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Débat humanitaire : droit, politiques, action

International Review of the Red Cross

Humanitarian Debate: Law, Policy, Action

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Genève

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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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INTERNATIONAL REVIEW OF THE RED CROSS

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Éditorial

Si l'on en croit un ancien directeur général du CICR, le droit international humanitaire serait toujours en retard d'une guerre. Les attaques terroristes du 11 septembre 2001 contre les États-Unis, et la «guerre contre le terrorisme» qui en a découlé, marqueraient-elles à nouveau une césure historique pour le droit international humanitaire?

Le nombre considérable de morts en l'espace de quelques minutes, l'ampleur des dommages et les moyens employés, ainsi que la représentation instantanée des événements sur les écrans du monde entier, ont donné aux attaques du 11 septembre contre le World Trade Center à New York et contre le Pentagone à Washington un caractère particulier, et appellent une réaction particulière.

Plusieurs questions fondamentales ont été soulevées touchant l'application du droit international humanitaire. Nous en abordons quelques-unes ci-dessous; la Revue *poursuivra leur analyse dans les numéros à venir, afin de participer à un débat approfondi à la recherche de réponses concrètes.*

* * *

Ces attaques dévastatrices ont confirmé la tendance générale, observée au siècle dernier, à un recul marqué des guerres opposant des États et à la prolifération des guerres civiles, des luttes de guérilla, de la violence interne et des attaques terroristes, autant de phénomènes qui prennent de plus en plus les civils pour cible, et dont ils sont indubitablement les principales victimes.

Les attaques du 11 septembre ont, semble-t-il, été planifiées, organisées, financées et exécutées par une entité non étatique. Elles ont montré que des protagonistes autres que des États – organisations, mais aussi individus – peuvent désormais affirmer leur puissance d'une manière qui était jusqu'ici l'apanage des États.

Ce fait remet en question, en premier lieu, le modèle dit «westphalien», centré sur l'État, qui domine depuis plus de trois siècles l'ordre international. On voit bien, dans le cas évoqué ci-dessus, que le modèle qui fait des États souverains les uniques créateurs et les seuls sujets du droit international est dépassé. La distinction entre droit international et droit interne est déjà brouillée dans de nombreux domaines – dont celui du droit humanitaire –, et les individus sont devenus des protagonistes importants du droit, qui font sentir leur influence sur l'ordre juridique international. Dans le même temps, des acteurs non étatiques sont apparus sur la scène internationale sous des formes inédites, animés parfois de motifs éthiques, mais aussi parfois de visées répréhensibles: ils vont des sociétés transnationales aux organisations humanitaires, d'organismes scientifiques à des organisations terroristes, et même ici, les frontières peuvent parfois être singulièrement floues...

Or, le droit international régit toujours les relations entre États et ne tient pas compte, à priori, du fait qu'un État peut être victime d'un acte de violence commis par un agresseur non étatique. Les règles internationales concernant l'agression, la légitime défense et les représailles reposent toutes sur l'hypothèse d'une violence opposant des États. Même si les attaques terroristes ont été perçues comme une déclaration de guerre, elles ne constituaient pas, en droit, un «acte de guerre», puisqu'elles ne pouvaient être attribuées de manière irréfutable à un État. Les règles du jus ad bellum *en vigueur ne prévoient pas la possibilité de l'emploi de la force par un État contre un agresseur non étatique et indépendant de tout État. D'où la difficulté de dégager, dans le régime juridique actuel régissant l'emploi de la force, des dispositions concernant l'interdiction de toute*

attaque terroriste par un acteur non étatique et le droit de répondre à une telle attaque. Le Conseil de sécurité a pu, pour l'instant, combler cette lacune dans le cadre du Chapitre VII de la Charte des Nations Unies. À cet égard, la résolution 1373, très circonstanciée, ressemble étrangement à un traité sur la lutte contre le terrorisme qui n'aurait pu être adopté par une procédure traditionnelle de rédaction d'un instrument international.

* * *

Le droit international humanitaire traite des aspects concrets des conflits sans examiner les motifs ni la légalité du recours à la force. Il a pour unique objet de limiter les souffrances causées par la guerre en protégeant et en secourant les victimes dans toute la mesure possible. Il ne régit que les aspects du conflit qui sont pertinents sur le plan humanitaire. L'article de François Bugnion *rappelle cette distinction fondamentale entre les règles du* jus ad bellum *et celles du* jus in bello, *qui s'applique même en cas de guerre d'agression ou de conflit armé lancé pour combattre le «terrorisme».*

La «guerre contre le terrorisme» comprend tout un éventail de mesures autres que le recours à la force. Dans la mesure toutefois où cette guerre prend la forme d'une opération militaire, elle reste régie par le droit international humanitaire. L'article de Hans-Peter Gasser *insiste sur le fait que les actes terroristes sont strictement prohibés par le droit international humanitaire, tout en soulignant que la réaction militaire à ces actes, lorsqu'elle prend la forme d'un conflit armé, demeure elle-même régie par ce droit.*

La campagne d'Afghanistan, en tant que première réaction militaire aux attaques terroristes, a soulevé de nombreuses questions touchant la pertinence du droit international humanitaire dans la lutte antiterroriste. Ce droit traite spécifiquement d'acteurs qui ne sont pas des États, à savoir «les parties à un conflit armé». Il est permis de douter que les attaques lancées le 11 septembre 2001 contre les États-Unis d'Amérique constituent un conflit armé entre les États-Unis et Al-Qaida, puisqu'elles ont été un acte isolé, même si elles ont causé la mort de milliers de personnes. Un an après cette terrible attaque, le tableau a cependant gagné en complexité. Ces attentats ne sont plus considérés comme un fait ponctuel, mais bien comme une partie d'un processus entamé des années plus tôt. Mais l'absence d'attaches territoriales d'un réseau terroriste aux structures indécises mais actif dans le monde entier complique non seulement la lutte contre cette organisation, mais aussi la tâche qui consiste à déterminer le cadre juridique applicable.

Il est permis de douter plus fortement encore de la volonté d'Al-Qaida de respecter les principes fondamentaux du droit des conflits armés dans la guerre déclarée par cette organisation contre les États-Unis. Les attaques de l'année dernière semblaient délibérément conçues pour anéantir le plus grand nombre possible d'êtres humains. Le droit international humanitaire est fondé sur la distinction entre combattants et non-combattants, et la stratégie apparente de certains groupes quasi-militaires et groupes de guérilla – mais parfois aussi d'acteurs étatiques – consistant à fouler aux pieds ce principe cardinal entame la crédibilité de ce droit. Dans de pareilles circonstances, l'objectif même du droit humanitaire, qui est de garantir un degré minimal d'humanité dans les conflits armés, est hors d'atteinte, et il devient difficile de considérer les responsables des attaques comme liés ne serait-ce que par un noyau minimal de règles d'humanité, ou encore comme responsables du respect de ces règles. Le fait que nul n'ait officiellement revendiqué la responsabilité de ces attaques semble indiquer que leurs auteurs étaient parfaitement conscients de la nature criminelle de leurs actes.

Nul ne doute que ces attaques, à New York comme à Washington, ont été en premier lieu des actes criminels, qui constitueraient des crimes de guerre s'ils étaient commis durant un conflit armé. À l'instar d'autres actes criminels de grande envergure, ils tombent sous le coup de la législation pénale nationale et sont interdits par certaines conventions internationales, comme celles qui régissent la répression des actes de terrorisme et la protection de l'aviation civile. Ils peuvent aussi constituer des crimes contre l'humanité, au regard à la fois du droit international coutumier et du Statut de Rome de la Cour pénale internationale.

* * *

Les attaques du 11 septembre sont le symbole même de la «guerre asymétrique»: des pilotes amateurs, armés de couteaux de poche, s'en sont pris à la plus grande puissance militaire du monde, avec son énorme arsenal d'armes perfectionnées et de boucliers antimissiles, et lui ont infligé de graves dommages. Le conflit armé qui s'en est suivi en Afghanistan a été un nouvel exemple de guerre asymétrique: les États-Unis, épaulés par d'autres États militairement puissants, combattaient un régime de facto *non reconnu et ses forces armées, lesquelles n'avaient guère de ressemblance avec des armées traditionnelles: un réseau mouvant d'extrémistes islamistes fanatiques et une personne entourée d'une centaine de proches collaborateurs et gardes du corps, avec une base (Al-Qaida) en Afghanistan, pays au demeurant toujours en proie à un conflit armé interne.*

La guerre asymétrique n'est pas un phénomène nouveau, et toutes les guerres sont asymétriques, à des degrés divers. Comment s'étonner, cependant, que dans un conflit où l'inégalité est si marquée, les fondements mêmes du droit de la guerre soient mis en question ? C'est non sans mal que l'égalité des belligérants au regard du droit humanitaire fut reconnue à l'égard des combattants talibans, assez peu conventionnels. En plus, le régime des talibans se vit accusé d'héberger des terroristes, et l'Afghanistan fut qualifié par la suite d' «État voyou» en raison de son soutien au terrorisme international. L'égalité des belligérants fut totalement niée aux membres d'Al-Qaida, officiellement qualifiée d'organisation terroriste.

Personne ne s'attendait réellement à ce que des ennemis à tel point inégaux fassent preuve de réciprocité, comportement illégal mais qui demeure un élément fondamental du droit de la guerre et un motif puissant de le respecter. Le dilemme était essentiellement – et demeure à ce jour – de savoir si les personnes capturées en Afghanistan et transférées à Guantanamo sont des prisonniers de guerre, des «combattants illégaux» ou des civils.

L'article de Yasmin Naqvi *examine précisément la question de l'institution d'un «tribunal compétent» lorsque l'incertitude règne quant au statut de prisonnier de guerre. Un tel tribunal doit être constitué lorsqu'il n'est pas certain que les détenus répondent aux critères définissant les prisonniers de guerre fixés par l'article 4, lettre A, par. 2, de la IIIe Convention de Genève. Le statut d'une personne capturée a des conséquences tout à fait concrètes, puisqu'il détermine les conditions d'internement, la durée de la détention et la question du rapatriement. Il n'est en revanche pas décisif en ce qui concerne la question de savoir si les personnes détenues doivent être poursuivies pour les infractions commises avant leur capture, notamment des crimes internationaux.*

L'équilibre délicat entre les intérêts de l'État en matière de sécurité et les considérations humanitaires a aussi été invoqué dans le sillage des événements du 11 septembre 2001.

On a notamment fait valoir que le respect des garanties judiciaires – et en particulier la divulgation, devant un tribunal, d'informations recueillies par les services de renseignement – compromettraient l'efficacité de la lutte contre des terroristes à l'œuvre dans le monde entier. Bien que les appels à la révision du droit international humanitaire aient été rares, et qu'aucune proposition en ce sens n'ait été directement avancée, le risque existe de voir l'interprétation du droit par les États modifiée par une perception nouvelle de l'équilibre entre avantages et inconvénients dans la guerre contre le terrorisme. Pour lutter contre des ennemis qui ne sont pas leurs égaux, les États pourraient être tentés de recourir eux-mêmes à des moyens de guerre asymétriques et de réintroduire des méthodes de guerre privée et échappant à toute contrainte.

Au minimum, personne ne devrait se trouver en dehors du droit. Même les individus accusés des crimes les plus haineux ont droit à une protection juridique. Si le droit international des conflits armés est applicable, le cadre juridique existant fournit des réponses parfaitement adéquates aux problèmes qui se posent, malgré l'absence de dispositions concernant un traitement spécial à réserver aux «terroristes» et au «terrorisme» différent de ce qui est défini pour les combattants ou les civils.

* * *

Le terrorisme et les actes de terreur ont souvent provoqué les guerres et les ont toujours accompagnées. Face à des organisations terroristes à l'œuvre dans le monde entier, des efforts sont entrepris pour appréhender le phénomène du terrorisme mondial et pour lui trouver une réponse.

L'attaque du 11 septembre et la «guerre contre le terrorisme» qui en a découlé ont aussi fait ressortir des clivages culturels et ouvert de nouvelles fractures. On décrit aujourd'hui souvent le monde comme le théâtre d'un «choc des civilisations», tout spécialement entre l'Occident et l'Islam. Cette vision des choses pourrait aussi avoir des répercussions sur l'universalité du droit international humanitaire. James Cockayne *propose une conception plus dynamique et constructive dans son article intitulé «*Islam and international humanitarian law: From a clash to a conversation between civilizations*» [L'Islam et le droit international humanitaire : du choc des civilisations au dialogue entre civilisations].*

Les organisations humanitaires, et le CICR en particulier, qui œuvrent la plupart du temps dans des contextes de violence et sont confrontés à toutes les manifestations imaginables de la terreur, ont le devoir de se poser des questions fondamentales, en termes d'orientations générales comme sur le plan opérationnel, quant à l'attitude à adopter face au terrorisme mondial et – ce qui n'est pas moins important – quant aux mesures à prendre pour y réagir. L'action des organisations humanitaires risque de pâtir du contexte nouveau créé par la «guerre contre le terrorisme», sous l'influence des mêmes facteurs qui touchent le droit international humanitaire. L'action humanitaire pourrait, en particulier, se trouver limitée par la place accrue accordée aux impératifs de la sécurité nationale.

Les organisations humanitaires placent à juste titre la vie, la santé et la dignité de l'être humain au cœur de leur action. Le contexte du terrorisme et du contre-terrorisme pourrait modifier les paramètres de l'action humanitaire; en tout état de cause, il ne la facilite pas. Les principes directeurs traditionnels qui régissent les activités de ces organisations – comme l'indépendance de toute influence politique, l'impartialité et l'absence de discrimination dans l'octroi de l'assistance, et plus encore le principe de neutralité –

risquent de ne pas être compris, et donc d'être mis en question, surtout lorsque les activités se déroulent dans des États mis au ban de la communauté internationale et amènent à entrer en contact avec des terroristes, réels ou prétendus, même si ces personnes sont détenues.

En œuvrant en coopération avec les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge de toutes les civilisations, de tous les milieux religieux et culturels, le CICR peut contribuer à réparer les fractures, à prévenir les affrontements et à jeter des ponts dans les lieux où naît le terrorisme. Dans ces contextes extrêmement difficiles, la relation entre les délégués et les victimes demeure cruciale pour le succès de toute entreprise humanitaire.

La Revue

Editorial

A former Director General of the ICRC said that international humanitarian law always lags behind a war. Do the terrorist attacks of 11 September on the United States and the ensuing "war on terrorism" again constitute a watershed of international humanitarian law?

The high death toll within minutes, the scale of the damage caused and the means employed, combined with the worldwide immediate screening, gave the attacks on the World Trade Centre in New York and the Pentagon in Washington on 11 September 2001 a particular character and called for a particular response.

Several fundamental questions have arisen with regard to the application of international humanitarian law, some of which are mentioned in the following remarks. In upcoming issues the Review *will continue to analyse them and participate in a thoughtful debate in search of effective answers.*

* * *

The devastating attacks reaffirmed the general trend, observed in the last century, towards a marked diminution of inter-State wars and a proliferation of civil wars, guerrilla wars, internal violence and terror attacks, with civilians increasingly the target and certainly the main victims of such events.

The attacks on 11 September were apparently planned, organized, financed and carried out by a non-State player. They showed that non-State players, including both organizations and individuals, can project power in a manner in which only States have acted previously.

First of all, this fact calls into question the State-centred "Westphalian model" which has dominated the international order for more than three centuries. In the aforesaid case, the paradigm that sovereign States are the sole creators and subjects of international law is clearly outdated. The distinction between international and domestic law is already blurred in many fields, including humanitarian law, and individuals have become a significant legal player affecting the international legal order. At the same time, non-State players have emerged at the international level in new forms, some ethically-minded and others reprehensible. They range from transnational corporations to humanitarian organizations, from scientific bodies to terrorist organizations, and even here the borders may sometimes be blurred...

Nonetheless, international law basically still regulates relations between States and does not a priori *take into account the fact that a State may be the victim of an act of violence carried out by a non-State assailant. International rules on aggression, self-defence and retaliation are based upon the assumption of inter-State violence. Even though the terrorist attacks were perceived as a declaration of war, they were not, technically speaking, an "act of war", as they were not easily attributable to a State. The existing rules of* jus ad bellum *do not cover the possibility of a use of force by a State against a non-State assailant that is independent of any State. Therefore the prohibition of a terrorist attack by a non-State actor and the right to respond thereto fit uncomfortably into the current regime regulating the use of force. Within the framework of Chapter VII of the Charter, the Security Council has been able to close that gap for the time being. In this sense, the very comprehensive Resolution 1373 strangely resembles a treaty on the fight against terrorism which could not be agreed to in the normal treaty-making processes.*

* * *

International humanitarian law addresses the reality of a conflict without considering the reasons for or legality of resorting to force, or jus ad bellum. *Its only purpose is to limit the suffering caused by war by protecting and assisting the victims as far as possible: it regulates only those aspects of the conflict which are of humanitarian concern. The article by* François Bugnion *recalls this fundamental distinction between the rules contained in* jus ad bellum *and those of* jus in bello, *which is applicable even in wars of aggression or in an armed conflict engaged to fight "terrorism".*

The "war on terrorism" includes a whole range of measures other than the use of force. If it takes the form of a military operation it is regulated by international humanitarian law. The article by Hans-Peter Gasser *stresses that acts of terror are absolutely prohibited by international humanitarian law, but also emphasizes that the military response to them, in the form of an armed conflict, is equally governed by that law.*

The Afghanistan campaign, as the first military response to the terrorist attacks, raised many questions about the relevance of international humanitarian law in combating terror. The latter deals specifically with non-State players, namely with "parties to an armed conflict". It may be questionable whether the attacks of 11 September 2001 on the United States of America constituted an armed conflict between the US and Al Qaeda since they were an isolated act, even though they caused the death of thousands of people. One year after that cruel attack, a more complex image has materialized and "9/11" is no longer considered as a single event, but as part of a continuum that started several years ago. However, the lack of territorial links of a loosely organized but globally active terrorist network renders not only the fight against that organization more difficult, but also the determination of the applicable legal framework.

It is even more questionable whether Al Qaeda is willing to respect fundamental tenets of the law of war in its declared war against the US. The attacks last year appeared intended to destroy as much civilian life as possible. International humanitarian law is based upon the distinction between combatants and non-combatants, and the apparent strategy of some quasi-military groups and guerrillas, but sometimes also of state actors, to disregard this cardinal principle erodes the credibility of that law. In such circumstances the goal of humanitarian law to guarantee a minimum of humanity in armed conflicts cannot be attained, and the perpetrators of the attacks can not easily be bound by at least a minimum of humane rules or made accountable for compliance with them. The fact that nobody officially claimed responsibility for the attacks seems to indicate that the perpetrators were fully aware of the criminal nature of their acts.

Nobody doubts that the attacks, both in New York and in Washington, are first and foremost criminal, and if committed during an armed conflict they constitute war crimes. Like other acts of big criminality, they come under national penal legislation and are banned by certain international conventions, such as those governing the repression of acts of terrorism and the protection of civilian aviation. They may also amount to crimes against humanity, both under customary international law and under the Rome Statute of the International Criminal Court.

* * *

The 11 September attacks were the epitome of "asymmetrical warfare": Amateur pilots armed with pocket knives attacked and seriously harmed the world's biggest military power with its huge arsenal of sophisticated weapons and missile shields. The ensuing armed conflict in Afghanistan was a further example of every aspect of asymmetrical warfare: the United States, assisted by other militarily powerful States, was combating an unrecognized de facto *regime and its armed forces which barely resembled traditional armies, a loose network of fanatical Islamist extremists and an individual surrounded by about a hundred close associates and bodyguards with their base (Al Qaeda) in Afghanistan. The country was simultaneously still being ravaged by an internal armed conflict.*

Asymmetrical warfare is not a new phenomenon and all wars are asymmetrical to varying degrees. But it was not surprising that pillars of the law of war were questioned in such an unequal war. The belligerents' equality under humanitarian law was recognized with difficulty vis-à-vis the rather unconventional fighters of the Taliban. In addition, the Taliban regime was accused of harbouring terrorists and Afghanistan was consequently considered to be a "rogue State" for supporting international terrorism. Equality was absolutely refused vis-à-vis members of Al Qaeda, officially branded a terror organization.

Reciprocity, an illegal form of conduct but nonetheless a fundamental element of and a strong motivation to respect the law of the war, was in reality not expected from unequal enemies. The dilemma was and still is mostly concerned with the question whether the persons captured in Afghanistan and transferred to Guantánamo are prisoners of war, "unlawful combatants" or civilians.

In this connection, the article by Yasmin Naqvi *looks into the establishment of a "competent tribunal" in the case of uncertain prisoner-of-war status. Such a tribunal should be established if there is any doubt that detainees fail to meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention to qualify as prisoners of war. The status of a captured person has far more than theoretical implications; in particular, conditions of internment, the length of detention and the question of repatriation depend upon it. It is, however, not decisive as to whether detained persons are to be prosecuted for offences committed before their capture, namely international crimes.*

The delicate balance between security interests of the State and humanitarian considerations has also been questioned in the wake of the events of 11 September 2001. In particular it has been argued that judicial guarantees, and especially the presentation of intelligence surveillance information in court, would prevent the effective combating of terrorists operating worldwide. Although calls for revision of international humanitarian law have been rare and no direct proposal has been put forward, there is a danger that the interpretation of the law by States may alter owing to a changing perception of the balance of harms and benefits in the war against terrorism. To combat unequal enemies, States themselves may be tempted to resort to asymmetrical warfare and reintroduce unlimited and private warfare.

