council adopted Resolution 1264 on 15 September 1999 which says, *inter alia*,

*“Determining that the present situation in East Timor constitutes a threat to international peace and security; and
Acting under Chapter VII of the Charter of the United Nations,
Authorizes the establishment of a multinational force under a unified command structure (...) with the following tasks: to restore peace and security in East Timor; to protect and support UNAMET in carrying out its tasks; and, within force capabilities, to facilitate humanitarian assistance operations; and
Authorizes the States participating in the multinational force to take all necessary measures to fulfil this mandate.”¹¹*

The multinational force began its deployment to East Timor on 20 September 1999. At that stage the East Timorese infrastructure had been badly damaged. In Dili few buildings were still intact. The towns of Ainaro and Cassa had been completely destroyed, with an estimated 70 per cent of Atsabe, Gleno, Lospalus, Maliana, Manatuto and Oecus either burnt down or levelled. Extensive damage was also reported in Suai and Liquica. In Vineque about 20 per cent of the town had been destroyed, whereas Bacau was relatively undamaged. The judicial and detention systems were not operating and no commercial activity was being conducted. There was no effective administration, as administrative officials had apparently left the territory after the announcement of the ballot results.

In humanitarian terms, the situation in East Timor when the multinational force arrived there was one of crisis: a preliminary UN

¹⁰ Report of the UN Secretary-General on the Situation in East Timor, UN Doc. S/1999/1024 (4 October 1999).

¹¹ UN Doc. S/RES/1264 (15 September 1999).

inter-agency assessment, issued on 27 September 1999, estimated that of a total pre-ballot population of 890,000, over 500,000 had been displaced by the violence, including 150,000 to West Timor.

By the time the multinational force had been deployed, the Indonesian armed forces still had significant numbers of personnel in East Timor — particularly in Dili. A contingent of Indonesian police remained in Dili with a substantial security detachment providing support. After consultations in New York and Dili, the Indonesian armed forces undertook to cooperate with the multinational force in the implementation of Resolution 1264 through a Joint Consultative Security Group established in Dili, with UNAMET participation.¹² On 24 September 1999 Indonesia lifted martial law and rapidly withdrew from the territory.

On 26 October 1999 the United Nations Transitional Authority (UNTAET) was established pursuant to Security Council Resolution 1272.¹³ INTERFET formally transferred its responsibilities under Resolution 1264 to UNTAET on 23 February 2000. UNTAET was given authority to “exercise all legislative and executive authority including the administration of justice”.

The INTERFET deployment¹⁴

Australian Defence Forces Operations

The Australian Defence Forces' involvement in the multinational force in East Timor was entitled “Operation Stabilise”. The broader ADF involvement in the East Timor deployment, including logistic support from the Australian support area, was called “Operation Warden”.

Operations Warden and Stabilise had been preceded by two other operations involving the ADF and related to East Timor. The first was “Operation Faber”, which took place in the period August–September 1999 and entailed the deployment of UN military

¹² *Op. cit.* (note 10).

¹³ SC Res. 1272, UN Doc. S/RES/1272 (24 October 1999).

¹⁴ Unless otherwise indicated, Colonel Mark Kelly, the inaugural Chief of Staff HQ

INTERFET, provided the information contained in this section in a presentation to the ADF's Operations Law Course, RAAF Base Williamstown, 11 May 2000.

observers in support of the UNAMET-monitored popular consultation. The second was "Operation Spitfire" and consisted of a Services-protected evacuation of 2,475 Australian and other nominated nationals from East Timor in the period 6-12 September 1999. Operation Spitfire was conducted by Joint Task Force 645 comprising the 3rd Battalion, the Special Air Service Regiment, 5 Aviation Regiment, Emergency Management Australia and C130 assets. Operation Spitfire also involved assistance in preparations for the deployment to East Timor of the multinational force during Operation Stabilise by prepositioning ADF assets in Darwin and at the RAAF Base at Tindal in the Northern Territory.

The International Force

INTERFET was established under unified command rather than UN command. Major General Peter Cosgrove, at the time the Commander of the ADF's Deployable Joint Force Headquarters (DJFHQ) based in Brisbane, was designated Commander INTERFET (COMINTERFET). Headquarters INTERFET was formed by the DJFHQ with supplementary support from other contributing States. The ADF's Headquarters 3 Brigade from Townsville provided the foundation for HQ Land Component Command later renamed HQ WESTFOR.

Although the figures varied throughout the INTERFET deployment, 22 contributing nations were represented in INTERFET with a total force strength of approximately 12,600. Australia provided the largest contingent of 5,521 ADF personnel.

The INTERFET concept of operations was for a four-phase operation with a preliminary phase involving preparation in Australia prior to deployment to East Timor. The four phases were as follows:

- Phase 1 — Control: during this phase, INTERFET control was established over air and sea points of entry in Dili on 20 September 1999 and an air point of entry in Bacau on 23 September 1999;
- Phase 2 — Consolidation: this phase occurred in the period September 1999 to January 2000 and involved INTERFET establishing and maintaining control progressively throughout East

Timor, including the Oecussi enclave in West Timor and Atauro Island;

- Phase 3 — Transition: INTERFET objectives were to hand over control of East Timor to UNTAET, having maintained security for three months without a serious incident, set up a border security management system, established an internally displaced persons (IDP) return plan and reduced the risk of militia activity. The transition from INTERFET to UNTAET took place progressively from east to west. Sector East was handed over on 1 February 2000, Sector Central, including Dili, on 14 February 2000, the Oecussi enclave on 15 February 2000 and Sector West on 21 February 2000;
- Phase 4 — Redeployment: INTERFET formally handed over authority to UNTAET on 23 February 2000 with INTERFET troops either moving to the UNTAET command structure or redeploying to home locations.

ADF legal officer involvement

In the late 1990s, as a result of the comprehensive rationalization and reorganization of the Australian Defence Force through the Defence Review Plan, civilian and military legal support at the strategic level were amalgamated. As a result, the previously separate three service legal directorates and the civilian legal division were combined, under a military one-star officer. The newly created entity was named the "Defence Legal Office". Following the amalgamation of these Canberra-based legal resources, the next stage in the rationalization of legal support to the ADF was the transfer of all legal officer positions in the ADF, regardless of service, to the control of the Defence Legal Office. A number of legal officers were then outposted to headquarters and units, generally on the basis of single-service specialization, i.e. with the exception of designated joint headquarters legal staff, legal officers at subordinate headquarters, formations and units were allocated in support of their parent service.

ADF legal officer support to INTERFET's operations was controlled by the Defence Legal Office, although, as a general prin-

principle, outposted permanent legal officers automatically deployed to East Timor with the organization — headquarters, formation or unit — to which they had been assigned.

Australia-based legal officer support to the East Timor operation was significant. That support included: strategic-level advice from the Defence Legal Office — particularly the Director-General, the General Counsel, the legal officers in the Directorate of Agreements and the Directorate of International and Operations Law, and the legal officer outposted to Strategic Command Division, Australian Defence HQ (AD HQ); legal officers within environmental commands, namely, Land, Special Forces, Maritime, and Air Commands; legal officers at HQ Australian Theatre (HQ AST) providing operational-level advice; legal officers at Headquarters Northern Command (HQ NORCOM) providing support at the rear support base and embarkation point in Darwin; and legal officers providing base support to units deploying to East Timor.

The following is a summary of ADF legal officer positions that deployed to East Timor during the INTERFET period:

- Senior Legal Adviser, INTERFET Combined Legal Office (ICLO), HQ INTERFET (lieutenant colonel);
- Two legal officers, ICLO, HQ INTERFET (ARA major/lieutenant colonel), reserve lieutenant colonel;
- Two legal officers HQ WESTFOR (one major and one captain);
- One legal officer HQ Force Logistic Support Group (FLSG) (one major);
- One legal officer Naval Component Command (one lieutenant commander);
- Four legal officers Detention Management Unit (one colonel, one major, one squadron leader, one lieutenant).

Legal officer support to a complex operation without precedent for Australia, which acted for the first time ever as lead nation in a coalition for a peace operation, deserves special recognition. The creation of novel framework agreements involving difficult legal issues, the formulation of significant policies in a rapidly changing operational environment, the development and implementation of

training packages, and other challenging legal requirements were all dealt with professionally and effectively for the ultimate benefit of the INTERFET mission.

Application of international law to the operation

We have already noted the complex nature of the international law framework for the INTERFET deployment. Issues which had to be taken into consideration in this framework included: the sovereign rights, if any, of Indonesia over East Timor and the recognition, if any, by members of the INTERFET coalition of those rights; the residual rights, if any, of Portugal as the former colonial power; the effect of the *de facto* control of East Timor by Indonesia as recognized by the 5 May 1999 agreements between Indonesia, Portugal and the UN; the effect of the unilateral move by the People's Consultative Assembly of Indonesia on 20 October 1999 to withdraw Indonesian claims of sovereignty over East Timor; and the effect of UN Security Council Resolutions 1264 and 1272.

The UN itself had not recognized Indonesian sovereignty over East Timor following the Indonesian invasion in 1975 and purported annexation on 17 July 1976,¹⁵ nor did most individual States contributing troops to the INTERFET coalition. For the UN and these States, the status of East Timor at the time of the INTERFET deployment was that of a UN-designated non-self-governing territory.¹⁶ The notable exception to this view was that of the coalition's lead nation, Australia.

Notwithstanding the UN's position regarding sovereignty, its acceptance of the reality of Indonesian control over East Timor was reflected in various framework documents such as the 5 May 1999 agreements between Indonesia, Portugal and the UN, and UN Security Council Resolution 1264 (1999) establishing INTERFET. Thus, although operative paragraph 3 of Resolution 1264 authorized

¹⁵ See *supra* note 4 for UN resolutions regarding Indonesian sovereignty.

¹⁶ This was, for example, New Zealand's view as reported in the written comments of LTCOL L.P. Maybee, Command Legal Officer,

HQ Land Command, NZDF, presented to the ADF "INTERFET Lessons Learnt Conference", Australian Defence Force Academy, Canberra, 17 March 2000. Transcript on file with the authors.

“the States participating in the multinational force to take all necessary measures” to fulfil its mandate, other provisions envisaged a continuing, although temporary, role for Indonesia in East Timor. Paragraph 5, for example, underlined the government of Indonesia’s “continuing responsibility under the Agreements of 5 May 1999 (...) to maintain peace and security in the interim phase between the conclusion of the popular consultation and the start of the implementation of its result”.

The issue of the legal status of East Timor, and the recognition of at least *de facto* Indonesian control over the territory, had a direct impact on the framework documents produced by Australian authorities on behalf of INTERFET and the reaction of certain troop-contributing nations to that framework. This recognition of *de facto* Indonesian control also had an impact on other issues such as the approach taken by HQ INTERFET and the maritime contributing nations to navigational rights for the deployment. These issues will be examined further below.

The ADF concluded that the laws of armed conflict, including the 1949 Geneva Conventions and their 1977 Additional Protocols, did not, as a matter of law, apply to INTERFET as there was no armed conflict, international or non-international, on the territory of East Timor at the time of the deployment. The ADF view that no armed conflict existed in East Timor was based on the following reasoning. First, there was no armed conflict between Indonesian forces and INTERFET. INTERFET deployed with Indonesian consent and there was no exchange of military force between coalition troops and Indonesian military. The sole exception to this was an incident involving an exchange of gunfire near the village of Motaain. As is explained below,¹⁷ this exchange occurred only as a result of ambiguity about the exact location of the border between East and West Timor. Secondly, INTERFET was not engaged in an armed conflict with the militia. There were several different militia groups which acted independently of each other and did not operate under a proper command structure. The ADF rarely engaged in an exchange

¹⁷ See section “Cross-border issues”.

of military force with militia members. Thirdly, the ADF view was that the militia were not engaged in an armed conflict with the people of East Timor. The militia failed to satisfy the criteria of an organized armed force, they did not control territory from which they could conduct sustained military operations and they were not fighting against an opposing force. Rather, they were perpetrating violent criminal acts against the civilian population of East Timor.

Some commentators have suggested that it is inaccurate to view the final phase of East Timor's 25-year struggle in isolation from the protracted struggle which preceded it. Since 1975 FRETILIN has operated in East Timor as a highly organized militia, under clear lines of command, against the occupying military forces of Indonesia. The argument goes that the fact that FRETILIN opted to exercise incredible levels of restraint and not to engage militia in the post-ballot period ought not alter the reality of a protracted armed conflict in East Timor at the time of INTERFET's deployment. Although this was not the approach taken by the ADF, it is the most valid case for the existence of an armed conflict in East Timor.¹⁸

However, consistent with ADF policy, the principles of the law of armed conflict were applied, where relevant, by way of guidelines.¹⁹ The same approach was taken with respect to international human rights law. The rationale behind the ADF approach has consistently been that the key international humanitarian and human rights law instruments usually reflect best practice and that compliance with them, where relevant, is the appropriate expectation for force stan-

¹⁸ The New Zealand position was different in relation to the application of the law of armed conflict. New Zealand Defence Force (NZDF) policy is to apply the fundamental principles and rules of that law to all its operations, whether strictly required by law or not. The NZDF view is that the demarcation between the application or non-application of the law of armed conflict is not clear-cut. Parts continue to apply, even where no armed conflict exists. The NZDF position is that the UN Secretary General's Bulletin of 12 August 1999 is intended to apply to all UN Peace Operations and that INTERFET, a UN-man-

dated force deriving its legal authority from UNSCR 1264, was required to give effect to the Secretary General's Bulletin during its operations. The ADF position, by contrast, is that the Secretary-General's Bulletin did not apply to INTERFET, as the Bulletin only applies to UN-commanded forces or to peace-enforcement or peacekeeping operations where UN forces are a party to a conflict.

¹⁹ Comments by LTCOL Kelly, Directorate of International and Operations Law, Defence Legal Office, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16), transcript, p. 134.

dards. Maintenance of the legitimacy of a peace operation is considered a key to mission success. We are not suggesting here that the lack of certainty about the law applicable to the INTERFET Operation created a *lacunae* in relation to the law applicable to the conduct of the troops deployed. In the case of ADF personnel, the *Australian Defence Force Discipline Act 1982*, applicable in relation to all ADF deployments, ensures that ADF troops are always subject to Australian Criminal Law irrespective of which international legal regime applies to the Operation itself. Other contributing nations have similar legislation.

The ADF has adopted a similar approach to the law of military occupation in its deployment on peace operations. The Australian position is that a UN-mandated force can be in at least *de facto* occupation of the area of operations. The INTERFET deployment drew extensively upon the law of occupation, for example for the establishment of an interim justice system. While it is the ADF view that the law of occupation does not require an armed conflict for it to apply *de jure*,²⁰ INTERFET forces were not occupying East Timor, because Indonesia had consented to their deployment. Here the law of military occupation provided a framework of guiding principles and did not apply *de jure*.

The legal framework for the operation

Establishing the framework

As Australia was the lead nation for INTERFET, Australian authorities, in particular the Department of Defence, the Attorney-General's Department and the Department of Foreign Affairs and Trade, assumed responsibility for the conception, drafting and negotiation of the framework documents. That responsibility normally falls to the UN Legal Adviser whenever an operation is com-

²⁰ Michael J. Kelly strongly advocated the application of the law of military occupation to the presence of the multinational force in Somalia. See Michael J. Kelly, *Peace Operations: Tackling the Legal and Policy Challenges*, Canberra, 1997. That law was in fact applied by the ADF in Somalia to good

effect. This interpretation of the law was subsequently asserted by Australia at the Meeting of Experts on the Fourth Geneva Convention of 1949 in Geneva in October 1998. Guidelines on the application of this approach have also been promulgated as Defence Legal Office policy.

mandated and controlled by the UN. These framework documents supplemented those created externally, such as the relevant Security Council resolutions and the agreements of 5 May 1999.

The following framework documents were adopted:

- Exchange of Diplomatic Notes Constituting an Arrangement Between the Government of Australia and the Government of the Republic of Indonesia Concerning the Status of the Multinational Force in East Timor, which came into effect on 24 September 1999 and was known as the Status of Forces Arrangement (SOFA);
- Exchange of Diplomatic Notes Constituting an Arrangement Between the Government of Australia and UNTAET, which applied to the activities of the multinational force operating under a unified command structure in East Timor (INTERFET) from 26 October 1999;
- Agreement on Participation in INTERFET.

One further document was also envisaged as forming part of the strategic framework, namely a military technical agreement between INTERFET and the Indonesian authorities. A draft document entitled "Military Technical Arrangement for Security in East Timor" was prepared. The document covered issues such as the creation and operation of a Joint Security Consultative Group in Dili involving Indonesian and INTERFET officers, detainee handling and the delineation of the area of operations. The strongest advocates for this type of agreement for the INTERFET deployment and future operations were and are air and naval legal officers concerned about navigation issues.²¹ These issues recurred throughout the INTERFET deployment with, for example, agreement with the Indonesians eventually being obtained for an air route to the Oecussi enclave but not for the coordinates for a sea route.²² It was originally anticipated that these particular freedom of movement issues could be addressed in the Status of Forces Arrangement, but for lack of agreement they were omitted from that instrument.

²¹ Comments by LCDR Stephens, Legal Officer, INTERFET Naval Component Command, SQNLDR Harvey, Legal Officer, Air Command, and LCDR Rogers, Legal Officer, Naval Command,

"INTERFET Lessons Learnt Conference", *loc. cit.* (note 16), transcript, pp. 96-99.

²² Comments of LCDR Stephens, *ibid.*, p. 96.

Although HQ INTERFET saw merit in the negotiation of a military technical agreement, political sensitivities in the bilateral relationship between Australia and Indonesia at the time of deployment precluded the negotiation of such an agreement at anything but the highest political levels. Any attempt to do otherwise could have jeopardized the informal negotiations that were taking place locally with Indonesian authorities.²³ Ultimately, the decision was taken not even to push the negotiation at the highest political level and the idea of concluding a military technical agreement was abandoned.

One feature of the process leading to adoption of the framework documents was the lengthy amount of time taken to conduct the requisite negotiations. For example, the Status of Forces Arrangement was not finally agreed until 24 September 1999, four days after the arrival of INTERFET in East Timor. Some of the participation agreements were not concluded at all during the period of the INTERFET deployment! Here a pragmatic approach was taken by HQ INTERFET: to proceed on the basis that the model participation agreement was operative in respect of those contributing States not yet party to an agreement.

Difficulties experienced in reaching agreement with the Indonesian authorities on certain technical issues have prompted the suggestion that in future operations, rather than seek formal agreement by a process of negotiation, the mechanism of a unilateral declaration be employed in appropriate circumstances. The consent of the other party would thereafter be assumed if that party did not object, i.e. after declaring the Australian position and intended course of action, operations would be conducted accordingly.²⁴ It is suggested that relevant circumstances for the use of this mechanism would be the strength of the UN mandate underpinning the operation.

Disparate approaches by coalition partners to the framework

We have already noted the complicating factor of Australia's controversial position on Indonesia's legal status in East

²³ Comments of LTCOL Braban, Senior Legal Adviser, HQ INTERFET, *ibid.*, p. 95.

²⁴ Comments of CMDR Letts, Naval Command, *ibid.*, p. 98.

Timor relative to other coalition partners' views. New Zealand, for example, argued that the Status of Forces Agreement was a bilateral issue between Australia and Indonesia flowing from Australia's recognition of Indonesian sovereignty over East Timor. It held that the SOFA did not bind New Zealand, which did not recognize that Indonesia had any sovereign rights regarding East Timor. The New Zealand position was that UNSC Resolution 1264 provided the legal authority for the INTERFET deployment to East Timor. Once New Zealand troops were deployed, the NZDF view was that NZDF forces were immune from the local jurisdiction and the enforcement of local laws on the basis of customary international law. It is true that, to date, UNTAET and Indonesia still have not concluded a SOFA and so New Zealand maintains that the status of UNTAET troops continues to be governed by customary international law.²⁵

On the legal status and the relevance of the contributing nations the UN itself followed an approach of constructive engagement with Indonesia, acknowledging its *de facto* control of East Timor without prejudice to the question of East Timorese sovereignty. Despite the New Zealand position on the irrelevance of the SOFA with Indonesia, it is unlikely that any State, including Australia, would have been prepared to enter East Timor on the basis of a Chapter VII mandate alone. This assertion is not related to a perception that a Chapter VII mandate would be an inadequate legal basis for intervention but arises from the reality that Indonesia had more than 20,000 troops on the ground in East Timor prior to its agreement to withdraw troops and permit INTERFET to be deployed.

Resolution 1264 itself, although authorizing resort to "all necessary measures" to fulfil the mandate,²⁶ envisages at least a temporary continuing involvement of Indonesia in East Timor and allows for subsequent cooperative agreements between INTERFET and Indonesia to be arranged. Specifically, operative paragraph 4 of Resolution 1264 welcomed "the expressed commitment of the Government of Indonesia to cooperate with the multinational force in all aspects of the implementation of its mandate" and anti-

²⁵ Written comments of LTCOL Maybee, *ibid.*

²⁶ SC Res. 1264 (1999), para. 3.

pated "close coordination between the multinational force and the Government of Indonesia."

We suggest that the Status of Forces Arrangement did not simply result from the unique view of Australia with regard to Indonesian sovereignty over East Timor. The instrument was consistent with the general approach of the UN towards Indonesia's involvement in East Timor, it was consistent with the specific terms of Resolution 1264 and, from a purely pragmatic perspective, it was a mechanism that helped avoid difficulties with the Indonesian authorities on the ground. In fact, the UN itself negotiated a similar Status of Mission Agreement with Indonesia — an instrument which will be considered in more detail below.

Two other framework documents were less controversial. The agreement on participation in INTERFET was considered constructive, although some States expressed concerns about the relative lack of time allowed for consideration of the agreement.²⁷ The Arrangement between the Government of Australia and UNTAET was consistent with paragraph 8 of Resolution 1264 requesting the leadership of the multinational force to "cooperate closely with the United Nations".

Specific law of armed conflict issues

We have identified three specific issues which arose during the deployment and are worthy of particular mention here: the use of the red cross emblem on armoured fighting vehicles; the use of medical personnel on picket duty and the effect this would have on their wearing the red cross emblem as medical personnel; and the status of militia members detained by INTERFET.

The issue of the red cross emblem on armoured fighting vehicles was raised with the ADF as a result of concerns voiced by the Australian Red Cross. Members of the National Society had observed images on national television of an ADF light armoured fighting vehicle configured as an ambulance and bearing the red cross emblem

²⁷ Written comments by LTCOL Maybee, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16).

for protective purposes but also armed with a .50 calibre machine gun. The issue was discussed with the Australian Red Cross National Advisory Committee on International Humanitarian Law.

The ADF's position on the use of the protective emblem on armoured ambulances is that the law of armed conflict permits personnel of military medical units to be armed and to use those arms in their own defence.²⁸ Furthermore, there is no relevant restriction regarding the type of weapons that may be used for defensive purposes. It is noted that the provision in Article 13, paragraph 2, of Additional Protocol I regarding carriage of "light individual weapons" relates to civilian, not military, medical units. As the .50 calibre machine gun is an integral part of the vehicle, there is no legal objection in the view of the ADF to its bearing the protective emblem and being armed with such a weapon.

The use of the red cross emblem on armoured ambulances was raised as a concern because of media reporting of the deployment. Conversely, the issue of medical personnel acting as armed pickets and carrying out perimeter patrols was actually raised by units and personnel within INTERFET, in relation to the guarding and patrolling of non-medical as well as medical units. The concern of the medical personnel themselves was that if a medical orderly, for example, were to remove the red cross armband to carry out non-medical tasks, then the armband could not be put back on when the orderly returned to her or his medical duties, i.e. that the protection, once lost, was lost forever. — Although this issue was not the subject of a general policy, the usual approach of legal officers advising the units concerned was that the Geneva Conventions and Protocols do not require medical orderlies, as opposed to doctors and nurses, to be exclusively engaged in medical duties.

²⁸ One interesting aspect of the discussion that took place concerning the use of the emblem was that the unit concerned would have preferred to keep the .50 calibre weapon and remove the emblem if required. The unit believed that the protection offered by the weapon was greater than that provided by the red cross emblem in an operational environ-

ment in which the militia had already demonstrated their lack of respect for the emblem. Comment by LTCOL Abbott, Chief Legal Officer Land Command and for a period a legal officer, INTERFET Combined Legal Office, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16), transcript, p. 136, and a communication from CAPT Bridley to LTCOL Abbott of 9/10/99.

Consequently, a medical orderly could remove the armband for armed guarding or other non-medical duties and reapply it upon returning to medical duties.²⁹

The final law of armed conflict issue involved strategic level consideration of the view held by the International Committee of the Red Cross that militia members detained for acts of violence against INTERFET members were entitled to prisoner-of-war status. The ICRC's reasoning was based on the widespread belief that militia members were acting under the control of the Indonesian armed forces. If this assumption was correct, then clashes between militia and INTERFET would have constituted an armed conflict.³⁰ The Directorate of International and Operations Law within the Defence Legal Office rejected the ICRC's view. Even if it could be argued that there was an armed conflict, the militia failed to meet the established criteria for prisoner-of-war status as they lacked sufficient organization and failed to conduct operations in accordance with the laws of armed conflict.³¹

The principal observation arising from an analysis of the legal issues that arose during the INTERFET deployment is that three elements must be addressed. First, the ADF's interpretation of the law on a particular issue must be determined. Second, flowing from that interpretation, it is necessary to determine the ADF's policy on the issue. For example, although a conclusion may be reached that, according to law, armoured ambulances can carry .50 calibre weapons, the ADF may choose to remove either the weapon or the red cross for reasons such as consistency with coalition partners³² or public image. Third, once the ADF policy is agreed it must be promulgated both internally and externally to bodies such as the International Red Cross and Red Crescent Movement. In relation to the need for internal promulgation, it is noted that the ADF's health services were adamant that

²⁹ Comments of LTCOL Kelly regarding past ADF land forces' practice, and MAJ Worswick, Legal Officer, HQ Force Logistic Support Group, INTERFET, regarding medical personnel of 1 Field Hospital in East Timor, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16), transcript, pp. 142-143.

³⁰ Comments of LTCOL Kelly, *ibid.*, p. 139.

³¹ *Ibid.*

³² It is noted that New Zealand's position was that .50 calibre weapons were not permitted on armoured ambulances bearing the red cross emblem. Written submission of LTCOL Maybee, *ibid.*

the carriage of crew-served weapons on armoured ambulances is inconsistent with the custom and practice of international humanitarian law, notwithstanding that this was neither the ADF's legal assessment nor its policy.

Cross-border issues

Two significant cross-border incidents occurred during the INTERFET deployment. The first was a fire fight between Australian INTERFET soldiers and Indonesian forces near the village of Motaain on the border between East and West Timor. The second incident involved a statement of the Australian Minister of Defence on 29 September 1999 regarding the authority of INTERFET forces to enter West Timor.