At the very least nobody should be excluded from the rule of law. Even persons accused of the most heinous crimes are entitled to legal protection. If the international law of armed conflict is applicable, the existing legal framework gives quite appropriate

answers to the problems involved, despite the absence of any provisions relating to special treatment for "terrorists" and "terrorism" distinct from that laid down for combatants or civilians.

* * *

Terrorism and acts of terror have often initiated and always accompanied warfare. In the light of terrorist organizations operating worldwide, new efforts are being made to grasp the phenomenon of global terrorism and shape a response to it.

The 11 September attack and the subsequent "war on terror" have also highlighted cultural divides and opened new rifts. The world is nowadays often described as beset by the "clash of civilizations", especially between the West and Islam. This perceived clash may also impact upon the universality of international humanitarian law. A more dynamic and constructive approach is taken by James Cockayne *in his article on "Islam and international humanitarian law: From a clash to a conversation between civilizations".*

Humanitarian organizations and in particular the ICRC, mostly working in violent environments and confronted with every conceivable manifestation of terror, must ask themselves serious policy and operational questions on how to deal with global terrorism and, equally important, how to respond to it. In the new context of the "war on terrorism", the work of humanitarian organizations may be affected. Considerations similar to those for international humanitarian law apply to humanitarian action, in particular the possibility that increased national security interests may limit humanitarian work.

Humanitarian organizations rightly place human life, health and dignity at the centre of their endeavours. The context of terrorism and counter-terrorism may change the parameters of humanitarian action and certainly do not make the work easier. The traditional guiding principles of those organizations for their activities, such as independence from political influence, impartiality and non-discrimination in providing assistance and even more the principle of neutrality, may not be understood and thus be open to challenge, especially when working in pariah States of the international community and being in contact with real or perceived terrorists, even if those persons are in detention.

Operating in cooperation with National Red Cross and Red Crescent Societies of all civilizations, religious and cultural circles, the ICRC can help to heal rifts, avert clashes and build bridges in places where terrorism breeds. In those extremely difficult environments the relationship between the delegates and the victims remains crucial for the success of any humanitarian undertaking.

The Review

Guerre juste, guerre d'agression et droit international humanitaire

FRANÇOIS BUGNION*

« Heureux ceux qui sont morts pour la terre charnelle,
Mais pourvu que ce fût dans une juste guerre.
Heureux ceux qui sont morts pour quatre coins de terre
Heureux ceux qui sont morts d'une mort solennelle. »
Charles Péguy[1]

« Qui croira à la justice de votre guerre
si elle est faite sans mesure ? »
François de La Noue[2]

C'est avec stupéfaction que le monde a assisté aux attentats meurtriers du 11 septembre 2001 contre New York et Washington et l'émotion provoquée par ces événements tragiques est loin d'être retombée. Des centaines de millions de femmes et d'hommes ont vu, sur leurs écrans, les tours jumelles du World Trade Center *s'embraser puis s'effondrer sous leurs yeux. Nul doute que les conséquences de ces événements continueront à se faire sentir durant des mois ou des années, et qu'elles détermineront un nouveau rapport de forces sur le plan international.*

Ces attentats et le conflit qui a submergé l'Afghanistan ont réveillé l'intérêt pour le droit international humanitaire et posé avec une nouvelle acuité la question des rapports entre les causes d'un conflit, d'une part, et le respect des règles qui régissent la conduite des hostilités et protègent les victimes de la guerre, de l'autre.

* François Bugnion est directeur du Droit international et de la coopération au sein du Mouvement au Comité international de la Croix-Rouge. Le présent article met à jour et développe une étude publiée en russe dans *Moscow Journal of International Law*, No. 4/98/32, octobre-décembre 1998, sous le titre. « Mezhdunarodnoe humanitaroe pravo, spravedlivaia voïna i agressivnaia voïna. »

rarement possible de savoir lequel des deux belligérants défend une juste cause. L'un et l'autre peuvent en être persuadés de bonne foi. Ainsi, les deux parties peuvent avoir le même droit de recourir aux armes. Bien plus – et sur ce point, son enseignement tranche nettement sur les mœurs de son temps – cette marge d'incertitude et le bénéfice de la bonne foi qui en découle, Vattel les reconnaît aux deux adversaires, même en cas de guerre civile[7].

C'est dans une large mesure sur cette marge d'indétermination et de tolérance que vont se développer les lois et coutumes de la guerre[8].

L'émergence des États-nations dans l'Europe du XVIIe et du XVIIIe siècle va modifier radicalement la conception que les hommes se font de la guerre et le sort réservé à ses victimes. Avec l'établissement d'un nouvel ordre européen issu des Traités de Westphalie (1648) qui mirent fin à la guerre de Trente Ans, la guerre cesse d'être perçue comme le moyen de faire triompher un dogme, une vérité ou une religion, pour n'être plus reconnue que comme un moyen – au demeurant fort imparfait – de régler un différend entre deux souverains qui ne se reconnaissent aucun juge commun. L'émergence des États-nations a également permis l'adoption de règles visant à endiguer le fléau de la guerre. La guerre était le fait du prince; les États se combattaient par l'intermédiaire de leurs forces armées, aisément reconnaissables à leurs uniformes chamarrés; les populations civiles, qui ne prenaient aucune part à la lutte, ainsi que les combattants blessés et ceux qui s'étaient rendus à discrétion, devaient être épargnés. De même, les États ont accepté de renoncer à des procédés déloyaux et se sont interdit l'usage de certaines armes, telles que les balles explosives et les armes empoisonnées, de nature à provoquer d'indicibles souffrances, hors de toute proportion avec le seul but

7 Vattel, *op. cit.*, livre III, chapitre XVIII, pp. 238-248.

8 *« Inexorablement, la guerre exprime les idées régnantes. Elle revêt la forme des passions dont elle se nourrit. Sur le champ de bataille, l'homme a d'abord rendez-vous avec ses démons. Et c'est, en définitive, le cérémonial de cette confrontation sanglante que le droit de la guerre a pour fonction d'aménager.*

Mais le droit de la guerre ne va pas sans un certain respect de l'adversaire. L'équation romaine : étranger = barbare, légitime l'extermination et fait obstacle à l'apparition du droit. Il en va de même quand l'ennemi est considéré comme un sous-homme ou comme l'agent d'une idéologie criminelle. Là encore, les conditions d'une entente modératrice disparaissent et le 'bon droit' dont on s'autorise pour donner libre cours à la violence souligne la défaite du droit. La guerre pénale est sans frein puisqu'on ne pactise pas avec un malfaiteur. C'est dans la mesure seulement où la guerre apparaît comme un moyen malheureux et tragiquement inadéquat de régler les différends internationaux qu'elle devient susceptible d'une codification tacite ou conventionnelle. » Pierre Boissier, *Histoire du Comité international de la Croix-Rouge, De Solférino à Tsoushima*, Paris, Plon, 1963 (réédition par procédé photomécanique, Genève, Institut Henry-Dunant, 1978), pp. 188-189.

légitime qu'ils peuvent se proposer dans la guerre: l'affaiblissement des forces militaires de l'adversaire[9].

Ces règles ont été progressivement codifiées, notamment dans les Conventions de Genève de 1864, 1906, 1929 et 1949, ainsi que dans la Déclaration de Saint-Pétersbourg de 1868 et dans les Conventions de La Haye de 1899 et de 1907.

De façon générale, on reconnaît deux moyens principaux d'endiguer la violence guerrière:

- les règles relatives à la conduite des hostilités, qui régissent les méthodes et moyens de combat et prohibent les attaques indiscriminées, les attaques dirigées contre des non-combattants, les armes de nature à provoquer des souffrances hors de proportion avec le but de la guerre, ainsi que les moyens perfides;
- les règles qui protègent les non-combattants et les personnes qui ont été mises hors de combat: militaires blessés et malades, naufragés, prisonniers de guerre, membres du personnel sanitaire des armées et populations civiles.

Relevons cependant que ces deux corps de règles sont interdépendants et complémentaires. Certaines règles sont communes à l'un et à l'autre. Ainsi, les règles qui limitent les bombardements aériens et interdisent les bombardements indiscriminés relèvent du droit de la conduite des hostilités, si on les envisage du point de vue de l'aviateur, et des règles protégeant les populations civiles lorsqu'on envisage les effets au sol des bombardements aériens. Ces deux corps de règles se rejoignent dans les Protocoles additionnels aux Conventions de Genève, du 8 juin 1977, qui ont actualisé aussi bien les dispositions relatives à la conduite des hostilités que celles qui protègent les victimes de la guerre.

L'interdiction du recours à la guerre et le droit international humanitaire

La plupart des règles du droit humanitaire ont été adoptées à une époque où le recours à la guerre était licite. La guerre était un attribut de la souveraineté; elle était légale lorsqu'elle était le fait du prince; l'État qui

9 «.. *le seul but légitime que les États doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi*» proclame la Déclaration relative à l'interdiction des balles explosibles en temps de guerre, échangée à Saint-Pétersbourg le 29 novembre / 11 décembre 1868, De Martens, *Nouveau Recueil général de Traités*, première série, tome XVIII, pp. 474-475.

l'entreprenait était seul juge des motifs qui le conduisaient à prendre les armes. Telle était la conviction juridique des États et la position dominante de la doctrine sous l'Ancien Régime et au XIXe siècle.

Le contexte est aujourd'hui tout autre: le recours à la guerre a été limité par le Pacte de la Société des Nations, puis interdit par le Pacte de Paris (ou Pacte Briand-Kellogg)[10] et par la Charte des Nations Unies. Aux termes du Pacte de Paris, les États contractants ont déclaré qu'ils condamnaient «*le recours à la guerre pour le règlement des différends internationaux*» et qu'ils y renonçaient «*en tant qu'instrument de politique nationale*». La Charte des Nations Unies interdit tout recours à la force dans les rapports internationaux, à l'exception de l'action coercitive collective prévue au Chapitre VII et du droit de légitime défense individuelle ou collective réservé par l'article 51.

Dès lors, la question se pose: un belligérant peut-il se prévaloir du fait qu'il est victime d'une agression pour se dégager de ses obligations au titre du droit international humanitaire et pour refuser d'en respecter les règles?

Cette question soulève un problème plus général: celui de l'autonomie des normes régissant les rapports réciproques des belligérants («*jus in bello*») au regard des normes relatives à la réglementation et à l'interdiction du recours à la force («*jus ad bellum*»): le fait que l'un des adversaires a déclenché une guerre d'agression est-il de nature à modifier les conditions d'application du *jus in bello* et, en particulier, les conditions d'application des règles humanitaires? [11]

10 Signé à Paris le 27 août 1928. Texte dans: *Société des Nations, Recueil des Traités*, vol. 94, pp. 58-64.

11 L'ouvrage fondamental sur la question des rapports entre le *jus ad bellum* et le *jus in bello* est celui de Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Éditions A. Pedone, 1970. On pourra également se reporter aux ouvrages suivants: *Les Conventions de Genève du 12 août 1949: Commentaire*, publié sous la direction de Jean S. Pictet, vol. I, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*, Genève, CICR, 1952 (ci-après: *Commentaire*), pp. 25-28; Denise Bindschedler-Robert, «A Reconsideration of the Law of Armed Conflicts», *in: The Laws of Armed Conflicts*, New York, Carnegie Endowment for International Peace, 1971, pp. 5-61, en particulier les pp. 9-10; Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1968, pp. 406-408; Yoram Dinstein, *War, Aggression and Self-Defence*, 2e édition, Cambridge, Cambridge University Press, 1994, en particulier les pp. 155-162; Paul Guggenheim, *Traité de Droit international public*, tome II, Genève, Librairie Georg & Cie, 1954, pp. 93-100, 253-261 et 295-305; Sir Hersch Lauterpacht, «The Limits of the Operation of the Law of War», *The British Year Book of International Law*, vol. XXX, 1953, pp. 206-243; L. Oppenheim, *International Law*, vol. II, *Disputes, War and Neutrality*, 7e édition par Sir Hersch Lauterpacht, London, Longman, 1952, pp. 177-197; Dietrich Schindler, «Abgrenzungsfragen zwischen ius ad bellum and ius in bello», *in: Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, Herausgegeben von Yvo Hangartner und Stefan Trechsel, Bern und Stuttgart, Verlag Paul Haupt, 1986, pp. 251-258; Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. II, *The Law of Armed Conflict*, London, Stevens & Sons, 1968, pp. 96-106; Krzysztof

Lors de tous les conflits récents, l'un ou l'autre des belligérants – et le plus souvent les deux – ont déclaré qu'ils ne faisaient qu'exercer leur droit de légitime défense pour repousser une agression dont eux-mêmes ou leurs alliés étaient les victimes. Des voix se sont élevées pour affirmer qu'à ce titre, ils étaient affranchis des obligations découlant des lois et coutumes de la guerre et que la victime d'une agression n'était pas tenue d'en observer les règles vis-à-vis de son agresseur. Certains auteurs, notamment aux États-Unis et en Union Soviétique, ont tenté de couler cette prétention dans le moule d'une théorie juridique en proposant de subordonner l'application du *jus in bello* au *jus ad bellum*[12]. Deux solutions peuvent alors être envisagées:

- soit on considère la guerre d'agression comme un acte illicite – le crime international par excellence – qui échappe à toute réglementation; dans cette perspective, on doit admettre qu'en cas d'agression, les lois et coutumes de la guerre ne s'appliquent ni à l'un ni à l'autre belligérant;
- soit on considère que l'illicéité du recours à la force a pour seul effet de priver l'État agresseur des droits conférés par le *jus in bello*; en revanche, cet État reste soumis à toutes les obligations qui en découlent. On aboutit ainsi à une application différenciée des lois et coutumes de la guerre, l'État agresseur restant soumis à toutes les obligations inhérentes à sa qualité de belligérant, tandis que l'État victime de l'agression est libéré de toute obligation vis-à-vis de son adversaire[13].

Skubiszewski, «Use of Force by States — Collective Security — Laws of War and Neutrality», *in: Manual of Public International Law*, Edited by Max Sørensen, London, Mac Millan, 1968, pp. 739-854, en particulier les pp. 808-812; Robert W. Tucker, *The Law of War and Neutrality at Sea* (International Law Studies, vol. 50), Newport (Rhode Island), United States Naval War College, 1955, pp. 3-25; Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine*, Baltimore, The John Hopkins Press, 1960; Gregory Ivanovic Tunkin, *Droit international public: Problèmes théoriques* (traduit du russe par le Centre de Recherches sur l'URSS et les pays de l'Est de la Faculté de Droit et des Sciences Politiques et Économiques de Strasbourg), Paris, Éditions A. Pedone, 1965, pp. 35-55 et 210-219; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2e édition, Basic Books, 1992; Quincy Wright, «The Outlawry of War and the Law of War», *American Journal of International Law*, vol. 47, No. 3, juillet 1953, pp. 365-376. Sur la conception soviétique du droit des conflits armés, on pourra se reporter à l'ouvrage de Jiri Toman, *L'Union soviétique et le droit des conflits armés*, Genève, Institut universitaire de Hautes Études internationales, 1997.

12 On trouvera un exposé des principales positions de la doctrine dans Meyrowitz, *op. cit.*, pp. 77-140.

13 On trouvera un exposé détaillé de la doctrine de l'application différenciée du droit humanitaire dans le document CDDH/41 soumis le 12 mars 1974 par la République démocratique du Viet-Nam à la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés, *Actes de la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés (Genève, 1974 - 1977)*, 17 volumes, Berne, Département politique fédéral, 1978 (ci-après: *Actes CDDH*), vol. IV, pp. 177-190.

La mise à l'écart du droit international humanitaire en cas de guerre d'agression

Seule la première solution tire toutes les conséquences qui découlent logiquement d'une éventuelle subordination du *jus in bello* au *jus ad bellum*. Il n'en faut pas moins la rejeter sans hésiter. En effet, que ce soit dans l'ordre interne ou dans l'ordre international, le droit a notamment pour mission de régir des situations de fait résultant d'un acte illicite[14]. En outre, puisqu'il ne peut y avoir de guerre, dans le système de la Charte, si ce n'est comme conséquence d'une agression, il faudrait admettre que les États ont élaboré des normes dépourvues de champ d'application, ce qui est absurde. Enfin, cette solution conduit à la licence la plus absolue et à une sauvagerie au regard de laquelle les horreurs des guerres d'autrefois paraîtront fort anodines. Conséquence d'une abdication du droit, la première solution conduit à des résultats absurdes et monstrueux.

L'application différenciée du droit international humanitaire en cas de guerre d'agression

La seconde solution requiert un examen plus approfondi.Pour l'essentiel, les partisans d'une application différenciée des lois et coutumes de la guerre ont invoqué trois arguments:

a) la justice exige une distinction absolue entre l'agresseur et la victime de l'agression; il n'est pas légitime que le droit humanitaire place sur le même plan l'État agresseur et celui qui résiste à l'agression; le droit humanitaire devrait au contraire venir au secours de la victime de l'agression tout en entravant l'action de l'agresseur; il devrait enfin condamner l'agresseur sans équivoque;

b) puisque la guerre d'agression constitue le crime de guerre par excellence, celui qui entraîne et englobe tous les autres, nul n'est tenu d'observer les règles du droit de la guerre vis-à-vis du belligérant qui a transgressé la première d'entre elles en ouvrant les portes de la guerre; en d'autres termes, l'État agresseur se met lui-même dans la position d'un hors-la-loi;

c) en vertu de la maxime « *ex iniuria jus non oritur* », l'État agresseur ne saurait être titulaire de droits qui auraient leur source dans un acte illicite[15].

14 Tel est notamment l'objet du droit pénal dans l'ordre interne, et des règles relatives à la responsabilité internationale en droit des gens.

15 Selon la maxime « *ex iniuria jus non oritur* », un acte illicite ne saurait être la source de droits.

Quelle est la pertinence de ces arguments ?

Il est évident que l'interdiction de la menace et de l'emploi de la force dans les rapports internationaux n'aurait qu'une valeur platonique si elle n'était pas assortie de sanctions, notamment sous la forme d'une discrimination entre l'agresseur et la victime de l'agression. Il est incontestable et incontesté que le droit international contemporain établit une telle discrimination, notamment en ce qui concerne le droit de légitime défense individuelle ou collective, l'application des mesures coercitives collectives prévues au Chapitre VII de la Charte, les relations avec les États tiers, l'acquisition de territoires, les traités imposés par l'agresseur à sa victime, ainsi que les réparations au terme des hostilités. En outre, la responsabilité pénale des individus qui se sont personnellement rendus responsables d'avoir préparé, déclenché ou dirigé une guerre d'agression est engagée.

Dès lors, la question se pose: l'illicéité du recours à la force peut-elle également justifier une application discriminatoire des règles qui régissent les rapports réciproques des belligérants et, notamment, des règles du droit humanitaire ?

Cette question doit être examinée en doctrine, ainsi qu'à la lumière du droit positif.

En doctrine, on doit en premier lieu constater que la maxime «*ex iniuria jus non oritur*» connaît de sérieuses exceptions, aussi bien dans l'ordre interne qu'en droit international, de telle sorte qu'il n'est pas certain qu'on puisse y reconnaître l'un des principes généraux du droit mentionnés à l'article 38, chiffre 1, lettre c, du Statut de la Cour internationale de Justice[16]. Mais surtout, en admettant même qu'on y reconnaisse l'un des principes généraux du droit, son application au cas d'espèce relève d'une double confusion: sur

16 En ce qui concerne le droit interne, on peut mentionner la maxime «*male captus, bene judicatus*» en vertu de laquelle une cour pénale se déclare compétente pour juger un prévenu, même si ce dernier a été conduit devant elle par des moyens illégaux, par exemple à la suite d'un enlèvement dans un autre État. Sur le plan international, on peut mentionner le fait qu'une occupation de territoire – qui est un état de fait – produit des effets juridiques, même lorsque cette occupation ne s'appuie sur aucun titre valide et résulte d'un pur acte de force. De même, on peut rappeler la relative indifférence du droit des gens quant à la situation du gouvernement d'un État au regard du droit constitutionnel de cet État. Pour autant qu'il exerce de manière effective un contrôle de fait sur la plus grande partie du territoire et de la population, un gouvernement se verra généralement reconnaître sur le plan international la plénitude des compétences, même s'il a accédé au pouvoir par des moyens illégaux. Ainsi, un acte illicite, *in foro domestico* produit sur le plan international des effets juridiques qui, le plus souvent, ne seront même pas contestés. On le sait, la doctrine de Tobar, qui posait en principe qu'un État devait s'abstenir de reconnaître un gouvernement étranger si celui-ci était fondé sur un coup de force, n'a jamais été acceptée en dehors du cadre américain et n'a jamais fait l'objet d'aucune application durable.

le plan de la logique formelle, d'une confusion entre la cause et l'accident; sur le plan juridique, d'une confusion entre la source d'un droit ou d'une obligation et le fait qui entraîne l'application de ce droit ou de cette obligation. Si une maison prend feu, ce n'est pas l'incendie mais le contrat d'assurance qui est à l'origine de la créance du sinistré vis-à-vis de l'assureur; s'il en allait autrement, aucun propriétaire ne prendrait la peine de verser des primes. De la même manière, ce n'est pas la guerre qui est la source des droits et des obligations découlant des lois et coutumes de la guerre mais les conventions humanitaires en ce qui concerne les obligations et les droits issus de ces traités, et le droit coutumier pour ce qui est des droits et des obligations qui en découlent; le conflit armé – quelle qu'en soit la qualification – n'est rien d'autre que le fait qui entraîne l'application de ces règles conventionnelles ou coutumières; s'il en allait autrement, les belligérants auraient des droits et des obligations identiques, qu'ils soient ou non parties aux conventions humanitaires; or, tel n'est manifestement pas le cas. La maxime « *ex iniuria jus non oritur* » n'a donc aucune pertinence en ce qui concerne la question posée[17].

On doit de même écarter l'argument qui assimile l'État responsable d'une agression à un hors-la-loi. Il faut toujours se méfier des transpositions du droit interne au droit international, en particulier lorsqu'il s'agit de concepts empruntés au droit pénal. Dans le cas d'espèce, la transposition est à la fois mensongère et fallacieuse. Mensongère, car elle assimile la responsabilité internationale de l'État à la responsabilité pénale du délinquant. Fallacieuse, car elle présuppose que le criminel est automatiquement déchu de

17 En un sens, toute la théorie de l'application discriminatoire du droit de la guerre repose sur la conception, à notre avis erronée, selon laquelle le *jus in bello* confère aux belligérants des compétences et des droits subjectifs. Or, tel n'est pas le cas. Le droit de la guerre n'a pas pour fonction d'attribuer des compétences ou des droits, mais au contraire d'imposer des limites à la liberté d'action des belligérants, comme l'atteste la sentence arbitrale rendue le 2 août 1921 dans l'Affaire des bateaux et remorqueurs du Danube: « *International law as applied to warfare is a body of limitations, and is not a body of grants of power* », *Recueil des Sentences arbitrales*, vol. I, New York, Nations Unies, 1948, p. 104. Dans le même sens: « *International Law is prohibitive law* », The Hostage Trial, United States v. List et al. United States Military Tribunal, Nuremberg, 8th July 1947 to 19 February 1948, *Law Reports of Trials of War Criminals*, Selected and prepared by the United Nations War Crimes Commission, Vol. VIII, London, His Majesty's Stationery Office, 1949, pp. 34-92, ad p. 66. Les compétences que l'on désigne habituellement sous le nom de « *droits de belligérants* » ne sont à proprement parler rien d'autre que l'exercice de la souveraineté étatique en temps de guerre dans les limites imposées par les lois et coutumes de la guerre; dans le même sens, Schwarzenberger, *op. cit.*, pp. 63-65. S'il en allait autrement, l'absence de règle dans un domaine particulier entraînerait l'absence de droits et de compétences, et non pas, comme c'est effectivement le cas, l'absence de limite imposée à la liberté d'action des belligérants.

toute protection légale, ce qu'aucun ordre juridique ne saurait tolérer. Dans tout État régi par le droit, le délinquant reste sous l'empire et sous la protection du droit pénal, quelle que soit la gravité du délit qui lui est imputé. En tant qu'acte illicite, la guerre d'agression entraîne une sanction, ou même une pluralité de sanctions, notamment sous la forme du droit de légitime défense individuelle ou collective, de mesures coercitives collectives, de la non-reconnaissance des acquisitions territoriales réalisées par la force, de la nullité des traités imposés par la menace ou par l'emploi de la force, d'une attitude discriminatoire de la part des États tiers, de réparations imposées à l'agresseur au terme des hostilités, etc. En revanche, la guerre d'agression ne saurait avoir pour effet de rejeter l'État agresseur hors des frontières du droit[18].

Reste l'argument fondé sur l'exigence de justice ou d'équité. C'est sans doute le plus séduisant du point de vue moral. Cependant, cet argument méconnaît totalement l'objet du droit humanitaire: le droit humanitaire ne met pas sur le même plan l'agresseur et la victime de l'agression car il n'a pas compétence pour cela; le droit humanitaire a pour seule fonction la protection de la personne humaine en tant que telle, à l'exclusion de toute considération de nature politique, militaire, idéologique, religieuse, raciale, économique ou autre; le droit humanitaire n'établit qu'une seule égalité: c'est celle qui se fonde sur le droit de toutes les victimes de la guerre à être traitées conformément au principe d'humanité. En outre, aucune exigence de justice ou d'équité ne saurait justifier que tous les ressortissants d'un État, ni même tous les membres de ses forces armées, soient considérés comme des criminels du seul fait de leur appartenance à un État réputé agresseur. On ne saurait en effet conclure de la responsabilité internationale de l'État à la culpabilité de l'ensemble des membres de ses forces armées ou de chacun de ses ressortissants.

On le constate, les principaux arguments qui ont été invoqués à l'appui d'une application discriminatoire du *jus in bello* doivent être écartés. En outre, d'impérieuses considérations commandent le maintien du principe de l'égalité des belligérants devant le droit de la guerre.

La désignation de l'agresseur

On ne peut méconnaître, en effet, les difficultés inhérentes à la désignation de l'agresseur. Malgré plus d'un demi-siècle de délibérations au sein des instances internationales, il n'y a pas d'accord général et obligatoire sur la

18 Meyrowitz, *op. cit.*, pp. 127-130.

définition de l'agression; ni le Pacte Briand-Kellogg, ni la Charte ne contiennent une telle définition. Quant à la Résolution 3314 (XXIX) adoptée le 14 décembre 1974 par l'Assemblée générale des Nations Unies[19], elle est loin de constituer une véritable définition; elle est pratiquement muette sur les formes d'agression indirecte qui caractérisent notre époque, telles que la subversion, les attentats terroristes, l'intervention étrangère en cas de guerre civile, l'occupation avec l'accord d'un gouvernement fantoche, etc. En outre, en réservant le cas des guerres de libération nationale[20], la Résolution 3314 a pris en compte un élément essentiellement subjectif – le motif du recours aux armes – qui est incompatible avec une véritable définition, puisqu'une définition susceptible d'emporter des effets juridiques doit se fonder sur des éléments objectifs et vérifiables. Enfin, cette résolution ne lie pas le Conseil de Sécurité[21].

L'adoption du Statut de la Cour pénale internationale, le 17 juillet 1998, n'a pas davantage résolu cette difficulté. En effet, les Etats ne sont pas parvenus à s'entendre sur une définition du crime d'agression, ni sur les modalités d'exercice de la compétence de la Cour à cet égard. L'article 5, alinéa 2, du Statut de la Cour dispose en effet: «*La Cour exercera sa compétence à l'égard du crime d'agression quand une disposition aura été adoptée conformément aux articles 121 et 123, qui définira ce crime et fixera les conditions de l'exercice de la compétence de la Cour à son égard. Cette disposition devra être compatible avec les dispositions pertinentes de la Charte des Nations Unies.*» Le Statut est entré en vigueur le 1er juillet 2002 et 77 Etats y sont à ce jour parties[22], mais, jusqu'à ce qu'un compromis soit trouvé sur cette question, la Cour n'aura compétence qu'à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre. Le groupe de travail traitant de la question du crime d'agression au sein de la Commission préparatoire de la Cour pénale internationale n'a encore eu que des discussions préliminaires sur cette question[23].

Est-il possible de surmonter cette difficulté en confiant à un organe compétent la responsabilité de la résoudre de cas en cas en désignant l'agresseur?

19 Résolution 3314 (XXIX) 1974, «Définition de l'agression», *Résolutions adoptées par l'Assemblée générale au cours de sa vingt-neuvième session*, volume I, Assemblée générale, Documents officiels, vingt-neuvième session, supplément N° 31 (A/9631), pp. 148-150.

20 Article 7 de l'annexe à la Résolution 3314.

21 Article 4 de la Résolution 3314.

22 Situation au 5 août 2002.

23 Renseignements obtenus sur: http://www.un.org/law/icc/prepcomm/prepfra.htm

C'est au Conseil de Sécurité qu'il appartient de constater l'existence d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression[24]. En vertu de l'article 25 de la Charte, cette constatation est valable *erga omnes*, puisque tous les États membres des Nations Unies sont tenus de l'accepter. Les difficultés n'en sont pas résolues pour autant: en l'absence de critères juridiques liant le Conseil de Sécurité, la décision de celui-ci ne peut être qu'un acte politique dont on ne voit pas comment il pourrait déployer des effets juridiques en dehors de ceux qui sont prévus par la Charte ou par d'autres dispositions conventionnelles. Or, aucune disposition de la Charte n'autorise une application discriminatoire du *jus in bello* dans les rapports réciproques des belligérants[25]. En outre, la constatation d'une agression requiert le vote affirmatif des cinq membres permanents du Conseil de Sécurité[26]; le Conseil sera donc paralysé chaque fois que l'agression sera le fait d'un membre permanent, d'un de ses alliés ou d'un de ses clients; étant donné la structure actuelle du système international, seules des circonstances tout à fait exceptionnelles, comme celles qui ont prévalu en juin et juillet 1950, lors du déclenchement de la guerre de Corée, de même que durant l'été et l'automne 1990, au lendemain de l'occupation du Koweït par l'Irak, permettront au Conseil de prendre une telle décision.

Dans ces conditions, la tentation est grande de se passer de la décision du Conseil de Sécurité. Les avocats d'une application discriminatoire du droit de la guerre ont donc proposé, soit de s'en remettre à une résolution de l'Assemblée générale[27], soit de s'en référer au jugement de l'opinion publique[28].

Or, rien dans la Charte n'attribue une telle compétence à l'Assemblée générale. Quant au jugement de l'opinion publique, il suffit de se demander qui s'en fera l'interprète pour comprendre où conduit cette pente savonneuse: à la constatation unilatérale de l'agression par chaque gouvernement.

En l'absence d'une procédure juridique centralisée et obligatoire permettant de constater l'agression dans tous les cas sur la base de critères juridiques précis et d'une manière qui s'imposerait également à tous les belligérants, la théorie de l'application discriminatoire du *jus in bello* conduit à l'inapplication de ce droit de part et d'autre: chacun des belligérants consi-

24 Article 39 de la Charte des Nations Unies.

25 Meyrowitz, *op. cit.*, p. 8.

26 Article 27, chiffre 3.

27 Wright, *loc. cit.*, p. 370.

28 A. Alvarez, *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples*, Paris, Éditions A. Pedone, 1959, p. 510.

dère son adversaire comme l'agresseur et se prévaut de cette constatation pour se libérer des règles du droit de la guerre. Là aussi, c'est la porte ouverte au déferlement d'une violence sans frein.

En outre, en admettant même que cette difficulté puisse être surmontée et qu'une constellation politique exceptionnelle permette au Conseil de Sécurité de prendre une décision dans des conditions qui ne laisseraient place à aucune contestation, d'autres difficultés non moins sérieuses ne manqueront pas de se présenter.

Des droits auxquels ne s'attacherait aucune obligation et des obligations auxquelles ne s'attacherait aucun droit

La théorie de l'application discriminatoire du droit de la guerre postule en effet la possibilité de séparer les droits des obligations qui en découlent, toutes les obligations restant à la charge de l'État agresseur qui n'aurait aucun droit, alors que la victime de l'agression bénéficierait de droits illimités sans être soumise à aucune obligation.

Cette conception traduit une profonde incompréhension du droit de la guerre en général, et du droit humanitaire en particulier. En effet, les lois et coutumes de la guerre n'ont pas pour objet de conférer aux belligérants des droits subjectifs auxquels ne s'attacherait aucune obligation, ni des obligations auxquelles ne s'attacherait aucun droit, mais de protéger la personne humaine par l'instauration de statuts objectifs qui imposent des droits et des obligations à l'un et à l'autre belligérant.

Il en est ainsi de l'emblème de la croix rouge et de celui du croissant rouge: l'emblème protège les installations sanitaires sur lesquelles il est apposé, mais il protège également la Partie adverse du fait que les installations signalées par l'emblème ne pourront être utilisées pour des actions hostiles. De la même manière, la distinction entre combattants et non-combattants a pour objet essentiel de protéger la population civile, mais elle protège également l'adversaire dans la mesure où les personnes civiles savent qu'elles ne pourront se livrer à des actions hostiles sans compromettre l'immunité qui les protège. De même, le statut de prisonnier de guerre protège également le captif et la Puissance adverse puisqu'il limite les catégories de personnes qui peuvent se livrer à des actes d'hostilités tout en pouvant prétendre, en cas de capture, à la protection de ce statut. On peut faire les mêmes observations en ce qui concerne l'interdiction de la perfidie, la protection des parlementaires, le respect des trêves et des armistices, le maintien de l'ordre et de la sécurité

en territoire occupé, etc. On le voit, on ne peut séparer les droits des obligations sans détruire les uns et les autres, et sans défaire les règles[29]. Le droit de la guerre est fait d'un ensemble d'équilibres entre droits et obligations; lorsque ces équilibres sont rompus, on ne se trouve plus en présence d'une application unilatérale du droit, mais en face de la licence et de l'anarchie.

Représailles et réciprocité

L'application discriminatoire du droit humanitaire constitue en outre une forme de représailles: à défaut de pouvoir saisir ceux qui se sont rendus personnellement responsables d'avoir préparé, déclenché ou dirigé une guerre d'agression, on se rabat sur ceux que l'on tient sous sa main: blessés et malades, prisonniers de guerre, internés civils et populations des territoires occupés. De ce point de vue, toutes les dispositions des Conventions de Genève et des Protocoles additionnels à ces Conventions qui interdisent les représailles dirigées contre des militaires blessés ou malades, des membres du personnel sanitaire des armées, des naufragés, des prisonniers de guerre, des personnes civiles ou des biens civils[30] font également obstacle à une application différenciée du droit international humanitaire.

Enfin, l'application discriminatoire des lois et coutumes de la guerre se heurte à une impossibilité pratique. Les diplomates et les juristes ont parfois tendance à raisonner comme s'ils étaient eux-mêmes les destinataires ultimes des normes du droit de la guerre. Sauf le respect dû à ces deux éminentes corporations, il n'en est rien. Les destinataires ultimes des règles, ceux dont dépend en définitive le respect ou la violation des lois et coutumes de la guerre, ce sont les combattants. Quelle est leur situation? Chaque nation attend de ses soldats qu'ils supportent les souffrances et les privations, qu'ils acceptent la mort de leurs camarades et qu'ils soient prêts à sacrifier leur propre vie. Dans le même temps, on attend d'eux qu'ils respectent les ennemis blessés et ceux qui se rendent à discrétion. Voilà qui ne va pas sans difficulté! Cependant, la discipline militaire, l'esprit chevaleresque, le souci du sort des camarades de combat tombés au pouvoir de la Partie adverse et peut-être la survivance d'un sentiment d'humanité que l'horreur de la guerre moderne n'aura pas totalement étouffé pourront inciter au respect de ces règles; en

29 Meyrowitz, *op. cit.*, pp. 106-116, en particulier p. 112.

30 Convention I, article 46; Convention II, article 47; Convention III, article 13, alinéa 3; Convention IV, article 33, alinéa 3; Protocole I, articles 20, 51, paragraphe 6, 52, paragraphe 1, 53, lettre c, 54, paragraphe 4, 55, paragraphe 2, et 56, paragraphe 4.

outre, chaque combattant sait intuitivement qu'il peut, selon l'évolution de la fortune des armes, se trouver en situation de devoir s'en remettre à la protection du droit humanitaire; il hésitera donc à transgresser des règles dont peut dépendre sa survie, celle de ses proches ou celle de ses camarades de combat. En revanche, il est illusoire d'attendre d'un soldat qu'il respecte les lois et coutumes de la guerre alors même qu'on l'a déclaré hors-la-loi du seul fait de son appartenance à un État qualifié d'agresseur. Aucune argumentation juridique ne permettra d'imposer à un combattant le respect d'un régime protecteur dont on lui refuse par avance la protection.

Il est non moins chimérique d'attendre d'un État qu'il respecte les lois et coutumes de la guerre alors même qu'on le déclare déchu, lui et ses ressortissants, de tous les droits qui en découlent.

Cette impossibilité psychologique est la conséquence d'une contradiction fondamentale sur le plan de la logique formelle: la contradiction qui consiste à considérer comme illicites tous les actes de guerre commis par le parti réputé agresseur, tout en exigeant de ce parti qu'il observe la distinction entre les actes de guerre licites au regard des lois et coutumes de la guerre et les actes de guerre intrinsèquement illicites parce que commis en violation des lois et coutumes de la guerre. On ne peut pas réclamer d'un adversaire qu'il respecte les lois et coutumes de la guerre tout en déclarant que chacun de ses actes sera traité comme un crime de guerre du seul fait qu'il est commis à l'occasion d'une guerre d'agression.

On le voit, quelles que soient les intentions morales ou juridiques qui ont pu l'inspirer, la théorie de l'application discriminatoire des lois et coutumes de la guerre conduit en pratique au même résultat que la conception selon laquelle la guerre d'agression échappe à toute réglementation, c'est-à-dire à la guerre sans frein.

Le principe de l'égalité des belligérants devant le droit de la guerre

Le principe de l'égalité des belligérants devant le droit de la guerre doit donc être maintenu. Son application répond à une exigence d'humanité, puisque le principe d'humanité commande le respect des victimes de la guerre en toutes circonstances et à quelque parti qu'elles appartiennent. Elle répond à une exigence d'ordre public dans la mesure où seule l'application de ce principe permet d'éviter le déferlement illimité de la violence[31]. Enfin, elle

31 Meyrowitz, *op. cit.*, pp. 252-259.

répond à une exigence de civilisation car, ainsi que le soulignait Bluntschli, « *le droit de la guerre civilise pareillement la guerre juste et la guerre injuste* » [32].

Ces conclusions sont en plein accord avec le droit positif.

En effet, ni le Pacte de la Société des Nations, ni le Pacte de Paris n'ont porté atteinte au principe de l'égalité des belligérants devant le droit de la guerre. Le « Comité des Onze », institué en 1930 par le Conseil de la Société des Nations (SDN) pour étudier les modifications qu'il convenait d'apporter au Pacte de la SDN pour le mettre en accord avec le Pacte Briand-Kellogg, a expressément reconnu que le *jus in bello* restait applicable et gardait toute sa valeur en cas de résistance à l'agression ou lors de mesures de police internationale, quelle que soit la qualification de semblables opérations[33].

De même, la Charte des Nations Unies ne contient aucune disposition qui modifie les conditions d'application du droit de la guerre dans les rapports réciproques des belligérants. En revanche, la Charte réaffirme sans restriction le principe de l'égalité souveraine des États[34], dont le principe de l'égalité des belligérants devant le droit de la guerre est une application.

Le Statut du Tribunal militaire international (Tribunal international de Nuremberg), annexé à l'Accord concernant la poursuite et le châtiment des grands criminels de guerre des Puissances européennes de l'Axe, signé à Londres le 8 août 1945, qui est assurément l'instrument de droit international qui est allé le plus loin dans la condamnation de la guerre d'agression, laquelle n'est pas seulement qualifiée d'acte illicite entraînant la responsabilité internationale de l'État, mais également de délit international entraînant la responsabilité pénale des individus qui se sont rendus responsables de la préparation et du déclenchement d'une guerre d'agression, n'en a pas moins maintenu de manière parfaitement claire et limpide la distinction entre les crimes contre la paix, c'est-à-dire « *la direction, la préparation, le*

32 « *Das Kriegsrecht zivilisiert den gerechten und den ungerechten Krieg ganz gleichmässig* », Johann Caspar Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen, Beck, 1868, p. 292, paragraphe 519.

33 « Amendement du Pacte de la Société des Nations en vue de le mettre en harmonie avec le Pacte de Paris », Rapport du Comité nommé par le Conseil, 8 mars 1930, *Journal officiel de la Société des Nations*, 1930, pp. 353-383, en particulier les pp. 354-355.

34 Article 2, paragraphe 1. Le fait qu'aucune des dispositions de la Charte ne justifie une application discriminatoire des lois et coutumes de la guerre doit être mis en rapport avec les nombreuses dispositions qui autorisent ou imposent une discrimination à l'encontre de l'agresseur dans les rapports entre les États tiers et les belligérants. Ainsi, le principe d'interprétation « *expressio unius est exclusio alterius* » vient confirmer le fait que les auteurs de la Charte n'avaient pas l'intention de porter atteinte au principe de l'égalité des belligérants devant le droit de la guerre et qu'ils ne l'ont pas fait.

déclenchement ou la poursuite d'une guerre d'agression ou d'une guerre en violation des traités, assurances ou accords internationaux » d'une part, et les crimes de guerre, c'est-à-dire « *les violations des lois et coutumes de la guerre* » d'autre part, signifiant par là que les actes conformes aux lois et coutumes de la guerre ne seraient pas sanctionnés, même s'ils avaient été commis à l'occasion d'une guerre d'agression[35].