The first incident was apparently due to the local Indonesian authorities persisting in the use of 1933 Dutch maps and the Australians using more recent Indonesian maps. The Dutch map indicated that the Mota Bicu river formed the border. However, the 1992 Indonesian map used by the Australians showed the border as being 500 metres to the west of that position. Apparently, the Indonesian map reflects a post-1975 decision to make the border a fixed provincial border not dependent on the river as a landmark, with the result that as the river changed course over time and as the villagers moved with it, the village of Motaain would shift its location from East to West Timor and vice versa. At the time of the UNAMET ballot, part of the village was in East and part in West Timor. UNAMET decided to declare the village to be in West Timor but permit the villagers to vote at other centres as East Timorese.

Two approaches were taken to resolve the delineation of the border and reach an agreement to remove the prevailing ambiguity. At the strategic level, a legal analysis of the historical justifications for the various Dutch, Portuguese and Indonesian maps was commissioned. Owing to the length of time needed to complete this process, possibly requiring a ground survey, the analysis was of more relevance in the longer term to UNTAET than to INTERFET. Hence a second approach producing a short-term accord was required. INTERFET reached agreement with local Indonesian authorities on a boundary

without prejudice to subsequent negotiations on the final border delimitation. As this was an administrative, rather than legal, process it required little involvement by the INTERFET Combined Legal Office;³³ it resulted in the Memorandum of Understanding for Tactical Coordination in the Border Area Between Nusatenggara Timur and East Timor Between the TNI, INTERFET and UNTAET.

The second incident arose over a statement to the media by the Australian Minister of Defence in which he claimed a right of "hot pursuit" for Australian troops to pursue militia members across the land border into West Timor. Although this erroneous statement created more concerns at the diplomatic level than it did on the ground in East Timor, the incident did highlight the need for an ADF position on the scope of the right of self-defence in the border region. There is no direct terrestrial equivalent to the maritime law concept of "hot pursuit". Hot pursuit under the Law of the Sea permits the continuous pursuit and apprehension of offenders against the law of a State from within that State's territorial sea and other offshore zones into the high seas but ceasing at the territorial sea of any other State. The right of maritime hot pursuit constitutes an exception to the freedom of the high seas. By contrast, any attempt to apprehend offenders crossing land borders must be with the consent of the State into which the person has fled. A continuing arrangement for cross-border pursuit could be made under a formal agreement setting out the parameters of such action. Deployed contingents from coalition States other than Australia all recognized an international border between the two territories. Australia considered that the two territories were under one jurisdiction and therefore that any apprehension authority, to the extent that it could be exercised anywhere on the island of Timor, would be based exclusively on the UN mandate or subject to separate agreement with Indonesia.

Security Council Resolution 1264 endorsed and ensured respect for Indonesian territorial integrity and sovereignty. There was no provision in the resolution addressing the cross-border apprehension of persons who had committed offences in East Timor. The deployment of INTERFET was specifically limited to the territory of

³³ Comment by LTCOL Braban, Senior Legal Adviser, HQINTERFET, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16).

East Timor. The mandate could not be interpreted to authorize cross-border apprehension. Irrespective of the position taken on Indonesian sovereignty over East Timor, Indonesian consent was a prerequisite for any apprehension action in West Timor.

A related issue involves the extent to which the international law of self-defence, as preserved by Article 51 of the UN Charter, permits armed, cross-border remedies by an aggrieved State against criminal elements (this would include "rogue" elements of TNI/POLRI) or insurgent bands operating from the territory of another State. This issue arose in two contexts: first, an assertion of the right to counter-attack the bases of operation of guerrilla, terrorist or criminal bands conducting armed attacks against a State's territory or nationals from the territory of another State because of an inability or unwillingness on the part of the "harbouring" State to take preventive action itself; and second, an assertion of a right to return fire across borders in self-defence.

The International Court of Justice dealt extensively with customary international law related to the question of cross-border military incursions in its judgment in the *Nicaragua* case.³⁴ In particular, the Court considered the requisite criteria justifying forceful cross-border action in self-defence. It accepted the proposition that acts of armed force committed by armed bands, groups, irregulars or mercenaries "if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" would justify a forceful response as much as if the acts had been committed by regular armed forces across an international border.³⁵ The critical issue for the Court was not the identity or character of the attacking forces but the nature and severity of the forceful measures. The Court distinguished, for example, "assistance to rebels in the form

³⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14. The Court reached its judgment on the basis of the application of customary international law on the use of force rather than on the basis of UN Charter provisions. It did so because it considered

itself precluded from applying the UN Charter by virtue of the United States' "Vandenberg reservation" to its declaration accepting the compulsory jurisdiction of the Court. See H. Charlesworth, "Customary international law and the Nicaragua Case", *Australian Yearbook of International Law*, Vol. 11, 1984-1987, p. 17.

of provision of weapons or logistical support or other support” which did not justify a forceful response in self-defence from the cumulative effect of a series of cross-border raids by armed groups.³⁶ If the threshold level of armed activity is satisfied, the customary law prerequisite of the necessity for an armed response in self-defence will be satisfied. The defending State will, of course, still be bound by the principle of proportionality in deciding on the level of force to be applied.

Return of fire across borders is uncontroversial as a legal right. Australia has consistently supported armed remedies in such contexts and there are numerous examples, in State practice, of acceptance of the right to return fire across borders. The right of self-defence is extra-territorial in the sense that its exercise is rarely confined to action taken solely within the aggrieved State's territory.

INTERFET's Chapter VII mandate did not negate this fundamental right of self-defence, which included INTERFET's right to defend itself and extended to INTERFET's right to protect the East Timorese. Resolution 1264 did not and was not intended to define the entire spectrum of international law rights of, and limitations on, INTERFET forces. In the absence of an explicit qualification, the right of self-defence must continue to operate. We are not suggesting here that East Timor was a defending “State” for the purposes of the national right of individual or collective self-defence. We have also already explained that the ADF did not recognize an international border between East and West Timor. The approach here is that the international law right of self-defence applies extra-territorially. INTERFET was legitimately in East Timor pursuant to Indonesian consent as well as a Security Council Chapter VII mandate. The assertion here is that INTERFET was entitled to rely on international law principles for the exercise of extra-territorial force (i.e. into West Timor where INTERFET had no explicit right to operate) in defence of its own troops and the East Timorese people.

In the case of action against armed bands, guerrillas and terrorists operating from a harbouring State there must be:

- clear proof of attacks being launched from the harbouring State;

³⁵ *Nicaragua case, ibid.*, p. 103, para. 195.

³⁶ *Ibid.*

and

- a proven inability or unwillingness on the part of the harbouring State to act.

Based on State and UN practice, the hierarchy of response in the case of action to respond to threats from a harbouring State would be as follows:

- at least one attack must have been launched from the harbouring State (it is more likely that a pattern of attacks would have to be established, except where the initial attack was of a gravely serious nature and a further such attack appears imminent);
- following the attack (or attacks) a complaint must be made to the harbouring State requesting that action be taken to prevent further attacks;
- the harbouring State must either fail to act, indicate no intention of acting or demonstrate an inability to take preventive action;
- a subsequent attack or attacks occur or there is clear evidence to indicate that such an attack or attacks are imminent;
- the armed defensive action must have as its sole objective the removal of the armed threat, with no reprisal action permissible against the forces, infrastructure or civilians of the harbouring State;
- the force used in the action must be proportionate to the threat posed.

Circumstances may be such that some aspects of this hierarchy will be compressed, depending on the seriousness and immediacy of the threat, for example where the armed bands, guerrillas or terrorists have a weapon of mass destruction capability (i.e. chemical, biological or radiological).

While Security Council Resolution 1264 recognized the mutual authority of the Indonesian authorities and INTERFET to take security action for East Timor, it was clear from the mandate and the context in which it was framed that INTERFET was authorized to take action where the Indonesian authorities were unable or unwilling to do so with respect to the tasks set out for it. We have already discussed the specific tasks contained within the INTERFET mandate. If sustained attacks that threatened the attainment of these

objectives (i.e. that were not merely sporadic incidents) had been launched by militia from bases in West Timor against East Timorese residents or other non-INTERFET personnel, then INTERFET would have been justified in taking necessary and proportional action against those bases.

It is suggested, commensurate with the principles outlined above, that prior to taking such action it would have been necessary for COMINTERFET to request that the UN Secretary-General and Security Council raise the matter with Indonesia, demanding action to prevent the attacks. If there were no satisfactory response then action could have been taken without the need for an additional Security Council resolution (although such a resolution would obviously be preferable).

Investigating alleged crimes against humanity³⁷

A key reason for the Security Council's authorization of the deployment of INTERFET was its deep concern over "the continuing violence against and large-scale displacement, and relocation, of East Timorese civilians".³⁸ However, no international tribunal has yet been established to try individuals alleged to have perpetrated atrocities in East Timor, and the UN, at least for the initial period of the INTERFET deployment, had only limited investigative resources available to conduct investigations of possible crimes against humanity.³⁹

The main challenge for INTERFET in relation to crimes against humanity, or indeed serious violations of local criminal law, was the type and extent of INTERFET's involvement. Ultimately, that involvement was restricted to the conduct of limited investigations and

³⁷ The expression "crime against humanity" rather than "war crimes" has been preferred to avoid the controversies of whether or not the acts in question in East Timor occurred in the context of an armed conflict. A "crime against humanity" means certain acts, including murder, rape, deportation or forcible transfer, committed as part of a widespread or systematic attack directed against the civilian population. For the most comprehensive treat-

ty definition of the crime see Article 7 of the Rome Statute of the International Criminal Court.

³⁸ Preamble to SC Res. 1264 (1999).

³⁹ At the time of INTERFET's arrival in East Timor, CIVPOL had only two members on the ground. MAJ Freeman, Legal Officer, INTERFET Combined Legal Office, "INTERFET Lessons Learnt Conference", *loc. cit.* (note 16), transcript, p. 118.

attempts to preserve some crime scenes. A note on Guidance for the Multinational Peacekeeping Force in East Timor on the Preservation of Evidence provided by the Office of the High Commissioner for Human Rights was applied by INTERFET forces. The limited INTERFET involvement was due in large part to a lack of available personnel resources — availability in terms both of numbers of military police and of personnel with relevant expertise (including, for example, forensic skills and crime investigation training) — as well as to perceptions that other agencies had a higher primary responsibility and possessed greater relevant expertise, particularly organizations such as the Office of the UN High Commissioner for Human Rights.

It is clear from the East Timor experience that some investigative role with regard to the alleged perpetration of international crimes will virtually always be required in future peace operations. Furthermore, this investigative role will most likely be required from the very start of the deployment. External pressure for the peace force to be involved more extensively in such investigations than was the case for INTERFET will probably be applied from a variety of sources. In future operations, particularly if other more appropriate agencies cannot deploy in sufficient time and the political will is present, an intervening military force may need to consider developing a more extensive crimes against humanity/war crimes investigative capability. Any such capability could include a mortuary, a forensic laboratory, forensic specialists, military police investigators, trauma counsellors, translators and logistic support.⁴⁰

Defending mission-essential property

A number of national contingents deployed with INTERFET queried whether lethal force could be used to defend mission-essential property. In recent years State practice, as evidenced for example by the Rules of Engagement (ROE) for UN-mandated missions, indicates widespread acceptance of a right to use force, includ-

⁴⁰ This structure was suggested in a written submission by MAJ O'Kane, SO2 Legal, HQ

WESTFOR, "INTERFET Lessons Learnt Conference", *op. cit.* (note 16).

ing lethal force, for the defence of property designated as having special status.⁴¹ A key distinction is drawn between the defence of mission-essential property as an expression of national self-defence governed by international law, and the right of individual soldiers to defend themselves pursuant to their own municipal law. The ADF Legal Office, with advice from the Australian Attorney-General's Department, concluded that customary international law acknowledges a right to defend mission-essential property when the destruction of such property would seriously compromise the security of the deployed force.⁴²

The prosecution of any ADF member for acts allegedly committed in Australia or overseas on military operations, will be undertaken pursuant to the Defence Force Discipline Act 1982 (DFDA).⁴³ The initiation of proceedings pursuant to the DFDA is a matter for the appropriate ADF authorities. Consequently, an ADF clarification policy was developed in the period 1998-1999 in relation to the use of force to defend property. This policy effectively precludes prosecution in situations where the relevant ADF member has acted in accordance with training and the Rules of Engagement in using force to defend mission-essential property. The policy is subject to the following qualifications:

- any property designated as mission-essential property must be specifically and not generically defined in the ROE;

⁴¹ See, for example, the US document titled "Operations Decisive Endeavour (Bosnia) Commander's Guidance on the Use of Force", *US Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General's School, 1996, pp. 8-13, which provides for the defence of "property with designated special status". It should also be noted that UN forces have also been authorized to use force to protect property since at least the deployment of UN forces to Cyprus (UNFICYP). In Cyprus UN forces were permitted to defend UN "... posts, premises and vehicles that are under armed attack" (UN Doc. S/5653 (11 April 1964), para. 18(b)).

In relation to the deployment of UN forces to Rwanda (UNAMIR), the Security Council authorized the use of force to "protect the means of delivery and distribution of humanitarian relief", UN Doc. S/RES/918 (17 May 1994), para. 4.

⁴² Attorney-General's Department Advice dated 3 May 1998 and Defence Legal Office Brief entitled "The Use of Force in Defence of Mission Essential Property".

⁴³ The Crimes (Overseas) Act 1964, for example, which extends ordinary criminal jurisdiction to Australian citizens serving with the UN, does not apply to members of the Defence Force.

- the property must in fact be essential to the accomplishment of the mission or the security of the force;
- the use of lethal force to defend mission-essential property must be a last resort in a graduated level of force response unless circumstances do not permit such a graduated response;
- the ROE concerning mission-essential property will be subject to approval by the Chief of the Defence Force and the National Security Council;
- members must receive proper training to act in accordance with the ROE.⁴⁴

INTERFET's ROE explicitly provided for the use of force (up to and including lethal force) for the defence of mission-essential property. Initially the property identified as mission-essential was extremely broad and included, for example, all INTERFET vehicles. However, the range of property explicitly identified within the definition was eventually narrowed.

Detention management

Within hours of deploying to East Timor INTERFET troops found it necessary to detain a number of East Timorese.⁴⁵ To ensure that persons taken into custody received basic legal rights, the Commander of INTERFET directed that detainees were to be conveyed to the Force Detention Centre as soon as practically possible, preferably within 24 hours, but no later than 36 hours after being apprehended. Within 72 hours of a detainee's arrival at the Centre, the Senior Legal Adviser at the INTERFET Combined Legal Office was to review the detainee's case and, where appropriate, make arrangements for the transfer of the detainee to the appropriate Indonesian authorities. The Status of Forces Agreement with Indonesia provided, *inter alia*, that INTERFET could, in furtherance of its mandate, detain a person who was committing or had attempted to commit offences

⁴⁴ *The Use of Force in Defence of Mission Essential Property*, *op. cit.* (note 42).

⁴⁵ For example, it was reported on 22 September 1999 that INTERFET had "arrested eight East Timorese — including members of

the militia — for carrying weapons in the capital Dili", Max Blenkin and John Martinkus, "Militia disarmed: Peacekeepers arrest eight", *The Daily Telegraph*, 22 September 1999, p. 3.

in relation to persons or property. Furthermore, the agreement required detainees to be handed over to the appropriate authorities for the purpose of dealing with the alleged offender. However, handing detainees over to Indonesian civilian police proved unsatisfactory because of the collapse of the civil administration (including the judiciary and court system) in East Timor.⁴⁶ The detainees were simply released by Indonesian police soon after the transfer of custody.

With the collapse of the Indonesian judicial and detention systems, INTERFET faced the challenge of balancing the rights of detainees to natural justice and due process against the need to maintain detention. On 21 October 1999, INTERFET addressed this issue through the establishment of the Detention Management Unit (DMU) as an interim judicial system, pending the re-establishment of a civil judiciary.

The DMU reviewed 60 cases between 21 October 1999 and 12 January 2000, when a civil judiciary, under the auspices of UNTAET, assumed responsibility for persons arrested/detained in connection with criminal offences. Prior to this transfer of custody, the bulk of the DMU's work consisted of dealing with persons detained on suspicion of the commission of a serious criminal offence — murder, rape, serious assault, kidnapping and arson. The reviews conducted by the DMU were akin to a bail hearing, albeit conducted on the basis of written submissions. The DMU did not conduct trials and reserved for UNTAET the responsibility of doing so. The DMU consisted of a Reviewing Authority,⁴⁷ Prosecutor, Defending Officer, two Visiting Officers and a Police Expert.

⁴⁶ On 4 October 1999, the UN Secretary-General reported: "The Indonesian police...appear to have withdrawn from [East Timor]. In Dili, there is a token presence of 12 persons, comprising senior officers, investigators and basic administrative staff.... The Indonesian police have confirmed that the judicial and detention systems are not operating. With regard to detainees, the multinational force has established basic, short-term legal and practical provisions for preventive detention, in consultation with UNAMET and the International Committee of the Red Cross (ICRC)". *Op. cit.* (note 10), para. 13.

⁴⁷ With a view to emphasizing the independent nature of the review, the Reviewing Authority was selected from the Australian Judge Advocates' Panel established under the Australian Defence Force Discipline Act 1982. The Judge Advocates' Panel is made up of officers who have been enrolled as legal practitioners in Australia for not less than five years. These officers are nominated by the Judge Advocate General and appointed to the panel by either the Chief of the Defence Force or a service chief. Members of that panel exercise their judicial functions unfettered by command direction.

The Detention Management Unit, which was established in consultation with both the UN and the ICRC, provided a review of detention independent of command direction and consistent with principles of international law. In particular, the DMU relied upon the framework of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War. This Convention was designed to "... regulate the relationship between foreign military forces and a civilian population where the force exercises sole authority or is the only agency with the capacity to exercise authority in a distinct territory".⁴⁸ INTERFET's incarceration of detainees was not the first occasion a multinational peace force had found it necessary to hold individuals in detention either in the absence of a workable local criminal justice system or on the basis of agreement by host nation authorities. In the late 1950s during the deployment of the UN Emergency Force (UNEF) in Sinai following the Suez Crisis of 1956, the UN Secretary-General stated that:

"A right of detention, which normally would be exercised only by local authorities, is extended to UNEF units. However, this is so only within a limited area where the local authorities voluntarily abstain from exercising similar rights, whether alone or in collaboration with the United Nations. Were the underlying principle of this example not to be applied, United Nations units might run the risk of getting involved in differences with the local authorities or public or in internal conflicts which would be highly detrimental to the effectiveness of the operation and to the relations between the United Nations and the host Government."⁴⁹

As mentioned above, the effective law in East Timor at the time of INTERFET's deployment was Indonesian law. Without prejudice to the question of the legitimacy of the application of Indonesian law, the UN Secretary-General recognized the *de facto* re-

⁴⁸ Michael J. Kelly, "Responsibility for public security in peace operations", in Helen Durham and Timothy L. H. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, The Hague/London/Boston, 1999, p. 151.

⁴⁹ Report of the UN Secretary-General, *United Nations Emergency Force: Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943 (9 October 1958), para. 165.

ality of Indonesian law in his report on the situation in East Timor.⁵⁰ The Fourth Geneva Convention requires the application of the prevailing legal regime by military forces in their relations with the local civilian population. This approach emphasizes the need to avoid retrospectivity and to ensure popular familiarity with the law. On 27 November 1999, UNTAET also ratified the application of Indonesian law in East Timor, in so far as those laws did not conflict with internationally recognized human rights standards and the mandate conferred on UNTAET pursuant to Security Council Resolution 1272.⁵¹ The Detention Management Unit also applied Indonesian law.

In order to provide INTERFET with the ability to assist UNAMET with orderly governance of East Timor and to ensure the security of persons and property there, COMINTERFET signed a Detainee Ordinance on 21 October 1999. The Ordinance was to be implemented subject to the exigencies of the situation prevailing in East Timor from time to time⁵² and it also suspended any law or provision applying in East Timor with regard to detention or arrest inconsistent with its terms.⁵³ The Ordinance was based on the framework of the Fourth Convention and specified Indonesian criminal law as the applicable law in East Timor.

A detainee was defined as any person, other than a member of INTERFET,⁵⁴ deprived of personal liberty by INTERFET except as a result of a conviction for an offence. A person could only be held as a detainee if he/she fell within one or more of the fol-

⁵⁰ *Op. cit.* (note 10), paras 32, 53-56.

⁵¹ Regulation No. 1999/1 (27 November 1999), Section 3. The mandate given to UNTAET, in broad terms, is to administer East Timor by exercising "... all legislative and executive authority, including the administration of justice", SC Res. 1272, UN Doc. S/RES/1272 (25 October 1999), para. 1.

⁵² Ordinance clause 7. This provision permitted INTERFET some flexibility to administer detainees within operational constraints. For example, it was recognized that, while INTERFET would make every effort to ensure that detainees were delivered to the FDC

within 24 hours of detention, this was not always possible to achieve because transport assets were often required for other more urgent operational tasks. Any non-compliance with the Ordinance would have to be justified.

⁵³ Ordinance clause 3.

⁵⁴ Members of INTERFET were not dealt with by the Detainee Ordinance. In accordance with general principles of privileges and immunities accorded to military forces, members of INTERFET alleged to have committed offences were dealt with under their national laws.

lowing classes identified by the Ordinance:

- a person detained on suspicion of the commission of a serious criminal offence;
- a person committed for trial in connection with the alleged commission of a serious offence;
- a person detained as a voluntary detainee;⁵⁵ and
- a person detained as a security risk.⁵⁶

The Ordinance established some limitations upon the operation of the Detention Management Unit. The first limitation was that the DMU could only consider the continued detention of persons held on suspicion of having committed a serious offence.⁵⁷ If the offence was not a serious one, the detainee was to be released. This limitation was based partly upon the need to prioritize efforts to deal only with serious matters, but also to ensure that persons were not being deprived of their liberty for substantial periods after committing minor offences.

The second limitation was that the DMU could only consider the continued detention of persons alleged to have committed serious offences after the deployment of INTERFET on 20 September 1999. Article 70 of the Fourth Convention prohibits the Occupying Power from prosecuting and punishing protected persons for acts (other than breaches of the laws and customs of war) that they are alleged to have committed before the territory was occupied. Furthermore, in light of the agreements of 5 May 1999, the Indonesian government had retained responsibility for the maintenance of law and order until INTERFET's deployment. For these rea-

⁵⁵ A voluntary detainee was defined as a person held at the FDC at that person's own request (Ordinance clause 1). There was at least one voluntary detainee held in the FDC. The notion of voluntary detention, which was also based on the Fourth Geneva Convention (see for example Article 42(2)), allowed a person at his/her own request to seek INTERFET protection where the person believed that his/her security may be threatened by hostile actions committed by the public.

⁵⁶ Ordinance clause 12.

⁵⁷ The Ordinance defined serious offence as an offence against certain chapters of the Indonesian Penal Code — essentially offences attracting a maximum sentence on conviction of more than five years (Ordinance clause 1). Examples of serious offences included: murder, manslaughter, grievous bodily harm, rape, possession of a weapon with intent to injure, carrying a weapon with criminal intent, causing an explosion likely to endanger life or property, kidnapping or looting.

sons, it was argued that any offences that were committed prior to 20 September were either a matter for the Indonesian authorities, the civilian judiciary that would be established under the auspices of UNTAET or some other international tribunal yet to be established.

Permitting persons accused of committing offences prior to 20 September 1999 to remain at large in East Timor was likely to encourage violent acts of revenge and so impact upon INTERFET's ability to maintain peace and security. Consequently, COMINTERFET decided that anyone accused of committing offences prior to that date could be held as a security detainee by INTERFET, to be handed over to the civil judiciary in East Timor once it was established. This class of detainee was recognized under the Ordinance but not handled by the DMU. The security detainee regime was to be governed by the relevant provisions of the Fourth Geneva Convention,⁵⁸ with access to detainees being provided to ICRC delegates. These detainees would be held until an appropriate judicial system capable of dealing with the alleged offences of the detainees was established.

The DMU provided COMINTERFET with a mechanism to deal with detainees on an independent legal basis ensuring that continued detention was subject to review according to legal principles and, therefore, not arbitrary. The challenge was to take due account of the military imperative to restore peace and security while ensuring that individual rights to natural justice and due process were not abused. In the opinion of the members of the UN Secretary-General's team of human rights experts:

"As far as the question of treatment of detainees is concerned, the conduct of INTERFET has been exemplary. The delegation met with six detainees in conditions in which it could be confident that the detainees would have no fear of speaking frankly of any complaints as to their treatment. There were none. The ICRC, which has full access, confirmed that it too had received no complaints from any of the detainees. The tone was set by the Force Commander who, especially in the beginning, established

⁵⁸ Article 78 and Section IV.

the pattern by personally visiting the detention area. The establishment of a detention-management team also acts as a safeguard against abuse.⁵⁹

In order to establish the standards and procedures of detention, COMINTERFET signed the Orders for the Force Detention Centres, of 21 October 1999. Those directives ensured that detention in the FDC complied with international law standards. Using the framework of the Fourth Geneva Convention⁶⁰ the Orders provided for notifying the detainee's family of the detainee's whereabouts,⁶¹ the duties of the Officer-in-Charge of the FDC⁶² and the Visiting Officer,⁶³ and visits by the ICRC,⁶⁴ a medical officer, chaplain, legal practitioner, and members of the detainee's family.⁶⁵ The Orders stipulated standards to be maintained in searching⁶⁶ and accommodating detainees.⁶⁷ Provisions also existed as to a detainee's cleanliness,⁶⁸ provision of meals,⁶⁹ purchases,⁷⁰ exercise,⁷¹ religious activities⁷² and medical treatment.⁷³

Privileges and immunities of INTERFET Forces

On 23 August 1999 the government of the Republic of Indonesia and the United Nations entered into a Status of Mission Agreement (SOMA) formalizing the status of the United Nations Mission in East Timor (UNAMET). In general terms the SOMA provided that the government of the Republic of Indonesia would extend to UNAMET, as an organ of the UN, the privileges and immunities

⁵⁹ *Situation of Human Rights in East Timor*, Report to the UN Secretary-General of the Joint Mission to East Timor undertaken by the Special Rapporteur of the Commission of Human Rights on Extrajudicial, Summary or Arbitrary Executions, Ms Asma Jahangir, the Special Rapporteur of the Commission on the Question of Torture, Sir Nigel Rodley, and the Special Rapporteur of the Commission on Violence Against Women — Its Causes and Consequences, Ms Radhika Coomaraswamy. UN Doc. A/54/660 (10 December 1999), para. 64.

⁶⁰ See, for example, the Fourth Geneva Convention, Article 76.

⁶¹ Order 10.

⁶² Orders 3-6.

⁶³ Orders 21 and 22.

⁶⁴ Orders 2.

⁶⁵ Orders 23-26.

⁶⁶ Order 7.

⁶⁷ Orders 11-16. Provisions were made for detaining men and women in separate quarters, and for the detention of persons under the age of 18.

⁶⁸ Order 16.

⁶⁹ Order 17.

⁷⁰ Order 18.

⁷¹ Order 19.

⁷² Orders 23-26, and 27.