Le Tribunal a respecté scrupuleusement la distinction entre crimes contre la paix et crimes de guerre. Il n'a retenu comme crimes de guerre que les actes commis en violation des lois et coutumes de la guerre, dont il a démontré le caractère illégal en se référant aux Conventions de Genève ou de La Haye. En revanche, le Tribunal a admis que les accusés pouvaient se prévaloir de l'exercice des droits prévus par le *jus in bello*, alors même qu'ils avaient pris part à une guerre d'agression[36]. Par ce biais, le Tribunal a confirmé le principe de l'égalité des belligérants devant le droit de la guerre et l'autonomie du *jus in bello* au regard du *jus ad bellum*.

Dans leur très grande majorité, les juridictions nationales chargées de juger les crimes de guerre commis au cours de la Seconde Guerre mondiale ont appliqué les mêmes principes, confirmant par là l'autonomie du *jus in bello* au regard du *jus ad bellum*[37].

Les Conventions de Genève du 12 août 1949 ont confirmé à un double titre le principe de l'égalité des belligérants en ce qui concerne l'application du droit humanitaire; par le biais de l'interdiction des représailles dirigées contre les personnes et les biens protégés par ces Conventions[38], mais surtout par la disposition de l'article premier, commun aux quatre Conventions:

35 Article 6 de la Charte du Tribunal militaire international. Le texte de l'Accord de Londres du 8 août 1945 et de ses annexes est reproduit dans: *Nations Unies, Recueil des Traités*, vol. 82, pp. 280-301.

36 Le jugement du Tribunal international de Nuremberg est notamment reproduit dans *American Journal of International Law*, vol. 41, No. 1, janvier 1947, pp. 172-333. On doit en particulier relever que le Tribunal a refusé de condamner les amiraux Dönitz et Raeder du chef de la guerre sous-marine à outrance, comportant notamment le torpillage de navires de commerce alliés et neutres et l'abandon des survivants, en raison du fait que l'illégalité de ces comportements au regard des lois et coutumes de la guerre n'avait pas été suffisamment démontrée (pp. 304-305 et 308). Le Tribunal a donc admis que les règles du *jus in bello* ne s'appliquaient pas seulement à la charge, mais aussi à la décharge des accusés, qui ne pouvaient être condamnés pour des actes d'hostilités dont l'illégalité au regard des lois et coutumes de la guerre n'avait pu être démontrée, même si les actes en question avaient été commis à l'occasion d'une guerre d'agression.

37 On se reportera aux nombreux cas cités par Meyrowitz, *op. cit.*, pp. 62-76.

38 Convention I, article 46; Convention II, article 47; Convention III, article 13, alinéa 3; Convention IV, article 33, alinéa 3.

« *Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances.* »

Cette disposition souligne la force obligatoire des Conventions de Genève, dont l'application ne saurait être subordonnée à une quelconque appréciation quant à la légalité ou à l'illégalité du recours à la force, que cette appréciation soit le fait des Parties au conflit ou d'un organisme international[39]. L'article 2 commun précise en outre que les Conventions s'appliquent « *en cas de guerre ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes* ».

Cette interprétation est confirmée par le *Commentaire* des Conventions de Genève publié par les soins du Comité international de la Croix-Rouge:

« *L'application de la Convention ne dépend pas du caractère du conflit. Qu'il s'agisse d'une guerre "juste" ou "injuste", d'une agression ou d'une résistance à l'agression, cela ne saurait affecter en rien la protection et les soins dus aux blessés et aux malades* » [40].

La Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire, réunie à Genève de 1974 à 1977 pour mettre à jour le droit international humanitaire et l'adapter aux nouvelles formes de conflits survenues depuis 1949, a mis un point final à toute controverse en introduisant dans le Préambule du premier Protocole additionnel aux Conventions de Genève (Protocole I) la disposition suivante:

« *Les Hautes Parties contractantes* [...]

Réaffirmant, en outre, que les dispositions des Conventions de Genève du 12 août 1949 et du présent Protocole doivent être pleinement appliquées en toutes circonstances à toutes les personnes protégées par ces instruments, sans aucune distinction défavorable fondée sur la nature ou l'origine du conflit armé ou sur les causes soutenues par les Parties au conflit, ou attribuées à celles-ci » [41].

Cette disposition, qui a été adoptée par consensus, sans discussion ni opposition, au sein de la Conférence diplomatique[42], doit être considérée

39 Même interprétation dans Meyrowitz, *op. cit.*, pp. 37-40.

40 *Commentaire*, vol. I, p. 28.

41 Protocole I, alinéa 5, du Préambule. Aux termes de l'article 31, alinéa 2, de la Convention de Vienne sur le droit des traités, du 23 mai 1969, le préambule est une partie intégrante du traité.

42 *Actes CDDH*, vol. VII, pp. 167-172, en particulier p. 172, Document CDDH/SR.54, Compte rendu analytique de la cinquante-quatrième séance plénière tenue le 7 juin 1977.

comme l'interprétation authentique des Conventions de Genève. Elle s'impose donc à tous les États parties à ces Conventions, qu'ils soient ou ne soient pas liés par le Protocole I.

Cette disposition confirme l'autonomie du droit humanitaire au regard du *jus ad bellum*. En conséquence, un État ne peut pas se prévaloir du fait qu'il est victime d'une agression ni de quelque autre considération tirée de l'origine ou de la nature du conflit pour se dégager de ses obligations au titre du droit international humanitaire et refuser d'en appliquer les règles. Une telle attitude serait contraire à l'esprit et à la lettre des Conventions de Genève et du premier Protocole additionnel.

Le Statut de la Cour pénale internationale confirme l'autonomie du *jus in bello* au regard du *jus ad bellum*. En effet, s'il est vrai que la Cour a compétence pour sanctionner le crime de génocide, les crimes contre l'humanité, les crimes de guerre et le crime d'agression, chaque crime doit être sanctionné pour lui-même, même si plusieurs d'entre eux peuvent avoir été commis simultanément[43]. Mais surtout, le fait que la Cour puisse statuer sur le crime de génocide, les crimes contre l'humanité et les crimes de guerre avant qu'un accord ait été trouvé sur la définition du crime d'agression et sur l'exercice de la compétence de la Cour pour la répression de ce crime[44] confirme avec force que les crimes de guerre sont indépendants des crimes contre la paix.

La pratique des États

La plupart des États qui ont été impliqués dans des conflits armés survenus depuis 1945 ont affirmé faire usage du droit de légitime défense individuelle ou collective pour résister à une guerre d'agression dont eux-mêmes ou l'un de leurs alliés affirmaient être les victimes. Cependant, un seul, à notre connaissance, en a tiré des conclusions concrètes sur le plan de l'application du droit humanitaire et des activités du Comité international de la Croix-Rouge (CICR). En effet, jusqu'aux accords de Paris de janvier 1973 supposés mettre un terme à la guerre du Viet-Nam et jusqu'au rapatriement des prisonniers de guerre américains, la République démocratique du Viet-Nam a repoussé toutes les offres de services du CICR en alléguant notamment que le Viet-Nam était victime d'une guerre d'agression de la part des États-Unis et qu'il n'était, en conséquence, pas tenu d'appliquer la Troisième

43 Article 13 du Statut de Rome de la Cour pénale internationale.

44 Article 5, alinéa 2, du Statut de Rome de la Cour pénale internationale.

Convention de Genève aux prisonniers de guerre américains, ni d'autoriser le CICR à exercer au profit de ces prisonniers les activités prévues par cette Convention. Toutes les démarches que le CICR a effectuées pour pouvoir venir en aide à ces prisonniers sont restées vaines[45].

Le gouvernement de la République socialiste du Viet-Nam s'est fondé sur le même argument lors du conflit sino-vietnamien de février 1979. Cependant, à la suite de discussions prolongées, ce gouvernement a finalement autorisé les délégués du CICR à visiter les prisonniers de guerre chinois capturés durant ce conflit, en dépit du fait qu'il affirmait avoir été victime d'une guerre d'agression de la part de la République populaire de Chine[46].

Enfin, en ratifiant le Protocole I, le gouvernement de Hanoi n'a fait aucune réserve à l'endroit de l'alinéa 5 du Préambule[47]. On est donc fondé à penser que ce gouvernement a modifié sa position sur les conditions d'application des Conventions de Genève et qu'il s'est rallié à l'avis unanime de la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire selon lequel aucune considération tirée de la nature ou de l'origine du conflit ou des causes soutenues par les Parties ne saurait faire obstacle à l'application du droit humanitaire.

45 La position du gouvernement de Hanoi a été exposée à maintes reprises, notamment dans la note du 31 août 1965 du Ministère des Affaires étrangères de la République démocratique du Viet-Nam, en réponse à l'appel du 11 juin 1965 du Comité international de la Croix-Rouge relatif à la conduite des hostilités au Viet-Nam; la traduction française de cette note est reproduite dans la *Revue internationale de la Croix-Rouge*, N° 562, octobre 1965, pp. 485-486. Il convient également de se reporter au document CDDH/41 soumis le 12 mars 1974 à la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire (*Actes CDDH*, vol. IV, pp. 177-190). On trouvera un résumé des négociations entre le CICR et le gouvernement de la République démocratique du Viet-Nam dans l'étude de Michel Barde, *La Croix-Rouge et la Révolution indochinoise: Histoire du Comité international de la Croix-Rouge dans la guerre du Vietnam*, Genève, Institut universitaire de Hautes Études internationales, 1975, ainsi que dans l'ouvrage du professeur Jacques Freymond, *Guerres, Révolutions, Croix-Rouge*, Genève, Institut universitaire de Hautes Études internationales, 1976, pp. 85-94. Le gouvernement de la République démocratique du Viet-Nam s'est également prévalu de la réserve qu'il avait formulée à l'encontre de l'article 85 de la Troisième Convention, relatif au traitement des criminels de guerre. Pour un examen de la position des autorités de Hanoi à la lumière du droit international humanitaire, on pourra se reporter à l'article de Paul de La Pradele, «Le Nord-Vietnam et les Conventions humanitaires de Genève», *Revue générale de Droit international public*, vol. 75, N° 2, avril-juin 1971, pp. 313-332.

46 Rapport sur la mission de protection et d'assistance effectuée en République socialiste du Viet-Nam du 5 au 14 avril 1979, en particulier annexe 7.1, p. 11; Rapport sur la mission de protection et d'assistance effectuée en République socialiste du Viet-Nam du 24 au 31 mai 1979, en particulier pp. 6-10 et annexe 8, Archives du CICR, dossier 251 (69).

47 Instrument de ratification du Protocole I par la République socialiste du Viet-Nam, 28 août 1981, et communication du Département fédéral des Affaires étrangères de la Confédération suisse à l'auteur du présent article, 24 juin 1982.

Depuis l'adoption de la Charte des Nations Unies, seules trois opérations militaires majeures ont été entreprises sur la base du Chapitre VII de la Charte et d'un mandat donné par le Conseil de Sécurité[48]:

- l'action des États-Unis et de leurs alliés en Corée, qui se fondait sur la Résolution 83 (1950) adoptée par le Conseil de Sécurité le 27 juin 1950;
- l'action de la coalition anti-irakienne en vue de la libération du Koweït, qui se fondait sur la Résolution 678 (1990) adoptée le 29 novembre 1990;
- l'intervention des forces de l'OTAN en Bosnie-Herzégovine, qui se fondait sur les Résolutions 816 (1993) et 836 (1993) adoptées les 31 mars et 4 juin 1993 et sur de nombreuses résolutions subséquentes.

Dans aucun de ces cas, les États qui agissaient sur injonction ou avec l'autorisation du Conseil de Sécurité n'ont prétendu en tirer argument pour se libérer de leurs obligations au titre du droit international humanitaire.

La pratique des États rejoint donc les conclusions de l'analyse doctrinale: un belligérant ne saurait se prévaloir du fait qu'il est victime d'une agression ou du fait qu'il défend une juste cause pour se libérer de ses obligations découlant des lois et coutumes de la guerre et, en particulier, des exigences du droit humanitaire. Il n'y a pas lieu de s'en étonner. En effet, ces conclusions reflètent la volonté de la communauté internationale de fixer des limites à l'exercice de la violence et d'assurer la protection de la personne humaine en toutes circonstances, quels que soient les motifs qui ont conduit les belligérants à prendre les armes.

Au demeurant, une juste cause ne saurait autoriser les belligérants à fouler aux pieds les exigences élémentaires d'humanité, ni donner prétexte au déferlement d'une violence sans frein. Même la guerre juste a ses limites.

Conclusions

C'est dans les moments de crise ou de tensions extrêmes que le droit trouve toute sa valeur, car c'est dans ces moments que la tentation de justifier le recours à des moyens que l'on répudie par ailleurs est la plus sournoise.

48 Nous ne mentionnons pas ici les nombreux cas où le Conseil de Sécurité a décidé la création de forces de maintien de la paix ou de forces d'interposition dont l'objectif principal était de prévenir la reprise des affrontements et non pas de combattre contre un Etat réputé agresseur. Par sa résolution N° 1368 du 12 septembre 2001, le Conseil de Sécurité des Nations Unies a condamné les attentats du 11 septembre contre New York et Washington, proclamé sa résolution à combattre par tous les moyens les menaces à la paix et la sécurité internationales causées par les actes terroristes et reconnu le droit de légitime défense des Etats-Unis.

Le droit des conflits armés a précisément été adopté pour limiter la violence dans la guerre et, quelle que soit la gravité de l'agression subie, quelles que soient les causes défendues par les parties au conflit et les motifs pour lesquels elles ont recours aux armes, l'on ne saurait en tirer argument pour le répudier.

Dans cette perspective, aucun État ni aucun parti ne saurait se proclamer au-dessus du droit, quelle que soit la cause qu'il prétend servir. Inversement, nul ne peut être rejeté en dehors de l'empire et de la protection du droit.

Qu'il s'agisse de « *guerre contre le terrorisme* » ou de toute autre forme de conflit, il faut veiller à ne pas détruire par les armes les valeurs qu'on prétend protéger par les armes. « *Qui croira à la justice de votre guerre si elle est faite sans mesure* », écrivait François de La Noue, qui fut l'un des meilleurs capitaines d'Henri de Navarre, le futur Henri IV[49].

A quoi font écho les *Chroniques algériennes* d'Albert Camus:

« *S'il est vrai qu'en histoire, du moins, les valeurs, qu'elles soient celles de la nation ou de l'humanité, ne survivent pas sans qu'on ait combattu pour elles, le combat (ni la force) ne suffit pas à les justifier. Il faut encore que lui-même soit justifié, et éclairé, par ces valeurs. Se battre pour sa vérité et veiller à ne pas la tuer des armes mêmes dont on la défend, à ce double prix les mots reprennent leur sens vivant* » [50].

Quels que soient les moyens dont il dispose et quelle que soit la violence des attaques dont il se rendra responsable, aucun mouvement terroriste ne peut détruire par ses seules forces une société moderne ni un État démocratique fondé sur le respect du droit, sur l'adhésion des citoyens et sur le respect des droits fondamentaux de la personne humaine. De nombreux indices donnent à penser que les chefs des organisations terroristes en sont conscients et qu'ils comptent sur l'émotion provoquée par les attentats qu'ils parviennent à commettre pour amener l'État qui en est victime à saper par lui-même les bases sur lesquelles il est fondé. Ce sont ces valeurs qu'il s'agit de protéger.

49 François de La Noue (1531-1591), cité par André Gardot, « Le droit de la guerre dans l'œuvre des capitaines français du XVIe siècle », *Recueil des Cours de l'Académie de Droit international*, tome 72, 1948, vol. I, pp. 393-539, ad p. 450.

50 Albert Camus, *Actuelles III, Chroniques algériennes (1939-1958), in: Œuvres complètes, Essais*, Paris, Éditions Gallimard (Bibliothèque de la Pléiade), 1965, p. 898.

Dès lors que les réseaux terroristes se jouent des frontières et disposent de ramifications internationales, seule une action concertée à l'échelle internationale permettra d'en venir à bout. Une telle action ne peut se construire dans la durée, si ce n'est dans le respect de l'ordre juridique international dont le droit international humanitaire constitue en quelque sorte le dernier rempart.

Abstract

Just war, war of aggression and international humanitarian law

François Bugnion

The attacks on New York and Washington on 11 September 2001 and the subsequent "war on terrorism" have suddenly brought international humanitarian law into the limelight and again highlighted the relationship between the causes of a conflict on one hand and the respect for rules on the conduct of hostilities and protection of victims of war on the other. The article traces the history of rules limiting violence and the interdiction of recourse to war. Despite the general banning of war in the Charter of the United Nations, the application of the jus in bello *remains independent of the causes of war, even in a war against aggression, and every discriminatory application of international humanitarian law has to be rejected. There are imperious reasons for maintaining the principle of egality of the belligerants with repect to the law of war. Whatever its moral and legal intentions, the theory of discriminatory application of the laws and customs of the war leads to the same unacceptable result, namely unrestricted warfare, as the conception that wars of agression are not covered by international humanitarian law. State practice and the Rome Statute of the International Criminal Court, which entered into force on 1st July 2002, confirm the strict separation between* jus in bello *and* jus ad bellum.

Acts of terror, "terrorism" and international humanitarian law

HANS-PETER GASSER*

Since time immemorial civilians have been victims of terrorist acts. Ordinary people going to work by bus or having coffee on the sidewalks are the usual target of indiscriminate violence, not well-known players on the domestic or international scene but bystanders. It may, however, also happen that an act of terrorism strikes persons in the limelight: government officials, opposition leaders, military or police personnel. Such recourse to unchecked and indiscriminate violence has always been deemed contrary to fundamental rules of law, whether enshrined in international treaties protecting the human being or codified by domestic law, in particular criminal law. No civilization, no creed — and no decent human being —condones acts of terrorism. Moreover, terrorists have always been prosecuted for their crimes.

Terrorist attacks on human lives and property have not only brought suffering and distress to the individual victims, but have often had far-reaching consequences for the life of a nation or even the course of history. In 1914, for example, the killing in Sarajevo of the Austrian Crown Prince triggered the outbreak of the First World War. That event and the revolution which in 1917 disrupted the Russian Empire signalled the end of a long period of stability in nineteenth-century Europe. The twentieth century has seen a spate of terrorist acts all over the world. Few recent conflicts have not been characterized by appalling acts of cruelty against civilians, perpetrated with the sole aim of terrorizing the civilian population of a country at war. To mention only a few examples, there was the war which led to an independent Algeria, the crushing of independence movements by the Soviet Union, the various armed conflicts in Indochina, in particular during the involvement of American and Allied forces in Vietnam, the mass murder of the Cambodian people, the civil war in Sri Lanka and in several African

* Hans-Peter Gasser is a former Senior Legal Advisor of the International Committee of the Red Cross, Geneva, and former Editor of the *International Review of the Red Cross*.

countries, the armed conflict in Colombia, the events which have shaken Northern Ireland for years and, of course, the wars in the Middle East, in particular the ongoing tragedy in Palestine.

A cursory look at the contexts in which these events took place shows that acts of terrorism are usually part of or indirectly linked in some way to an armed conflict, i.e. a situation in which peaceful ways of settling disputes among contending groups have failed to end the conflict. It should not, however, be overlooked that acts of terrorism have also been committed in (apparently?) "normal" times.

The 1970s witnessed a large number of terrorist acts against civilians, the more spectacular of which were linked to the conflict between Israel, the Palestinian people and some Arab States. That was also the time when "terrorism" in general and the international response to such events were placed on the agenda of the United Nations and international governmental organizations. Scholars and the media likewise took up the subject. Moreover, under the headings of "wars of national liberation" and guerrilla warfare, terrorism became a dominant issue for the Diplomatic Conference which brought about the adoption, on 8 June 1977, of the two Protocols Additional to the Geneva Conventions of 12 August 1949. Having launched the process of updating international humanitarian law, the International Committee of the Red Cross was suddenly confronted with the problem.

The destruction, by hijacked passenger planes, of the World Trade Centre's Twin Towers in New York and part of the Pentagon in Washington D.C. on 11 September 2001, and the subsequent armed campaign led by the United States against Afghanistan "to destroy terrorism", have once again thrust "terrorism" to the forefront of international concern. The worldwide reaction to these events has been particularly intense, among other things because of the obvious link between them and the more than thirty years' conflict in the Middle East over the destiny of the Palestinian people. The world is seeing the use of a considerable amount of violence to support or counter the goals of the contending parties. Suicide attacks by Palestinians against civilians on Israeli territory and retaliatory incursions by the Israeli armed forces into the territories of the West Bank and Gaza, with casualties among the civilian population and destruction of the civilian infrastructure, particularly housing, have generated an incredible degree of hatred between two peoples which history and geography have condemned to live side by side.

In an article published in 1986, I examined the response of international law, in particular international humanitarian law, to terrorist acts and those who commit them.[1] The main conclusion was that existing humanitarian law prohibits any conceivable form of terrorism committed in an armed conflict and that, at first sight, there was no reason to propose amendments to the 1949 Geneva Conventions. The analysis made in 1986 appears to be still valid today. Yet the world has changed in many respects in the last two decades and a fresh look at the response of inter-national humanitarian law to terrorism may be useful.