⁷³ Orders 23-26, and 29.

provided in the Convention on Privileges and Immunities of the United Nations. The Indonesian government also undertook to provide, at the request of the Special Representative of the Secretary-General (SRSG), armed escorts to protect UNAMET members during the exercise of their functions. Furthermore, the SOMA required the Indonesian government to ensure the safety and security of UNAMET and its members. The SOMA continued to apply to UNAMET until the Mission was replaced on 26 October 1999 by UNTAET.

The deployment of INTERFET to East Timor was based on Security Council Resolution 1264 and therefore was not under the umbrella of UNAMET. Consequently, the above-mentioned Status of Mission Agreement did not apply to INTERFET and new arrangements were considered necessary to clarify INTERFET's status. The Status of Forces Agreement (SOFA), already referred to above, between INTERFET and Indonesia established the privileges and immunities of INTERFET. That agreement was negotiated by Australia as the lead nation for the deployment but provided for Indonesia to confirm its application, on request, to each participating State.

The SOFA, in general terms, required members of INTERFET to maintain strict neutrality and to refrain from any action incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the SOFA. It established that INTERFET, its property, funds, assets and its members⁷⁴ were to enjoy the privileges and immunities specified in the SOFA, as well as those provided for in the Convention on Privileges and Immunities of the United Nations. These privileges and immunities included immunity from Indonesian criminal and civil jurisdiction, as well as freedom from taxation, and local licensing requirements. INTERFET members (military and civilian) were immune from local criminal and civil jurisdiction. They were permitted to possess or carry armaments when authorized to do so by their orders, and it was agreed that members of the force would enjoy freedom of movement into, throughout and out of East Timor, including Atauro Island and the Ambino enclave.

⁷⁴ Excluding locally recruited personnel to the extent that they were not carrying out

clerical and administrative tasks for the purposes of INTERFET.

Following the handover of responsibility for East Timor to UNTAET on 26 October 1999, assurance was given by UNTAET on 16 December 1999 that INTERFET should continue to enjoy, *mutatis mutandis*, the privileges and immunities provided for in the SOFA of 24 September 1999. This arrangement with UNTAET continued until INTERFET formally transferred its responsibilities to UNTAET on 23 February 2000, and was consistent with Security Council Resolution 1272 which requested that INTERFET and UNTAET cooperate closely with each other.⁷⁵

Conclusion

The INTERFET deployment in East Timor posed an array of challenges covering all aspects of the operation — including the legal field. The success of the operation guarantees INTERFET an honourable place in the annals of the history of contemporary peace operations. The challenges faced by INTERFET reflected many of the common experiences and issues that have recurred in the course of recent complex peace operations. With regard to promoting the rule of law and defining the international humanitarian and human rights legal norms that should apply in such situations, the operation marked a successful evolution in the approach that has been adopted by Australia. We are not suggesting here that it ran perfectly or that it represents a model for doctrinaire replication. However, the Australian approach to many of the legal challenges confirmed the existence of some fundamental general principles and issues that must be planned for and considered before any future military deployment into complex emergency situations.

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⁷⁵ UN Doc. S/RES/1272 (25 October 1999), para. 9.

Résumé

Aspects juridiques de l'implication de l'Australie dans l'*International Force for East Timor* (INTERFET)

par MICHAEL J. KELLY, TIMOTHY L. H. MCCORMACK,
PAUL MUGGLETON ET BRUCE M. OSWALD

Sur la base de la résolution 1264 du Conseil de sécurité (du 15 septembre 1999), une force multinationale a été déployée au Timor Oriental, afin de rétablir l'ordre et de parer à l'écroulement de l'administration locale; il s'agit de l'*International Force for East Timor (INTERFET)*. L'Australie a assumé le rôle de pays responsable dans une force qui était composée de contingents militaires de plusieurs pays de la région. Après avoir analysé la situation juridique du territoire et les conséquences qui en découlent, les auteurs passent en revue un nombre considérable de problèmes d'ordre juridique qu'il fallait résoudre dans cette opération internationale de type nouveau (même si les forces australiennes ont fait leurs premières expériences lors de l'engagement en Somalie). De l'avis des auteurs, l'intervention de l'INTERFRET conservera « une place honorable » dans l'histoire des missions des Nations Unies.

The Chinese humanitarian heritage and the dissemination of and education in international humanitarian law in the Chinese People's Liberation Army

by
HE XIAODONG

China is a country with a civilized history of thousands of years and has a rich traditional culture in which the concepts of humanity, justice and morality have long played a very important part. Throughout the millennia many aphorisms of Confucius and Mencius, such as those that “a man of humanity and benevolence will care for others”, “no one in the world can challenge a man who is human and benevolent” and “he who cares for others is constantly cared for by them; he who respects others is constantly respected by them”, have shaped the lives of the Chinese people. This shows how deeply rooted such concepts are in China. They have a lot in common with today's humanitarianism.

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The Chinese humanitarian heritage

Looking back over Chinese history, it is easy to find many successful rulers and strategists who liked to cultivate “virtue” and considered that not only military strength but also humanity and morality were decisive factors in winning a war, i.e. in order to win a war, you should first win the people’s hearts, you should take care of the people and protect them. In ancient China, the legendary emperor of Huangdi defeated the emperor of Yandi because Huangdi knew not only how to train the soldiers but also how to win the hearts of the people. He helped them in their farm work, so “people from everywhere would like to see the emperor of Huangdi act as the king, because he is humane and benevolent”. Huangdi gained the people’s support and eventually became strong enough to win the final victory over the emperor of Yandi, whereas the latter, though initially very powerful, lost the war in the end because he was inhuman, violent and savage and had lost the support of the people.

Huang Gongshi’s “Three Stratagems” was a major work in the famous annals of Chinese military history, the “Seven Books of Military Manœuvres”. One of its most important viewpoints was that the final outcome of a war would be decided by the people. It says that “with the support of the people, a state will be successfully governed and the inhabitants will live in peace and contentment; without the support of the people, a state will perish and families will be broken up”; that “to run a state, the first thing is to know what the great masses think and to satisfy their needs”; and that “it is the people that will win a war and defeat the enemy”. It thus points out that only with the support of the people will a state be made strong and prosperous and a war be won, so the ruler of a state must “appease the people” and “care for the people”.

The notion that the people are the dominant factor in military struggles has been quite common in our history and examples of it are very easily found, for it embodies an irrefutable truth, a truth to which our late Chairman Mao Zedong firmly adhered in his leadership of the revolutionary wars in China when he said that “the richest source for the greatest strength of war comes from the people”. It was due to this concept that the Chinese People’s Liberation Army

(CPLA) grew, within the brief space of about twenty years, from a weak military group of only twenty to thirty thousand men into a strong regular force of several million which defeated the Guomindang forces outnumbering it once, dozens and even hundreds of times and won the final victory of the Civil War.

Although the above-mentioned concepts of “humanity”, “morality”, “appease the people” and “care for the people” were not quite in line with the “protection of civilians and the victims of war” that is the aim of international humanitarian law, they have at least one thing in common, namely the humanitarian principles they all advocated. The principles of revolutionary humanitarianism consistently respected by the CPLA are nevertheless in close compliance with those of international humanitarian concepts, especially with regard to the protection of the ordinary people and the treatment of captives.

The humanitarian tradition of the CPLA

The Chinese People’s Liberation Army, as the name itself indicates, is first of all an army of China, so it will beyond doubt succeed and develop the best of Chinese traditional culture. What is more important, however, is that it is also a people’s army, an army of the people, from the people and for the people. To take good care of the people, to protect the people and to serve the people wholeheartedly are the sole purpose and aim of this army. For several decades, either in the past revolutionary wars or in disaster relief operations, the CPLA has proved itself to be a highly disciplined people’s own army which never commits the slightest offence against the people.

As early as 1927, Mao Zedong laid down for the Red Army of the Chinese Workers and Peasants the *Three Main Rules of Discipline* and then in January 1928 the *Six Points for Attention*, in which most of the provisions were connected with protection of the people’s interests. For example, the second rule of the *Three Main Rules of Discipline* was “Do not take a single potato from civilians” and the *Six Points for Attention* were, respectively, “Put back the door boards you have taken down for bed boards”; “Fasten the straw bundles you used for bedding”; “Speak politely”; “Pay fairly for what you buy”; “Return everything you borrowed”; and “Pay for anything you

damaged". Later these three rules and six points were developed into three rules and eight points. Some modifications were made. The second rule of discipline was changed into "Do not take a single needle or piece of thread from the masses". As for the original six points for attention, the third, fourth, fifth and sixth were preserved but rearranged as Points 1 to 4. The original Points 1 and 2 were cancelled, while four new points were added: "5. Do not hit and swear at people"; "6. Do not damage crops"; "7. Do not take liberties with women"; "8. Do not maltreat captives". With this last added point, the requirement that lenient treatment be given to captives has from then on been laid down as a written command for the CPLA.

The *Three Main Rules of Discipline* and the *Eight Points for Attention* are now the top set of disciplinary regulations and basic code of conduct for every member of the CPLA.

Three Main Rules of Discipline:

1. Obey orders in all your actions.
2. Do not take a single needle or piece of thread from the masses.
3. Turn in everything captured.

Eight Points for Attention:

1. Speak politely.
2. Pay fairly for what you buy.
3. Return everything you borrow.
4. Pay for anything you damage.
5. Do not hit or swear at people.
6. Do not damage crops.
7. Do not take liberties with women.
8. Do not maltreat captives.

Giving lenient treatment to captives has always been a tradition of the CPLA. In its early stages the Red Army made it clear that one of the fundamental rules of discipline was: "Fight against the warlords, but not their soldiers, and give lenient treatment to the captives". Together with the *Three Main Rules of Discipline* and *Six Points for Attention*,

in 1928 four policies for the lenient treatment of captives were also laid down. They were: "Do not hit, swear at, kill or maltreat captives", "Do not search captives' pockets", "Give medical treatment to wounded captives" and "Let captives stay or set them free at their own will". These rules were later developed into *Five Policies for Lenient Treatment of Captives*: "Do not kill or injure captives"; "Do not hit, swear at, maltreat or insult captives"; "Do not confiscate the private property of captives"; "Give medical treatment to sick and wounded captives" and "Set the captives free".

In 1937, three main principles for political work were put forward and among them was a mandate to give lenient treatment to captives. In October 1947, Mao Zedong said in the *Manifesto of the CPLA* that "our army will not kill nor insult any of the Guomindang soldiers and officers who have laid down their arms. We will collect those who are willing to stay and repatriate those who are willing to leave". This once again shows that to treat captives leniently has long been a policy as well as a good tradition of the CPLA. Under the impact of such a policy the enemy forces eventually disintegrated, while the CPLA grew quickly, finally defeated the well-equipped eight million Guomindang forces and established a new people's regime.

These policies of giving lenient treatment to captives reflect revolutionary humanitarianism and, as may easily be observed, were all adopted by the CPLA well before 1949. Thus even before the four Geneva Conventions were formally established, the CPLA had already carried out humanitarian policies for over twenty years. This undoubtedly served as a sound foundation for the CPLA to perform its future international obligations.

Implementation and observance of international humanitarian law

With the approval of the Standing Committee of the People's Congress of the People's Republic of China, China ratified the four 1949 Geneva Conventions in 1956 and the two 1977 Additional Protocols in 1983, thereby becoming party to each treaty. The Chinese government and the CPLA have ever since abided by the provisions of the Geneva Conventions voluntarily. During the Korean War in

the early fifties, the Chinese Volunteers' Army strictly observed the international humanitarian principles and treated the prisoners of war most humanely, although at that time the PRC had not yet ratified the Geneva Conventions (signed in 1949 by the Republic of China). Even though the Chinese Volunteers' Army had great difficulties with its logistic supplies and was living under very tough conditions, it nonetheless did its utmost to provide the POWs with the same living standard as its own soldiers, and sometimes even better. It also gave medical treatment to all the wounded, including the POWs and foreign civilians. For the dead, it filled out death certificates and sent them to the enemy side together with the mortal remains. In performing these international obligations, it did everything required of it by humanity and duty, as even the American media of that time had to agree. During the border conflict with India in the sixties, the CPLA rescued and helped the wounded on the battlefield, treated the POWs in full compliance with the requirements of the Geneva Conventions, and at the end of the conflict it not only repatriated all the POWs but also returned to the Indian side all the weapons and equipment captured during the conflict.

In the four 1949 Geneva Conventions, there is a common provision (i.e. Article 49 of the First Convention, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth) stipulating that "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article". Accordingly, many of the requirements of the Conventions are integrated into China's domestic laws. For example, in the "Interim Regulations of the People's Republic of China on Punishment of Servicemen Who Commit Crimes Contrary to Their Duties" adopted at the 19th session of the Standing Committee of the 5th People's Congress on 10 June 1981, there were two provisions particularly concerning the protection of civilians and the treatment of POWs. Article 20 provides that "any serviceman who plunders or cruelly injures innocent inhabitants in an area of military operation shall be sentenced to a fixed-term imprisonment of not more than 7 years; if the breach is serious, the offender shall be sentenced to a fixed-term imprisonment

of more than 7 years; if the breach is especially serious, the offender shall be sentenced to life imprisonment or death". Article 21 provides that "any serviceman who maltreats a prisoner of war shall be sentenced, if such maltreatment is serious, to a fixed-term imprisonment of not more than 3 years".

In the new Criminal Law enacted in 1997, the aforesaid Interim Regulations are substituted by Chapter 10, entitled "Crime in Contravention of Servicemen's Duties". The stipulations of the original Articles 20 and 21 are kept but modified, thus making protection of civilians and POWs in wartime a written law of China. Article 446 of the new Criminal Law adds the words "in wartime" to Article 20 so as to more precisely reflect the requirements of the Geneva Conventions. In 1997, China's first National Defence Law was enacted. Its Article 67 clearly specifies that "in its military relations with other countries, the P. R. China observes the relevant treaties and agreements that it has concluded, acceded to or accepted". Such domestic legislation has provided strong legal support and a firm basis for the CPLA to follow and abide by international humanitarian law.

Dissemination of and education in international humanitarian law in the CPLA

Apart from implementation and observance of the international treaties, another important obligation that has to be performed by the contracting parties is to disseminate and promote the treaty among their own people. In the two 1977 Protocols, there are two articles addressing this issue. Article 83 of Protocol I provides that "[t]he High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population." Article 19 of Protocol II provides that "[t]his Protocol shall be disseminated as widely as possible". In compliance with these requirements, the CPLA has always taken the dissemination

of and instruction in the law of war to be an important part of the education and training of its members.

The education and training of the CPLA are divided into two main parts, school education and field training. In the military schools and colleges of the CPLA, instruction in the law of war is included in the teaching programmes, and to learn about it is a must and a compulsory course for the cadets. In the CPLA's political colleges, there are a great number of professors and experts in international law and the law of war; there are also some faculty sectors that specialize in teaching and studying the law of war. The CPLA's Xian Political College has set up a military law department to cultivate legal professionals with bachelor's or master's degrees throughout the CPLA, and the law of war is one of the areas of research offered for its postgraduates. The National Defence University, the highest learning academy of the CPLA, runs special lectures each year on the law of war for officers in training at or above the division and corps level. Of the Ph.D. students at the CPLA's Academy of Military Science, there are also some who major in the law of war. As for the grassroots units, instruction in the law of war is, however, given together with the political education and military training and forms one part of the CPLA's political work.

Political work is the lifeline of the CPLA to guarantee and enhance its fighting capability. Only with vigorous political work was the CPLA able to grow quickly from weak to strong and to win the final victory of the Liberation War. Revolutionary humanitarianism has always been an important part of that work. In the CPLA, there is a competent and integrated political working system. From the highest levels down to the most basic units there are political working organs and personnel so that every person in the CPLA will be able to receive appropriate political education. Thus, education in the law of war can be given effectively and quickly throughout the CPLA.

Since 1986 the CPLA has launched three Five-Year Law Dissemination and Education campaigns. These campaigns include spreading knowledge of the punishment that breaches of the law of war entail. To enable the policies to protect civilians and POWs to be strictly implemented in wartime, besides education in peacetime the

CPLA also has plans for pre-war practice sessions and a variety of supporting organizations to back these plans. In military exercises at all levels, the setting up of POW collection centres has remained one of the indispensable training subjects. The task of such centres is to group together, administer and protect POWs. During the exercises, a sort of mass-working organization will also be formed, usually called the mass-working section or mass-working group. Its task is to monitor and supervise the observance of mass discipline and the protection of civilian lives and property. This political working system has played a very active and effective role in dissemination of the law of war throughout the CPLA and has proved to be a great advantage for the military with such a system, at least in the field concerned.

Article 82 of Protocol I stipulates that “[t]he High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriated instruction to be given to the armed forces on this subject”. In accordance with this requirement, the CPLA has devoted great efforts to building up and developing a group of legal workers. To date, more than 250 sections of legal advisors with around 2,000 registered military lawyers, 10% of them with a Master’s degree, have been set up in the CPLA units at or above the corps level, while at or below the division level the CPLA has over 20,000 legal consultative stations with about 60,000 legal consultants. One of the military lawyers’ and legal consultants’ main tasks is to advise their units and commanders on the law of war and to supervise the application and implementation of that law.

Together with dissemination and education, studies and research on the law of war are also efficiently conducted in the CPLA. From the general headquarters level down to the military schools, there are some research institutes and academicians specialized in the study of the law of war. In addition to the research and educational institutes, an interest in and a desire to study the law of war has been shown, mainly in recent years, by a large number of soldiers as well as officers, many of whom become entirely self-taught experts in that field. Of those who

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are assigned by the CPLA to study abroad, a lot have chosen the law of war as an optional or compulsory course. In military journals such as "Chinese Military Law" and numerous other military or non-military journals, many very impressive articles are written by those non-professional law researchers. Along with its research and educational work, the CPLA has since the fifties published a considerable amount of literature on the law of war either through its publishing houses or in military or non-military magazines. As early as 1954 the General Political Department of the CPLA had, for example, compiled and published "A Collection of International Treaties Concerning Rules of War"; in 1985, the Publishing House of the CPLA published "Documents on the Law of War"; in 1988, the Publishing House of the National Defence University published "Introduction to the Law of War"; in 1993, the Military Science Publishing House of the CPLA published "International Military Conventions" as part of the "China Military Encyclopaedia"; and in 1994 the Military Court of the CPLA's Shenyang Major Military Command published "Selections of Data on the Law of War". These publications contribute greatly to the dissemination of and education in international humanitarian law within the CPLA.

Looking ahead

Half a century has passed and great changes have taken place all over the world since the signing of the four 1949 Geneva Conventions. With the efforts made jointly by all peace-loving countries and people, the Cold War has been brought to an end, the threat of a world war has diminished, and peace and development have become the world's foremost consideration. The people of the world have shown an ever stronger desire for peace and need a more stable and peaceful international environment to develop the economy for their common interests.

For the past fifty years, however, we have as yet failed to reach true peace in this world. Though the danger of a world war is diminishing, regional wars and various armed conflicts have broken out as a major threat to world peace. People in many countries and regions are still suffering from these wars and conflicts. The determination voiced in the UN Charter to "save succeeding generations from the

scourge of war" has not been realized, and its requirement "to practice tolerance and live together in peace with one another as good neighbours ... and to ensure ... that armed force shall not be used, save in the common interest" has not yet been met. Therefore, we have to work hard or even harder before a more peaceful and stable world can be built. China is a peace-loving country. It respects and observes the UN Charter at all times and is always determined to devote itself to the maintenance of world peace. Since opening up to the world, China, in accordance with the Five Principles of Peaceful Existence, has played an increasingly important role in world affairs, and the CPLA, as the main military force of China and the numerically biggest army in the world, has an unshirkable duty to perform in safeguarding world peace.

China never thinks it right to resolve any dispute by waging wars or using force. The military should be a means of safeguarding peace and violence may only be used to combat violence, with peace as the final aim. Such a notion can be traced far back into Chinese history. According to Zuo's "Commentary" (the earliest chronicle of China, covering the years of 722 B.C. to 454 B.C. and compiled by Tso Ch'iu-ming in the 5th century B.C.), during the Spring and Autumn and the Warring States periods, King Zhuang of the Chu kingdom had pointed out that the Chinese character for *wu* (use of force) was made up of *zhi* (stop) and *ge* (weapon), meaning that the final goal of waging a war was to stop the war itself and finally reach peace. So we can see that to get rid of wars completely has forever been a common ideal of mankind.

Unfortunately, thousands of years have passed and war, this cancer of human society, is still here poisoning the health of our world. But we do have a hope. We have hope because of the will and spirit reflected in the UN Charter and the Geneva Conventions. We have hope because although we cannot for the time being rid the world of war, we have tried, are still trying and will keep on trying our best to reduce any possible harm and suffering that war brings to all mankind. This is our understanding of today's international humanitarianism and this will be the course unswervingly pursued by the CPLA.

The advance of global integration has made this planet smaller and smaller, and with the increasingly frequent communica-

tions between the various countries, our interests have become more and more closely intermeshed. Any war or armed conflict, wherever it may occur in this small world, will have a more direct impact than ever upon each one of us. The rapid development of science and technology has made modern wars even crueller, which in turn raises unprecedented challenges to the application and implementation of the law of war. The Geneva Conventions came into force fifty years ago, but we still have a lot to do and a long way to go before we can have not only a lasting but also an eternal peace. With that ultimate aim, the CPLA will continue its work of dissemination and education in the law of war, will pay more attention to the outside world, will try to take a more active part in international activities relating to international humanitarian law and will further strengthen its cooperation with the International Committee of the Red Cross (with which it has been working for years and has achieved a great deal, especially in spreading knowledge of that law) and other peace-loving international organizations in various fields in order to make its due contribution to promoting international humanitarian law and the peace of the world as a whole.



Résumé

L'héritage humanitaire de la Chine et l'enseignement du droit international humanitaire au sein des forces armées de la République populaire de Chine

par HE XIAODONG

Un bref regard sur l'histoire de la Chine montre que les princes et les stratèges ont toujours insisté sur la nécessité de ménager la population civile dans la guerre, car, sans le soutien du peuple, il ne serait pas possible de contrôler un pays. Un proverbe chinois dit: «Pour gagner une guerre, il faut d'abord gagner le cœur des gens». Au début de la guerre révolutionnaire en Chine, Mao Zedong a promulgué des directives qui vont dans le même sens, en insistant particulièrement sur la discipline des soldats. Sous une forme adaptée, ces directives sont valables encore aujourd'hui. L'auteur décrit les mesures prises et les programmes en cours actuellement au sein de l'armée chinoise pour diffuser les connaissances nécessaires en droit international humanitaire parmi les officiers et la troupe. Il conclut en constatant que même après la fin de la guerre froide, les Conventions de Genève n'ont rien perdu de leur importance.

Promoting the teaching of international humanitarian law in universities: the ICRC's experience in Central Asia

by
LUISA VIERUCCI

The ICRC is most visible in times of armed conflict, when it intervenes to protect and assist the victims in accordance with its mandate. Less well known are the activities which the ICRC carries out in time of peace (also referred to as preventive action). They include spreading knowledge of international humanitarian law among the civilian and military sectors of society, providing legal advice to state authorities on that branch of law and helping National Red Cross and Red Crescent Societies to develop their capacity.¹

Since the early 1990s the ICRC has been promoting the teaching of international humanitarian law in the universities of countries which, though not necessarily at war, need to train lawyers in that field. At present such programmes, under the direction of a dozen ICRC delegates and several local assistants, are being carried out in some 25 countries. The aim of the programme is both to improve knowledge of international humanitarian law among future decision-

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makers and to make the ICRC and its activities better known. One of the regions where the ICRC university programme has been strongly developed is the former Soviet Union, where the newly independent States, especially those of Central Asia, had little or no tradition in international law, let alone in international humanitarian law.²

After the break-up of the USSR in 1991 and their accession to independence, the four countries examined here — Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan — had to train their own diplomats and increase their public officials' knowledge of international law. Under the circumstances, the ICRC offered to start developing the teaching of international humanitarian law at the universities of Central Asia.³ The programme was first directed by the ICRC in Moscow and has been continued since 1996 by the ICRC's regional delegation in Tashkent, Uzbekistan.

Ways to develop the teaching of international humanitarian law in universities

To devise methods of instruction in international humanitarian law that were compatible with the particular characteristics of the Central Asian universities, allowance had to be made for the legacy of the Soviet educational system, the desire of the new States to build their national identity on restored historical foundations, and the limited financial resources available to the Ministries of Education. In Soviet times the professional training of lawyers at Central Asian universities was almost exclusively geared to preparing enforcement officials and members of the judiciary, and attention was consequently centred on the traditional branches of the law (civil, criminal and

¹ See J. L. Chopard, "Dissemination of the humanitarian rules and cooperation with National Red Cross and Red Crescent Societies for the purpose of prevention", *IRRC*, No. 306, May-June 1995, pp. 244-262.

² During the Soviet era international law was predominantly taught by the universities in Moscow, Kiev and St. Petersburg. Moreover,

before independence in Central Asia there was little need to develop that branch of law because international relations were maintained primarily from Moscow.

³ Tajikistan has not been included in this programme, because the protracted armed conflict has given rise to special circumstances there.

constitutional law). Some specialists in constitutional law have recently turned to international law, but there are as yet few international lawyers in that region, and they are mainly interested in the commercial or financial aspects of international transactions.

In the early 1990s, when the ICRC began to approach the governments of the various countries in Central Asia, all the newly created republics had succeeded or acceded to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.⁴ However, the authorities, academic and legal circles and the general public knew very little about these agreements and local legislation was not in compliance with the obligations that States had undertaken by adhering to them. While it is the responsibility of the parties to the Geneva Conventions to familiarize military personnel with their content in advance, in peacetime, and also to include the study thereof in programmes of civilian instruction,⁵ the ICRC offered to help governments set up a programme to promote international humanitarian law and enable universities to develop a tradition of teaching and conducting research into it so that graduates will be able to advise the authorities on its implementation and further development. At the same time, it was deemed necessary to ensure that those students who were potential decision-makers, for instance students in political science, had at least a basic knowledge of that law.

⁴ Kazakhstan succeeded to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 on 5 May 1992, Kyrgyzstan on 18 September 1992 and Turkmenistan on 10 April 1992, whereas Uzbekistan acceded to them on 8 October 1993. – This article refers exclusively to the Geneva Conventions and their Additional Protocols. However, the countries considered in it have ratified (or acceded to) a good number of other conventions which make up international humanitarian law. See <www.icrc.org/ihl>

⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 48; Geneva Convention relative to the Treatment of Prisoners of War, Art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 144; and Protocol additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 83.

For that purpose, the ICRC first identified the leading faculties of law in the region and people willing to cooperate in promoting the teaching of international humanitarian law. Later it started a dissemination programme at the universities which was mainly aimed at:

- training academic staff for the teaching of international humanitarian law;
- supporting publications and research;
- including international humanitarian law in university curricula; and
- developing knowledge of and interest in international humanitarian law among university students.

a) Training academic staff for the teaching of international humanitarian law

It was clear from the outset of the programme to promote international humanitarian law at the Central Asian universities that the ICRC did not want to give the actual courses for students. This would have required specifically trained delegates with a good knowledge of the language. More importantly, it would not have encouraged the formation of a pool of local experts. For this reason the ICRC decided to train Central Asian lawyers by means of seminars for staff of the law, international relations and journalism faculties of the region's main universities. They were held either in Moscow or in Central Asia⁶ and imparted a basic knowledge of international humanitarian law. As these seminars dealt not only with the content of the law but also with teaching methods, the participants received the legal and practical knowledge required to set up an international humanitarian law course at their own university.

In view of the theoretical approach which characterized the Soviet educational system and the fact that the relevance of international humanitarian law was not immediately evident in Central Asia in the present peaceful environment there, the ICRC placed

⁶ 1998 in Tashkent, Uzbekistan, and 1999 in Ashgabad, Turkmenistan, the latter in cooperation with the Ruhr-University of Bochum, Germany. See P. Dorbes and S. M. Seidel,

"Second Central Asian Conference on the Teaching of International Humanitarian Law", *Humanitäres Völkerrecht*, 2/2000, pp. 72-73.

particular emphasis on practical case-studies. This seemed to be the most appropriate method for training future lawyers because it demonstrated the way that international humanitarian law was applied in specific situations.⁷

Although to a varying extent, Russia is still an outstanding point of cultural reference for the countries of Central Asia. Inviting Russian professors for seminars or sending Central Asian scholars to Moscow to acquire or consolidate their knowledge of international humanitarian law is therefore a viable and fruitful solution. On the other hand, the progressive rediscovery of national heroes and the revival of local epic poems in those countries since their accession to independence should also be borne in mind when promoting international humanitarian law. For instance, the famous fourteenth-century commander Tamerlane is considered by many to have been the father of the Uzbek nation. Uzbek scholars tend to refer to what is known as *Tamerlane's code of conduct* as an historic example of codification of special rules in time of war. The Kyrgyz epic poem *Manas*, which tells of the achievements of a mythical hero and his two descendants who respected women, children and prisoners in their military campaigns, appears to help promote international humanitarian law at various levels of society, as people have already heard of a certain conduct in war through listening to this narrative.⁸ In short, for humanitarian law to be fully accepted and understood by the post-Soviet societies of Central Asia, a balance needs to be struck between the heritage of the past and the educational requirements of today.

b) Supporting publications and research

In the early 1990s it was very difficult to find relevant text editions of treaties and literature on international humanitarian law in

⁷ On teaching international humanitarian law at university level, see M. Sassoli and A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1451-3. This book provides extremely useful guidance for academic staff interested in teaching international hu-

manitarian law, as it contains cases and documents, references to background literature and model outlines for university courses.

⁸ The Kyrgyz epic, *Manas: The Great Campaign*, has been translated into English by W. May; it was published in Bishkek in 1999.

Central Asian libraries. The ICRC therefore set out to translate more than fifty publications into Russian and about a dozen into national languages.⁹ These publications have been distributed free of charge to the main university libraries of the faculties of law, international relations and journalism. The ICRC has also supported publications on topics related to international humanitarian law by Central Asian scholars so that the specificity of each country in terms of customary methods and practice could be taken into due account.

A documentation centre with over five hundred publications and fifty videos on international humanitarian law and the International Red Cross and Red Crescent Movement can be consulted at the ICRC delegation in Tashkent. The centre is frequently used by scholars, students and members of the armed forces who are interested in certain topics for either research or teaching purposes.

c) Including international humanitarian law in university curricula

On the basis of the model standard programme and the teaching kits (adapted for each branch of study), academic staff who are willing to teach international humanitarian law now have to work out specific programmes adapted to the needs of their university. Once they have been approved by the university, the way is paved for this subject to be included in the curricula of the relevant faculties. Turkmenistan is the first country in Central Asia where international humanitarian law has become a compulsory course in the faculties of law, international relations and journalism. In Kazakhstan the standard programme for teaching international humanitarian law in the law faculties has been approved by the Ministry of Higher Education and it may soon be included in the curriculum.

⁹ Before independence, Russian was the official language in the five countries of Central Asia. Today national languages are more and more widely used there in the universities

as well, although Russian still plays an important part in the higher educational system of Central Asia.

At present, the faculties of law of the main universities in all four countries under consideration are providing a special course on international humanitarian law. In addition, a few hours have been included in the general course on international law. A growing number of special courses on the subject are also being given in the faculties of international relations and journalism. The latter, in particular, have become unexpectedly and keenly interested in international humanitarian law and are developing special courses on the media in conflict situations.

d) Developing knowledge of and interest in international humanitarian law among university students

International humanitarian law is not a very attractive course of study for students in Central Asia. As it is a peaceful region, the students do not immediately grasp the importance of that branch of the law and do not perceive it as being a "worthwhile" specialization. Moreover, the National Red Cross and Red Crescent Societies are young and have limited expertise in international humanitarian law. The ICRC has consequently sought to arouse the interest of an increasing number of university students in international humanitarian law. In particular, they have been given the possibility to attend summer courses abroad or to do an internship at its delegation in Tashkent, thereby allowing them to get to know the ICRC as an institution and improve their ability to take up subjects related to international humanitarian law.

A recent event organized by the ICRC specifically for students deserves special attention: the Martens International Humanitarian Law Competition. Following the successful example of the competition named after *Jean Pictet* which is held annually for French and English-speaking students from all over the world, the ICRC launched the Martens Competition in 1996 for law students of the Commonwealth of Independent States. It consisted of a series of role-playing exercises in which the participants had to argue legal issues concerning a hypothetical armed conflict before a jury of renowned international experts. The event helped to convince the students of the topicality of international humanitarian law and, by the

same token, established closer contacts among the region's international lawyers.

The competition turned out to be an excellent opportunity for identifying students particularly interested and proficient in international humanitarian law. Some of them may eventually become instructors in international humanitarian law for their country's National Society, thereby taking an active part in its dissemination work. In addition, the competition is an effective means of drawing media attention to a branch of law which is normally neglected by journalists.

What results have been achieved?

The ICRC programme for the promotion of international humanitarian law at the universities of Central Asia has undoubtedly been a success. Despite the constraints felt there, mainly due to an instinctive diffidence towards a course of study thought to be useless in a peaceful context and — because it seemed to hint at a possible outbreak of hostilities — considered as potentially destabilizing by the newly created States, both the authorities and academic circles have understood the relevance of that part of international law and have endeavoured to spread knowledge of it.

As recently as 1997, the ICRC reckoned that international humanitarian law was a "minor component of the academic curriculum at universities in the countries of the Commonwealth of Independent States".¹⁰ Today, in Central Asia specific courses ranging from a minimum of eight to a maximum of fifty-four hours are given in eleven law faculties, two international relations faculties and four faculties of journalism. Moreover, elements of international humanitarian law have been incorporated into international law classes and other relevant courses at the above-mentioned faculties.

Textbooks, papers and text editions of the relevant conventions in Russian, local languages and English are available in

¹⁰ S. Hankins, "Promoting international humanitarian law in higher education and universities in the countries of the Common-

wealth of Independent States", *IRRC*, No. 319, July-August 1997, p. 447.

university libraries. Students are increasingly aware of international humanitarian law and ever greater numbers of them are writing theses on related topics for their first or postgraduate degrees.

Conclusions

Some conclusions which may be helpful elsewhere in contexts similar to that in Central Asia can be drawn from the above.

While the Soviet background there is still very strong, nationalistic tendencies are steadily gaining in importance. A balance therefore has to be struck between these two elements in order to reach a point at which international humanitarian law is taught at a qualitatively high level and is well understood as a branch of law that has no potentially destabilizing effect. Giving due attention to both elements is not an easy task, especially because they are often mutually contradictory. Although the Soviet educational heritage is still present in Central Asia and thus justifies encouraging links with Russian universities and distributing Russian publications, concern for the national identity and the desire to distance oneself from the recent past sometimes appear to be pre-eminent. In this case, local traditions should be highlighted and local publications promoted in order to facilitate the process of incorporating international humanitarian law into the fabric of national life and make it more comprehensible and acceptable for a young State.

In quantitative terms a lot has been achieved in promoting international humanitarian law at university level in Central Asia. Special courses are offered at the main faculties of law, journalism and international relations, and elements of humanitarian law have been introduced in the general courses on international law and relevant courses of other faculties. Professors and lecturers are acquainted with international humanitarian law and are gradually in a position to advise the authorities.

Now the time has come to spur the creation of one main centre of international humanitarian law in each country. They should ideally be established in a faculty of law with the purpose of providing interested students, civil servants and members of the armed forces with literature and guidance for research. Such centres could also train

same token, established closer contacts among the region's international lawyers.

The competition turned out to be an excellent opportunity for identifying students particularly interested and proficient in international humanitarian law. Some of them may eventually become instructors in international humanitarian law for their country's National Society, thereby taking an active part in its dissemination work. In addition, the competition is an effective means of drawing media attention to a branch of law which is normally neglected by journalists.

What results have been achieved?

The ICRC programme for the promotion of international humanitarian law at the universities of Central Asia has undoubtedly been a success. Despite the constraints felt there, mainly due to an instinctive diffidence towards a course of study thought to be useless in a peaceful context and — because it seemed to hint at a possible outbreak of hostilities — considered as potentially destabilizing by the newly created States, both the authorities and academic circles have understood the relevance of that part of international law and have endeavoured to spread knowledge of it.

As recently as 1997, the ICRC reckoned that international humanitarian law was a "minor component of the academic curriculum at universities in the countries of the Commonwealth of Independent States".¹⁰ Today, in Central Asia specific courses ranging from a minimum of eight to a maximum of fifty-four hours are given in eleven law faculties, two international relations faculties and four faculties of journalism. Moreover, elements of international humanitarian law have been incorporated into international law classes and other relevant courses at the above-mentioned faculties.

Textbooks, papers and text editions of the relevant conventions in Russian, local languages and English are available in

¹⁰ S. Hankins, "Promoting international humanitarian law in higher education and universities in the countries of the Common-

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and advise other faculties on how to introduce this subject in their standard programmes.

An increasing number of professors, lecturers and students should be encouraged to go abroad to broaden their knowledge of international humanitarian law. Considering the language constraints that the region's academic staff face today (few scholars are fluent in any other language than Russian) and the fact that more and more of the younger generation speak English or French, it is foreseeable that the ability of a growing number of people to follow courses abroad will have a positive impact on the level of knowledge of international humanitarian law.

The quality of teaching and research in international humanitarian law can best be improved on the basis of a solid background in international law. Greater efforts should therefore be devoted to training international lawyers. Some universities in Central Asia have already organized exchanges of international law professors with law faculties abroad. This trend should definitely be stepped up in the immediate future.

Last but not least, the role of the National Red Cross and Red Crescent Societies in the dissemination of international humanitarian law at university level should be encouraged. As it is not their task, for obvious reasons, to prepare the academic staff needed to teach international humanitarian law, they should start working together with those students who have successfully completed their studies. Whereas the ICRC took the initiative to promote the teaching of international humanitarian law at the universities of Central Asia, the National Societies should take over, in accordance with their statutory responsibility to assist with its dissemination. Such efforts have a great potential for strengthening their capacity and building up their image.



Résumé

Promotion de l'enseignement du droit international humanitaire dans les universités : l'expérience du CICR en Asie centrale

par LUISA VIERUCCI

Depuis quelques dix ans, le CICR s'est engagé dans la promotion de l'enseignement du droit international humanitaire au niveau universitaire. Cette activité fait partie de son programme de diffusion, élément essentiel pour faire connaître le contenu du droit humanitaire à ceux qui sont ou seront chargés de sa mise en œuvre. L'article de Luisa Vierucci présente ces projets dans les États nouvellement indépendants d'Asie centrale. À l'époque soviétique, les universités de la région n'enseignaient pas le droit international, et encore moins le droit international humanitaire. Un délégué du CICR spécialement préparé à cette tâche a apporté son aide aux autorités des différents pays pour former les enseignants dans cette discipline très spécialisée. Il a également conseillé les autorités universitaires dans la préparation des programmes d'enseignement et mis à leur disposition une documentation en la matière. Aujourd'hui, le droit international humanitaire est ainsi enseigné dans les universités de l'Asie centrale.

Teaching international humanitarian law in academic institutions in South Asia: An overview of an ICRC dissemination programme

The 1949 Geneva Conventions and their 1977 Additional Protocols require States Parties to disseminate the content of these humanitarian treaties as widely as possible in their respective countries. Of course, their inclusion in military instruction is indispensable to ensure their implementation in time of armed conflict. But it is equally important to promote knowledge of humanitarian law among those whom it is intended to protect — the civilian population — as well as among those who have to apply it — public officials of various ministries. At the same time, political leaders and decision-makers must also be familiar with that law, so that they are aware of its relevance, realism and mode of operation if and when a conflict should break out. Therefore, to ensure respect for it — and also to promote its development — it is an essential task to include international humanitarian law in higher education. The ICRC has taken a number of steps to achieve just that in the South Asian region.

Higher education in most of the South Asian countries is based on the British system. After twelve years of schooling, a student has the option of joining any of the professional courses such as medicine, engineering or law. There is also the possibility of opting for basic graduate programmes in arts, science, commerce, etc. Moreover, a student can switch to professional courses after obtaining a basic graduate degree. Once professional qualifications have been attained, such as a degree in law which qualifies the person for entry into the legal profession as a lawyer, an academic career can be pursued by taking up postgraduate studies and research. Most of the professional courses as well as graduate courses are run by colleges affiliated to universities. Universities are in charge of postgraduate courses.

Educational planners in the various South Asian countries have by and large agreed to include international humanitarian law in law and political science studies. Following the recommendations of the Association of Indian Universities in May 1998, most of the *Indian universities* have included an international humanitarian law

component in their undergraduate LL.B. programmes, which are conducted by the 550 law colleges affiliated to them. About 30 universities offer postgraduate courses in international law. Of these, some twenty universities offer a full optional course in international humanitarian law. Moreover, thirty-five universities in India offer a Master's programme in defence and strategic studies, with an optional course on international humanitarian law. Most human rights postgraduate or diploma programmes include a course on international humanitarian law.

In *Pakistan*, international humanitarian law is taught primarily within law faculties and departments of international relations. In some universities international humanitarian law is an optional course in international relations studies. The Universities Grants Commission of Pakistan has shown interest in the inclusion of international humanitarian law modules in undergraduate professional law courses. In a number of law faculties, international humanitarian law is part of a postgraduate law programme. A team of law students from Pakistan took part in last year's Jean Pictet International Moot Court Competition, and another team is being trained for the 2001 Competition.

In *Sri Lanka*, the University of Colombo offers a full postgraduate course in international humanitarian law for international law graduates. In addition, the undergraduate international law course contains a brief module on international humanitarian law. The same is true of Tribhuvan University of Kathmandu, Nepal, and the University of Dhaka, *Bangladesh*. The other universities in *Nepal* and *Bangladesh* teach international humanitarian law at the undergraduate level.

The ICRC, through its Regional Delegation in New Delhi, is closely involved in promoting international humanitarian law in academic institutions in South Asia. Thus the delegation:

- regularly organizes a South Asian Teaching Session on international humanitarian law for postgraduate students and young university lecturers;
- supports research and publications in this field;
- publishes a journal on international humanitarian law; and

- organizes academic events on specific aspects of international humanitarian law, such as the International Criminal Court, the 1977 Additional Protocols, the issue of anti-personnel landmines, etc.

The delegation also accepts students for internships, has established a documentation centre on its premises, supports libraries of academic institutions by providing publications on international humanitarian law, holds moot court and essay-writing competitions and arranges other promotional events. It regularly organizes training programmes in international humanitarian law for academic staff teaching law, international relations, human rights, etc. who give courses on the subject at undergraduate and postgraduate levels. Since 1999, together with the Indian Academy of International Law, it has launched a postgraduate diploma programme in international humanitarian law.

It must be stressed that as a rule these activities of the ICRC Delegation in New Delhi are conducted in collaboration with universities and other educational institutions in the countries concerned, and also with academic societies. Academic institutions have generally shown a keen interest in introducing international humanitarian law into higher education. As a result, there is considerable awareness of its importance among the academic communities in South Asia.

UMESH KADAM

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ICRC Delegation for South Asia
New Dehli

Security challenges for humanitarian action

by ANGELO GNAEDINGER

In keeping with the focus of this conference, which is on “coping with the new security challenges of Europe”, I shall deal primarily with what I see as security challenges for humanitarian action in Europe. My comments will be made solely on behalf of the International Committee of the Red Cross (ICRC), a humanitarian organization that is present in practically every armed conflict and situation of internal strife or disturbances around the globe, and are not intended to reflect the position of any other humanitarian agency. I shall give you a more detailed portrait of the ICRC in a moment.

The questions I shall attempt to answer are the following:

- In what environment is today’s humanitarian action taking place on a *global level* and what are the *main challenges* to be met by humanitarian agencies in this environment?
- Is there anything that specifically characterizes security challenges for humanitarian action *in Europe*? I shall try to answer this question by comparing the ICRC’s activities in Africa with those of our organization in two European theatres of operations, namely the Balkans and the northern Caucasus.

ANGELO GNAEDINGER is Delegate-General for Europe, the Middle East and North Africa, ICRC. — Text of a presentation made at the International Security Forum, Geneva, November 2000. The form of an oral presentation has been retained.

- To what extent has the framework for ICRC activities in *Europe* changed over recent years and might it change further in the coming years? Here, the effects of European integration so far and the possible impact of a common EU foreign and security policy deserve special consideration. Article 17, paragraph 2, of the Treaty on the European Union is, as you well know, of special interest in this context.

The International Committee of the Red Cross

The ICRC is an independent humanitarian organization, with an international legal personality, which protects and assists victims of armed conflicts and internal strife worldwide. The promotion and development of international humanitarian law is central to its mandate.

With independence, impartiality and neutrality as its main guiding principles, the ICRC is no doubt the only humanitarian organization present in practically every armed conflict and situation of internal disturbances worldwide. Physical proximity to the victims on a durable basis, wherever there is a need for protection and assistance, is characteristic of its action. The ICRC strives to obtain access to victims through negotiations with all the parties to a conflict or a political crisis. The ability to maintain close and regular contacts with the parties — however they may be viewed by different members of the international community — is a result of the ICRC's long experience and is one of the organization's major assets. This unique network of contacts is constantly being developed through more than 200 delegations, sub-delegations and offices around the world.

The ICRC has a staff of almost 12,000 people, including more than 11,000 in the field. Its total expenditure in 1999 came to 849 million Swiss francs, almost twice the amount spent in 1990 (443 million). Expenditure for the year 2000 is expected to reach a record high of 871 million francs. The planned budget for 2001 has been set at a slightly lower level in order to take into account various financial and human resources constraints.

Environment for humanitarian action worldwide

Internal armed conflicts have become the rule, international armed conflicts the exception — and we must not forget internationalized internal conflicts, such as those in the Democratic Republic of Congo or in Sierra Leone. Non-State parties to conflict, which are very difficult to identify as they are often poorly structured and have no clear chain of command, play an ever-increasing part in the fighting. Violence is encouraged by easy access to cheap and powerful weaponry, rapid worldwide communications and, in many places, crumbling State structures. The domination of one ethnic group or one religion by another and the monopoly over access to economic resources are among the most frequent causes of fighting in Africa, the continent with the world's highest number of armed conflicts. The ICRC carries out almost 40% of its field activities in Africa, where nothing seems to be stable and where the situation can change radically within a relatively short time frame. While in three conflicts the fighting has recently come to an end — those in Guinea Bissau, Congo-Brazzaville, and Eritrea/Ethiopia — the situation is worsening in West Africa and concern is growing as far as Zimbabwe and some neighbours of Angola are concerned. At the same time, many other conflicts, such as those in Sudan, Angola, Congo-Kinshasa and Somalia, continue unabated.

A study published by the World Bank in June 2000 on the causes of civil wars from 1965 to 1999 concludes that material factors, in particular economic and demographic ones, led to 47 of the 73 conflicts analysed. In this respect, it is difficult to overlook the fact that Africa, with its share of 10% of the world's population, accounts for just one per cent of the global GDP. In addition, 70% of the world's 25 million AIDS victims live in Africa.

Overcrowding on the humanitarian scene, such as occurred last year in the Balkans, is not the main problem faced by the ICRC in Africa, even if the sudden arrival of vast numbers of aid workers in a situation given extensive media coverage, like the one in Ethiopia last spring, may hamper rather than facilitate humanitarian assistance. Moreover, there are very few African countries in which the ICRC and international military forces are working side by side. The

United Nations forces designated for Congo-Kinshasa have not yet been deployed and the positioning of UN forces between Eritrea and Ethiopia has only just begun.

The most obvious case where the relationship between humanitarian and political or military action has to be considered is Sierra Leone. There, the ICRC has drawn the attention of the United Nations to the problems arising from so-called integrated mandates — those that call on the same armed forces to carry out both military and humanitarian tasks. It would be unfortunate, for instance, if the human rights components of a UN peacekeeping mission were to visit detention centres on the basis of less stringent working procedures than those applied by the ICRC. This example points, by the way, to a wider problem under the heading of challenges for humanitarian action, which has nothing to do with cooperation between the military and aid agencies. I am referring to the competition between humanitarian workers which can lead to a duplication of efforts and, in some cases, to a marked lowering of standards. Visits to detention centres or protection and assistance for internally displaced persons are sectors where, it must be clearly said, the humanitarian community has much to gain from complementarity and much to lose from sterile competition resulting from divergent guidelines for action.

What are the main challenges we face today in the most difficult contexts?

- The complexity of conflict situations, i.e. the intermingling of local and international groups in the same context, each of them driven by a different mix of political, economic, ethnic and religious motives.
- Ignorance, or worse, the flouting of the rules of international humanitarian law by parties to a conflict.
- The sharp rise in abductions, “whether because of the copycat effect (Somalia is one example)”, as our Delegate in charge of Security put it, or because our activities now extend to areas where such crimes have a long tradition (as in the Caucasus).
- The deliberate targeting of humanitarian workers.
- Ignorance or the calling into question of the ICRC’s role as an impartial and neutral intermediary entrusted with a mandate by the international community.

- Rejection of the ICRC's presence by parties to a conflict.

Moreover, our staff members work in situations where boarding an aircraft is more dangerous than anywhere else in the world and where the risk of contracting a serious illness is exceptionally high.

How does the ICRC strive to meet these challenges?

First, we have to accept and understand the full complexity of today's conflicts. Conflict analysis is vital — not just an intellectual exercise. Since the ICRC acts at the crossroads of divergent interests, it must develop an ongoing dialogue with all those involved, be they global players or representatives of a rebellious minority group, militants of a radical religious movement or senior members of the armed forces of a State. Our proximity to and the quality of our dialogue with all the warring parties are essential if we are to gain access to the victims of a conflict and provide them with the protection they need. In order to achieve this we must adapt our discussion of humanitarian law and values to different cultural contexts, while reaffirming our own identity as an impartial and truly independent humanitarian organization. We need to avoid any action, as inoffensive as it may seem, that could give rise to doubts about our independence. When, in spite of all these efforts, our acceptability is questioned, withdrawal must be considered. As an alternative, we sometimes restrict our activities to a particular area or sector.

Secondly, security training and the systematic exchange and analysis of security-related data have become essential to the ICRC. Strict observance of the rules and criteria for action and for withdrawal have come to play an important role for the organization. Our *modus operandi* must be consistent and reliable, so that we know what to do and others know what to expect of us. The role of security is highlighted in this recent comment made by our Delegate in charge of Security: "The safety of our personnel is a precondition for action. It is both more important than those activities and at the same time entirely secondary to them." Except for the decision to evacuate personnel and to use armed escorts, all other security-related activities — such as gathering information, analysing data and decision-making — are entrusted to our field staff.

Different humanitarian agencies have different security policies and the approaches they adopt can have serious consequences for the ICRC. In particular, the use of armed escorts by aid personnel working in the same area can have a negative impact on the ICRC, which is traditionally unarmed, by pinpointing it as a so-called soft target.

To conclude these general comments, let me say that the issue of improved security for humanitarian workers has now necessarily become part of the overall political agenda. If those who might be tempted to attack humanitarian workers could be convinced that their deeds would elicit more than easily forgotten verbal reprimands on the part of the international community, the security environment for humanitarian organizations would no doubt improve considerably.

Security challenges for humanitarian action in Europe

The security challenges arising from the recent conflicts in Europe are no different in substance from those I have just described. As elsewhere around the globe, ethnic strife, nationalist fervour and religious extremism have spawned tremendously destructive violence in the Balkans and the Caucasus. Combined with the difficulties of transforming the socio-economic structure and coping with conflicting strategic interests, these forces have brought enormous suffering to the populations in those regions and have been the cause of repeated humanitarian tragedies over the past ten years. The ICRC had to learn quickly about the complexity of the cultural, ethnic, political and socio-economic fabric of south-eastern and eastern Europe, which the Cold War had so effectively covered up for decades. And in order to reach the victims in Sarajevo, Pristina, Sukhumi, Nagorny Karabakh and Grozny, it had to explain its role and its way of doing humanitarian work to thousands of people whose respect was — and remains — crucial to its action.

The most outstanding security challenge for humanitarian work in Europe, however, has been the enormous interest which the media, public opinion and hence governments have shown in these dramatic events. The result has been the ICRC's

extraordinarily intense interaction with political and military components of inter-national crisis management. In that respect the conflict in Bosnia-Herzegovina, with the involvement of several generations of United Nations peacekeeping forces and the post-Dayton deployment of IFOR/SFOR, has been the most important testing ground for the new and evolving relationship between humanitarian agencies and the military. From the experience gained in this context, the ICRC has learned to weigh the risks resulting from the blurring of military and humanitarian mandates and to identify areas in which the military can make significant contributions to the work of aid agencies without taking over their role.

Let me say it right away and clearly: the military can indeed make important contributions in the humanitarian field, without turning themselves into a humanitarian enterprise:

- in an unstable situation where, for instance, the military can restore public order and thus not only protect the civilian population, but also facilitate the work of aid personnel;
- in situations of sudden and massive demands for humanitarian assistance (e.g. earthquakes, floods, or a massive influx of refugees into poor countries, such as occurred in Macedonia and Albania last year), military assets can be made available to public services or humanitarian organizations, thus enabling them to respond more effectively.

To highlight the potential of smooth cooperation between humanitarian agencies and the military, let us take a look at the release and repatriation of prisoners in Bosnia-Herzegovina following the conclusion of the Dayton agreement at the end of 1995. In its military annex, this agreement provided for a tight schedule for military measures to enforce the withdrawal from the front lines and the demobilization of hostile armed forces. With the arrival of IFOR in December 1995, those measures were implemented forcefully and on time. As for the implementation of the complex civilian and political provisions of the Dayton agreement, however, the parties showed enormous reluctance to move forward. In that respect their decision to release all prisoners within a few weeks under the auspices of the ICRC became an initial test of the viability of the agreement.