The following major developments have no doubt had a substantial impact on the context in which international humanitarian law operates:

- Bipolarity, in which one superpower checks and counterbalances all the movements of the other superpower, has ceased to be the main characteristic of the world order. The Cold War is over. Today there is but one State with the power to control, or at least influence, events all over the world, namely the United States. At the same time, so-called "wars by proxy" have become less important.
- The fight against the remnants of colonialism is no longer an issue today. This means that sometimes painful debate along the lines of "your terrorist is my freedom fighter" (and vice versa) has almost disappeared.
- The development of information techniques has made possible instant communication worldwide.
- At the same time, the international community has shown a new concern for respect for the fundamental human rights of individuals and has strengthened international control mechanisms to guarantee such respect, *inter alia* by creating judicial bodies to bring perpetrators to justice, and in particular by adopting the Rome Statute establishing the International Criminal Court (ICC).

These developments have a bearing on our topic, not so much on the rules prohibiting terrorism as on the measures taken to counter terrorist violence. Indeed, never before have governments engaged their armed forces on foreign territory with the intent to combat and even liquidate what they perceive as "terrorists". In other words, "war against terrorism" has become a justification for the use of armed force against another country. While the notion of "war" against terrorism is a political slogan — comparable to the

1 See Hans-Peter Gasser, "Prohibition of terrorist acts in international humanitarian law", *International Review of the Red Cross*, July/August 1986, No. 253, 1986, p. 200.

"war" against poverty or the "war" against AIDS — the attack on a third country transforms such a campaign into an armed conflict in the sense of the laws of war. On the other hand, the jurisdiction of the ICC to try persons accused of serious acts of terrorism makes prosecution of terrorists an international concern, while at the same time exerting pressure on States to prosecute such individuals under their domestic criminal jurisdiction.

This is not the place to examine whether the use of force against another State "to combat terrorism" is compatible with existing international law on the right to use force, in particular with the Charter of the United Nations.[2] The United States has based its armed intervention in Afghanistan on its inherent right of self-defence as confirmed by Article 51 of the Charter, a legal position which seems to be generally accepted. It is undisputed that counter-terrorist actions transcend individual national jurisdictions and thus go beyond domestic law enforcement. It may even be argued that such campaigns transcend law enforcement as such. Is it the perceived "national interest" of a State which primarily dictates the response to terrorist actions, if the alleged perpetrators of the crime are beyond the reach of its jurisdiction?

This article first discusses the provisions of international humanitarian law which prohibit acts of terrorism. In the second part, some legal issues raised by responses to terrorist acts, i.e. by counter-terrorist operations or, as politicians and the media have come to call it, the "war on terrorism", will be considered. Finally, it will be asked whether existing international rules are sufficient to ban terrorism at the international level.

Prohibition of terrorism by international law

International treaty law

There is at present no universal treaty which comprehensively prohibits terrorism and applies in all circumstances. The only attempt to elaborate such a treaty, the *Convention for the Prevention and Punishment of Terrorism* drafted in 1937 by the League of Nations, never entered into force.

Over the last few decades the United Nations has adopted a number of treaties dealing with specific aspects of terrorism, of which the following conventions are the most important:[3]

2 A lively debate among international lawyers has already produced abundant literature on the subject.

3 A comprehensive list of treaties on terrorism can be found at ‹http://untreaty.un.org/English/Terrorism.asp›.

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973
- Convention against the Taking of Hostages, 1979
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
- International Convention for the Suppression of Terrorist Bombings, 1997
- International Convention for the Suppression of the Financing of Terrorism, 1999

In recent years, an ad hoc committee established by the United Nations General Assembly has been working on the text of a *Comprehensive Convention on International Terrorism*.[4] At the time of writing, negotiations are still under way.

Initiatives to combat terrorism by adopting international instruments have also been taken at a regional level: the *European Convention on the Suppression of Terrorism*, of 1977, deals with aspects of the fight against terrorism in Europe, and in June 2002, States party to the Organization of American States (OAS) adopted an *Inter-American Convention against Terrorism*.

The main treaties of international humanitarian law which have a bearing on the issue are the four *Geneva Conventions of 12 August 1949 for the protection of war victims*,[5] supplemented by their two 1977 *Additional*

4 UNGA Res. 51/210, 17 December 1996. For information on the work of the Ad Hoc Committee established by Resolution 51/210 see its yearly reports. At the time of writing, the most recent source of information is: *Measures to Eliminate International Terrorism*, Report of the Working Group, A/C.6/56/L.9, 29 October 2001.

5 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. 190 States are party to these Conventions (at 30 June 2002).

Protocols.[6] Many other treaties deal with aspects of armed conflict and thereby indirectly with terrorism, such as the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954).

It should, of course, not be forgotten that all States (supposedly) prohibit recourse to terrorist acts by domestic legislation, in particular criminal law.

Definition

None of the aforesaid treaties has established a definition of "terrorism" or "terrorist acts". Terrorism is a social phenomenon with many aspects which vary from case to case. Neither experts in international law nor government representatives have yet agreed on a comprehensive and widely acceptable definition. The only text dates back to the 1937 *Convention for the Prevention and Punishment of Terrorism*, which defined acts of terrorism as

> "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public".

This definition is not very explicit, as the text refers only to "criminal acts" and does not specify which acts are illegal in the context of terrorism.

The draft UN *Comprehensive Convention on International Terrorism* as formulated by the Ad Hoc Committee and its Working Group ventures the following definition of terrorist acts (Article 2):

> "Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> - Death or serious bodily injury to any person; or
> - Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
> - Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act."[7]

6 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, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (160 and 153 States parties respectively as at 30 June 2002).

7 Report of the Working Group — see note 4.

Whether this text will become a universally accepted reference for coming to grips with the phenomenon of terrorism remains to be seen.

There is no intention in the present article to work out a definition of terrorism or terrorist acts. The many attempts to do just that have shown that the issue is fraught with political considerations which do not lend themselves to reasonable and broadly acceptable legal definitions. Moreover, the notion of terrorism is changing with the passage of time. It has been broadened of late to cover such phenomena as cyber-terrorism and illegal financial transactions across national borders. As long as there is no consensus on how to respond to the phenomenon, agreement on definitions is unlikely to emerge.

However, we all know more or less what we mean by the notion, even in the absence of a clear-cut definition. It can be assumed that this common perception of terrorism is made up of the following elements:

- Terrorism is violence or the threat of violence against ordinary civilians, against their life, their property, their well-being. Terrorist acts do not distinguish between an intended target and bystanders, or between different groups of bystanders. Terrorists strike indiscriminately.
- Terrorism is a means to attain a political goal which allegedly could not be attained by ordinary, lawful means, within the context of the established constitutional order.
- Terrorist acts are usually part of a strategy. They are carried out by organized groups over a longer period of time.
- Terrorist acts are often perpetrated against persons who have no direct influence upon or connection with the intended result of those acts, i.e. ordinary civilians.
- The purpose of terrorist acts is to create fear in order to establish conditions which, in the perpetrators' opinion, should further their cause.
- Terrorism is intended to humiliate fellow human beings.

Acts of terrorism are perceived as crimes by the large majority of people. In certain circumstances, however, some persons may attempt to justify such acts as allegedly helping to achieve a goal which, in their view, is more important than the prohibition of indiscriminate violence against civilians.

In order to further clarify the topic under consideration here, a closer look should be taken at the notion of "terrorist act" or "act of terrorism". "Terrorism" is not a legal notion. It is much more a combination of policy goals, propaganda and violent acts — an amalgam of measures to achieve an

objective. In a nutshell, however, terrorism is criminal behaviour. Conversely, "war on terrorism" is the sum of all forms of action taken to combat terrorists. Counter-terrorist measures may differ widely, ranging from action taken by the United Nations Security Council to prosecution of presumed terrorists at the domestic level.

In particular: the ban on terrorism by international humanitarian law

International humanitarian law deploys its effect in armed conflict. Thus the 1949 Geneva Conventions deal with acts of terrorism only insofar as they occur in the context of an armed conflict or, in plain language, of a war.

Violence against persons and destruction of property are inherent in warfare. The use of deadly force against persons and objects is contrary to international humanitarian law only if such acts transgress the limits established by the international rules. Violence is also one of the salient features of terrorism. International law must therefore draw a line to distinguish the violence which is legitimate in war from acts of terrorism, i.e. illicit recourse to violence. How is this distinction achieved?

International humanitarian law approaches the problem from two angles. *First*, the right to use force and commit acts of violence is restricted to the armed forces of each party to an armed conflict. Only members of such armed forces have the "privilege" to use force against other armed forces, but their right to choose methods or means of warfare is not unlimited. On the other hand, only members of armed forces and military objectives may be the target of acts of violence. *Second*, other categories of persons, in particular the civilian population, or of objects, primarily the civilian infrastructure, are not legitimate targets for military attacks — they are, in the words of the Geneva Conventions, "protected" and must in all circumstances be spared.

International humanitarian law does not grant unfettered licence to use any conceivable form of violence against the other party to an armed conflict. Since time immemorial international rules have drawn a line between methods and means of warfare which are legitimate and those which are not, such as the use of chemical weapons or the assassination of civilians not taking part in the hostilities. To resort to illegal methods and means violates the legal order and, in aggravated circumstances, can be prosecuted as a crime under domestic law or as a war crime. Consequently, members of armed forces, though entitled to commit acts of violence, may be held responsible for violations of rules protecting persons or civilian property. In

other words, officers and ordinary soldiers may (or must) be prosecuted at the domestic or international level and punished for terrorist acts they are found to have committed.

Rules applicable to *international* armed conflict

The 1949 Geneva Conventions and their 1977 Additional Protocols refer only twice in a specific manner to acts of terrorism: in Article 33 of the Fourth Geneva Convention and Article 51, para. 2, of Protocol I.

Under the heading "Protection of the civilian population", Article 51 of Protocol I codifies the basic rules to be respected in military operations. Article 52 adds precise rules banning the destruction of civilian objects, in particular those which are part of the civilian infrastructure.[8] After a reminder of the obligation to protect the civilian population against dangers arising from military operations, an obligation firmly anchored in customary law, paragraph 2 of Article 51 reads:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

Paragraph 4 of the same provision prohibits indiscriminate attacks[9] in warfare. This provision covers military operations (or any acts of violence) which

- are not directed at a specific military objective,
- employ a method or means of combat which cannot be directed at a specific military objective, or
- employ a method or means of combat the effects of which cannot be limited as required by the law,

and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. In other words, attacks or acts of violence which, though intended to hit a military target, in fact kill or wound civilians or destroy civilian objects, including the civilian infrastructure, in disproportionate manner are prohibited.

8 As at 30 June 2002, 160 States are party to Protocol I. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not bound by Protocol I, which prohibits attacks against civilians and the civilian infrastructure.

9 "'Attacks' means acts of violence against the adversary...", Article 49 of Protocol I.

Beyond all doubt, these rules ban terrorist activities insofar as they are directed against civilians. By definition, terrorist acts are acts "the primary purpose of which is to spread terror among the civilian population" (Article 51, para. 2). Acts of terrorism are always either attacks against civilians or indiscriminate attacks which usually strike civilians. However, terrorist acts *need* not necessarily or exclusively strike civilians or the civilian infrastructure. It must be stressed that threats of violence intended to spread terror among the civilian population are also prohibited. The *intention* to spread terror among civilians is a necessary element for defining acts of terrorism, for the simple reason that in war any use of deadly force may create fear among bystanders, even though the attack may be directed at a lawful target (e.g. aerial bombardment of a military target close to a civilian area).

As a first conclusion on this basic point it can be seen that terrorist acts causing harm to civilians or civilian property are clearly prohibited by modern international law governing international armed conflict, in particular by Articles 51 and 52 of the 1977 Protocol I additional to the Geneva Conventions. These prohibitions cannot be bypassed by claiming a right to resort to reprisals;[10] they are absolute. Terrorist acts causing death or serious injury to civilians are grave breaches of the Fourth Geneva Convention, in other words, war crimes.[11] As such, they require that perpetrators thereof be prosecuted and, if guilty, punished by domestic tribunals. Under the conditions laid down by the Rome Statute, those persons may be subject to the jurisdiction of the International Criminal Court. Terrorist acts committed in times of armed conflict most probably will be prosecuted as war crimes (Article 8 of the Rome Statute), while in other situations such acts may be qualified as crimes against humanity (Article 7).[12]

In addition to the general prohibitions established by Articles 51 and 52 (the main parts of which give expression to customary law rules), several other provisions of humanitarian law are also relevant in a discussion on the response of international humanitarian law to terrorism. They usually cover

10 Protocol I, Articles 51, para. 6, and 52, para. 1.

11 Article 147.

12 Statute of the International Criminal Court (ICC), adopted in Rome on 17 July 1998, Article 7 (crimes against humanity) and Article 8 (war crimes), in particular para. 2 (a) and (b). — After ratification by more than 60 States the Rome Statute entered into force on 1 July 2002. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not party to the Court established to prosecute persons accused of serious war crimes, such as terrorist acts, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Rome Statute, Article 8, para. 1).

specific needs for protection, such as the rules on the protection of cultural property from any hostile act,[13] or the legal protection given to installations containing dangerous forces (such as dams, dykes and nuclear power plants).[14]

While we have hitherto examined the protection afforded by international humanitarian law to civilians and civilian property in times of armed conflict, we now turn to the question whether international rules also confer legal protection against terrorist acts targeting members of armed forces. The answer is not self-evident, because soldiers are allowed to shoot and can be shot at. Members of armed forces are unquestionably active participants in, and simultaneously a legitimate target of, military operations. And what appears to be a terrorist act in a civilian context may well be a legitimate act of war if carried out against enemy personnel. However, "the right of parties to the conflict to choose methods or means of warfare is not unlimited", says a fundamental rule of the laws of war. As codified by Article 35, para. 1, of Protocol I, this rule imposes upon warfare limits for the benefit of those who participate in the war effort, i.e. members of the armed forces. Article 35 goes on to state in its second paragraph that "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". One example of such illegal behaviour vis-à-vis members of armed forces is perfidy. Article 37 of Protocol I prohibits acts of perfidy, which are acts of violence that betray the trust of the other side. For example, use of violence while feigning civilian, non-combatant status constitutes perfidy. Specific acts of terrorism may well be of a perfidious nature.

This short presentation clearly shows that terrorist acts may be considered a crime if committed against members of the armed forces.

After analysing those parts of international humanitarian law which set limits to the conduct of military operations, we shall now consider the rules dealing with the fate of persons who have stopped fighting and find themselves in the hands of the adverse party, either as wounded or sick, as detainees or as inhabitants of an occupied territory.

The First and Second Conventions reiterate the customary rules that wounded and sick persons who are *hors de combat* — out of action — must be "respected and protected in all circumstances". In particular, "they shall not be murdered or exterminated".[15] "Wilful killing" of a protected person is a

13 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 4. See also Protocol I, Article 53.

14 Protocol I, Article 56.

15 First Convention, Article 12, para. 2; Second Convention, Article 12, para. 2.

grave breach of the First and Second Geneva Conventions, i.e. a war crime.[16]

By virtue of the Third Geneva Convention of 1949, members of armed forces captured and detained by the adverse party as prisoners of war must be dealt with in accordance with a detailed code of rules which ensure their humane treatment. Any life-threatening treatment or other form of violence to their person is strictly forbidden; they must at all times be treated humanely.[17] The law gives special attention to the conditions under which detained persons may be interrogated: "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[18] Serious violations of these commitments are grave breaches of the POW Convention, and are thus war crimes.[19]

Of particular importance is the legal regime set up by international humanitarian law to protect enemy civilians held by or otherwise under the control of the adverse party, be it on its own territory or in an occupied territory. The goal of the Fourth Geneva Convention is to ensure humane conditions for civilians living under foreign control. The rules codified by that Convention leave no doubt: terrorist acts committed by civilians who find themselves under the control of a party to conflict are illegal. Article 33 is, incidentally, the only provision in the 1949 Conventions which uses the word "terrorism". It reads: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Article 33 refers to situations where a person in the power of the enemy is in particular danger of becoming the victim of "measures of intimidation or of terrorism" while in detention or in an occupied territory. The term "terrorism" as used by the Fourth Convention seems, however, to have a narrower meaning than in present-day language. Wilful killing, torture or inhuman treatment, the taking of hostages or "extensive destruction (...) of property" are grave breaches of the Fourth Geneva Convention: such acts are war crimes.[20]

16 First Convention, Article 50; Second Convention, Article 51.

17 Third Convention, Article 13.

18 Third Convention, Article 17, para. 4.

19 Third Convention, Article 120.

20 Fourth Convention, Article 147.

Protocol I considerably reinforces international standards for the protection of civilians insofar as they are directly exposed to the dangers of military operations. The basic rule stipulates that civilians shall not be the target of hostilities. A serious violation of that prohibition constitutes a war crime.[21] The treaty also introduces new rules for the benefit of persons who find themselves under enemy control. Under the heading "Fundamental guarantees", Article 75 codifies those basic standards with which all authorities must comply — as a minimum and in all circumstances — in their dealings with persons belonging to the adverse party. It is a safety net applicable in circumstances where the persons concerned do not benefit from more favourable treatment under more detailed provisions. In its Article 75, Protocol I clearly "borrows" universally accepted standards from the body of international rules on human rights.

It should be recalled at this point that international law addresses the behaviour of persons who act on behalf of a party to an *international* armed conflict, i.e. a State. Entities other than States cannot become parties to such a conflict, with the exception of a national liberation movement, which may qualify as a party to an international armed conflict provided that movement fulfils the strict conditions set up by Protocol I.[22] If these conditions are met, the liberation movement assumes the same rights and the same obligations in an armed conflict as those of a State, except for those rights which are linked to the status as a signatory to an international treaty.

It can thus be concluded that in an international armed conflict terrorist acts are prohibited without exception or reservation. In particular, reprisals cannot be justified as a reaction to terrorist acts. Reprisals against civilians are, anyway, prohibited in all circumstances.[23]

Violations of the more important rules are considered to be grave breaches of the Geneva Conventions or of Protocol I. In other words, such violations are war crimes. Under certain strictly worded conditions, the International Criminal Court (ICC) has jurisdiction to try persons suspected of having committed the more serious forms of crimes. But the ICC has only a subsidiary role to play. Both under the provisions of the Geneva Conventions and those of the Statute of Rome, the State which has jurisdic-

21 Protocol I, Article 85, para. 3.

22 Protocol I, Article 1, para. 4, and Article 96, para. 3.

23 Protocol I. Article 51, para. 6. — Some States party to Protocol I have made a reservation to the rules prohibiting reprisals. The United States has expressed its rejection of that rule through other means.

tion over the person concerned has priority over the powers of the international tribunal.[24]

It is particularly important to note that members of armed forces who have committed terrorist acts amounting to a grave breach of the Geneva Conventions may be brought to justice and prosecuted for their acts. This is also true if they are in the hands of the adverse party and have the benefit of POW status. Combatant or POW status does not grant immunity from criminal prosecution for acts contrary to international law. Nor does the Fourth Geneva Convention, in any circumstances, grant civilians the right to use force. Therefore, any person suspected of having committed violent acts may be prosecuted.

International rules applicable to *non-international* armed conflict

International humanitarian law applicable in non-international armed conflict is the result of a compromise between the concept of sovereignty and humanitarian concerns. In an internal armed conflict at least one party is not a State; it is usually an insurgent group determined to overthrow the government, or a rebel movement fighting for autonomy or secession. It is generally accepted today that internal conflicts with a high intensity of violence cannot remain beyond the reach of international law protecting persons from the effects of hostilities, whether those persons are actively involved in acts of violence or not. Indeed, civil wars often have the same devastating effects as armed conflict between States. Since 1949 and 1977 respectively, Article 3 common to the four Geneva Conventions and Additional Protocol II have set the basic standards intended to limit violence and suffering in non-international armed conflict. Customary law confirms and supplements the fundamental Article 3 and the fifteen articles of Protocol II.

It is not our intention to blur the dissimilarities between the two types of armed conflict. And yet it can be seen that the norms prohibiting acts of terrorism in non-international armed conflict are basically identical with those applicable in international armed conflict. Article 3 common to the four Geneva Conventions prohibits acts of terrorism with the following words, though without actually using the word "terrorism":

> "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de*

24 Rome Statute, Articles 1 and 17.

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 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;
(...)"

Protocol II reaffirms and develops these rules. Under the heading "Humane treatment" of those who do not, or no longer, take part in military operations, Article 4, para. 2 (d) even condemns "acts of terrorism" outright as contrary to the law. Moreover, Protocol II — and in this respect it breaks new ground — also codifies standards for the conduct of military operations in internal conflicts. The basic provision is, of course, the obligation to distinguish between those who take an active part in hostilities and those who do not, in particular civilians, the wounded and the sick. Article 13 specifically prohibits attacks on the civilian population as well as on individual civilians. It furthermore states in paragraph 2 that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". These same words are to be found in Article 52, para. 2, of Protocol I, which deals with international armed conflict.

Neither Article 3 nor Protocol II has a provision similar to Article 35 of Protocol I, which, for international armed conflict, codifies the long-established principle that parties to an armed conflict are not free to choose methods or means of combat to their liking and, in particular, that weapons which cause superfluous injury or unnecessary suffering are outlawed. However, the fourth preambular paragraph of Protocol II restates the message of the Martens Clause for non-international armed conflict. The Martens Clause says that, in the absence of a specific prohibition, a rule must be found which is compatible with "the principles of humanity and the dictates of the public conscience".[25]

Neither common Article 3 nor Protocol II of 1977 contains any provision on criminal responsibility for (mis)behaviour in an internal armed con-

25 For the full text of the updated Martens Clause see Protocol I, Article 1, para. 2.

flict. It is up to domestic jurisdictions to deal with persons who have committed a crime in such a context. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded, in an important decision, that the more egregious crimes committed in a non-international armed conflict are to be considered as international crimes. Therefore, international rules do apply in the trial of a person prosecuted for a crime committed in a non-international armed conflict.[26] This means that acts of terrorism committed in a non-international armed conflict may indeed be equated with grave breaches as defined by the 1949 Geneva Conventions. The same rules regarding the jurisdiction of States or the ICC are applicable.