Through its activities during the war, the ICRC had a fairly good knowledge of the places of detention that existed on all three sides and had met the authorities concerned on the ground. This know-how was activated as soon as the ICRC received its mandate under the Dayton Agreement. ICRC delegates held meetings at senior level in Sarajevo, Pale and Mostar, registered prisoners throughout Bosnia and submitted a detailed plan for the simultaneous release and transfer home across the former front lines of the more than 1,000 prisoners being held at the time. Implementing this plan implied first of all strong support from the then High Representative Carl Bildt, who exerted the necessary political pressure on the parties. Equally decisive was the ICRC's extremely close coordination with the IFOR command, which gathered top military leaders from all sides around a table and instructed them in no uncertain terms to open the former front lines at specific locations and points in time, to secure road transport and — last but not least — to comply with the ICRC release plan by bringing forward the prisoners. Moreover, IFOR contributed logistical means and secured crossing points during the critical phase. Only thanks to this excellent cooperation, drawing on the respective strength and know-how of the humanitarian, political and military spheres, was it possible to bring these prisoners back home promptly. The ICRC thus succeeded not only in resolving a pressing humanitarian issue, but also in giving an important impetus to the implementation of the Dayton agreement at a crucial moment. Encouraged by this experience, we continued to cooperate with IFOR/SFOR in its efforts to search for missing persons and develop mine awareness among exposed population groups.

More recently the ICRC had an equally positive experience with KFOR in Kosovo. Already present in Pristina when KFOR was deployed in early June 1999, the ICRC immediately made operational contacts and quickly worked out practical arrangements concerning such issues as the protection of vulnerable groups of civilians, especially minorities, ICRC access to persons arrested and held by KFOR and the return of Kosovar prisoners held in Serbia proper. Our experience is that such cooperation with the military is efficient and does not get bogged down in bureaucracy.

It should be stressed, however, that these examples are drawn from situations in which the ICRC was working with international armed forces that were not only properly mandated for their mission by the UN Security Council, but were officially — albeit reluctantly — accepted by the former warring parties. In addition, IFOR/SFOR as well as KFOR were built on the principle of “one mission — one command” while nevertheless bringing together a large number of partners, including non-NATO countries. The participation of Russian troops in those missions, in particular, proved essential in securing the political agreement of all those involved.

Obviously, the ICRC's experience with the NATO forces engaged in hostilities with the Federal Republic of Yugoslavia was quite different. Although this military campaign was declared to be a “humanitarian intervention”, the ICRC had to make it clear from the very beginning that under the 1949 Geneva Conventions the hostilities simply qualified as an international armed conflict, whatever the political motives behind it. Given those conditions, the ICRC had to steer a course of total neutrality between the NATO countries involved and the Federal Republic of Yugoslavia. The ICRC did all it could to stay on the spot, not only in Belgrade but also in the rest of Serbia, in Montenegro and indeed in Kosovo, during the air campaign. Although our delegates were forced to withdraw from Pristina during the crucial weeks of April and early May, we were nonetheless able to bring assistance to many victims within the area declared a “war zone” by the NATO command. The ICRC therefore reacted somewhat tensely when NATO restricted its freedom of movement within Yugoslavia and, moreover, claimed to be the main provider of humanitarian aid for people driven out of Kosovo.

The ICRC must always bear in mind the fact that the military, even when involved in a peacekeeping mission to which consent has been obtained, runs by its very nature the risk of potentially engaging in open hostilities.

Thus the experience in the Balkans has shown how important it is to distinguish clearly, in substance and in form, between military and humanitarian operations. The different mandates and tasks of the military and aid agencies should not be confused. The

ICRC has also drawn a clear line in the other contexts in which it is working alongside the military, for instance in Sierra Leone and East Timor. The importance of this distinction became particularly evident in Sierra Leone, where UN troops with a partial humanitarian mandate became directly involved in the fighting.

The ICRC's determination to maintain its independence with regard to decision-making and action is what enables it to gain access to all the victims of an armed conflict. This independence must be exercised consistently in all contexts where the ICRC works and its meaning must be explained over and over again, especially wherever the organization is not well known.

In order to avoid casting doubt on its independence, impartiality and neutrality, the ICRC refrains from using armed escorts in conflict situations. In the analytical framework devised by K. van Brabant, which comprises the three concepts of acceptance, deterrence and protection, the ICRC has chosen acceptance. The military, however, must maintain its capacity to escalate the use of force and thus to act as a deterrent, if it wants to remain credible. It can therefore never be seen as neutral or impartial.

There are nevertheless contexts in which we are asked tough questions and for which our operational principles do not provide clear answers; the northern Caucasus is one of them. There, banditry with clear financial objectives constitutes an even greater risk than military attacks. The question therefore was: should our expatriate delegates visit detention centres in Chechnya and the surrounding republics with armed escorts or should they stay away altogether, even if the Russian authorities grant us access to Chechens detained by them? We have opted for the armed escorts, given the importance of our visits to the detainees in question.

Since May 2000, ICRC delegates have conducted more than 40 visits to detainees in Chechnya and to detention centres elsewhere in southern Russia. However, our humanitarian assistance programmes in Chechnya are conducted without armed escorts by local ICRC staff and members of the local branch of the Russian Red Cross. Meanwhile, our expatriate staff members concentrate their efforts on maintaining contact with the authorities and on monitoring

relief activities. We intend to considerably extend our assistance programmes in Chechnya and the surrounding region in 2001.

Our operation in the northern Caucasus thus demonstrates the flexibility with which the ICRC responds to specific situations, working with both expatriate and local staff and bringing into play National Red Cross Societies, while serving as the lead agency of the International Red Cross and Red Crescent Movement in all situations of armed conflict and internal strife.

The European context, as compared with other contexts in which the ICRC works, is striking for its relatively high concentration of security-related international organizations and similar frameworks. In the Balkans and the Black Sea region alone there are numerous overlapping international structures. The main players are, as we all know, NATO for security in military terms, the European Union for security in the wider sense of what we sometimes call *Existenzsicherung* ("subsistence protection"), and the OSCE as a European approach to crisis management and conflict prevention.

As a result, Europe no doubt enjoys favourable conditions for ending armed conflicts and internal violence. This was not always the case. Before the end of the Second World War and before the European Union came into being, Europe, especially Western Europe, was the ICRC's main theatre of operations. The specific nature of the present European context makes it particularly important for the ICRC to maintain a continuous dialogue with the various supranational and international organizations on the continent so as to ensure an ongoing exchange of information concerning guidelines and action.

The European Union as a humanitarian player

By developing its common foreign and security policy (Title V of the Treaty on the European Union) the EU may well become a more important provider of humanitarian aid. The so-called Petersberg Tasks are fully integrated in Article 17 of that treaty's paragraph 2, which reads as follows:

"Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking."

At the end of 1999, the European Council decided in Helsinki to set up an intervention force of 60,000 members by 2003 to carry out the tasks laid down in this paragraph.

As a result of this development the European Union, already a major partner for the ICRC, will become even more important for us. There will no doubt be great potential for cooperation. Based on our experience in places such as the Balkans we will, however, insist on a clear line being drawn between humanitarian and political-military action. Considering its own experience in this part of the world, the EU is doubtless also aware of the problems that arise when the same entities and individuals carry out both military and humanitarian activities. To the extent that the European Union is developing its Common Foreign and Security Policy (CFSP), we may well eventually need a dialogue with the EU similar to that which we have established with NATO. Provided that the development of the CFSP does not promote confusion between political-military and humanitarian tasks, it can, in my opinion, only be welcomed, even by a humanitarian organization. It will contribute to improving Europe's security environment, which already owes so much to the very existence of the European Union.

This brings me to a last point: prevention. There is growing agreement that many more resources should be devoted to preventing armed conflict and internal strife. Surprisingly, the conflict-prevention aspect of the European Union's enlargement policy (which sets clear political standards — regarding minority issues for example — for countries seeking EU membership) too often passes unnoticed. During the 1990s, this process defused considerable conflict potential in Central Europe. We must hope that similar processes can be developed in other frameworks, such as the OSCE and the Balkans Stability Pact, in order to bring the peoples of the Balkans and the Caucasus the peace and tranquility for which they long so fervently.

Non-discrimination and armed conflict

by JELENA PEJIC

The Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance will take place in South Africa in the autumn of 2001. The ICRC has been actively participating in conference preparations with a view to reminding governments and other players that non-discrimination is not only a guiding principle of human rights law, but also a basic tenet of international humanitarian law. The text has been adapted from an ICRC submission to the conference organizers.

Racism, racial discrimination, xenophobia and related intolerance are not just problems that individual nations and the international community need to address in peacetime. It is equally important to address them in times of armed conflict as well. As a number of recent and ongoing conflicts around the world clearly show, the inequality or exclusion of peoples, groups and individuals is one of the root causes of conflict and, very often, one of its consequences.

The International Committee of the Red Cross (ICRC) therefore believes that the issue of non-discrimination in times of armed conflict should be given adequate consideration in preparation for the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (South Africa, 2001), and at the Conference itself. This paper aims to explain the importance of non-discrimination as an underlying principle of international humanitarian law, as a principle guiding the work of the International Red Cross and Red Crescent Movement and as a principle underlying humanitarian action.

Non-discrimination and international humanitarian law

The principle of non-discrimination underlies all international humanitarian law, which is a body of rules specifically intended to solve humanitarian problems arising directly from armed conflicts. The purpose of international humanitarian law is to protect persons and property that are, or may be, affected by an armed conflict, and to limit the rights of the parties to a conflict to use means and methods of warfare of their choice. International humanitarian law seeks to regulate armed conflicts that may be either international or non-international. International conflicts are wars involving two or more States, regardless of whether a declaration of war has been made or whether the parties recognize that there is a state of war. Non-international armed conflicts are those in which government forces are fighting with armed insurgents, or armed groups are fighting among themselves. Because international humanitarian law deals with exceptional situations — armed conflicts — no derogations whatsoever from its provisions are permitted. Just as importantly, international humanitarian law binds not only States, but also non-State parties to a conflict.

The beneficiaries of international humanitarian law are persons who do not take, or are no longer taking, part in hostilities. As their very titles indicate, the four Geneva Conventions of 1949¹ are geared to protecting the wounded and sick members of armed forces on land (First Convention), wounded, sick and shipwrecked members of armed forces at sea (Second Convention), prisoners of war (Third Convention), and individual civilians and civilian populations (Fourth Convention). The definition of civilians under Additional Protocol I of 1977,² which supplements the 1949 Conventions, includes refugees, stateless persons, journalists and other categories of

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949; Geneva Convention relative to the Treatment of

Prisoners of War, of 12 August 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

individuals who must be granted “protected person” status when they fall into the hands of an adverse party. While the body of rules applicable to non-international armed conflicts (Article 3 common to all four Geneva Conventions, and Additional Protocol II of 1977³) is tailored to take account of the fact that persons taking part in those conflicts are nationals of the same State, it too protects persons who are not, or are no longer, taking part in the hostilities. An important category of such persons are, for example, persons internally displaced by a conflict.

It was the need to provide aid to wounded and sick combatants on a non-discriminatory basis that motivated Henry Dunant, the founder of the ICRC, to spearhead efforts to draft the first-ever international humanitarian law treaty — the original Geneva Convention of 1864.⁴ This Convention established the principle that wounded and sick combatants must be cared for regardless of their nationality, provided for medical services to be recognized as neutral and led to the creation of the distinctive red cross emblem. The principle of non-discrimination has been a basic tenet of international humanitarian law ever since, obliging parties to an armed conflict to treat persons without distinctions of any kind save those based on the urgency of their needs. The principle of non-discrimination — the prohibited grounds for discrimination were subsequently expanded and made non-exhaustive — finds expression in many specific rules of the Geneva Conventions and their two Additional Protocols. Some examples are given below.

International armed conflict

The First and Second Geneva Conventions (Article 12, respectively) stipulate that wounded, sick and shipwrecked members of armed forces and other protected persons must be treated humanely and cared for by the party to the conflict in whose power they may be,

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

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864.

without any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria. Any attempts upon their lives, or violence to their person, are strictly prohibited. In particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments, or wilfully left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. The Conventions also specify that only urgent medical reasons will determine priority in the order of treatment to be administered, and emphasize that women must be treated with all consideration due to their sex.

The concept of no adverse distinction — to which parallels may be found in international human rights instruments — is applicable in both international and non-international armed conflicts. It means that in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may, and indeed must, be granted to them. International humanitarian law contains numerous provisions designed, for example, to provide special protection for women and children who may be affected by an armed conflict.

The Third Convention, which deals with the treatment of prisoners of war, provides another example of mandatory equality of treatment under international humanitarian law. Article 16 reads: "Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

Likewise, the Fourth Convention in Article 13 provides that measures for the general protection of civilian populations against certain consequences of war (e.g. the establishment of hospital and safety zones and of neutralized zones, the protection of civilian hospitals and their staff, the free passage of relief supplies, etc.) cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or

political opinion. Under Article 27 of the Convention, civilians are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They must at all times be treated humanely and be protected especially against all acts of violence or threats thereof, as well as against insults and public curiosity. Women must be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons must be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

Additional Protocol I of 1977, relating to the protection of victims of international armed conflicts, also contains important provisions on non-discrimination. Article 75, entitled "Fundamental Guarantees", aims to provide minimum standards for the treatment of persons who are in the power of a party to an international conflict and who do not benefit from more favourable treatment under other provisions. It specifies that all such persons shall be treated humanely and shall enjoy, as a minimum, the protection provided by that article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Article 75 prohibits the following acts: violence to life, health, or physical or mental well-being (in particular murder, torture, corporal punishment and mutilation), outrages upon personal dignity (in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault), the taking of hostages, collective punishments, and threats to commit any of the above-listed acts. It also contains a series of detailed provisions on judicial guarantees that must be observed in criminal proceedings against persons suspected of an offence related to the armed conflict, as well as principles that shall apply in the prosecution and trial of persons accused of war crimes and crimes against humanity.

Additional Protocol I lists a series of acts that are considered to be grave breaches of the Protocol. Among them are: "practices

of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”⁵. Grave breaches are acts considered so harmful to the interests of the international community that they are subject to mandatory universal jurisdiction, which means that all States have a duty to search for the perpetrators of such acts and to bring them, regardless of nationality, before their own courts, or to surrender them for trial to another State that has made out a *prima facie* case.

Non-international armed conflict

Article 3 common to the Geneva Conventions lays down rules applicable to situations of non-international armed conflict, which is the most widespread form of conflict today. It provides that humane treatment and non-discrimination are the basic principles which must guide the behaviour of the parties to the conflict *vis-à-vis* persons not taking part in it, and presents a list of rules which, according to the International Court of Justice, are an expression of “elementary considerations of humanity”⁶. It is thus not only binding as treaty law, but as part of customary international law belonging to the category of *jus cogens*. Article 3 reads:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at

⁵ Protocol I, Art. 85, para. 4(c).

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para 218.

any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(...)"

Additional Protocol II of 1977 relating to the protection of victims of non-international armed conflict develops and supplements Article 3 common to the Geneva Conventions. It is applicable to conflicts occurring within the territory of a State Party between its armed forces and dissident armed forces which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. While the Protocol thus has a higher threshold of application than Article 3 of the Conventions, it too emphasizes the fundamental importance of the principle of non-discrimination. Article 2 of the Protocol, entitled "Personal field of application", stipulates that the Protocol shall be applied to all persons affected by an armed conflict without any adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.

The obligation of parties not to discriminate is reiterated in the Protocol's provisions on "Fundamental guarantees", under the heading "Humane treatment". The Protocol provides that: "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction." Specifically prohibited by the Protocol, "at any time and in any place whatsoever", are the following acts:

- “(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.”⁷

In view of the provisions of international humanitarian law which are outlined above, the ICRC believes that the Third World Conference Against Racism would be a good opportunity to remind governments that non-discrimination is a basic tenet not only of human rights law, but also of international humanitarian law. Preparations for the Conference and the draft conference documents should, in the ICRC's view, reflect the importance of non-discrimination in situations of armed conflict, whether international or non-international. The Conference should urge States that have not yet done so to adhere, without reservations, to the Geneva Conventions and their two Additional Protocols, as well as to other instruments of international humanitarian law. States should also be called on to fully abide by their obligations under international humanitarian law as a means of ensuring non-discrimination in times of armed conflict.

Implementation of international humanitarian law

As the guardian of international humanitarian law, the ICRC has a particular interest in seeing that international humanitarian law rules are respected and that respect for them is ensured in all circumstances, as provided for by Article 1 of the Geneva Conventions and of Additional Protocol I. Respect for international humanitarian

⁷ Protocol II, Part II, Art. 4.

law means that States have a duty to take a number of legal and practical measures aimed at ensuring full compliance with their treaty obligations. Among the former is the obligation to adopt legislation implementing the treaties and, in particular, the obligation to provide in domestic law for the prosecution and punishment of persons suspected of having committed grave breaches of the Conventions and of Protocol I. As already mentioned, the list of grave breaches includes “practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”. Compliance with treaty obligations also includes the duty of States to disseminate the rules of international humanitarian law as widely as possible both among members of the armed forces and among the civilian population, in time of peace as well as in time of armed conflict.

Grave breaches have two special aspects. One is the duty of States to take legislative measures necessary to establish appropriate penal sanctions for persons who have committed, or have ordered the commission of, grave breaches. The other is that grave breaches are subject to mandatory universal jurisdiction. This means that States have a duty to search for persons alleged to have committed, or to have ordered the commission of, these crimes. In accordance with the principle of *aut dedere aut judicare*, a State must either bring the alleged perpetrator — regardless of his or her nationality — before its own courts, or it must hand that person over for trial to another State which has made out a *prima facie* case.⁸

While Article 3 common to the Geneva Conventions and Additional Protocol II not explicitly provide for international criminal responsibility of persons suspected of having violated their provisions, it is meanwhile well-established that certain acts perpetrated in non-international armed conflict are also war crimes over which States may exercise universal jurisdiction. Proof of this view was most recently given by the inclusion of war crimes committed in internal armed conflict within the jurisdiction of the International Criminal

⁸ Geneva Conventions, Arts 49 f., 50 f., 129 f. and 146 f., respectively.

Court (ICC), and in subsequent work done by the UN Preparatory Commission on the ICC to define the elements of such crimes.

The ICRC believes that appropriate attention in preparation for the World Conference and in the draft conference documents should be given to the issue of combating impunity for violations of international humanitarian law, and to ways of strengthening implementation mechanisms. Moreover, the World Conference should call on States to enact national legislation implementing their obligations under the Geneva Conventions and the two Additional Protocols thereto. Such legislation should, in particular, focus on prohibiting and punishing war crimes and enable application of the principle of universal jurisdiction in the prosecution of these acts. The Conference should also recall the importance of ratifying other international instruments conducive to combating impunity for war crimes, whether committed in international or internal armed conflict, such as the 1998 Rome treaty establishing a permanent International Criminal Court.

Impartiality as a fundamental principle of the Red Cross and Red Crescent Movement

Non-discrimination is a key element of impartiality, which is one of the seven Fundamental Principles guiding the mission of the International Red Cross and Red Crescent Movement. According to its Statutes, the Red Cross and Red Crescent Movement — of which the ICRC is a component part — “makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.”⁹ This means that all individuals are recognized as equal and must be treated as such, and that the needs of the victims are the only relevant criterion for providing them with assistance and protection.

⁹ Statutes of the International Red Cross and Red Crescent Movement (October 1986), preambular para. “Impartiality”.

In addition, according to the fundamental principle of neutrality, the Red Cross and Red Crescent Movement “may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.¹⁰

While the activities of the International Committee of the Red Cross are based on these fundamental principles, the ICRC believes that it is useful to remind States of the need to enable their continued and consistent application in practice. Conference participants should be aware of the importance of the fundamental principles guiding the Red Cross and Red Crescent Movement — in particular the principles of impartiality and neutrality — and make every effort to ensure that components of the Movement are in all circumstances allowed to carry out their activities in keeping with those principles.

Impartiality as the basis for humanitarian action

The principle of impartiality also underlies and guides humanitarian action in general, including activities aimed at providing assistance to persons in need. While a detailed rendition of the relevant provisions of international humanitarian law is outside the scope of this paper, a couple of examples will be provided.

Under Article 70 of Additional Protocol I, impartiality is a key condition for relief actions undertaken in situations of international armed conflict. The Protocol stipulates that relief actions shall be undertaken when the population is not adequately provided with supplies. It specifies that such actions must be “humanitarian and impartial in character and conducted without any adverse distinction”. While the Protocol mentions that relief actions are subject to the agreement of the parties concerned, it should be noted that according to a generally accepted interpretation, a State *must* accept relief actions when the aforesaid conditions are met, i.e. when the civilian population is not adequately supplied and when relief, which is humanitarian and impartial in nature, is available. Similarly, impartiality is mentioned as a condition for the delivery, under Article 59 of the Fourth Convention,

¹⁰ *Ibid.*, “Neutrality”.

of assistance by humanitarian organizations to the populations of occupied territories.

The rules of international humanitarian law applicable in internal armed conflicts contain similar provisions. Thus, Article 3 common to the Geneva Conventions provides that: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." Such an offer cannot be arbitrarily refused when made by an impartial body. Additional Protocol II elaborates on relief actions that may be undertaken in situations of non-international armed conflict. Pursuant to Article 18, relief actions "which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned". What has already been said above remains valid: if the party in question receives an offer of assistance from a humanitarian organization fulfilling the required conditions of impartiality, such an offer cannot be refused without good reason.

Explosive remnants of war: Protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons

by **PETER HERBY AND ANNA R. NUITEN**

Large numbers of civilians quite predictably become “accidental” victims each year from a variety of unexploded munitions which no longer serve any military purpose. These munitions include anti-personnel mines, which are now widely prohibited, as well as anti-vehicle mines, submunitions from airborne cluster bombs or land-based systems and other unexploded ordnance (UXO). The frequent post-conflict death and injury from submunitions and other UXO is a result of their failure to explode on impact as they are designed to do, whereas that from anti-vehicle mines is a result of their design.

Although the international community has made significant progress in addressing the humanitarian problems caused by anti-personnel mines (e.g. through the 1997 Convention on the prohibition of anti-personnel mines¹), the broader problems, caused by other “explosive remnants of war” have not been addressed, although there has been considerable support expressed for stricter restrictions on the use of anti-vehicle mines. This article will show that the large number of civilian casualties caused by unexploded ordnance other than anti-personnel mines is both predictable and largely preventable. It suggests that the most appropriate tool for addressing this issue would be the adoption of an additional protocol on “explosive remnants of war” in the context of the planned Review Conference of the Convention on Certain Conventional Weapons (CCW)² in December 2001.

The contents of this article are based upon research conducted or commissioned by the International Committee of the Red Cross in the year 2000. The research analysed the human costs of mines, cluster bomb submunitions and other unexploded ordnance

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in Kosovo in the year following the end of the conflict in the province, surveyed the use and effects of submunitions on a more global basis and considered the possible reasons for the high failure rate of submunitions in conflicts over the past 30 years. The ICRC also examined the effects of anti-vehicle mines on its own relief operations and those of National Red Cross and Red Crescent Societies, and their implications for civilian populations.

Remnants of war — their effects and current regulation

Anti-vehicle mines

Effects — Anti-vehicle mines have a major impact on civilian populations. However, this impact is qualitatively different than that of anti-personnel mines — the most disturbing effects of which are the maiming or killing of large numbers of individual civilians. In contrast, the most troubling effects of anti-vehicle mines are the denial of humanitarian assistance to large numbers of civilians in both conflict and post-conflict situations and the limitation of movement of affected populations. By making the transportation structure, particularly roadways, unusable, anti-vehicle mines all too often prevent essential foods, medicines and other relief supplies and services from reaching vulnerable populations often in desperate need of such help.

In 1993 one such vulnerable population consisted of 100,000 to 120,000 people in communities isolated for months by the conflict in Bosnia-Herzegovina. On 12 October of that year a convoy of 14 ICRC trucks loaded with food and blankets set out to reach the affected communities of Maglaj and Tesanj. The mission was cancelled when the armored lead vehicle hit an anti-vehicle mine and all vehicles were forced to return to their base.

¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997.

² 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. Geneva, 10 October 1980.

This scenario is repeated year after year in a variety of countries as the ICRC, United Nations and other humanitarian agencies are forced to abandon civilian populations due to the presence or suspected presence of anti-vehicle mines. The result is that the humanitarian assistance, which civilians have a right to expect under the Fourth Geneva Convention of 1949 and the Additional Protocols of 1977, is not available. In addition to this denial of assistance, many civilians lose their lives from anti-vehicle mines on transport routes as they attempt to continue or rebuild their lives in war-torn lands.

A preliminary survey of the ICRC and National Red Cross and Red Crescent Society operations reveals a total of 20 incidents involving anti-vehicle mines in 11 countries during the 1990s. Each and every one of these incidents resulted in the cancellation of relief operations for already vulnerable populations. A total of 16 staff were killed and 63 injured in these incidents. When relief had to be delivered by air due to mined roadways the financial costs to the ICRC increased between 10 and 20 times.

Current regulation — The use of anti-vehicle mines is subject to the general rules of customary international law and is also covered by the original and amended versions of Protocol II of the CCW.³ However, limitations on the use of anti-vehicle mines in this Protocol are weak, of a general nature and have often simply been ignored in actual conflicts. Most mine-affected States are not party to Protocol II.

Although they are indiscriminate in nature, anti-vehicle mines can, in theory, be used in a discriminate manner if placed in marked minefields and monitored by military personnel. However, the increasing use of remotely delivered anti-vehicle mines will make the discriminate use of these weapons much more difficult and unlikely. Considerable support was generated during the first CCW Review Conference (1995-96) for requirements that anti-vehicle mines be detectable and self-destructing. However, a decision was eventually

³ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980. Protocol on Prohibitions or Restrictions

on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996).

made to postpone discussion on these weapons and to concentrate on anti-personnel mines.

Submunitions and other unexploded ordnance (UXO)

Effects — Submunitions are small bomblets that are delivered by a cluster bomb or artillery shell. They are dispersed in large numbers (varying from tens at a time to 600-700 per bomb) and have the capacity to spread destruction over an area as large as a football field — which is considered their military advantage. This military advantage, however, has important humanitarian implications.

During conflict, because submunitions are area weapons, there is a heightened risk of indiscriminate effects of attacks. When targeting is imprecise the “collateral effects” of missing the target can be far greater than with traditional ordnance. As with other gravity ordnance (dumb bombs), the precision of submunition delivery will depend on weather (wind and air density), drop height and drop speed. When used against military objects located in civilian areas those submunitions which fail to explode are an immediate threat to the civilian populations concerned, rendering dangerous such essential activities as obtaining food, water and medical care and blocking relief activities on behalf of such populations.

Following their use unexploded submunitions can pose a massive clearance problem and significant threat to civilians for many years. Failure rates (i.e. the proportion of munitions which fail to explode on impact) tend to be high due to factors such as poorly designed fuses, manufacturing problems, incorrect delivery and the difference between the ideal conditions used in testing and the reality of the actual target areas. The fuses are normally designed to function on impact with hard targets whereas actual strike surfaces often include soft ground, trees, mud, vegetation, etc.

During the war in Indochina, an estimated 285 million submunitions were dropped resulting in millions of unexploded submunitions.⁴ The lowest estimates of 5% failure rates suggest that

⁴ Eric Prokosch, *The technology of killing, aerial weapons*, London, 1995, p. 114.
A military and political history of antiperson-

14 million submunitions were left unexploded,⁵ although credible estimates are much higher (up to 30% failure rates).⁶ As of 1996 these remnants of war are reported to have taken more than 10,000 victims, of which around 31% are children.⁷ The ICRC recently received a report from the clearance agency UXO Laos indicating that in just the 27-month period, from 1 January 1998 through 31 March 2000, some 80,000 submunitions had been cleared.⁸ However, millions more remain and continue to inflict casualties nearly 30 years after the conflict.

Given the well-known fact of high failure rates in Indochina, it would have been advantageous if the problem of cluster submunitions could have been resolved before their use in Kosovo. However, in Kosovo, the territory of which is about one third of the size of Belgium, NATO acknowledges dropping 1,392 cluster bombs, containing some 290,000 submunitions,⁹ while the United States Department of Defense stated that 340,000 submunitions were dropped. According to NATO's own estimate of a 10% failure rate, some 29,000 unexploded submunitions remained in the area, many in or near populated areas. Others, however, estimate failure rates at 3% to 26% per canister, with the average failure rate falling between 10% and 15%.¹⁰

Casualty data collected by the ICRC in the year following the Kosovo conflict indicate that cluster bomblets are, along with anti-

5 *Ibid.*

6 See Colin King, Associates (UXO consultants), referring to talks with B. Lark, former technical adviser to UXO Laos, and further stating that this is a conservative estimate based on the *UXO Laos post-conflict impact survey*, which states that "up to 30% of the more than 2 million tons of ordnance dropped on Laos failed to explode".

7 King states that these figures are based on a national survey conducted by Handicap International in 1997.

8 Lao National UXO Programme (UXO Laos), fax containing answers to a questionnaire sent out by the ICRC, Vientiane, 18 May 2000, p. 3.

9 NATO dropped cluster munitions, document presented by NATO to the UN Mine Action Coordination Centre (UNMACC) in Pristina/Prishtine, undated [1999]. See also *Mine Action Coordination Centre Comprehensive Update and Plan for the Year 2000*, Update as of 5 November 1999, UNMACC, Pristina/Prishtine, November 1999.

10 Based on ICRC talks with a KFOR explosive ordnance disposal specialist, 10 February 2000. This figure is also used formally in KFOR Mine Awareness Briefings.

personnel mines, the leading cause of mine/UXO-related death and injury in Kosovo. Cluster bomblets and anti-personnel mines accounted for 73% of the 280 incidents individually recorded by the ICRC between 1 June 1999 and 31 May 2000, with each type of ordnance responsible for 102 deaths or injuries (i.e. 36% of casualties for each). In addition, as compared to those killed or injured by anti-personnel mines, those injured or killed by cluster bomblets were 4.9 times as likely to be under age 14.¹¹ Incidents involving cluster munitions were also much more likely than landmines to result in death or injury to several people. The high cluster bomblet casualty rate for children may be because they find the brightly coloured munitions lying on the surface attractive.

According to the database of the UN Mine Action Coordination Centre in Kosovo, which contains casualty reports from the ICRC and other organizations, the total number of UXO-related casualties during this one-year period was 492 persons.¹² This corresponds to an annual rate of approximately 31 per 100,000 population. The comparable rate for a heavily mine-affected region in northwest Cambodia (during a period without an influx of refugees) was 61 casualties per 100,000.¹³

Experience shows that whereas civilians generally show great respect for mines and will avoid mined areas whenever possible, they tend to underestimate or ignore the threat of cluster bomb submunitions, which leads to even more victims. This may be due to the fact that submunitions are perceived as “duds”, and therefore not a threat.

In addition to killing and injuring individuals, unexploded submunitions cause significant socio-economic problems. First, unexploded submunitions prevent people from returning to their homes,

¹¹ Information provided by Dr. David Meddings, Epidemiologist, Unit of the Chief Medical Officer, ICRC. The 95% confidence interval is (2.3, 10.3).

¹² The more comprehensive UNMACC data also show that among the 492 casualties from UXO reported to its database from June 1999 through May 2000, cluster bomblets and anti-personnel mines were the leading cause

of death and injury — with similar numbers of casualties resulting from each. “Other UXO”, some of which may in fact be cluster bomblets or anti-personnel mines, represent a significant proportion (27% to 35%) of casualties.

¹³ Information provided by Dr. David Meddings, Epidemiologist, Unit of the Chief Medical Officer, ICRC.

hamper the reconstruction of urban areas and infrastructure, which will in its turn hinder development and external investment. Secondly, amputees and the injured put a heavy toll on medical infrastructure. Since most victims are adult men and children, the economically active population will be diminished for two generations. Thirdly, the agricultural capacity will diminish because access to land is hindered by the presence of unexploded submunitions. Cattle and other animals also fall victim to submunitions — which reduces the means of survival for a population depending on agriculture. Even worse, economic necessity often drives people to work the land, despite the threat of unexploded submunitions, with more casualties as a result. Fourthly, the natural environment will be severely affected for many years.¹⁴

Submunitions, which are often highly unstable and dangerous, are more difficult to clear than mines and other ordnance for a number of reasons. Submunitions may never be removed for destruction, but must be destroyed individually *in situ*. In addition, mechanical clearance methods cannot be used, as submunition explosions are so powerful they are likely to destroy the clearance machine. While commonly used for the clearance of mines, dogs cannot be used for detection since they are prone to touching the submunition while sniffing it — which may trigger detonation. Added to this, many submunitions contain extremely dangerous multi-directional fuses, which make the submunition detonate if it is pushed or moved in any direction. Lastly, standard electromagnetic (mine) detectors cannot be used since many submunitions use electromagnetic fuses and will be detonated by such a detector. Clearance of unexploded submunitions is an extremely delicate and dangerous task, even more dangerous than mine clearance.

Current regulation — The use of submunitions is currently subject only to the general customary rules of international humanitarian law, which have not proven to be specific enough to reduce the human toll taken by these weapons.

Specific regulation is needed for the following reasons:

¹⁴ Arthur Westing (ed.), *Explosive remnants of war: mitigating the environmental*

effects, Publication of SIPRI & UNEP, Taylor & Francis, London, 1985.

- the predictably high failure rates of submunitions;
- their impact on wide areas;
- their widespread and long-lasting effects;
- the historical pattern of their use in or near civilian populations and their major impact on such populations;
- the trend of major industrialized countries to rely primarily or exclusively on air power to achieve their military objectives which suggests that cluster submunitions will be used in large numbers in the future.

Such regulations should also be applied to other munitions which fail to explode on impact and have the same effects as submunitions.

Towards a fifth protocol to the 1980 Convention on Certain Conventional Weapons

A proposal

The ICRC is proposing a new additional protocol to the 1980 Convention on Conventional Weapons which would address the humanitarian problems caused by explosive remnants of war. Such a protocol would deal comprehensively with the use and clearance of munitions — including anti-vehicle mines, submunitions and other munitions.

Possible key elements of a new protocol, currently being discussed with governments by the ICRC, are as follows:

- The central principle that those who use munitions which remain after the end of active hostilities are responsible for clearing or providing assistance to ensure the clearance of such ordnance. This is similar to what is required for landmines and booby traps in amended Protocol II of the CCW.

The responsibility could be fulfilled by a variety of measures including, for example, by equipping munitions and submunitions with effective self-destruction mechanisms and ensuring that munitions are detectable. However, if self-destruct mechanisms are not used or do not function the responsibility for clearance should remain.

- 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. This principle has also been accepted for landmines and booby traps in amended Protocol II.
- The principle that those who use munitions likely to have long-term effects should provide warnings to civilian populations on the dangers of such ordnance, as is already the case for landmines and booby traps in the original and amended versions of Protocol II.
- For submunitions (whether delivered by air or ground-based systems) — a prohibition of use against military objects located in concentrations of civilians. This would be similar to the rule already accepted for incendiary weapons in Protocol III of the CCW and a specific application of the rules contained in Article 51 of 1977 Additional Protocol I which prohibits indiscriminate attacks.¹⁵

Precedents

Such a proposal would not be the first addressing the problems caused by submunitions and other unexploded ordnance. Recent history has seen several attempts to address this issue. Following the use of cluster submunitions in the Indochina wars, Sweden and six other States¹⁶ made a proposal to the Conference of Governmental Experts in Lucerne in 1974, later to be slightly amended and followed by 13 States¹⁷ in Lugano, in which it was stated that “[a]nti-personnel cluster warheads (...) are prohibited for use”.¹⁸ Other States resisted this proposal. They claimed that anti-personnel cluster weapons are neither indiscriminate nor cruel. However, it is important to note that States were speaking here only of submunitions designed for their anti-personnel effects.

In 1983 the UN General Assembly endorsed the recommendations of a report to the UN Environment Programme on explosive remnants of conventional war in its Resolution 38/162 of 19

¹⁵ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980.

¹⁶ Sweden, Egypt, Mexico, Norway, Sudan, Switzerland and Yugoslavia.

¹⁷ Algeria, Austria, Egypt, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and Yugoslavia.

¹⁸ CDDH/IV/201, Article II (Anti-personnel fragmentation weapons).

December 1983. The recommendations, *inter alia*, propose co-operation between States in the area of collection, classification, dissemination of information on remnants of war, installing a database for this purpose and the promotion of technical assistance and co-operation in clearing. Most importantly they state that “[h]igh explosives should be designed to have built-in mechanisms that render the munitions harmless in due course”¹⁹ and that “[t]he important issues of responsibility for damage and compensation should not be minimised or neglected. Fair compensation must be considered in the light of damage and suffering entailed by remnants of war”.²⁰

A May 1994 ICRC expert meeting on certain weapon systems and on implementation mechanisms in international law also addressed the issue of submunitions. An informal Australian paper presented to this meeting stated that during conflict submunitions may be used as long as they are used in conformity with the international humanitarian law rules on targeting. It added, however, that unexploded ordnance in post-conflict situations forms such a hazard to the civilian population that a self-destruction feature on submunitions should be obligatory.

In September 2000 the ICRC presented its concerns and proposals to States at an expert meeting on “Explosive Remnants of War” held in Nyon, Switzerland. The discussions made clear that there is a widespread recognition of this problem and of the need to begin addressing the issue in the context of preparations for the 2001 CCW Review Conference. Subsequently, statements by a number of countries in the First Committee of the UN General Assembly (2000) called for consideration of this issue in the context of the 2001 CCW Review Conference.

During the first Preparatory Committee meeting for the 2001 Review Conference, on 14 December 2000, some 30 States²¹ supported a proposal to discuss the remnants of war issue in detail at the April

¹⁹ The report, prepared by a group of eight international experts, forms part of UN General Assembly Doc. A/38/383 (19 October 1983), pp. 6-28.

²⁰ *Ibid*

²¹ Including all European Union States, Argentina, Bulgaria, Canada, Cambodia, China, Hungary, New Zealand, Mexico, Norway, Peru, South Africa, Switzerland and the United States.

2001 Preparatory Committee meeting with a view to taking a decision at the December Review Conference on establishing a mandate for work on this issue.

Conclusions

It is encouraging that governments appear ready to begin addressing the long-standing problems caused by explosive remnants of war. However, many difficult issues will need to be addressed, including the nature of responsibility States are willing to accept, the types of information needed to facilitate explosive ordnance clearance and to protect civilian populations, and technical issues concerning the possible integration of self-destruct mechanisms in a variety of munitions.

The scale of the humanitarian problems of explosive remnants of war is likely to grow dramatically in the future. The increased ability to rapidly deliver large amounts of ordnance over greater and greater distances means that even conflicts lasting only a few days can leave huge numbers of unexploded munitions. Protracted conflicts will have even greater effects. Furthermore, as cluster bombs and land-based delivery systems for submunitions become more readily available and proliferate beyond the few countries which currently use them, these weapons and their associated humanitarian problems will occur in more and more regions of the world.

Although civilian casualties in armed conflicts are regrettably not always avoidable, a large proportion of the deaths and injuries from explosive remnants of war in the post-conflict context are both predictable and preventable. It is important that governments, humanitarian agencies, the military, the mine-clearance community and other interested organizations use the 2001 CCW Review Conference, and the negotiations which should follow, to engage in an intensive effort to achieve a dramatic reduction in the senseless death and injury inflicted by explosive remnants of war.

Composition du Comité international de la Croix-Rouge¹

JAKOB KELLENBERGER, PRÉSIDENT, docteur ès lettres de l'université de Zurich, ancien secrétaire d'État aux affaires étrangères suisses (1999, président depuis 1999).

ANNE PETITPIERRE, VICE-PRÉSIDENTE, docteur en droit, avocate, professeure à la faculté de droit de l'Université de Genève (1987).

JACQUES FORSTER, VICE-PRÉSIDENT PERMANENT, docteur ès sciences économiques, professeur à l'Institut universitaire d'études du développement (IUED) à Genève (1988, vice-président permanent depuis 1^{er} août 2000).

RENÉE GUISAN, secrétaire générale de l'«Institut de la Vie internationale», directrice d'établissements médico-sociaux, membre de l'*International Association for Volunteer Effort* (1986).

PAOLO BERNASCONI, licencié en droit, avocat, professeur de droit fiscal et de droit pénal économique aux universités de Saint-Gall, Zurich et Milan (Bocconi), ancien procureur général à Lugano (1987).

LISELOTTE KRAUS-GURNY, docteur en droit de l'Université de Zurich (1988).

SUSY BRUSCHWEILER, infirmière, ancienne directrice de l'École supérieure d'enseignement infirmier de la Croix-Rouge suisse à Aarau, directrice générale de SV-Service, restauration de collectivités (1988).

JACQUES MOREILLON, licencié en droit, docteur ès sciences politiques, secrétaire général de l'Organisation mondiale du mouvement scout, ancien directeur général au CICR (1988).

DANIEL THÜRER, docteur en droit, LL.M. (Cambridge), professeur à l'Université de Zurich (1991).

JEAN-FRANÇOIS AUBERT, docteur en droit, ancien professeur à l'Université de Neuchâtel, ancien député au Conseil national et au Conseil des États suisses (1993).

GEORGES-ANDRÉ CUENDET, licencié en droit de l'Université de Genève, diplômé de l'Institut d'études politiques de l'Université de Paris, *Master of Arts* de l'Université de Stanford (États Unis), ancien membre du Conseil administratif de Cologny (canton de Genève) (1993).

¹ Au 1^{er} janvier 2001.

- ÉRIC ROETHLISBERGER, docteur ès sciences politiques de l'Institut universitaire de hautes études internationales de Genève (1994, vice-président permanent de 1995 au 31 juillet 1999). ERNST A. BRUGGER, docteur ès sciences naturelles, conseiller économique, professeur titulaire à l'Université de Zurich (1995).
- JEAN-ROGER BONVIN, docteur ès sciences économiques de l'Université de Saint-Gall, ancien président du Centre de développement de l'Organisation de coopération et de développement économiques (OCDE) à Paris (1996).
- JAKOB NÜESCH, ingénieur agronome diplômé, docteur ès sciences de l'École polytechnique fédérale de Zurich, professeur en microbiologie à l'Université de Bâle, ancien président de l'École polytechnique fédérale de Zurich (1997).
- PETER ARBENZ, licencié ès sciences économiques, ancien délégué du Conseil fédéral suisse aux réfugiés, ancien président de la section du canton de Zurich de la Croix-Rouge suisse, conseiller pour le développement stratégique et d'entreprises (1983-1987, 1997).
- ANDRÉ VON MOOS, docteur en droit, licencié ès sciences économiques, certificat SMP de la *Harvard Business School*, ancien président du Groupe von Moos, entrepreneur (1998).
- OLIVIER VODOZ, licencié en droit, avocat, ancien député au Grand Conseil et ancien président du Conseil d'État de la République et Canton de Genève (1998).
- GABRIELLE NANCHEN, licenciée ès sciences sociales de l'École des sciences sociales, Université de Lausanne, ancien membre du Conseil national suisse (1998).
- JEAN DE COURTEN, licencié en droit, ancien délégué et ancien directeur des opérations au CICR (1998).
- JEAN-PHILIPPE ASSAL, docteur en médecine et professeur de médecine, responsable de la Division d'enseignement thérapeutique pour maladies chroniques à la faculté de médecine de l'Université de Genève (1999).
- JACQUELINE AVRIL, docteur en médecine de l'Université de Genève, médecin généraliste, membre du Bureau et secrétaire du Conseil de l'Association des médecins du Canton de Genève (1999).
- JEAN ABT, agriculteur, officier instructeur, commandant de corps de l'armée suisse (à disposition) (2001).

Composition of the International Committee of the Red Cross¹

JAKOB KELLENBERGER, PRESIDENT, Ph.D. of the University of Zurich, former Swiss Secretary of State for Foreign Affairs (1999, President since 2000).

ANNE PETITPIERRE, VICE-PRESIDENT, Doctor of Laws, barrister, Professor at the Law Faculty of the University of Geneva (1987).

JACQUES FORSTER, PERMANENT VICE-PRESIDENT, Doctor of Economics, Professor at the Graduate Institute of Development Studies in Geneva (1988, permanent Vice-President since 1 August 1999).

RENÉE GUISAN, General Secretary of the "Institut de la Vie internationale", head of medico-social institutions, member of the International Association for Volunteer Effort (1986).

PAOLO BERNASCONI, Bachelor of Laws, barrister, professor of fiscal law and economic criminal law at the Universities of St. Gallen, Zurich and Milan (Bocconi), former Public Prosecutor in Lugano (1987).

LISELOTTE KRAUS-GURNY, Doctor of Laws of Zurich University (1988).

SUSY BRUSCHWEILER, nurse, former Director of the Swiss Red Cross College of Nursing in Aarau, Chairwoman of S-V Service Contract Catering (1988).

JACQUES MOREILLON, Bachelor of Laws, Doctor of Political Science, Secretary-General of the World Organization of the Scout Movement, former Director-General at the ICRC (1988).

DANIEL THÜRER, Master of Laws (Cambridge), Doctor of Laws, Professor at the University of Zurich (1991).

JEAN-FRANÇOIS AUBERT, Doctor of Laws, former Professor at the University of Neuchâtel, former member of the Swiss National Council and Council of States (1993).

GEORGES-ANDRÉ CUENDET, Bachelor of Laws of the University of Geneva, graduate of the Institute of Political Studies of the University of Paris (France), Master of Arts of Stanford University (USA), former member of the Administrative Council of Cologne (Switzerland) (1993).

ÉRIC ROETHLISBERGER, Doctor of Political Science of the Graduate Institute of International Studies in Geneva (1994, permanent Vice-President from 1995 to 31 July 1999).

¹ As at 1 January 2001.

- ERNST A. BRUGGER, Doctor of Natural Science, consultant for economic development issues, Professor at the University of Zurich (1995).
- JEAN-ROGER BONVIN, Doctor of Economics of the University of St. Gallen, former President of the Development Centre of the Organisation for Economic Co-operation and Development (OECD) in Paris (1996).
- JAKOB NÜESCH, Agricultural engineer, Doctor of Technical Science of the Federal Institute of Technology of Zurich, Professor of microbiology at the University of Basle, former President of the Federal Institute of Technology of Zurich (1997).
- PETER ARBENZ, graduate in Economics, former Swiss Federal Council Delegate for Refugee Affairs, former Chairman of the Zurich branch of the Swiss Red Cross, consultant for Strategic and Enterprise Development (1983-1987, 1998).
- ANDRÉ VON MOOS, Doctor of Laws, Bachelor of Economics, SMP certificate of the Harvard Business School, former Chairman of the von Moos Group, industrialist (1998).
- OLIVIER VODOZ, Bachelor of Laws, barrister, former Deputy in the Geneva *Grand Conseil* and former President of the *Conseil d'État* of the Republic and Canton of Geneva (1998).
- GABRIELLE NANCHEN, Bachelor of Social Science from the University of Lausanne School of Social Studies, former member of the Swiss National Council (1998).
- JEAN DE COURTEN, Bachelor of Laws, former delegate and former Director of Operations at the ICRC (1998).
- JEAN-PHILIPPE ASSAL, Doctor of Medicine, Professor of Medicine, head of the Division for Instruction in the Treatment of Chronic Diseases at the Faculty of Medicine of the University of Geneva (1999).
- JACQUELINE AVRIL, Doctor of Medicine of the University of Geneva, general practitioner, member of the Board and Secretary of the Council of the Medical Association of the Canton of Geneva (1999).
- JEAN ABT, diplomas in agriculture and business, Lieutenant-General of the Swiss Army (rtd.) (2001).

Nouveau membre du Comité international de la Croix-Rouge

Lors de son assemblée du 12 octobre 2000, le Comité international de la Croix-Rouge (CICR) a élu un nouveau membre du Comité, Monsieur **Jean Abt**. Avec cette nomination, le Comité, qui est composé de citoyens suisses, compte désormais 23 membres.

Jean Abt, né en 1938, citoyen suisse, a une formation d'agriculteur, de commerce et d'officier instructeur. Sa formation inclut des études à l'École supérieure de guerre interarmées, à Paris. Officier d'état-major depuis 1971, Jean Abt a été nommé commandant de corps en 1992. M. Abt a pris sa retraite de l'armée suisse le 31 décembre 2000.

Le mandat de membre du CICR de M. Jean Abt commence le 1^{er} janvier 2001.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

New member of the International Committee of the Red Cross

At its meeting of 12 October 2000, the Assembly of the International Committee of the Red Cross (ICRC) coopted a new member, Mr **Jean Abt**. This brings the membership of the Committee, which is made up of Swiss citizens, to 23 members.

Jean Abt, a Swiss citizen, was born in 1938. He studied agriculture and business, and became a professional officer in the Swiss Army. He also studied at the *École supérieure de guerre interarmées* in Paris. On the Swiss General Staff since 1971, Mr Abt was promoted to the rank of Lieutenant-General in 1992. He retired from the Swiss Army on 31 December 2000.

Mr Abt's terms of office as a member of the ICRC begins on 1 January 2001.

INTERNATIONAL COMMITTEE OF THE RED CROSS

Mise en œuvre du droit international humanitaire

Chronique semestrielle de législation et de jurisprudence nationales
juillet-décembre 2000

A) Législation

Albanie

La décision n° 269 du Conseil des ministres, adoptée le 25 mai 2000, interdit l'usage de toute mine antipersonnel, la production publique ou privée de celles-ci, leur vente et leur exportation. Elle demande à ce que les mines antipersonnel en possession des forces armées soient retirées des stocks et qu'elles soient détruites d'ici fin 2004. Les zones minées du pays doivent être identifiées et déminées avant la fin 2009. Le transfert de mines antipersonnel n'est autorisé que dans le cadre du programme de destruction des stocks que le ministère de la Défense doit rapidement présenter au Conseil des ministres. Le ministère des Affaires étrangères est, quant à lui, chargé de solliciter l'assistance technique et financière qui seront nécessaires au déminage de la part d'autres États, des Nations Unies ou d'organisations non gouvernementales, et d'adresser chaque année au secrétaire général des Nations Unies un rapport sur l'état d'avancement du programme et les problèmes rencontrés dans la mise en œuvre de celui-ci.

Colombie

Par la loi n° 599 du 24 juillet 2000, le Congrès a adopté une version modifiée du Code pénal, qui entrera en vigueur le 24 juillet 2001. Ce nouveau Code contient un chapitre intitulé *Delitos contra personas y bienes protegidos por el DIH*, qui sanctionne, dans son deuxième titre, les violations du droit international humanitaire, sans distinction fondée sur le caractère international ou non du conflit armé. Le long catalogue des actes incriminés inclut, notamment, les crimes de violence sexuelle (articles 138 à 141), l'utilisation illicite ou la destruction des biens culturels (article 156), le recrutement d'enfants de moins de 18 ans et le fait de les obliger à participer directement ou indirectement aux hostilités, ou encore le

fait d'empêcher des actions de secours humanitaires, médicales et autres.

Le Congrès colombien a également adopté, le 30 mai 2000, une loi spéciale qui sanctionne les crimes de génocide, de déplacement ou de disparition forcés, et qui prévoit, pour les crimes de torture, une peine plus sévère que celle stipulée par le Code pénal ordinaire. Cette loi a été publiée dans le *Diario Oficial* du 7 juillet 2000 (n° 44.073).

Costa Rica

La loi sur l'usage et la protection des emblèmes de la croix rouge et du croissant rouge (*Ley n° 8031 «Uso y Protección del Emblema de la Cruz Roja y de la Media Luna Roja»*) a été adoptée par l'Assemblée législative le 25 septembre 2000 et publiée dans *La Gaceta* n° 210 du 2 novembre 2000. Cette loi couvre également les signaux distinctifs, distingue clairement entre l'usage protecteur et l'usage indicatif de l'emblème, prévoit des amendes pour les cas d'abus et une peine d'emprisonnement de dix à quinze ans pour les cas d'usage perfide en temps de conflit armé.

El Salvador

La loi sur la protection de l'emblème et du nom de la Croix-Rouge et du Croissant-Rouge (*Ley de Protección del Emblema y el Nombre de la Cruz Roja y Media Luna Roja*, décret n° 175) a été adoptée par le Congrès le 26 octobre 2000 et publiée dans le *Diario Oficial*, le 18 décembre 2000 (tome 329, n° 237).

Inde

Quatre ans après la ratification de la Convention des Nations Unies sur les armes chimiques de 1993, le parlement indien a adopté à l'unanimité, le 16 août 2000, le *Chemical Weapons Convention Act*. Cette loi incorpore dans le droit national indien les obligations découlant du traité pour le gouvernement. Celui-ci permettait déjà des inspections de routine, et il a émis des déclarations relatives aux armes chimiques en sa possession dont il a, par ailleurs, entrepris la destruction. La loi habilite le gouvernement à superviser également les responsabilités de l'industrie chimique et prévoit des sanctions pénales pour toute violation.

Kirghizistan

La loi n° 82 sur l'utilisation et la protection de l'emblème du croissant rouge et de la croix rouge a été adoptée par le Parlement le 8 septembre 2000 et signée par le président de la République kirghize le 29 septembre 2000. Cette loi régit l'usage des emblèmes et les dénominations « Croissant-Rouge » et « Croix-Rouge », ainsi que des signaux distinctifs destinés à identifier les unités et moyens sanitaires. Elle identifie les utilisateurs autorisés tout en établissant clairement la distinction entre usage à titre indicatif ou protecteur. Elle définit différents cas d'abus, mais renvoie à d'autres actes législatifs pour ce qui est de leur répression. Les sanctions sont en effet envisagées dans les projets de loi relatifs aux modifications du Code pénal et du Code des infractions administratives.

Nicaragua

Une loi interdisant la production, l'achat, la vente, l'importation, l'exportation, le transit, l'utilisation et la possession de mines terrestres antipersonnel a été adoptée par le Parlement nicaraguayen, le 24 novembre 1999, et publiée dans *La Gaceta*, le 12 janvier 2000, date de son entrée en vigueur. Elle définit le genre de mines concerné, prévoit la destruction des stocks détenus par les forces armées, conformément à un calendrier à établir par les autorités pertinentes, et érige toute violation en « délit d'exposition de personnes au danger », sans exclure une éventuelle responsabilité civile et pénale qui pourrait découler d'un tel délit.