What distinguishes non-international armed conflict from armed conflict between States is the fact that on one side there is a State and on the other one or more groups of individuals who oppose the government's authority. While it is no surprise to learn that State contenders are under an obligation to comply with the international obligations binding for that State (*pacta sunt servanda*), Article 3 and Protocol II also impose obligations on dissident forces and their members, which are non-State contenders. Thus members of those forces must heed the ban on terrorist acts, and commanders of dissident forces are under an obligation to enforce compliance with the international rules. In other words, they must take all necessary steps to enforce the prohibition of terrorist acts, including appropriate measures if that prohibition is violated.

To sum up, it can safely be said that the prohibition of recourse to terrorist acts is as firmly anchored in the law applicable in non-international armed conflict[27] as it is in the rules governing international armed conflict. Acts of terrorism are banned, without exception. This conclusion is important, as non-international armed conflicts are particularly prone to wanton violence.

Wars of national liberation and guerrilla warfare: weakening the ban on acts of terrorism?

While negotiating Protocol I, delegates at the Diplomatic Conference in Geneva had to find solutions for two controversial issues, namely, the sta-

26 *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, The Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-AR 72, ICTY Appeals Chamber, 2 October 1996.

27 See also the International Law Committee's Draft Code of Crimes against Peace and Security of Mankind (1996) whose Art. 20(f)(iv) makes serious acts of terrorism committed in a non-international armed conflict a war crime.

tus of wars of national liberation and the legal regime applicable to guerrilla warfare. Acceptable solutions were found for both, and on 8 June 1977 the conference adopted Protocol I by consensus. The two issues have a certain importance for the debate on the law applicable to terrorism.

Article 1, para. 4, of Protocol I declares wars of national liberation to be international armed conflicts. This means that the whole body of law elaborated for international armed conflict also applies to a war in which a people fight against a colonial power in the exercise of their right of self-determination. International humanitarian law must consequently be respected in its entirety by any group which claims to be a liberation movement in the sense of Article 1, para. 4, and Article 96, para. 3. Thus the ban on terrorist acts applies without any doubt to wars of national liberation.

Article 44 of Protocol I slightly modifies one of the age-old conditions a combatant must fulfil in order to be recognized by international law as a member of an armed force. That condition requires a combatant to be identifiable as such, i.e. he must distinguish himself from his civilian surroundings. According to the new law of 1977, a member of an armed force will, however, not necessarily lose his status as a combatant if, in narrowly defined circumstances of combat, he does not distinguish himself from the civilian environment. This new rule has no bearing on the ban on terrorism, which remains unchanged. Any combatant who chooses to engage in guerrilla warfare remains bound to respect all rules on the conduct of military operations and the protection of civilians. There will be no excuse if he combines (legitimate) guerrilla warfare with a (criminal) terrorist campaign.

Controversy over these two issues subsided after the end of the Diplomatic Conference in 1977. Moreover, no party to any armed conflict has ever invoked either of these two provisions. In 1987, however, President Reagan submitted Protocol II, on non-international armed conflict, to the Senate "for [its] advice and consent" with a view to ratification.[28] The same Letter of Transmittal spelled out the reasons why the United States rejects Protocol I, though this treaty was signed by the U.S. in 1977. During the same period, the main architects of the Administration's negative position on Protocol I published their views in various journals.

28 Text of the Letter of Transmittal published in "AGORA: The U.S. decision not to ratify Protocol I to the Geneva Conventions on the Protection of War Victims", *American Journal of International Law*, Vol. 81, No. 4, October 1987, p. 910. See also a comment by the author of the present paper: Hans-Peter Gasser, "An appeal for ratification by the United States", *ibid.*, p. 912.

All arguments used to demolish Protocol I appeared to revolve around Article 1, para. 4 — wars of national liberation — and Article 44 — on guerrilla warfare. Douglas J. Feith, at that time Deputy Assistant Secretary in the Department of Defense, came to the somewhat astonishing if not nonsensical conclusion that the new law of Protocol I was in the service of terror,[29] and that it "lays waste the legal and moral achievement of ages". For his part, Abraham D. Sofaer, then Legal Advisor at the State Department, equated a people's armed struggle for self-determination with terrorism.[30] Hence his refusal to accept Protocol I, which, he claims, by including a clause on wars of national liberation, justifies such wars – an argument which has no merits, as neither Protocol I nor any other treaty on international humanitarian law ever justifies recourse to force. With the benefit of hindsight it may be argued that instead of being the results of analysis, the conclusions advanced by these authors are much more the premises for the decision not to ratify Protocol I. Is it far-fetched to believe that by rejecting Protocol I the U.S. kept its options open for any subsequent "war on terrorism"?

Security Council Resolution 1373

In the wake of the events of 11 September 2001 the United Nations Security Council adopted Resolution 1373, also called the *Anti-Terrorism Resolution*, on 28 September 2001. Does this text in any way affect international humanitarian law or give any clues how existing law should be amended? A careful reading shows that Resolution 1373 mainly proposes a considerable number of preventive measures for combating terrorism which ought to be taken by States at the domestic level. It deals with criminal prosecution of alleged terrorists and in particular also with cooperation between States in that regard. There is nothing in the paragraphs on criminal prosecution of alleged terrorists that is not already covered by the Geneva Conventions and their Additional Protocols on situations of armed conflict. While Resolution 1373 is important for inter-State cooperation in the fight against terrorism, the text is not intended to amend the law codified by international humanitarian law treaties.

29 Douglas J. Feith, "Law in the service of terror: The strange case of the Additional Protocol", *The National Interest*, No. 1, Fall 1985. During the "war on terror" Feith was Under Secretary of Defense for Policy in the Bush Administration.

30 Abraham D. Sofaer, "Terrorism and the law", *Foreign Affairs*, Summer 1986, p. 901.

International humanitarian law and "war on terror": some preliminary remarks

Every act of terrorism is incompatible with international humanitarian law applicable in armed conflict. Like any other violation of the 1949 Geneva Conventions, of another humanitarian law treaty or of international customary law, such acts call for action by States party to those treaties to redress the situation. They not only have a legitimate interest in stopping criminal behaviour and thereby protecting their own citizens, they are also legally obliged to monitor compliance with the law, to prosecute and punish offenders and to prevent any further act contrary to humanitarian law.[31]

The Geneva Conventions and their Additional Protocols of 1977 have laid down a number of measures and procedures to ensure compliance with their provisions. In particular, serious violations of the more important provisions are international crimes — "grave breaches" in the words of the Geneva Conventions — and all States parties have jurisdiction to prosecute offenders (universal jurisdiction). As has been abundantly shown in this paper, acts of terrorism are grave breaches of international humanitarian law. Moreover, the Geneva Conventions do not exclude action by third States with a view to responding to grave breaches or preventing further violations, especially if the State concerned does not take appropriate action itself. Whether such third-party involvement includes the right to use force is not a question for international humanitarian law but for the law of the UN Charter.[32]

Under the shock of the events of 11 September 2001, a number of States have taken steps to prevent terrorist acts from being committed on their territory. These steps include *inter alia*:

- tightening police surveillance, particularly of foreign residents;
- adopting more "vigorous" interrogation procedures, which may amount to inhumane treatment or even to torture;
- curtailing the right of alleged terrorists to a fair trial by e.g. establishing limits to access to witnesses and to the exercise of other rights of the

31 Article 1 common to the four 1949 Geneva Conventions recalls this basic truth with the following words: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

32 Hans-Peter Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations", Hazel Fox and Michael A. Meyer (eds), *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49, esp. p. 27 ff.

defendant, measures which may sometimes be equivalent to abolishing the presumption of the defendant's innocence;

- toughening attitudes vis-à-vis asylum-seekers, refugees and migrants e.g., by ignoring the prohibition on returning such persons against their will to a country where they have to fear for their lives (principle of *non-refoulement*).

While not necessarily illegal as such, these measures may amount to clear violations of a government's commitment to respect international human rights and humanitarian law obligations.

Adam Roberts has the following to say about the difficulties international humanitarian law has to face in counter-terrorist operations:

> "In military operations with the purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subjected to mistreatment or torture. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it. External states supporting the government have sometimes contributed to such excesses. Applying pressure on a government or army to change its approach to anti-terrorism, to bring it more into line with the laws of war and human-rights law, can be a difficult task."[33]

The following brief analysis is based on two assumptions — or rather convictions. *First*, international humanitarian law is not an obstacle to effectively combating terrorism. It has, however, been argued that the Geneva Conventions impose overly stringent limitations on interrogation of detainees. The danger of such an argument is more than evident, and the international community should not weaken its endeavours to protect the physical and mental integrity of even the worst criminal. *Second*, alleged terrorists remain under the protection of international humanitarian law, whether they are members of an armed force or civilians ("illegal fighters"). They are and remain "protected persons" in the sense of the Geneva Conventions. When captured and detained for whatever reason, they must be dealt with in accordance with the provisions of the Third or Fourth Geneva Convention respectively, in particular those rules which regulate the detention regime. They may be prosecuted for acts of violence, but they are entitled to a number of judicial guarantees if put on trial for their deeds.

33 Adam Roberts, "Counter-terrorism, armed force and the laws of war", *Survival*, Vol. 44, Spring 2002, p. 13.

The U.S. government's decision on the status and treatment to be given to prisoners captured during the military campaign in Afghanistan and held at the U.S. base of Guantánamo and elsewhere sparked worldwide controversy. The main question was which legal status should be attributed to the different categories of prisoners, some of whom arguably were members of the Afghan armed forces (the *Taliban*), while others were not (members of *al-Qaeda* or other groups). The U.S. government decided not to give POW status to any of them and left the question of their legal status open. While practical difficulties may have made it hard to ascertain each prisoner's affiliation, this decision is nevertheless astonishing, because it ignores a precedent. Indeed, the United States had to solve similar problems during the Vietnam War, where captured enemy personnel either belonged to the North Vietnamese Armed Forces or were members of the Vietcong and thus not recognized as combatants within the meaning of the law of war. The U.S. Military Command in Vietnam adopted the following guidelines: captured military personnel belonging to the North Vietnamese Armed Forces were to be granted POW status, in accordance with the Third Geneva Convention; members of Vietcong guerrilla units were to be treated as if they were POWs — though without being granted POW status as defined by the Third Convention — provided they were caught while actually engaged in a military operation and, at the same time, were carrying their arms openly. They were thus considered to be "illegal fighters" who were recognizable as persons taking part in hostilities. The wearing of a uniform was not required by the U.S. guidelines. A Vietcong arrested while throwing a grenade into a downtown Saigon café was handed over to the Vietnamese authorities for prosecution as a criminal or "terrorist".[34]

This policy seems to have worked to the U.S. authorities' satisfaction. In particular, nothing precluded criminal proceedings for war crimes against any prisoner or detainee, of whatever category. This fine-tuned attitude of the U.S. Military Command towards a highly sensitive issue was no doubt also influenced by the fact that North Vietnam held a number of American servicemen, especially pilots. There were no U.S. prisoners in Afghan hands during the campaign against terrorism.

The Third Geneva Convention, with its comprehensive set of rules determining the treatment and material conditions of detention of members

34 United States Military Assistance Command, Vietnam, "Criteria for classification and disposition of detainees", Annex A of Directive No. 381-46 (Dec. 27, 1967), reprinted in *American Journal of International Law*, Vol. 62, 1968, p. 766. See also Gasser, *op. cit.* (note 28), p. 921.

of the armed forces taken prisoner, is perhaps the best known and strongest pillar of the international legal system which protects victims of warfare. The POW Convention best serves the interests of armed forces and of their members, officers and men, and has consequently never been a subject of controversy. A weakening of it would be a tragedy for members of armed forces who have to fight in future conflicts. The law which protects them in captivity should not be undermined by any "war against terrorism".

A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons. If they are not nationals of the adverse party to the conflict but citizens of third States, they keep the status of foreign nationals. Civilian detainees have to be treated according to the rules set out in the Fourth Geneva Convention. Civilian detainees suspected of having committed a serious crime can and must be put on trial. The Fourth Geneva Convention does not grant them any immunity from prosecution for acts of terrorism, but it does establish the obligation to grant them a fair trial.[35]

The ICRC has said in this connection that it "remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime. International humanitarian law grants the detaining power the right to legally prosecute prisoners of war suspected of having committed war crimes or any other criminal offence prior to or during the hostilities."[36]

Concluding remarks: is international humanitarian law adequate to combat terrorism?

The 1949 Geneva Conventions, their 1977 Additional Protocols, other international treaties and customary law prohibit without any exception terrorist acts committed in the course of an international or non-international armed conflict. Treaty law has established procedures which enjoin States to take measures to prevent and repress violations and allows the international community to react under the United Nations Charter. In particular, serious violations of international humanitarian law are international crimes which entail the obligation of States to bring the alleged

35 Article 5 of the Fourth Geneva Convention curtails the rights of a person who "is definitely suspected of or engaged in activities hostile to the security" of the State concerned. The right to be treated with humanity and to a fair trial as guaranteed by the Convention is not affected.

36 ICRC Press release of 9 February 2002.

offender to justice before their own courts, the courts of another State party or an international criminal court.

Measures to combat terrorism and to bring alleged terrorists to justice must comply with international humanitarian law whenever such acts are committed in the course of an armed conflict. In view of the increased danger of even fundamental humanitarian obligations being disregarded in "wars on terrorism", there appears to be a special need to emphasize that all those who, in some way or other, are involved in the fight against terrorism have a duty to respect international humanitarian law. Scrupulous respect for IHL in military campaigns to eradicate terrorism helps to strengthen determination to abide by the law in all circumstances.

The purpose of international humanitarian law is to protect and assist victims of armed conflict. The 1949 Geneva Conventions and the other IHL treaties do not provide essential or indispensable tools for the fight against terrorism. International humanitarian law cannot eradicate terrorism, among other things because terrorism has multiple and complex causes. Only civil society can attain that goal by concerted effort and patient action at home and abroad. Conflicts of a political nature must be settled by political means, in such a way as to open the door to more justice for all. It must become clear to every player on the domestic and international scene that recourse to indiscriminate violence is illegal and reprehensible – and ultimately useless. Full respect for international humanitarian law in counter-terrorist operations is a positive contribution to the eradication of terrorism.

Immediately after the atrocious events of 11 September 2001 the question was raised whether international humanitarian law is up to the task of combating terrorism. No law is perfect and immutable, certainly not international humanitarian law, which has to adapt to changes in the conduct of armed conflict. Constant evaluation is necessary to determine whether the rules are adequate or not, and all constructive proposals for amendments must be taken seriously. It is remarkable that no ideas have yet been put forward on how to strengthen the Geneva Conventions or the Additional Protocols and increase their effectiveness in the fight against terrorism. The denial of prisoner-of-war status to "terrorists" misses the target and risks losing ground in the fight to ensure protection for members of armed forces.

It is also surprising that doubts have been expressed in the United States about the adequacy of the law, although the United States has not ratified Protocol I of 1977. As has been shown, it is that very treaty which reinforces the legal arsenal for the fight against terrorism. By ratifying it,

160 States, including U.S. friends and allies (with the exception of Israel), have underscored its importance for the protection of victims of violence. Protocol I must first be accepted before new initiatives are taken to amend provisions which, in actual practice, prove satisfactory. Moreover, in the present circumstances few people believe in the successful outcome of a lengthy revision procedure, which would entail convening of a diplomatic conference and require subsequent ratification of the new treaty or amendments by all States party to the Geneva Conventions.

Finally, it should be borne in mind that international law guarantees humane treatment for persons who have committed a crime, be they military or civilian, but does not obstruct criminal justice in the accomplishment of its task. On the contrary, bringing suspected criminals to justice is an essential part of ensuring respect for humanitarian commitments. By creating the International Criminal Court, the international community has made an important contribution both to the policy of prosecuting and punishing alleged terrorists and to the prevention of acts of terrorism. The Statute of Rome and the Geneva Conventions of 1949 enshrine the right of all persons to a fair trial – hardly an unacceptable claim at the beginning of the twenty-first century.

Résumé

Actes de terreur, «terrorisme» et droit international humanitaire

Hans-Peter Gasser

Le droit international humanitaire interdit sans exception tout acte terroriste commis lors des conflits armés internationaux et non internationaux. Il demande aussi aux États de prévenir et punir les violations de ce droit. Les actes de terrorisme peuvent être des crimes de guerre soumis à la juridiction universelle et la Cour pénale internationale peut être compétente en la matière. Inversement, le combat contre le terrorisme et la poursuite des personnes suspectées d'avoir commis des actes terroristes sont régis par le droit humanitaire s'ils ont lieu lors d'un conflit armé. Ce droit n'est pas un obstacle pour combattre le terrorisme et les terroristes suspectés peuvent être poursuivis pour leurs actes de terreur. Mais même les membres de forces armés ou les «combattants illégaux» suspectés d'avoir commis des actes de terreur sont des personnes protégées par les Conventions de Genève et ont droit à des garanties judiciaires s'ils se trouvent devant un tribunal.

Doubtful prisoner-of-war status

YASMIN NAQVI*

The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention or GC III), generally regarded as part of the customary law of armed conflict,[1] sets out, *inter alia*, two cardinal principles. The first is that a prisoner of war cannot be prosecuted and punished for the mere fact of having taken part in hostilities.[2] The second is that prisoners of war must be given humane treatment from the time they fall into the power of the enemy until their final release and repatriation.[3] Prisoner-of-war status is therefore of utmost importance for a captured person in the hands of a hostile power in terms both of legal status and of treatment. If a person is not given combatant status, he may be tried for having committed a belligerent act. Where this criminal offence may be punished by capital punishment under the domestic jurisdiction, the lack of prisoner-of-war status may be a matter of life or death.

Therefore, when the prisoner-of-war status of a captured person is in doubt, the question of how to resolve the determination of status takes on a crucial significance, a realization not lost on the delegates at the Diplomatic Conference of Geneva in 1949 when negotiating the Third Geneva Convention.[4] Accordingly, this Convention provides that where the prisoner-of-war status of a captured person who has committed a belligerent act is in doubt, their status shall be determined by a competent tribunal.[5] The Convention does not, however, lay down the composition of the tribunal, or specify the due process rights of a person facing status determination procedures. The open-ended wording of the Third Geneva Convention's Article 5(2) begs the question of what exactly a competent tribunal consists of, and what judicial guarantees must be accorded to those who come before one. It also raises the question as to how doubt over prisoner-of-war status arises.

* Yasmin Naqvi, B.A., L.L.B. Hons (University of Tasmania), is a DES (Masters) candidate at the Graduate Institute of International Studies, Geneva. She is currently working for the *International Review of the Red Cross*, ICRC, Geneva.

This article explores what is meant by doubtful prisoner-of-war status and what constitutes a "competent tribunal" for the purpose of prisoner-of-war status determination. The first part gives a legal analysis of the rule stated in Article 5(2), taking into account customary rules and principles concerning judicial guarantees in international humanitarian law. In the second part, State practice and domestic military regulations regarding status determination are examined.

International humanitarian law and the Article 5(2) rule

The Third Geneva Convention is based on the principles of general international law on the treatment of prisoners.[6] These principles, which have gradually evolved since the eighteenth century, have established that captivity in war is "neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[7] This particular principle was developed in accordance with the view that it is contrary to the law of war to kill or injure helpless people. Moreover, prisoners of war are among the most vulnerable victims of war and therefore in need of spe-

1 L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, p. 188; H. Fischer, "Protection of prisoners of war", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 325.

2 Art. 99 of GC III provides: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed."

3 Articles 12-16 set forth the general protection to be given to prisoners of war by the Detaining Power, including the requirement of humane treatment at all times (Art. 13), respect for their persons and their honour (Art. 14) and the principle that there must be no adverse distinction in treatment based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria (Art. 16). See also Art. 5(1) GC III.

4 Delegates were aware that status determination decisions might have "the gravest consequences". J. Pictet, *Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 [hereinafter *Commentary GC III*], p. 77.

5 GC III, Art. 5(2).

6 This assertion, first made in 1941 by the German Admiral Canaris in protest against the regulations concerning Russian prisoners of war issued by the German army authorities, was approved as legally correct by the International Military Tribunal at Nuremburg. HMSO Cmd 6964 (1946) p. 48, reprinted in *American Journal of International Law*, Vol. 41, 1947, pp. 228-229.