Nouvelle-Zélande

Le *International Crimes and International Criminal Court Act 2000*, qui est entré en vigueur le 1^{er} octobre 2000, met en œuvre le Statut de Rome de la Cour pénale internationale. Cette loi est divisée en onze titres principaux, qui comprennent un total de 187 articles. Le texte des dispositions du Statut de Rome relatives au génocide, aux crimes contre l'humanité et aux crimes de guerre est repris et réparti dans des articles spécifiques. En ce qui concerne les crimes de guerre, la loi précise qu'elle n'affecte ni ne limite en rien le *Geneva Conventions Act 1958*, qui établit comme crime, selon le droit

néo-zélandais, les infractions graves aux Conventions de Genève et à leur premier Protocole additionnel. Cette loi fournit des directives détaillées pour la coopération avec la Cour, le transfèrement de personnes et la poursuite des individus suspectés d'avoir commis des crimes définis par le Statut. Elle amende également plusieurs autres lois en conséquence.

Ukraine

Des règles relatives à la production, à la délivrance et à l'enregistrement des cartes d'identité du personnel médical utilisant l'emblème de la croix rouge ont été approuvées, le 12 juin 2000, par le biais de la résolution n° 939 du Cabinet des ministres de l'Ukraine. Cette résolution met en œuvre les dispositions pertinentes de la *Loi sur la symbolique de la croix rouge et du croissant rouge en Ukraine*, adoptée en juillet 1999.

B) Commissions nationales

Azerbaïdjan

Une *Commission pour la mise en œuvre de la Convention pour la protection des biens culturels en cas de conflit armé* a été établie par un décret présidentiel du 13 novembre 2000. Elle réunit, entre autres, des représentants des ministères des Affaires étrangères, de la Culture, de l'Éducation et de la Justice, ainsi que divers représentants d'organes étatiques ou non impliqués dans les domaines de l'art, des sciences ou de la religion.

Belgique

Créée en 1987 par décision du Conseil des ministres, la *Commission interdépartementale de droit humanitaire* a été réorganisée par le biais d'un arrêté royal, le 6 décembre 2000. Ceci a pour avantage de consacrer officiellement et publiquement son rôle et de renforcer sa base légale. Sous son nouveau nom, la *Commission interministérielle de droit humanitaire*, est donc réorganisée en vue d'améliorer son fonctionnement, mais ne change pas de mandat. Celui-ci avait été défini par une décision du Conseil des ministres du 23 décembre 1994.

Croatie

La *Commission nationale croate pour le droit international humanitaire* a été créée par une décision gouvernementale du 13 juillet 2000. Elle est constituée de représentants des ministères des Affaires étrangères, de la Défense, de l'Intérieur, de la Justice, de l'Administration et du Gouvernement local, de la Santé, de l'Éducation et du Sport, du Travail et du Bien-Être social, ainsi que de la Commission de la République de Croatie pour les droits de l'homme et de la Société nationale de la Croix-Rouge. Elle peut s'adjoindre, si nécessaire, un expert extérieur. La commission a pour mandat de coordonner toutes les activités des structures étatiques chargées de protéger et de promouvoir le droit international humanitaire, de collecter des informations sur la mise en œuvre de ce droit en Croatie, d'évaluer la situation et de formuler des recommandations à cet égard.

Kazakhstan

Établie par l'arrêté gouvernemental n° 1794 du 1^{er} décembre 2000, la *Commission interministérielle de mise en œuvre du droit international humanitaire* est chargée d'élaborer des propositions portant sur la mise en œuvre de ce droit au niveau national. La Commission est un organe consultatif du gouvernement, qui réunit notamment des représentants des ministères des Affaires étrangères, de la Justice, de l'Économie, de l'Éducation et des sciences, de l'Intérieur, de la Défense, de la Culture, de l'Information et de l'Harmonie sociale, de l'Environnement, ainsi que des représentants du Comité de la sécurité nationale, du Bureau du procureur général, de la Cour suprême et du Parlement. La présidence est assurée par le ministre de la Justice.

Ukraine

La *Commission interministérielle de mise en œuvre du droit international humanitaire en Ukraine* a été établie par la résolution du Cabinet des ministres de l'Ukraine n° 1157 du 21 juillet 2000. Présidée par le ministre de la Justice, cette Commission est composée de 16 membres représentant le Cabinet des ministres, les ministères de la Justice, des Affaires étrangères, de l'Intérieur, des Finances, de la Santé, de l'Économie, de l'Éducation et des sciences, des Situations d'urgence, de la

Culture et des Arts, ainsi que des représentants de l'état-major des forces armées et de la Société nationale de la Croix-Rouge. La Commission est chargée d'examiner la législation nationale et prépare des propositions (projets de loi et règlements) quant à sa mise en accord avec le droit international humanitaire, de coordonner les activités des autorités dans le domaine de la mise en œuvre et de contribuer à la diffusion de ce droit.

**SERVICES CONSULTATIFS EN DROIT
INTERNATIONAL HUMANITAIRE, CICR**

État des Protocoles additionnels aux Conventions de Genève de 1949 relatifs à la protection des victimes des conflits armés

Déclaration faite par le représentant du CICR
à l'Assemblée générale des Nations Unies,
55^e session, 2000

L'adhésion universelle aux instruments de base du droit international humanitaire demeure une première étape indispensable pour que ce droit soit respecté. Les *Conventions de Genève pour la protection des victimes de la guerre* ont atteint cette universalité : 189 États, soit un de plus que depuis la 53^e session de l'Assemblée générale, y sont maintenant parties.

Pour assurer une meilleure protection juridique de la population civile contre les effets des hostilités, il est essentiel que les *Protocoles additionnels de 1977 aux Conventions de Genève de 1949* atteignent la même universalité. À cet égard, il est encourageant de constater que le nombre d'États liés par les Protocoles s'accroît chaque année ; depuis le dernier débat sur ce point à l'ordre du jour, cinq États ont adhéré au premier Protocole, ce qui porte à 157 le nombre d'États parties. En ce qui concerne le deuxième Protocole, avec six nouveaux instruments de ratification déposés, 150 États en sont maintenant parties. Le Comité international de la Croix-Rouge (CICR) soutient cet effort, et il souhaite ici appeler les États qui n'ont pas encore ratifié ces instruments à le faire dans les plus brefs délais.

Le CICR ne saurait passer sous silence l'importance reconnue à la Cour pénale internationale par les 21 États qui ont à ce jour ratifié son Statut. La création de cette Cour a pour but de punir plus efficacement les auteurs des crimes les plus graves, au nombre desquels figurent les crimes de guerre, qu'ils soient commis en situation de conflit armé international ou non international. Il est donc instamment demandé aux États de ratifier le Statut de la Cour, afin de contribuer à lutter contre l'impunité.

Le CICR tient aussi à saluer la teneur du dernier

rapport du Secrétaire général sur l'état des Protocoles additionnels de 1977, et à féliciter les États qui y ont contribué. Nous sommes convaincus du bien-fondé et de l'importance de cette initiative, et nous exprimons le vœu de voir le plus grand nombre possible d'États communiquer des informations sur la mise en œuvre des dispositions du droit humanitaire par leurs autorités nationales compétentes.

Le droit humanitaire occupe une place importante dans le monde contemporain. La Décennie des Nations Unies pour le droit international a offert, par le passé, un forum privilégié pour en débattre. Cette Décennie étant arrivée à son terme, il nous semble essentiel de préserver un lieu de débat sur le droit humanitaire. Dans ce but, le CICR souhaite faire deux propositions.

La première concerne l'élargissement du champ d'application du présent point de l'ordre du jour, pour y inclure des instruments du droit humanitaire autres que les Protocoles additionnels de 1977. Il s'agit des Conventions de Genève de 1949, de la *Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé* et de ses deux *Protocoles additionnels de 1954 et 1999*, ainsi que du *Statut de Rome de la Cour pénale internationale de 1998*. Rappelons que les autres traités du droit humanitaire concernant la conduite des hostilités sont abordés en Première Commission.

La seconde proposition concerne la périodicité du débat. La protection des victimes des conflits armés demeure une préoccupation constante de la communauté internationale, et le CICR est d'avis qu'il serait souhaitable d'inscrire ce point à l'ordre du jour chaque année.

La protection des victimes de la guerre nécessite obligatoirement, en temps de paix déjà, des mesures sur le plan national afin de garantir l'application des dispositions du droit humanitaire. C'est pourquoi l'adoption de législations nationales revêt une importance particulière, notamment en ce qui concerne la répression des violations graves, la réglementation de l'usage des emblèmes protégés et la sanction de leur utilis-

tion abusive, ainsi que la protection des biens culturels. Par ailleurs, la diffusion des Conventions de Genève et des Protocoles additionnels à l'ensemble de la population, à commencer par les porteurs d'armes, est également une obligation des États parties à ces traités.

À cet égard, le CICR saisit cette occasion pour se féliciter des engagements pris par les États lors de la XXVII^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge. Un nombre très important d'entre eux se sont engagés à ratifier les traités du droit humanitaire et à prendre des mesures nationales de mise en œuvre. Le CICR espère fermement que ces engagements se matérialiseront. Il tient à faire part de sa disponibilité pour donner tout le soutien nécessaire à cet effet.

Dans ce domaine, permettez-nous d'attirer l'attention sur la Réunion d'experts sur la mise en œuvre, au niveau national, des règles de protection des biens culturels en cas de conflit armé. Organisée par les Services consultatifs en droit international humanitaire du CICR, avec la participation de l'UNESCO, cette réunion a eu lieu à Genève les 5 et 6 octobre 2000. Les discussions avec les experts serviront de base pour rédiger des lignes directrices sur la mise en œuvre nationale de la Convention de La Haye de 1954 et de ses deux Protocoles. Ces lignes directrices recenseront l'ensemble des mesures juridiques et pratiques qui doivent être adoptées dans ce domaine. Elles seront destinées à soutenir les autorités nationales dans l'accomplissement de leurs obligations en matière de protection des biens culturels en cas de conflit armé.

La création, par un État, d'une commission nationale, chargée de conseiller et d'aider le gouvernement dans la mise en œuvre et la diffusion du droit humanitaire, constitue une étape importante en vue d'assurer l'application effective de ce droit. Ceci est aujourd'hui reconnu par tous. Le CICR tient donc à féliciter les 61 États qui ont pris une telle initiative, et il réitère sa disponibilité pour des conseils juridiques et une assistance technique dans la mise en œuvre des traités du droit humanitaire.

Enfin, nous aimerions saisir cette occasion pour rappeler que le CICR a entrepris, depuis 1996, un important travail sur le droit humanitaire coutumier. Cette étude, qui se base sur la pratique d'un grand nombre d'États et qui est unique en son genre, devrait être disponible en automne 2001.

Résolution de l'Assemblée générale des Nations Unies sur les Protocoles additionnels de 1977 — A/RES/55/148 du 12 décembre 2000

L'Assemblée générale,

Rappelant ses résolutions 32/44 du 8 décembre 1977, 34/51 du 23 novembre 1979, 37/116 du 16 décembre 1982, 39/77 du 13 décembre 1984, 41/72 du 3 décembre 1986, 43/161 du 9 décembre 1988, 45/38 du 28 novembre 1990, 47/30 du 25 novembre 1992, 49/48 du 9 décembre 1994, 51/155 du 16 décembre 1996 et 53/96 du 8 décembre 1998,

Ayant examiné le rapport du Secrétaire général sur l'état des Protocoles additionnels aux Conventions de Genève de 1949 relatifs à la protection des victimes des conflits armés,

Remerciant les États Membres et le Comité international de la Croix-Rouge de leur contribution à ce rapport,

Convaincue de la pérennité des règles humanitaires établies concernant les conflits armés et de la nécessité de respecter et de faire respecter ces règles dans toutes les circonstances entrant dans le champ des instruments internationaux pertinents, en attendant qu'il soit mis fin à ces conflits le plus rapidement possible,

Soulignant qu'en cas de conflit armé, il peut être fait appel à la Commission internationale d'établissement des faits en application de l'article 90 du Protocole I, et rappelant que, s'il y a lieu, la Commission peut faciliter, en prêtant ses bons offices, le retour à l'observation des dispositions des Conventions et du Protocole,

Soulignant également qu'il importe, pour le renforcer, que le corps de règles en vigueur constituant le droit internatio-

nal humanitaire soit universellement accepté, et qu'il doit être largement diffusé et pleinement appliqué au niveau national et constatant avec préoccupation toutes les violations des Conventions de Genève de 1949 et des deux Protocoles additionnels,

Notant avec satisfaction le nombre croissant de commissions nationales et autres organes intervenant, au niveau national, auprès des autorités pour les conseiller sur l'application, la diffusion et le développement du droit international humanitaire,

Consciente du rôle que joue le Comité international de la Croix-Rouge en offrant une protection aux victimes des conflits armés,

Notant avec satisfaction les efforts constants que le Comité international de la Croix-Rouge déploie pour promouvoir le droit international humanitaire, en particulier les Conventions de Genève de 1949 et les deux Protocoles additionnels, et diffuser des renseignements à leur sujet,

Rappelant que la vingt-sixième Conférence internationale de la Croix-Rouge et du Croissant-Rouge a fait siennes les recommandations du Groupe intergouvernemental d'experts pour la protection des victimes de la guerre tendant notamment à ce que le depositaire des Conventions de Genève de 1949 organise des réunions périodiques des États parties aux Conventions en vue d'examiner les problèmes d'ordre général touchant l'application du droit international humanitaire,

Accueillant avec satisfaction l'adoption, à La Haye le 26 mars 1999, d'un deuxième protocole à la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé,

Notant la célébration en 1999, à La Haye et à Saint-Petersbourg, du centenaire de la première Conférence internationale de la paix, qui a mis en évidence l'importance des Conventions de Genève relatives à la protection des victimes des conflits armés et de leurs protocoles additionnels,

Prenant note du fait que le Statut de Rome de la

Cour pénale internationale, adopté le 17 juillet 1998, couvre les crimes ayant une portée internationale des plus graves au regard du droit international humanitaire, et que tout en rappelant qu'il est du devoir de chaque État de soumettre à sa juridiction criminelle les responsables de tels crimes, le Statut manifeste la détermination de la communauté internationale à mettre un terme à l'impunité des responsables et à concourir ainsi à la prévention de tels crimes,

Notant que le droit international humanitaire a été un thème-phare de la Décennie des Nations Unies pour le droit international, qui s'est achevée en 1999, 50 ans après l'adoption des Conventions de Genève, et reconnaissant qu'il est utile que l'Assemblée générale examine l'état des instruments de droit international humanitaire relatifs à la protection des victimes des conflits armés,

1. *Se félicite* de l'acceptation quasi universelle des Conventions de Genève de 1949, et note qu'une tendance analogue se dégage en ce qui concerne l'acceptation des deux Protocoles additionnels de 1977;
2. *Engage* tous les États parties aux Conventions de Genève de 1949 qui ne l'ont pas encore fait à envisager de devenir parties aux Protocoles additionnels à une date aussi rapprochée que possible;
3. *Demande* à tous les États qui sont déjà parties au Protocole I, ou à ceux qui n'y sont pas parties, lorsqu'ils s'y porteront parties, de faire la déclaration prévue à l'article 90 du Protocole;
4. *Prie* tous les États qui ne l'ont pas encore fait d'envisager de devenir parties à la Convention de 1954 pour la protection des biens culturels en cas de conflit armé et à ses deux protocoles ainsi qu'aux autres traités pertinents dans le domaine du droit international humanitaire relatif à la protection des victimes des conflits armés;
5. *Invite* tous les États parties aux Protocoles additionnels à faire en sorte que ceux-ci soient largement diffusés et pleinement appliqués;
6. *Prend note* avec satisfaction du Plan d'action adopté à la vingt-

septième Conférence internationale de la Croix-Rouge et du Crois-sant-Rouge, qui réaffirme notamment l'importance d'une adhésion universelle aux traités de droit humanitaire et de leur application effective au niveau national;

7. *Affirme* la nécessité d'une application plus effective du droit international humanitaire;

8. *Prend note avec satisfaction* des activités des services consultatifs du Comité international de la Croix-Rouge qui viennent appuyer les efforts entrepris par les États Membres pour adopter des mesures législatives et administratives en vue d'appliquer le droit international humanitaire et qui facilitent l'échange d'informations entre les gouvernements à cet égard;

9. *Se félicite* du nombre croissant de commissions ou comités nationaux chargés de faire appliquer le droit international humanitaire, de promouvoir la transposition en droit interne des traités qui le constituent et d'en assurer la diffusion;

10. *Accueille avec satisfaction* l'adoption du Protocole facultatif se rapportant à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés;

11. *Prie* le Secrétaire général de lui présenter, à sa cinquante-septième session, un rapport établi à partir des renseignements reçus des États Membres et du Comité international de la Croix-Rouge, sur l'état des Protocoles additionnels et sur les mesures prises en vue de renforcer le corps de règles en vigueur constituant le droit international humanitaire, notamment pour en assurer la diffusion et la pleine application au niveau national;

12. *Décide* d'inscrire à l'ordre du jour provisoire de sa cinquante-septième session la question intitulée « État des Protocoles additionnels aux Conventions de Genève de 1949 relatifs à la protection des victimes des conflits armés ».

Status of the Protocols additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts

Statement made by the representative of the ICRC at the United Nations General Assembly, 55th session, 2000

Universal adherence to the basic instruments of international humanitarian law remains an essential first step in ensuring compliance with that law. The *Geneva Conventions for the protection of war victims* have attained this universality, with 189 States now party to the Conventions — one more since the 53rd session of the General Assembly.

In order to improve legal protection of the civilian population against the effects of hostilities, it is essential that the *1977 Protocols additional to the 1949 Geneva Conventions* attain the same degree of universality. It is therefore encouraging to note that the number of States bound by the Protocols is increasing yearly. Since the last debate on this topic, five States have become bound by Protocol I, bringing the total of States party to 157. As far as Protocol II is concerned, six new instruments of ratification have been deposited, bringing to 150 the number of States party. The International Committee of the Red Cross (ICRC) supports these efforts and would like to take this opportunity to call on those States that have not yet done so to ratify these instruments as soon as possible.

The ICRC wishes to stress the importance of the International Criminal Court, as attested by the ratification of its Statute by 21 States so far. The aim of setting up the Court is to ensure more effective punishment of those who commit the most serious crimes, including war crimes, regardless of whether the conflicts during which they are committed are international or not. We therefore urge the States to ratify the Court's Statute and thereby to advance the cause of putting an end to impunity.

The ICRC also welcomes the latest report by the

Secretary-General regarding the status of the 1977 Additional Protocols, and congratulates those States that contributed. We are convinced of the importance of this initiative, and hope that as many States as possible will supply information regarding the implementation of humanitarian law by their relevant national authorities.

Humanitarian law plays an important role in today's world. The United Nations Decade of International Law provided an excellent forum for discussion on the subject. Now that the Decade has come to an end, we believe it to be essential that some forum for debate on humanitarian law be preserved. The ICRC therefore wishes to advance two proposals.

The first is to extend the scope of this agenda item to include instruments of humanitarian law other than the 1977 Additional Protocols, namely the 1949 Geneva Conventions, the *Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* and its *two additional Protocols of 1954 and 1999*, and the *1998 Rome Statute of the International Criminal Court*. The other humanitarian law treaties concerning the conduct of hostilities are already dealt with by the First Commission.

The second proposal concerns the frequency of these debates. Given that protecting the victims of armed conflict is a matter of ongoing concern for the international community, the ICRC feels it would be appropriate to place this topic on the agenda every year.

To protect the victims of war, it is necessary in time of peace to take measures at a national level to ensure implementation of humanitarian law. That is why it is particularly important to enact national legislation to repress serious violations of humanitarian law, to establish regulations governing the use of the protected emblems and measures for the punishment of their misuse, and to protect cultural property. The States parties are also under an obligation to promote knowledge of the Geneva Conventions and their Additional Protocols among the entire population, especially those who bear arms.

The ICRC therefore takes this opportunity to welcome the pledges made by the States at the 27th International Conference of the Red Cross and Red Crescent. A large number of States undertook to ratify the instruments of humanitarian law and to take measures to implement that law at the national level. It is the ICRC's fervent hope that these pledges will be translated into concrete action and we wish to emphasize its willingness to provide any assistance that may be needed in achieving this.

One activity to which I would like to draw your attention is the meeting of experts on national implementation of the rules for the protection of cultural property during armed conflict. This meeting, which was organized by the ICRC's Advisory Service on International Humanitarian Law, with UNESCO participation, took place in Geneva on 5 and 6 October 2000. The discussions with these specialists will form the basis for drafting guidelines for national implementation of the 1954 Hague Convention and its two Protocols. These guidelines, which will draw together all the legal and practical measures that must be taken in this area, are intended to assist national authorities in discharging their obligations for the protection of cultural property in the event of armed conflict.

The creation by a State of a national commission to advise and aid the government in implementing and spreading knowledge of humanitarian law constitutes an important step towards ensuring effective implementation of this law. The ICRC congratulates the 61 States that have taken such an initiative and reiterates its willingness to provide legal advice and technical assistance in implementing humanitarian law.

Finally, we wish to take this opportunity to mention the major project on customary humanitarian law in which the ICRC has been engaged since 1996. This study is based on the practice of a large number of States and is quite unique in its field. The results of the study should be available in the autumn of 2001.

Resolution of the United Nations General Assembly on
the 1977 Additional Protocols — A/RES/55/148, 12
December 2000

The General Assembly,

Recalling its resolutions 32/44 of 8 December 1977, 34/51 of 23 November 1979, 37/116 of 16 December 1982, 39/77 of 13 December 1984, 41/72 of 3 December 1986, 43/161 of 9 December 1988, 45/38 of 28 November 1990, 47/30 of 25 November 1992, 49/48 of 9 December 1994, 51/155 of 16 December 1996 and 53/96 of 8 December 1998,

Having considered the report of the Secretary-General on the status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts,

Thanking Member States and the International Committee of the Red Cross for their contribution to this report,

Convinced of the continuing value of established humanitarian rules relating to armed conflicts and the need to respect and ensure respect for these rules in all circumstances within the scope of the relevant international instruments, pending the earliest possible termination of such conflicts,

Stressing the possibility of making use of the International Fact-Finding Commission in relation to an armed conflict, pursuant to article 90 of Protocol I, and recalling that the International Fact-Finding Commission may, where necessary, facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol,

Stressing also the need for consolidating the existing body of international humanitarian law through its universal acceptance and the need for wide dissemination and full implementation of such law at the national level and expressing concern about all violations of the Geneva Conventions of 1949 and the two Additional Protocols,

Noting with satisfaction the increasing number of national commissions and other bodies involved in advising authorities at the national level on the implementation, dissemination and development of international humanitarian law,

Mindful of the role of the International Committee of the Red Cross in offering protection to the victims of armed conflicts,

Noting with appreciation the continuing efforts of the International Committee of the Red Cross to promote and disseminate knowledge of international humanitarian law, in particular the Geneva Conventions of 1949 and the two Additional Protocols,

Recalling that the twenty-sixth International Conference of the Red Cross and Red Crescent endorsed the recommendations of the Intergovernmental Group of Experts on the Protection of War Victims, including the recommendation that the depositary of the Geneva Conventions of 1949 should organize periodic meetings of States parties to the Conventions to consider general problems regarding the application of international humanitarian law,

Welcoming the adoption of a second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, in The Hague on 26 March 1999,

Noting the celebration in 1999 at The Hague and at St. Petersburg of the centennial of the first International Peace Conference which highlighted the importance of the Geneva Conventions for the protection of victims of armed conflicts and their additional protocols,

Acknowledging the fact that the Rome Statute of the International Criminal Court, adopted on 17 July 1998, includes the most serious crimes of international concern under international humanitarian law, and that the Statute, while recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such crimes, shows the determination of the international community to put an end to impunity for

the perpetrators of such crimes and thus to contribute to their prevention,

Noting that international humanitarian law has been an important topic in the United Nations Decade for International Law, which came to an end in 1999, 50 years after the adoption of the Geneva Conventions, and acknowledging the usefulness of discussing in the General Assembly the status of international humanitarian law instruments relevant to the protection of victims of armed conflicts,

1. *Appreciates* the virtually universal acceptance of the Geneva Conventions of 1949, and notes the trend towards a similarly wide acceptance of the two additional Protocols of 1977;
2. *Appeals* to all States parties to the Geneva Conventions of 1949 that have not yet done so to consider becoming parties to the additional Protocols at the earliest possible date;
3. *Calls upon* all States that are already parties to Protocol I, or those States not parties, on becoming parties to Protocol I, to make the declaration provided for under article 90 of that Protocol;
4. *Calls upon* all States which have not already done so to consider becoming parties to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols and to other relevant treaties on international humanitarian law relating to the protection of victims of armed conflict;
5. *Calls upon* all States parties to the additional Protocols to ensure their wide dissemination and full implementation;
6. *Notes with appreciation* the Plan of Action adopted by the twenty-seventh International Conference of the Red Cross and Red Crescent, in particular the reiteration of the importance of universal adherence to treaties on humanitarian law and their effective implementation at the national level;
7. *Affirms* the necessity of making the implementation of international humanitarian law more effective;
8. *Welcomes* the advisory service activities of the International Committee of the Red Cross in supporting efforts undertaken by Member States to take legislative and administrative action to

implement international humanitarian law and in promoting the exchange of information on those efforts between Governments;

9. *Welcomes* the increasing numbers of national commissions or committees for the implementation of international humanitarian law and for promoting the incorporation of such treaties into national law and disseminating the rules of international humanitarian law;

10. *Welcomes* the adoption of the Optional Protocol 7 to the Con-

vention on the Rights of the Child on the involvement of children in armed conflicts;

11. *Requests* the Secretary-General to submit to the General Assembly at its fifty-seventh session a report on the status of the additional Protocols relating to the protection of victims of armed conflicts, as well as on measures taken to strengthen the existing body of international humanitarian law, inter alia, with respect to its dissemination and full implementation at the national level, based on information received from Member States and the International Committee of the Red Cross;

12. *Decides* to include in the provisional agenda of its fifty-seventh

session the item entitled "Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts".

Conventions de Genève du 12 août 1949 et Protocoles additionnels du 8 juin 1977

ratifications, adhésions
et successions

au 31 décembre 2000

Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977

ratifications, accessions
and successions

as at 31 December 2000

1. Abréviations

R/A/S Ratification / Adhésion /
Déclaration de succession

R/D Réserve / Déclaration

D90 Déclaration prévue par
l'article 90 du Protocole I

2. Dates

Les dates indiquées sont celles du
jour de réception par le dépositaire
de l'acte officiel transmis par l'État
qui ratifie, adhère, succède ou fait
la déclaration selon l'article 90
du Protocole I.

3. Entrée en vigueur

Les Conventions et les Protocoles
entrent en vigueur pour chaque
État six mois après la date indiquée;
pour les États faisant une déclaration
de succession, l'entrée en
vigueur intervient rétroactivement
au jour de l'accession à
l'indépendance.

1. Abbreviations

R/A/S Ratification/Accession/
Declaration of succession

R/D Reservation/Declaration

D90 Declaration under Article 90
of Protocol I

2. Dates

The dates indicated are those on
which the depositary received the
official instrument from the State
which ratified, acceded to or succeeded
to a treaty or made the declaration
under Article 90 of Protocol I.

3. Entry into force

The Conventions and the Protocols
enter into force for States six months
after the date given in the present
document; for States which have
made a declaration of succession,
entry into force takes place
retroactively, on the day of their
accession to independence.

Les Conventions de Genève sont entrées en vigueur le 21 octobre 1950. Les Protocoles additionnels sont entrés en vigueur le 7 décembre 1978.

4. Noms des pays

Le nom figurant dans la liste peut être différent du nom officiel de l'État concerné.

5. Modifications apportées depuis le 1^{er} janvier 2000

Ratifications, adhésions ou successions aux Conventions de Genève de 1949

Érythrée	14. 8. 2000
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Ratifications, adhésions ou successions au Protocole I

Monaco	7. 1. 2000
Lituanie	13. 7. 2000

Ratifications, adhésions et successions au Protocole II

Monaco	7. 1. 2000
Lituanie	13. 7. 2000

Déclaration prévue par l'article 90 (Protocole I)

Lituanie	13. 7. 2000
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6. Note

Palestine: en date du 21 juin 1989, le Département fédéral suisse des Affaires étrangères a reçu de l'Observateur permanent de la Palestine auprès de l'Office des Nations Unies à Genève

The 1949 Geneva Conventions entered into force on 21 October 1950. The 1977 Additional Protocols entered into force on 7 December 1978.

4. Names of countries

The name of a State given in the list may differ from its official name.

5. Changes since 1 January 2000

Ratifications, accessions or successions to the Geneva Conventions

Eritrea	14. 8. 2000
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Ratifications, accessions or successions to Protocol I

Monaco	7. 1. 2000
Lithuania	13. 7. 2000

Ratifications, accessions or successions to Protocol II

Monaco	7. 1. 2000
Lithuania	13. 7. 2000

Declaration under Article 90 (Protocol I)

Lithuania	13. 7. 2000
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6. Note

Palestine: On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office in Geneva

une lettre informant le Conseil fédéral suisse que «le Comité exécutif de l'Organisation de Libération de la Palestine, chargé d'exercer les fonctions de Gouvernement de l'État de Palestine par décision du Conseil National Palestinien, a décidé en date du 4 mai 1989, d'adhérer aux quatre Conventions de Genève du 12 août 1949 et à leurs deux Protocoles additionnels». Le 13 septembre 1989, le Conseil fédéral suisse a informé les États qu'il n'était pas en mesure de trancher le point de savoir s'il s'agissait d'un instrument d'adhésion, «en raison de l'incertitude au sein de la communauté internationale quant à l'existence ou non d'un État de Palestine».

informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

7. Totaux

États parties aux
Conventions de Genève 189

États parties au
Protocole additionnel I 157

États parties au
Protocole additionnel II 150

États ayant fait la déclaration prévue
par l'article 90 (Protocole I) 58

États membres
des Nations Unies 189

7. Totals

States party to the
Geneva Conventions 189

States party to
Additional Protocol I 157

States party to
Additional Protocol II 150

States having made the declaration
under Article 90 58

Member States
of the United Nations 189

États membres de l'ONU ou parties au Statut de la Cour internationale de Justice qui ne sont pas parties aux Conventions de Genève de 1949: Îles Marshall, Nauru.
(Liste ci-dessous en anglais seulement.)

UN member States or States party to the Statute of the International Court of Justice which are not party to the 1949 Geneva Conventions: the Marshall Islands, Nauru.

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	Dgo	R/A/S	R/D
Afghanistan	26 09 1956	R					
Albania	27 05 1957	R X	16 07 1993	A		16 07 1993	A
Algeria	20 06 1960						
	03 07 1962	A	16 08 1989	A X	16 08 1989	16 08 1989	A
Andorra	17 09 1993	A					
Angola	20 09 1984	A X	20 09 1984	A X			
Antigua and Barbuda	06 10 1986	S	06 10 1986	A		06 10 1986	A
Argentina	18 09 1956	R	26 11 1986	A X	11 10 1996	26 11 1986	A X
Armenia	07 06 1993	A	07 06 1993	A		07 06 1993	A
Australia	14 10 1958	R X	21 06 1991	R X	23 09 1992	21 06 1991	R
Austria	27 08 1953	R	13 08 1982	R X	13 08 1982	13 08 1982	R X
Azerbaijan	01 06 1993	A					
Bahamas	11 07 1975	S	10 04 1980	A		10 04 1980	A
Bahrain	30 11 1971	A	30 10 1986	A		30 10 1986	A
Bangladesh	04 04 1972	S	08 09 1980	A		08 09 1980	A
Barbados	10 09 1968	S X	19 02 1990	A		19 02 1990	A
Belarus	03 08 1954	R X	23 10 1989	R	23 10 1989	23 10 1989	R
Belgium	03 09 1952	R	20 05 1986	R X	27 03 1987	20 05 1986	R
Belize	29 06 1984	A	29 06 1984	A		29 06 1984	A
Benin	14 12 1961	S	28 05 1986	A		28 05 1986	A
Bhutan	10 01 1991	A					
Bolivia	10 12 1976	R	08 12 1983	A	10 08 1992	08 12 1983	A
Bosnia and Herzegovina	31 12 1992	S	31 12 1992	S	31 12 1992	31 12 1992	S
Botswana	29 03 1968	A	23 05 1979	A		23 05 1979	A
Brazil	29 06 1957	R	05 05 1992	A	23 11 1993	05 05 1992	A
Brunei Darussalam	14 10 1991	A	14 10 1991	A		14 10 1991	A
Bulgaria	22 07 1954	R	26 09 1989	R	09 05 1994	26 09 1989	R
Burkina Faso	07 11 1961	S	20 10 1987	R		20 10 1987	R

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Burundi	27 12 1971	S	10 06 1993	A		10 06 1993	A
Cambodia	08 12 1958	A	14 01 1998	A		14 01 1998	A
Cameroon	16 09 1963	S	16 03 1984	A		16 03 1984	A
Canada	14 05 1965	R	20 11 1990	R X	20 11 1990	20 11 1990	R X
Cape Verde	11 05 1984	A	16 03 1995	A	16 03 1995	16 03 1995	A
Central African Republic	01 08 1966	S	17 07 1984	A		17 07 1984	A
Chad	05 08 1970	A	17 01 1997	A		17 01 1997	A
Chile	12 10 1950	R	24 04 1991	R	24 04 1991	24 04 1991	R
China	28 12 1956	R X	14 09 1983	A X		14 09 1983	A
Colombia	08 11 1961	R	01 09 1993	A	17 04 1996	14 08 1995	A
Comoros	21 11 1985	A	21 11 1985	A		21 11 1985	A
Congo	04 02 1967	S	10 11 1983	A		10 11 1983	A
Congo (Dem. Rep.)	24 02 1961	S	03 06 1982	A			
Costa Rica	15 10 1969	A	15 12 1983	A	02 12 1999	15 12 1983	A
Côte d'Ivoire	28 12 1961	S	20 09 1989	R		20 09 1989	R
Croatia	11 05 1992	S	11 05 1992	S	11 05 1992	11 05 1992	S
Cuba	15 04 1954	R	25 11 1982	A		23 12 1999	A
Cyprus	23 05 1962	A	01 06 1979	R		18 03 1996	A
Czech Republic	05 02 1993	S X	05 02 1993	S	02 05 1995	05 02 1993	S
Denmark	27 06 1951	R	17 06 1982	R X	17 06 1982	17 06 1982	R
Djibouti	06 03 1978	S	08 04 1991	A		08 04 1991	A
Dominica	28 09 1981	S	25 04 1996	A		25 04 1996	A
Dominican Republic	22 01 1958	A	26 05 1994	A		26 05 1994	A
Ecuador	11 08 1954	R	10 04 1979	R		10 04 1979	R
Egypt	10 11 1952	R	09 10 1992	R X		09 10 1992	R X
El Salvador	17 06 1953	R	23 11 1978	R		23 11 1978	R
Equatorial Guinea	24 07 1986	A	24 07 1986	A		24 07 1986	A
Eritrea	14 08 2000	A					
Estonia	18 01 1993	A	18 01 1993	A		18 01 1993	A
Ethiopia	02 10 1969	R	08 04 1994	A		08 04 1994	A
Fiji	09 08 1971	S					
Finland	22 02 1955	R	07 08 1980	R X	07 08 1980	07 08 1980	R
France	28 06 1951	R				24 02 1984	A X
Gabon	26 02 1965	S	08 04 1980	A		08 04 1980	A
Gambia	20 10 1966	S	12 01 1989	A		12 01 1989	A
Georgia	14 09 1993	A	14 09 1993	A		14 09 1993	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Germany	03 09 1954	A X	14 02 1991	R X	14 02 1991	14 02 1991	R X
Ghana	02 08 1958	A	28 02 1978	R		28 02 1978	R
Greece	05 06 1956	R	31 03 1989	R	04 02 1998	15 02 1993	A
Grenada	13 04 1981	S	23 09 1998	A		23 09 1998	A
Guatemala	14 05 1952	R	19 10 1987	R		19 10 1987	R
Guinea	11 07 1984	A	11 07 1984	A	20 12 1993	11 07 1984	A
Guinea-Bissau	21 02 1974	A X	21 10 1986	A		21 10 1986	A
Guyana	22 07 1968	S	18 01 1988	A		18 01 1988	A
Haiti	11 04 1957	A					
Holy See	22 02 1951	R	21 11 1985	R X		21 11 1985	R X
Honduras	31 12 1965	A	16 02 1995	R		16 02 1995	R
Hungary	03 08 1954	R X	12 04 1989	R	23 09 1991	12 04 1989	R
Iceland	10 08 1965	A	10 04 1987	R X	10 04 1987	10 04 1987	R
India	09 11 1950	R					
Indonesia	30 09 1958	A					
Iran (Islamic Rep. of)	20 02 1957	R X					
Iraq	14 02 1956	A					
Ireland	27 09 1962	R	19 05 1999	R X	19 05 1999	19 05 1999	R X
Israel	06 07 1951	R X					
Italy	17 12 1951	R	27 02 1986	R X	27 02 1986	27 02 1986	R
Jamaica	20 07 1964	S	29 07 1986	A		29 07 1986	A
Japan	21 04 1953	A					
Jordan	29 05 1951	A	01 05 1979	R		01 05 1979	R
Kazakhstan	05 05 1992	S	05 05 1992	S		05 05 1992	S
Kenya	20 09 1966	A	23 02 1999	A		23 02 1999	A
Kiribati	05 01 1989	S					
Korea (Dem. People's Rep.)	27 08 1957	A X				09 03 1988	A
Korea (Republic of)	16 08 1966	A X	15 01 1982	R X		15 01 1982	R
Kuwait	02 09 1967	A X	17 01 1985	A		17 01 1985	A
Kyrgyzstan	18 09 1992	S	18 09 1992	S		18 09 1992	S
Lao People's Dem. Rep.	29 10 1956	A	18 11 1980	R	30 01 1998	18 11 1980	R
Latvia	24 12 1991	A	24 12 1991	A		24 12 1991	A
Lebanon	10 04 1951	R	23 07 1997	A		23 07 1997	A
Lesotho	20 05 1968	S	20 05 1994	A		20 05 1994	A
Liberia	29 03 1954	A	30 06 1988	A		30 06 1988	A
Libyan Arab Jamahiriya	22 05 1956	A	07 06 1978	A		07 06 1978	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Liechtenstein	21 09 1950	R	10 08 1989	R X	10 08 1989	10 08 1989	R X
Lithuania	03 10 1996	A	13 07 2000	A	13 07 2000	13 07 2000	A
Luxembourg	01 07 1953	R	29 08 1989	R	12 05 1993	29 08 1989	R
Macedonia	01 09 1993	S X	01 09 1993	S X	01 09 1993	01 09 1993	S
Madagascar	18 07 1963	S	08 05 1992	R	27 07 1993	08 05 1992	R
Malawi	05 01 1968	A	07 10 1991	A		07 10 1991	A
Malaysia	24 08 1962	A					
Maldives	18 06 1991	A	03 09 1991	A		03 09 1991	A
Mali	24 05 1965	A	08 02 1989	A		08 02 1989	A
Malta	22 08 1968	S	17 04 1989	A X	17 04 1989	17 04 1989	A X
Mauritania	30 10 1962	S	14 03 1980	A		14 03 1980	A
Mauritius	18 08 1970	S	22 03 1982	A		22 03 1982	A
Mexico	29 10 1952	R	10 03 1983	A			
Micronesia	19 09 1995	A	19 09 1995	A		19 09 1995	A
Moldova (Republic of)	24 05 1993	A	24 05 1993	A		24 05 1993	A
Monaco	05 07 1950	R	07 01 2000	A		07 01 2000	A
Mongolia	20 12 1958	A	06 12 1995	R X	06 12 1995	06 12 1995	R
Morocco	26 07 1956	A					
Mozambique	14 03 1983	A	14 03 1983	A			
Myanmar	25 08 1992	A					
Namibia	22 08 1991	S	17 06 1994	A	21 07 1994	17 06 1994	A
Nepal	07 02 1964	A					
Netherlands	03 08 1954	R	26 06 1987	R X	26 06 1987	26 06 1987	R
New Zealand	02 05 1959	R X	08 02 1988	R X	08 02 1988	08 02 1988	R
Nicaragua	17 12 1953	R	19 07 1999	R		19 07 1999	R
Niger	21 04 1964	S	08 06 1979	R		08 06 1979	R
Nigeria	20 06 1961	S	10 10 1988	A		10 10 1988	A
Norway	03 08 1951	R	14 12 1981	R	14 12 1981	14 12 1981	R
Oman	31 01 1974	A	29 03 1984	A X		29 03 1984	A X
Pakistan	12 06 1951	R X					
Palau	25 06 1996	A	25 06 1996	A		25 06 1996	A
Panama	10 02 1956	A	18 09 1995	R	26 10 1999	18 09 1995	R
Papua New Guinea	26 05 1976	S					
Paraguay	23 10 1961	R	30 11 1990	A	30 01 1998	30 11 1990	A
Peru	15 02 1956	R	14 07 1989	R		14 07 1989	R
Philippines	06 10 1952	R				11 12 1986	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	Dgo	R/A/S	R/D
Poland	26 11 1954	R X	23 10 1991	R	02 10 1992	23 10 1991	R
Portugal	14 03 1961	R X	27 05 1992	R	01 07 1994	27 05 1992	R
Qatar	15 10 1975	A	05 04 1988	A X	24 09 1991		
Romania	01 06 1954	R X	21 06 1990	R	31 05 1995	21 06 1990	R
Russian Federation	10 05 1954	R X	29 09 1989	R X	29 09 1989	29 09 1989	R X
Rwanda	05 05 1964	S	19 11 1984	A	08 07 1993	19 11 1984	A
Saint Kitts and Nevis	14 02 1986	S	14 02 1986	A		14 02 1986	A
Saint Lucia	18 09 1981	S	07 10 1982	A		07 10 1982	A
Saint Vincent Grenadines	01 04 1981	A	08 04 1983	A		08 04 1983	A
Samoa	23 08 1984	S	23 08 1984	A		23 08 1984	A
San Marino	29 08 1953	A	05 04 1994	R		05 04 1994	R
Sao Tome and Principe	21 05 1976	A	05 07 1996	A		05 07 1996	A
Saudi Arabia	18 05 1963	A	21 08 1987	A X			
Senegal	18 05 1963	S	07 05 1985	R		07 05 1985	R
Seychelles	08 11 1984	A	08 11 1984	A	22 05 1992	08 11 1984	A
Sierra Leone	10 06 1965	S	21 10 1986	A		21 10 1986	A
Singapore	27 04 1973	A					
Slovakia	02 04 1993	S X	02 04 1993	S	13 03 1995	02 04 1993	S
Slovenia	26 03 1992	S	26 03 1992	S	26 03 1992	26 03 1992	S
Solomon Islands	06 07 1981	S	19 09 1988	A		19 09 1988	A
Somalia	12 07 1962	A					
South Africa	31 03 1952	A	21 11 1995	A		21 11 1995	A
Spain	04 08 1952	R	21 04 1989	R X	21 04 1989	21 04 1989	R
Sri Lanka	28 02 1959	R					
Sudan	23 09 1957	A					
Suriname	13 10 1976	S X	16 12 1985	A		16 12 1985	A
Swaziland	28 06 1973	A	02 11 1995	A		02 11 1995	A
Sweden	28 12 1953	R	31 08 1979	R X	31 08 1979	31 08 1979	R
Switzerland	31 03 1950	R	17 02 1982	R X	17 02 1982	17 02 1982	R
Syrian Arab Republic	02 11 1953	R	14 11 1983	A X			
Tajikistan	13 01 1993	S	13 01 1993	S	10 09 1997	13 01 1993	S
Tanzania (United Rep of)	12 12 1962	S	15 02 1983	A		15 02 1983	A
Thailand	29 12 1954	A					
Togo	06 01 1962	S	21 06 1984	R	21 11 1991	21 06 1984	R
Tonga	13 04 1978	S					
Trinidad and Tobago	24 09 1963	A					

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Tunisia	04 05 1957	A	09 08 1979	R		09 08 1979	R
Turkey	10 02 1954	R					
Turkmenistan	10 04 1992	S	10 04 1992	S		10 04 1992	S
Tuvalu	19 02 1981	S					
Uganda	18 05 1964	A	13 03 1991	A		13 03 1991	A
Ukraine	03 08 1954	R X	25 01 1990	R	25 01 1990	25 01 1990	R
United Arab Emirates	10 05 1972	A	09 03 1983	A X	06 03 1992	09 03 1983	A X
United Kingdom	23 09 1957	R X	28 01 1998	R X	17 05 1999	28 01 1998	R
United States of America	02 08 1955	R X					
Uruguay	05 03 1969	R X	13 12 1985	A	17 07 1990	13 12 1985	A
Uzbekistan	08 10 1993	A	08 10 1993	A		08 10 1993	A
Vanuatu	27 10 1982	A	28 02 1985	A		28 02 1985	A
Venezuela	13 02 1956	R	23 07 1998	A		23 07 1998	A
Viet Nam	28 06 1957	A X	19 10 1981	R			
Yemen	16 07 1970	A X	17 04 1990	R		17 04 1990	R
Yugoslavia	21 04 1950	R X	11 06 1979	R X		11 06 1979	R
Zambia	19 10 1966	A	04 05 1995	A		04 05 1995	A
Zimbabwe	07 03 1983	A	19 10 1992	A		19 10 1992	A

See/voir: www.cicr.org/dih - www.icrc.org/ihl

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Helen Durham and Timothy L. H. McCormack (eds)
**The Changing Face of Conflict and the Efficacy
of International Humanitarian Law**

Martinus Nijhoff Publishers, The Hague/London/Boston,
1999, 225 pages

International humanitarian law is attracting ever greater attention at all levels. Growing discussion of that law and of issues related to armed conflict is being encouraged by a variety of books, lectures and specialized articles. This thought-provoking book, which contains the papers presented during a conference held in 1997 at the University of Melbourne, Australia, to mark the 20th anniversary of the two 1977 Additional Protocols to the 1949 Geneva Conventions, is a case in point. Compiled and edited by Helen Durham, Legal Officer at the Australian Red Cross, and Timothy McCormack, Australian Red Cross Professor of International Humanitarian Law at the University of Melbourne, it is also the second volume of a new series on international humanitarian law which Kluwer Law International began publishing in 1999.

The book is divided into five parts and ten chapters, each of them written by experts on the respective subject, and examines developments in various fields of international law which may ensure a better implementation of international humanitarian law standards in the new situations encountered today. It does not seek to address the causes of, or problems related to, the different types of conflicts and crises that have arisen, in particular, since the end of the Cold War,

such as the ethno-national conflicts and the disintegration or collapse of State structures. The editor's preface clearly states that this reality "is taken as given". On the basis of that assumption, and considering the devastating effects of present forms of conflict mainly on the civilian population, an attempt is instead made to find out "how to maximise the efficacy of international humanitarian law" (p. xvii).

In an excellent overview Christopher Greenwood describes the intentions and the process that led to the two 1977 Additional Protocols to the Geneva Conventions. Analysing both their historical development and their content, he stresses the negative and positive results of those international norms. Despite some negative aspects, such as the introduction of "highly politicised considerations of the *jus ad bellum*" (p. 15) regarding wars of national liberation and guerrilla warfare, the author considers that the two Protocols are useful instruments, provided that wider ratification and concrete implementation can be assured. In his opinion, there is at present no need for further treaties. — Christine Chinkin makes a strong appeal for greater concern with regard to violence to women in war. In particular, she points out the little interest shown by international law instruments, such as the 1949 Geneva Conventions and the 1977 Protocols, in the protection of women against rape and other forms of sexual violence. In view of the jurisprudence of the ad hoc International Tribunals for Rwanda and the former Yugoslavia and of international bodies such as the Inter-American Commission on Human Rights, the author expresses some concern about the recognition of rape and sexual abuses as crimes affecting women as such. It would be better, she suggests, to elaborate a new protocol additional to the Geneva Conventions which specifically addresses the rights of women during armed conflict, following the example of the new Optional Protocol to the Convention on the Rights of the Child.

In Part II Daniel Thürer discusses several problems related to contemporary forms of conflict, in particular the situation of minorities as one of the main causes of conflict — the so-called "identity struggle". After examining both human rights law and international humanitarian law to check their adequacy for the protection of minorities, he concludes that international humanitarian law does not

provide specific protection for them, but that the concept of non-discrimination gives adequate protection to minorities in conflict situations. Problems arise in those unclear situations which precede or follow an armed conflict, situations of crisis and unstable peace, which are often characterized by attacks against specific groups and minorities. The author realizes that international humanitarian law is not equipped for creating new structures and institutions for the peaceful integration of minorities and for the construction of a multinational society within a State. Humanitarian agencies, such as National Red Cross or Red Crescent Societies, may, however, play an important role and "take preventive action regarding minorities if they constitute potentially vulnerable groups in a specific context" (p. 59). National Societies and the ICRC have an important role to play in establishing new values based on justice and non-discrimination.

The papers in Part III of the book are devoted to arms control, the effects of arms and the concept of superfluous injury and unnecessary suffering, in particular the SIrUS Project.

Part IV deals with issues related to the law applicable to peace operations. As one of the authors says, "[t]he relatively new (on a larger historical scale) use of military forces in peacekeeping roles has created considerable legal confusion" (p.125). International humanitarian law is supposed to be applicable to armed conflict between States or factions. What is the situation in peacekeeping operations where there is no State engaged in conflict with another State? Garth J. Cartledge suggests that a specific code of conduct for UN peacekeeping operations should be drafted. This code should not be based exclusively on international humanitarian law, as peacekeeping forces are only exceptionally involved in combat situations, but should also reflect human rights principles and legal principles common to all nations. In this way "the minimum standard of legal behaviour in all likely situations" may be identified (p. 137). — In his paper on "Responsibility for public security in peace operations" Michael J. Kelly suggests that the Fourth Geneva Convention, in particular the provisions on belligerent occupation, should be accepted as a guideline. Does this approach mean that the Geneva Conventions are in general applicable to peacekeeping operations? Would States have an

interest in acknowledging that such operations are to be governed by international humanitarian law?

The final three papers examine issues related to enforcement of international humanitarian law: "National prosecution of war crimes and the rule of law", by Gillian Triggs; "International criminal law and the *ad hoc* Tribunals", by Helen Durham; and "Enforcement of international humanitarian law", by Geoffrey J. Skillen.

The papers published by Durham and McCormack shed interesting light on some new trends and provide new answers to difficult issues concerning international law applicable to armed conflict situations. Particularly important is their consideration of the growing relationship between international humanitarian law and other areas of international law.

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Asie et droit international humanitaire – Notice bibliographique

Textes publiés par la *Revue* au cours de ces dernières années se rapportant à l'Asie :

Catherine Rey-Schirr, « Les activités du Comité international de la Croix-Rouge dans le sous-continent indien à la suite de la partition (1947-1949) », *RICR*, n° 830, juin 1998, pp. 287-313

David Lloyd Roberts, « Former les forces armées au respect du droit international humanitaire – Le point de vue du délégué du CICR aux forces armées et de sécurité en Asie du Sud », *RICR*, n° 826, juillet-août 1997, pp. 461-477

G.I.A.D. Draper, « La contribution de l'empereur Açoka Maurya au développement des idéaux humanitaires dans la conduite de la guerre », *RICR*, n° 812, mars-avril 1995, pp. 215-231

Voir également la collection d'articles examinant l'approche traditionnelle de la protection des victimes de la guerre dans quelques pays asiatiques, notamment en Chine, au Japon, en Malaisie et en Inde :

D. W. Greig (ed.), "A collection of papers on the protection of the human being in armed conflicts", *The Australian Year Book of International Law*, Vol. 9, Faculty of Law, Australian National University, 1985

Asia and international humanitarian law — a bibliographical note

Some recent articles from the *Review* dealing with Asia:

Catherine Rey-Schirr, "The ICRC's activities on the Indian subcontinent following partition (1947-1949)", *IRRC*, No. 323, June 1998, pp. 267-291

David Lloyd Roberts, "Training the armed forces to respect international humanitarian law — The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia", *IRRC*, No. 319, July-August 1997, pp. 433-446

G.I.A.D. Draper, "The contribution of the Emperor Asoka Maurya to the development of the humanitarian ideal in warfare", *IRRC*, No. 305, March-April 1995, pp. 192-206

See also a collection of articles on traditional approaches to the protection of victims of armed conflict in Asian countries, such as China, Japan, India and Malaysia:

D. W. Greig (ed.), "A collection of papers on the protection of the human being in armed conflicts", *The Australian Year Book of International Law*, Vol. 9, Faculty of Law, Australian National University, 1985

Publications récentes — Recent publications

Christine Bell, *Peace Agreements and Human Rights*, Oxford University Press, 2000, 409 pages

Gérard Chauvy, *La Croix-Rouge dans la guerre 1935-1947*, Flammarion, Paris, 1999, 405 pages

Marc Henzelin, *Le principe de l'universalité en droit international pénal — Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité*, Faculté de droit de Genève/Helbing & Lichtenhahn, Bâle/Genève/Munich/Bruylant, Bruxelles, 2000, 527 pages

Jean de Senarclens, *Gustave Moynier, le bâtisseur*, Slatkine, Genève, 2000, 357 pages

Care in the Field for Victims of Weapons of War, Report from the Workshop organized by the ICRC on "Pre-hospital care for war and mine wounded", Robin Coupland, Asa Molde and John Navein (eds), International Committee of the Red Cross, Geneva, 2001, 92 pages

Richard May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague/London/Boston, 2000, 624 pages

John E. Ackerman and Eugene O'Sullivan (eds), *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, with selected materials from the International Criminal Tribunal for Rwanda, Kluwer Law International, The Hague/London/Boston, 2000, 580 pages

The Challenges of Complementarity, Report on the Fourth Workshop on Protection for Human Rights and Humanitarian Organizations, Jacques de Maio (ed.), International Committee of the Red Cross, Geneva, 2000, 94 pages



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Comité international de la Croix-Rouge

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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International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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