7 *Ibid.*

cial protection.[8] In addition, principles underlying prisoner-of-war status and treatment have been developed from traditional military concepts of chivalry, entailing a respect for the honour of combatants.[9] The State detaining the captured persons is responsible for the treatment given to prisoners of war.[10] This responsibility extends to a requirement that the detaining State be fully satisfied that a State to which it intends to transfer or has transferred prisoners of war is willing and able to apply GC III.[11]

To be recognized as having prisoner-of-war status, a captured person has to fit within one of the six categories in Article 4 of GC III.[12] Despite the careful wording of Article 4, in the confusion of battle the distinction

8 In ancient times, prisoners of war were killed, mutilated or enslaved, whereas in the Middle Ages they were generally imprisoned or held to ransom. In the 17th century, for the first time, prisoners of war were regarded as prisoners of the State and not the property of the individual captors. Ill-treatment of prisoners of war continued, however, throughout the 19th century. Following World War II, a great number of German and Japanese officers were tried and convicted for the murder and maltreatment of prisoners of war. Art 6(b) of the Charter of the International Military Tribunal made "murder or ill-treatment of prisoners of war" a war crime. See the *Dachau Concentration Camp Trial*, 11 W.C.R., p. 5; *Belsen Trial*, 2 W.C.R.; "The Law of War on Land", Part III of the *Manual of Military Law*, The War Office, London, 1958 [hereinafter UK 1958 Military Manual], p. 45, para. 122; Fischer, *op. cit.* (note 1), p. 322.

9 This is stipulated as a rule in Art. 3 of the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (the 1929 Prisoner of War Convention), and in Art. 16 of GC III: "Prisoners of war are entitled to respect for their persons and honour."

10 GC III, Art. 12(1).

11 GC III, Art. 12(2). If that Power fails to carry out the provisions of GC III in any important respect, the Power which transferred the prisoners of war must either take measures to correct the situation or must request their return. Such requests must be complied with. Art. 12(3) GC III.

12 The six categories in GC III, Art. 4, are: "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war; (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power; (4) Persons who accompany the armed forces without actually being members thereof (...); (5) Members of crews (...) of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law; (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular army units, provided they carry arms openly and respect the laws and customs of war."

between combatants and civilians may not always be apparent.[13] For this reason, Article 5(2) of GC III provides:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

This rule would seem to make clear that where there is doubt as to the prisoner-of-war status of a captured person, States Parties are required to have individual status determined by a formal mechanism. In the meantime, the captured person must be treated as if he or she is a prisoner of war. What is not clear is what "any doubt" really means, who should be entertaining the doubt, and what is meant by a "competent tribunal".

Prisoner-of-war status "in doubt"

As Article 5(2) states, the doubt must be with regard to whether a captured person belongs to any of the six categories listed in Article 4 of GC III. But what does it mean to have a doubt and who should be having it?[14] "Reasonable doubt" may be defined judicially as such doubt as would cause a reasonable person to hesitate before acting in a matter of importance.[15] The *Commentary to GC III* is fairly unhelpful in explaining how "any doubt arises". It mentions only two examples of those to whom Article 5(2) would apply: deserters, and persons who accompany the armed forces and have lost their identity card. It does, however, make the point that "[t]he clarification contained in Article 4 should, of course, reduce the number of doubtful cases in any future conflict. It therefore seems to us that this provision should not be interpreted too restrictively". Given the instruction in the *Commentary* to interpret Article 4 of GC III broadly, it should be easy to raise a doubt that captured persons are *not* entitled to prisoner-of-war status. Conversely, it should be difficult to raise a doubt that a captured person is a prisoner of war. This means that States should not be able to unilaterally decide that no

13 See for example the confusion over combatants and non-combatants in the 1980-1988 Iran-Iraq War, described in P. Tavernier, "Combatants and non-combatants", in I. Dekker and H. Post (eds), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, The Netherlands, 1992, pp. 129-136.

14 "Doubt" is defined by the *Oxford English Dictionary*, 2nd. ed., 1989, as being either "the (subjective) state of uncertainty with regard to the truth or reality of anything" or "the condition of being (objectively) uncertain; a state of affairs such as to give occasion for hesitation or uncertainty."

15 *Merriam-Webster's Dictionary of Law* 1996.

doubt has arisen for an entire group of captured persons who have taken part in hostilities. In fact, GC III has been interpreted by some commentators as creating a presumption that individuals apprehended in the war zone are prisoners of war.[16] This quasi-presumption of prisoner-of-war status for those participating in hostilities has been adopted in some military manuals. For example, the 1992 Interim Law of Armed Conflict Manual of New Zealand states that "[a]s a practical matter, unless combatants as defined in Article 43 [of Protocol I] are actually captured while their arms are concealed, they will be entitled to prisoner-of-war status. In any event, status will be determined by a tribunal."[17] Similarly, the Australian Defence Force Manual 1994 notes that "[i]n most cases, captured combatants are entitled to claim PW [prisoner-of-war] status."[18]

The United Kingdom (UK) Privy Council considered the operation of Article 5 in a case arising out of the confrontation between Malaysia and Indonesia in 1967.[19] It held that: "Until 'a doubt arises' article 5 does not operate and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises."[20] This indicates that the Council construed "a doubt arises" as meaning that a claim for prisoner-of-war status is made by an accused before or at the trial. This is an interesting interpretation of Article 5(2), suggesting that the criterion "a doubt arises" may be fulfilled in a procedural sense, rather than in a factual sense in relation to the Article 4 categories. Lords Guest and Barwick, in their joint dissenting judgment, differed on this point, noting that "the accused in reality did not raise the appropriate claim.(...) The 'doubt' which would have to arise under article 5 would be whether the person belonged to the categories mentioned in Article 4A [GC III]."[21]

The interpretation of "a doubt arises" as occurring when a claim of prisoner-of-war status is made has also been adopted in some military manu-

16 See for example "Statement of Eliso Massimino, Director of the Washington Office of the Lawyers Committee for Human Rights", Lawyers Committee for Human Rights Press Release, 7 February 2002, ‹http://www.lchr.org/media/admin_gc.htm›.

17 New Zealand Defence Force Interim Law of Armed Conflict Manual, Directorate of Legal Services Headquarters, Wellington, 1992, para. 907(3).

18 Australia, Defence Force Manual 1994, ADFP 37, para. 1004.

19 *Public Prosecutor* v. *Oie Hee Koi and connected appeals*, Judicial Committee of the Privy Council (U.K.), 4 December 1967 [1968] ,A.C. 829.

20 *Ibid.*, p. 834.

21 *Ibid.*, p. 839.

als, notably the United States (US) 1997 Army Regulation dealing with prisoners of war, which requires the convening of a competent tribunal to determine the status "of any person not appearing to be entitled to prisoner-of-war status" but who "asserts that he or she is entitled to treatment as a prisoner of war".[22] Significantly, this interpretation is also consistent with the presumption of prisoner-of-war status in Article 45(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 1977 when a captured person "claims the status of prisoner of war" or if "the Party on which he depends claims such status on his behalf".[23]

While Article 5(2) of GC III was an important development in 1949 for the protection of people taking part in hostilities, the rule remained "rather imprecise and at an embryonic stage".[24] The problems of legal recognition of combatants of guerrilla warfare highlighted the insufficiency of Article 5(2). Article 45 of Protocol I was designed to remedy this insufficiency. The objective was to establish procedures which were more likely to guarantee that prisoner-of-war status would be granted.[25] In effect, the provision lists the cases in which doubt regarding the status of a combatant must give way to a presumption of prisoner-of-war status: (1) if he claims that status; (2) if he appears to be entitled to such status; and (3) if the Party on which he depends claims such status. Where doubt remains notwithstanding the said presumption, the question then goes to the competent tribunal. The series of presumptions in Protocol I are a development of Article 5(2) of GC III, but in contrast to the latter provision the burden of proof clearly lies

22 Section 1-6 (b) Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, DC, 1 October 1997 [hereinafter 1997 US Army Regulation].

23 The Party makes this claim by notification to the detaining Power or to the Protecting Power. Protocol I, Art. 45(1).

24 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I)*, Martinus Nijhoff Publishers, Geneva, 1987, [hereinafter *Commentary to Protocol I*] p. 544, para. 1726.

25 *Ibid.*, para. 1728. The first paragraph of Article 45, entitled "Protection of persons who have taken part in hostilities" provides: "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Geneva Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."

with the captor. By implementing a system of presumptions, Protocol I reverses the burden of proof so that it is the competent tribunal which must provide evidence to the contrary every time the presumption exists and is contested.[26]

It would thus appear that Article 45 of Protocol I reaffirms the interpretation of "any doubt arises" in Article 5(2) as including instances when a claim of prisoner-of-war status is made either by the detainee or by the Party on which he or she depends. It may be concluded, on the basis of the interpretation of the rule in military manuals, that doubtful prisoner-of-war status under Article 5(2) of GC III may arise where serious doubt exists as to whether a captured person fits within the Article 4 categories despite a general (unwritten) presumption of prisoner-of-war status for those taking part in hostilities.

A "competent tribunal"

The "competent tribunal" in Article 5(2) is undefined, leaving its composition to be determined under the domestic law of the States Parties. The word "competent" has been defined as "possessing jurisdiction or authority to act".[27] A "tribunal" can be a "court of justice" or, more generally, a "place of judgment or decision".[28] The phrase "competent tribunal" therefore suggests an authorized forum of judgment, not necessarily judicial in character. The drafting history of Article 5(2) gives some indication of the meaning of the phrase. The original draft provision, inserted at the request of the International Committee of the Red Cross (ICRC) and approved at the Stockholm Conference in 1949, stated:

> "Should any doubt arise whether any of these persons belongs to one of the categories named in the said Article, that person shall have the benefit of the present Convention until his or her status has been determined by *some responsible authority*".[29]

The objective of the ICRC was to guarantee these combatants a minimum degree of protection when they were captured by the enemy. During

26 *Commentary to Protocol I, op. cit.* (note 24), p. 553, para. 1746.

27 *Oxford English Dictionary*, 2nd ed., 1989. The word "competent" is used in the International Covenant on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) of 16 December 1966 [hereinafter "the Covenant"], and in the American Convention on Human Rights 1950 to denote one of the essential characteristics of a tribunal for the determination of any criminal charge or of rights and obligations in a suit of law.

28 *Oxford English Dictionary*, 2nd ed., 1989.

29 See "XVIth International Red Cross Conference, Draft revised or new Conventions", p. 54, quoted in *Commentary GC III, op. cit.* (note 4), p. 77 (emphasis added).

the 1949 Geneva Conference, the term "military tribunal" was initially proposed to replace "responsible authority" in order to achieve a greater degree of precision, in view of the grave consequences which might result if the decision was left to a single person who might even be of a low rank.[30] As per-sons taking part in hostilities without the right to do so are liable to be prosecuted for murder or attempted murder, it was felt by many delegates that the question of prisoner-of-war status should be decided by a court.[31] However, this view was not unanimously accepted. Some delegates felt that bringing a person before a military tribunal might have more serious consequences than a decision which would deprive that person of the protection of the Convention.[32] To address these concerns, a further amendment was made which provided that the determination of doubtful prisoner-of-war status would be made by a "competent tribunal", not specifically a military tribunal.[33] The drafting history indicates therefore that a "competent tribunal" is something more formal and judicial in character than the ICRC's original proposal of "responsible authority", suggesting that the determination of status should be made by more than one person and with properly constituted procedures.

As noted above, Article 5(2) of GC III was considered important in principle, but legally insufficient given the definitional vagaries of combatants waging guerrilla warfare and the gravity of the consequences if captured persons were not given prisoner-of-war status. Article 45 of Protocol I likewise does not specify what a "competent tribunal" should consist of. However, two important points may be gleaned in this regard. First, the "competent tribunal" in Article 45(1) may be distinguished from the "judicial tribunal" in Article 45(2), which must adjudicate prisoner-of-war status where the person is charged with an offence arising out of hostilities and is

30 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. II-A, p. 388. During the Second World War, decisions regarding the right of a captive to benefit or not from the protection of the 1929 Prisoner of War Convention had sometimes simply been taken by non-commissioned officers, particularly corporals. See J. P. Maunoir, "La répression des crimes de guerre devant les tribunaux français et alliés" (thesis), Geneva, 1956, p. 191, cited in *Commentary GC III*, *op. cit.* (note 4).

31 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, No. 95, p. 63.

32 The USSR delegation pointed out that "If the defendant is sentenced by a [military] tribunal, he will not only be unable to benefit by the Convention under Article 4 [Article 5], but it is also uncertain whether he will succeed in clearing himself (...). I believe that the persons to be protected would (...) refuse the benefit of the Convention rather than appear before a military tribunal which is likely to punish them." *Ibid.*, Vol. II-B, p. 270.

33 The Danish delegation suggested replacing the words "military tribunal" with "competent tribunal", which would mean that "[t]he laws of the Detaining Power may allow the settlement of this question by a civil court rather than by a military tribunal." *Loc. cit.*

not being held as a prisoner of war.[34] Second, the Rapporteur indicated in his report that "as in the case of Article 5 [GC III], such a tribunal may be administrative in nature", including military commissions.[35]

One assumption made during the debates was that such a tribunal would be set up near the front lines of the battle and therefore needed to be quickly organized, although it was stated that even in such circumstances, "guarantees should be furnished regarding its competence, its composition and its procedures" and it should be "impartial and effective".[36] As this is most difficult to achieve for a hastily set up tribunal near the front line, the Conference finally added the rule that each time a prisoner who is not held as a prisoner of war is to be tried for an offence related to the hostilities, that person's status must be decided by a *judicial* tribunal.[37] Article 45 thus sets up a two-tiered system: first, a "competent tribunal" must determine status where doubt in that regard persists despite the series of presumptions; second, if a detainee not held as a prisoner of war but claiming entitlement to that status is to be charged with an offence arising out of hostilities, a "judicial tribunal" will determine his status.

The implications of committing "a belligerent act"

The original proposed text for Article 5(2) was modified in Stockholm in order to specify that the provision applies only in cases of doubt where the persons have committed a belligerent act and have fallen into the hands of the adversary.[38] The *Commentary to GC III* states that "[t]he reference in the Convention to 'a belligerent act' relates to the principle which motivated the person who committed it, and not merely the manner in which the act was committed." Clearly, if someone has committed a belligerent act, it is essential that their legal status be ascertained.

34 Article 45(2) of Protocol I provides, *inter alia*: "If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated."

35 *Commentary to Protocol I, op. cit.* (note 24), p. 551, para. 1745. Bothe, Partsch and Solf have also commented that "[a]n administrative board is generally considered to satisfy this requirement", citing US Army, Field Manual 27-10, para. 71b. M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 260.

36 Such rules were applied by the United States during the Vietnam War. See "Contemporary practice of the United States relating to international law", *American Journal of International Law*, Vol. 62, 1968, p. 767.

37 Protocol I, Art. 45(2).

38 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 270-271.

The most significant deficiency of Article 5(2) is the absence of any provision which expressly authorizes a person found by a competent tribunal not to be a prisoner of war to have the question of this status decided by the judicial tribunal which tries him for his allegedly illegal act of hostility.[39] If the prisoner-of-war status of a captured person has not or not yet been established by a competent tribunal, the *Commentary to Protocol I* rightly points out that "he runs a double risk: a) to be accused of acts which are not necessarily offences (in the case of simply participating in the hostilities); b) to be deprived of the procedural guarantees to which prisoners of war are entitled, even when the acts of which he is accused are punishable."[40]

In this situation, it is essential for the accused to have the right to assert prisoner-of-war status and to have the question determined by a judicial tribunal with all the generally recognized guarantees and procedures. This was the basis for Article 45(2) of Protocol I. The Rapporteur of Committee III indicated that this provision constitutes:

> "a new procedural right (...) for persons who are not considered prisoners of war and who are to be tried for a criminal offence arising out of the hostilities. Such persons are given the right to assert their entitlement to prisoner-of-war status and to have that question adjudicated *de novo* by a judicial tribunal, without regard to any decision reached pursuant to paragraph 1. (...) The judicial tribunal may either be the same one that tries the offence or another one. It may be either a civilian or military tribunal, the term judicial meaning merely a criminal tribunal offering the normal guarantees of judicial procedure."[41]

Problems arise, however, because it is not always possible to determine the captured person's prisoner-of-war status before judgment is passed on the offence of which he is accused (in particular, the requirement to carry arms openly or to wear a distinctive sign).[42] Furthermore, entitlement to prisoner-

39 Bothe, Partsch and Solf, *op. cit.* (note 35), p. 260.

40 *Commentary to Protocol I, op. cit.* (note 24), p. 554, para. 1751.

41 O.R. XV p. 433, CDDH/III/338 quoted in *Commentary to Protocol I, op. cit.* (note 24), para. 1752. Administrative authorities, military or other commissions were excluded at this stage. The tribunal called upon in the first instance to determine prisoner-of-war status may be civilian or military. The moment that prisoner-of-war status is recognized, however, Articles 84 and 102 of GC III apply, unless the offence was merely one of taking part in hostilities, in which case the indictment will lapse. Art. 84 requires the Detaining Power to have the person tried by a military court, while Art. 105 specifies all the rights and means of defence of an accused. It is a grave breach to deprive a prisoner of war of his rights to fair and regular trial, both under GC III (Art. 130) and under Protocol I (Art. 85(4)(e)).

42 Art. 45(2) of Protocol I provides that: "[w]henever possible under the applicable procedure, this adjudication [of prisoner-of-war status] shall occur before the trial for the offence."

of-war status may depend not only on facts, but on the interpretation of the rules of the Convention or the Protocol.[43]

The *Commentary to Protocol I* states that "[t]here is no doubt that in principle it is preferable to determine the status of the accused with regard to the protection of the Third Convention, i.e. to make a decision regarding his status as a combatant and prisoner of war, before deciding on the merits of the case."[44] This rather weak solution was due to the fact that, in view of the great differences in national judicial procedures, it was not thought possible to establish a concrete rule that this question must be decided before the trial for the offence. The Rapporteur did argue that "it should be so decided if at all possible, because on it depend the whole array of procedural protections accorded to prisoners of war by the Third Convention, and the issue may go to the jurisdiction of the tribunal."[45]

In any case, the procedure followed by the competent tribunal under Article 45 in the first instance should, as a minimum, be in accordance with the corresponding rules of the Fourth Convention[46] or should comply with the rules of Article 75 of Protocol I ("Fundamental guarantees").[47]

43 For example, the UK 1958 Manual of Military Law, *op. cit.* (note 8), with regard to the difficulty of application of Art. 5 of GC III for combatants coming under Art. 4A(6), states that: "It would seem that if a civilian is alleged to have violated the law of war [for example] by firing at the wounded and stretcher bearers, he would nevertheless be entitled to be treated as a prisoner of war until a competent tribunal had established that he had not complied with any one of the requirements of Art. 4A(6) (...). Accordingly, if it were proved before such competent tribunal that he had fired on the wounded or protected medical personnel of the enemy, that fact would automatically disentitle him to prisoner-of-war status with the result that he could be tried as a civilian who had committed illegal acts of hostility." This interpretation is contrary to the common understanding that a violation of the laws of war does not deprive a person of combatant or prisoner-of-war status, but entails his prosecution under Art. 85 of GC III. The requirement of respect for the laws and customs of war is constitutive of combatant status only as a group criterion, not as an individual criterion. See also Art. 44 of Protocol I.

44 *Commentary to Protocol I, op. cit.* (note 24), para. 1755.

45 O.R. XV, p. 433, CDDH/III/338. The *Commentary to Protocol I* notes that although "undoubtably [it would have] been easier, in theory, to provide for such guarantees right at the first stage, when the status of prisoners is determined by the 'competent tribunal' (...) it did not seem feasible to burden a tribunal called upon to intervene on the battlefield with such a difficult task." *Commentary to Protocol I, op. cit.* (note 24), p. 554, para. 1751.

46 If a person does not qualify as a prisoner of war, or until such status is granted, he is protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV).

47 Art. 45(3) of Protocol I provides: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol."

Fundamental due process rights and status determination procedures

International humanitarian law is silent as to what due process rights are applicable to prisoner-of-war status determination procedures. As human rights law operates at all times, including situations of armed conflict, it may be argued that basic human rights standards guaranteeing the due process rights of persons in any form of detention should apply to the status determination procedure.[48] Although international humanitarian law may operate as *lex specialis* in times of armed conflict,[49] fundamental due process rights are also contained in Article 75 of Protocol I[50] and in the fair trial guarantees of Article 3 common to the Geneva Conventions,[51] both of which are recognized as representing customary law.[52]

The question remaining is whether these rights are applicable to status determination procedures or exclusively to criminal prosecutions arising out of participation in hostilities. The Inter-American Commission of the Organization of American States (OAS) has recently given its opinion on the matter in answer to a Request for Precautionary Measures in regard to the Detainees in Guantanamo Bay, Cuba.[53] The Commission firstly noted that in situations of armed conflict, the protections under international

48 See for example Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988; International Covenant on Civil and Political Rights, *op. cit.* (note 27), Articles 9 and 14; Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948, Articles 6-11; American Declaration of the Rights and Duties of Man 1948, Articles II, XVIII, XXV and XXVI; and Standard Minimum Rules for the Treatment of Prisoners, GA Res. 43/173 of 9 December 1988.

49 *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, International Court of Justice Advisory Opinion of 8 July 1996, ICJ Reports 1996, paras. 23-34.

50 Note, in particular, Art. 75(3) providing that "[a]ny person arrested, detained, or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. *Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.*" (Emphasis added). See also Art. 75(4) listing fundamental due process rights.

51 Art. 3(1)(d) common to the Geneva Conventions prohibits at any time and in any place whatsover "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."

52 The International Court of Justice has described common Art. 3 as a reflection of "elementary considerations of humanity." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, ICJ Reports 1986, pp. 14 and 114. See also T. Meron, "Humanization of humanitarian law", *American Journal of International Law*, Vol. 94, 2000, p. 246.

53 Organization of American States, Washington, D.C., 20006, Ref. Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures, 13 March 2002, available at: ‹http://www.humanrightsnow.org/oasconventionnonguantanamodetainees.htm›.

human rights and humanitarian law may complement and reinforce one another, "sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity". The Commission found that where persons find themselves within the authority and control of a State and where circumstances of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law.

Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain entitled at least to the non-derogable protections under international human rights law. Therefore, according to the Commission, "a competent court or tribunal, as opposed to a political authority, must be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a state." The Commission, noting that "doubt exists as to the legal status of the detainees", requested the United States to take the "urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent authority".[54]

It may safely be concluded that at least the fundamental due process rights under customary international law are applicable to status determination procedures.[55] The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, asserted in its General Comment on Reservations that a State may not reserve the right to arbitrarily arrest and detain persons or to presume a person guilty unless he proves his innocence.[56] The United States Third Restatement of Foreign Relations Law has also identified prolonged arbitrary detention and a consistent pattern of gross violations of internationally recognized human rights as among its list of human rights violations which have achieved customary law status.[57]

54 *Ibid.*, p. 3. Without the clarification of legal status, "the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State."

55 The core of the due process guarantees stated in Art. 14 of the Covenant, *op. cit.* (note 27), may be regarded as having reached customary law status, in view of the large number of parties to the Covenant (148 States Parties at 10 July 2002) and the degree to which some of the fair trial rights in the Covenant have been repeated in other international instruments, and through the incorporation of the rights in national laws. See generally D. Weissbordt and R. Wolftrum (eds), *The Right to Fair Trial*, Springer, Berlin, 1997.

56 United Nations Human Rights Committee General Comment on Reservations No. 24, para. 8. UN Doc. CCPR/C/21/Rev1/Add.6, 2 November 1994.

57 Restatement (Third) of the Foreign Relations Law of the United States, § 702 (1987).

While Articles 9 (*habeas corpus*) and 14 (fair trial) of the Covenant are not among the non-derogable rights listed in Article 4, derogations of these rights can only be "to the extent strictly required by the exigencies of the situation"[58] and the State Party may not take discriminatory measures on the ground of race, colour, sex, language, religion or social origin.[59] Furthermore, General Comments by the Human Rights Committee indicate that a State is not able to derogate from basic judicial guarantees necessary to vindicate non-derogable rights, such as the right to life and the right not to be subjected to torture.[60]

State practice with regard to the GC III Article 5(2) rule

United States of America

The relevant United States legislation is the 1997 Army Regulation entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees".[61] "Other detainees", defined in the glossary as "persons in the custody of United States Armed Forces who have not been classified" as enemy prisoners of war (GC III, Article 4), retained personnel (GC III, Article 33) or civilian internees (GC IV, Article 78) "shall be treated as enemy prisoners of war until a legal status is ascertained by a competent authority". Section 1-6(a) of the Regulation sets out the Article 5(2) rule. In addition, paragraph (b) provides that "[a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."[62] The Regulation in fact goes further than Article 5(2) of

58 Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev.1 (1994), at 14.

59 Human Rights Committee, General Comment 5, Article 4, UN Doc. HRI/GEN/1/Rev. 1 (1995), at 5.

60 De Zayas, A., "The United Nations and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", in Weissbordt and Wolftrum, *op. cit.* (note 55), p. 674. The Inter-American Court of Human Rights has similarly held that the "essential" guarantees which are not subject to derogation under the American Convention on Human Rights include *habeas corpus*, *amparo*, and any other effective remedy which is designed to guarantee respect for the non-derogable rights and freedoms in the Convention. *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987, Inter-Am. Ct. H.R. (Ser. A) NO. 9 (1987), at 41. The United Nations Commission on Human Rights adopted a resolution in 1994 encouraging States "to establish a procedure such as *habeas corpus* or a similar procedure as a personal right not subject to derogation, including in states of emergency", Res. 1994/32 of 4 March 1994.

61 1997 US Army Regulation, *op. cit.* (note 22).

62 *Ibid.*, Section 1-6 (b).

GC III in that it requires a competent tribunal to determine status not only where doubt about Article 4 criteria has arisen, but also where the person does not appear to be entitled to prisoner-of-war status but asserts that he or she is entitled to prisoner-of-war treatment. Therefore, even if a captured person in the custody of the US Armed Forces did not appear to fit within the Article 4 categories but claimed to be entitled to prisoner-of-war treatment, the US would be bound to have the matter determined by a competent tribunal. This is consistent with the analysis of the meaning of "any doubt arises" as including instances in which a claim of prisoner-of-war status has been made.

As regards the status determination procedures, the competent tribunal must be composed of three commissioned officers, one of whom must be of field grade. The Regulation stipulates all the fundamental procedures and guarantees of a fair trial.[63] Most importantly, persons who have been determined by a competent tribunal not to be entitled to prisoner-of-war status "may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[64] Furthermore, the record of every tribunal proceeding resulting in a determination denying prisoner-of-war status "shall be reviewed for legal sufficiency" at the office of the Staff Judge Advocate for the convening authority.[65]

The 2000 US military Judge Advocate General Operational Handbook also requires the establishment of a "competent tribunal" in case of doubt about prisoner-of-war status. The Handbook also comments on past US practice with regard to establishing competent tribunals. It is noted that during the Vietnam conflict, a Directive established procedures for the con-

63 The following guarantees are stipulated: (1) a written record of proceedings; (2) open proceedings except for deliberation or if security would be compromised; (3) persons shall be advised of their rights at the beginning of their hearing; (4) persons shall be allowed to attend all open sessions and be provided with an interpreter if necessary; (5) persons shall be allowed to call witnesses if reasonably available and to question those witnesses called by the tribunal; (6) persons have a right to testify; (7) persons may not be compelled to testify. The standard of proof used by the tribunal is "preponderance of evidence". In addition, a written record of the tribunal decision is required to be completed in each case. The tribunal may make the following board determinations: (a) prisoner of war; (b) recommended retained personnel, entitled to prisoner of war protections, who should be considered for certification as a medical, religious, or volunteer aid society retained personnel; (c) innocent civilian who should immediately be returned to his home or released; and (d) civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained. *Ibid.*, Section 1-6 (10).

64 *Ibid.*, Section 1-6(g).

65 *Ibid.*

duct of Article 5 tribunals. On the other hand, no Article 5 tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation "Desert Storm" led to the capture of a large number of persons thought to be prisoners of war, who were in fact displaced civilians. Interrogations subsequent to their capture determined that they had taken no hostile action against Coalition forces.[66] In any case, tribunals were established to verify the status of the detainees.[67]

In the Vietnam War the United States issued Directive Number 20-5 which prescribed policies and procedures for determining whether persons in the custody of the US who had committed belligerent acts were prisoners of war.[68] The Directive authorized and established "GPW [GC III] Article 5 tribunals".[69] Detainees who had committed belligerent acts were referred to an Article 5 tribunal either (a) if there was doubt as to whether the detainee was entitled to prisoner-of-war status, or (b) if a determination had been made that the status of the detainee was that of a non-prisoner of war and the detainee or someone on his behalf claimed that he was entitled to prisoner-of-war status.[70] Under the Directive, the Article 5 tribunal should consist of no less than three officers, at least one of whom must be a judge advocate or other military lawyer.[71] Detainees were advised and accorded "fundamental rights considered to be essential to a fair hearing".[72] The procedure was weighted in favour of finding prisoner-of-war status.[73] From 1965 in the Vietnam War, the United States granted not only the treatment, but also the status, of prisoner of war to combatants for whom there was any evidence to show that they belonged to a military unit, even a secret one, and

66 The Handbook notes that in some cases they had surrendered to Coalition forces to receive food and water.

67 The Handbook states that "[w]hether the tribunals were necessary as a matter of law is open to debate — the 'civilians' had not 'committed a belligerent act', nor was their status 'in doubt'." If it was determined that they were civilians who had taken no part in hostilities, they were transferred to refugee camps.

68 Directive Number 20-5 of 15 March 1968, reproduced in *American Journal of International Law*, Vol. 62, 1968, p. 768.

69 *Ibid.*, Art. 2.

70 *Ibid.*, Art. 5(f).

71 *Ibid.*, Annex A(3).

72 *Ibid.*, Annex A(7).

73 Decisions were by majority vote, but if the vote was evenly divided the decision would be in favour of prisoner-of-war status. *Ibid.*, Annex A(6). Where the determination was that a detainee was not entitled to prisoner-of-war status, the decision had to be accompanied by all relevant documents and copies given to all parties and the convening authority. *Ibid.*, Art. 15(b).

who had taken part in an act of war of any nature, including propaganda or protection missions, whether these were full-time or part-time activities.[74] The ICRC delegate speaking in Saigon had the following to say about the US policy concerning treatment of captured combatants:

> "The MACV instruction (...) is a brilliant expression of a liberal and realistic attitude (...) this text could very well be a most important one in the history of the humanitarian law, for it is the first time (...) that a government goes far beyond the requirements of the Geneva Conventions in an official instruction to the armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones become embodied in an international treaty (...) will be a great one for man concerned about the protection of men who cannot protect themselves."[75]

United Kingdom

The United Kingdom 1981 Manual "The Law of Armed Conflict" provides that if there is doubt about the status of a captured person, he should be treated as a prisoner of war until his status has been determined by a "higher authority".[76] The more comprehensive UK 1958 Manual of Military Law restates the Article 5 rule. It also emphasises that "[s]uch determination cannot be finally made by the officer into whose hands he has fallen."[77] Furthermore, "[i]t is not (...) for officers or soldiers in determining towards a disarmed enemy to occupy themselves with his qualifications as a belligerent.(...) [T]hey are responsible for his person and must leave the decision of his fate to the competent authority".[78] The Manual goes on to say that if his character as a member of the armed forces is contested, he should be sent before "a court competent to enquire into the matter."[79] The terms of the findings of the competent tribunal should determine whether or not further

74 *Commentary to Protocol I, op. cit.* (note 24), p. 548. The reason for such treatment was largely based on the reciprocal benefits for American captives in the power of the Viet Cong and North Vietnamese Army. "Prisoners of War and War Crimes", ‹http://www.army.mil/cmh-pg/books/Vietnam/Law-War/law-04.htm›.

75 Quoted in "Prisoners of War and War Crimes", *op. cit.* (note 74), p. 5.

76 "The Law of Armed Conflict", Army Code 71130, D/DAT/13/35/66, United Kingdom Ministry of Defence, revised 1981, p. 28.

77 UK 1958 Military Manual, *op. cit.* (note 8), p. 50, para. 132.

78 *Ibid.*, p. 35, para. 104.

79 The Manual calls for the creation of Regulations to provide for tribunals to function as competent tribunals for the purposes of Art. 5. *Ibid.*, para. 104. This was done in the Prisoner of War Determination of Status Regulations 1958, First Schedule of the Royal Warrant Governing the Maintenance of Discipline among Prisoners of War 1958.

proceedings will be instituted for a war crime, for example, a hostile act committed by a person found by a competent tribunal not to be entitled to prisoner-of-war status.[80]

Article 5 tribunals are governed by the Prisoner of War Determination of Status Regulations 1958, which become applicable if it appears to an officer that a doubt exists as to whether a captured person in the custody of the UK belongs to any of the categories of Article 4 of GC III. For the purposes of the Regulations, a "competent tribunal" consists of a board of inquiry which makes a report that constitutes the effective determination of the status of the person concerned. Detainees may be represented by a lawyer at public expense. The practice of the UK indicates a willingness to utilize a board of inquiry to determine status even where Article 5 does not apply. For example, during the 1990-1991 Gulf War, some 35 Iraqi detainees protested that they were not members of the Iraqi armed forces and asked to be released from their internment in the Rollestone camp. Despite the fact that none of the detainees was alleged to have committed a belligerent act, it was decided, "in order to follow the spirit of the Convention",[81] that where the Commandant of Rollestone entertained doubts about the status of a particular individual, the correct course would be for him to report those doubts to his superiors, with a recommendation that a board of inquiry be convened under the Board of Inquiry (Army) Rules 1956.[82]

Canada

In Canada, the 1991 Prisoner-of-War Status Determination Regulations provide that a tribunal, consisting of one officer of the Legal Branch of the Canadian Forces, "shall hold a hearing to determine whether a detainee brought before it is entitled to prisoner-of-war status."[83] Each detainee (defined as a person in the custody of the Canadian Forces who has committed a belligerent act) is initially screened as soon as is practicable after being taken into custody by the commanding officer to determine whether or not the detainee is entitled to prisoner-of-war status or whether

80 *Ibid.*, footnote 3(a).

81 G. Risius, "Prisoners of war and the United Kingdom", in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, Routledge, London, 1993, p. 296.

82 These Rules derive their authority from s.135 Army Act 1955 (UK). The detainees were allowed legal representation, were present during the proceedings, and could give evidence and question witnesses.

83 Articles 4 and 5 of the Prisoner-of-War Status Determination Regulations, SOR/91-134, Department of Justice Canada, 1 February 1991.

there is doubt with respect to the detainee's entitlement to prisoner-of-war status. Where the commanding officer "believes that there may be doubt" about status entitlement, he requests an authority[84] to direct that a tribunal hold a hearing to determine status. If the authority is in doubt with respect to the entitlement of the detainee to prisoner-of-war status, it may direct a tribunal to hold a hearing for determination of status.[85] Therefore there is in a sense a preliminary finding by the authority, at least of whether there is doubt with regard to status.[86]

In the tribunal hearing, a detainee has the right to be represented, the right not to testify against himself or herself, the right to an interpreter, the right to present evidence, and the right to request a review of the determination within 24 hours after the tribunal announces its determination.[87] The standard of proof is "a balance of probabilities that the detainee is not entitled to prisoner-of-war status", or "in any other case, determine that the detainee is entitled to prisoner-of-war status".[88] The fact that a standard of proof is specified only for a determination that the detainee is not entitled to prisoner-of-war status suggests that a lesser standard of proof may suffice to entitle a detainee to that status. It is stipulated that in the interim period of doubtful status, a detainee shall be treated as a prisoner of war.[89]

Australia

Under the 1994 Australian Defence Force Manual, if any doubt arises about a captured person's status, prisoner-of-war status is to be granted until such time as a "proper tribunal" established under the Third Geneva Convention can determine their status.[90] This is reiterated in the Law of Armed Forces Commanders' Guide, which provides that in cases of doubt, prisoner-of-war status shall be granted until "a proper tribunal can authorita-

84 The authorities which may establish a tribunal are: the Ministry of National Defence; the Chief of the Defence Staff; an officer commanding a command; an officer commanding a formation; and any other authority that the Chief of the Defence staff may prescribe or appoint. *Ibid.*, Art. 3.

85 *Ibid.*, Art. 8.

86 If the authority is not in doubt as to entitlement of prisoner-of-war status, it may direct the commanding officer either to recognize prisoner-of-war status or not to, depending on its opinion. See *ibid.*, Art. 8(1)(a) and (b).

87 *Ibid.*, Articles 10, 6(2), 11, 13(d), and 17 respectively.

88 *Ibid.*, Art. 13(g).

89 *Ibid.*, Art. 12. See also Canada LOAC [The Law of Armed Conflict at the Operational and Tactical Level] Manual 1999, Office of the Judge Advocate General, 8 January 1999, Section 2 (10).

90 Australia, Defence Force Manual 1994, ADFP 37, para. 1004.

tively rule on their status".[91] The use of the words "authoritatively rule" seems to suggest that a high burden of proof is required to make a determination on status. It may also imply that all the due process rights and procedures are necessary for the proceedings to be valid.

New Zealand

The Interim Law of Armed Conflict Manual provides that when there is doubt as to whether a particular captive is entitled to "treatment he claims as a prisoner of war", he shall be treated as such until his status has been "determined and denied by a properly constituted tribunal (...)".[92] These provisions indicate that doubt may arise if a detainee claims to be entitled to prisoner-of-war treatment. The words "properly constituted tribunal" could either be meant to refer simply to a tribunal under Article 5 of GC III or could denote a more formal, judicial character of the tribunal.

Israel

Prisoner-of-war status determination procedure is contained in the Imprisonment of Combatants not Entitled to Prisoner-of-War Status Law 2000 in Israel, the objective of which is to "incorporate in Israeli law the imprisonment of combatants who are not entitled to prisoner-of-war status, in a manner consistent with the provisions of international humanitarian law, particularly the Geneva Conventions of 12 August 1949".[93] Under this Law, if the Chief of Staff "has a basis to assume" that a person in the custody of the State is a combatant who is not a prisoner of war, he may issue an order directing imprisonment of that person.[94] The order is made known to the prisoner "at the earliest possible time" and he is given the opportunity to state his arguments regarding the order before an officer holding the rank of Lt. Colonel, and to have his written arguments conveyed to the Chief of Staff. Within three weeks from the issuing of the order, the prisoner must be brought before the President of the District Court, who must determine

91 Law of Armed Conflict Commanders' Guide, ADFP 37 Supp. 1, Australian Defence Force Publication, Operations Services, Canberra, 7 March 1994, para. 703.

92 Interim Law of Armed Conflicts Manual, *op. cit.* (note 17), para. 912. New Zealand does not have any prisoner-of-war status determination regulations in force, although under section 9 of the Geneva Conventions Act 1958, the Governor-General by Order in Council may make such regulations as are necessary to give full effect to the Act.

93 Imprisonment of Combatants not Entitled to Prisoner-of-War Status Law, 5769-2000, Art. 1.

94 *Ibid.*, Art. 3(A). The order is valid until "the end of hostile activities between the State of Israel and the force combating Israel to whom the prisoner belongs or took part in its activities" or until an earlier time that the Chief of Staff shall direct. See *ibid.*, Art. 3(B).

whether the prisoner is a combatant who is not a prisoner of war.[95] This decision may be appealed to the Supreme Court. In terms of proceedings, the detainee has the right to representation (although this may be limited to persons approved to serve as defence counsel in military courts), the hearing is conducted *in camera*, and deviation from the law of evidence is allowed (although the reasons for this must be recorded).[96] Even before the enactment of this law, one commentator noted that "[t]he utilization of special tribunals and detention facilities, and the special treatment accorded to captured Palestinian 'terrorists' by Israel (...) is further evidence of an underlying humanitarian law."[97]

Article 45 of Protocol I as representing customary law

A proper analysis of the customary nature of Article 45 goes beyond the scope of this paper; however, a few indications of its status may be pointed out. The overview of the incorporation by some States of Article 5(2) into military regulations reveals that States have generally treated the Article 5 rule as a minimum protection. States such as the United States have voluntarily extended the obligation to have status determined before a competent tribunal to instances in which a captured person does not appear to be entitled to such status but has made a claim to that effect. States have also tended to accord most of the fundamental due process rights to those facing status determination procedures. With the notable exception of the detainees at present being held at Guantánamo Bay, Cuba, by the United States,[98] State practice as regards GC III Article 5(2) has generally shown a willingness to accord both the treatment and status of prisoners of war to captured persons who have taken part in hostilities, even where, strictly speaking, the persons may not fit easily into the Article 4 categories.

Bothe, Partsch and Solf point out in their commentary to Protocol I that "Article 45 reaffirms, supplements, clarifies and expands upon Article 5 of the Third Convention".[99] As discussed above, the series of presumptions of prisoner-of-war status and the reversal of the burden of proof in Article 45

95 *Ibid.*, Art. 4.

96 *Ibid.*, Art. 4(E), (D) and (C).

97 A. Rubin, "Terrorism and the laws of war", *Denver Journal of International Law and Policy*, Vol. 12, No. 2-3, 1983, p. 227.

98 For a discussion of the legal issues involved, see E. Chlopak, "Dealing with the detainees at Guantanamo Bay: Humanitarian and human rights obligations under the Geneva Conventions", *Human Rights Brief*, Vol. 9, Issue 3, p. 1, available at: ‹http://www.wcl.american.edu/hrbrief/09/3guantanamo.cfm›.

99 Bothe, Partsch and Solf, *op. cit.* (note 35), p. 260.

are expansions or a development of Article 5 of GC III. On the other hand, Article 5 has already been interpreted in many military manuals as establishing a high threshold for asserting that doubt as to status had arisen.[100] Therefore, while the exact provisions of Article 45(1) may be said not to reflect customary law in their entirety, it is submitted that the underlying principle establishing a general presumption of prisoner-of-war status for those participating in hostilities is developing into a customary rule. In addition, the right of a captured person who does not appear to be a prisoner of war to assert such entitlement and thereby to trigger Article 5(2) is reflected in many military manuals and is consistent with State practice.[101] The Article 45(2) rule stipulating that a person not being held as a prisoner of war who is to be tried for an offence arising out of hostilities has the right to have his status decided by a judicial tribunal has also been adopted by some States in military manuals or in practice. It is also supported by a great body of internationally agreed principles and declarations concerning the rights of persons in any form of detention.

As a non-party to Protocol I, the US position on the customary status of some aspects of Article 45 may be ascertained from a speech by Michael J. Matheson, Deputy Legal Adviser of the State Department during the Reagan Administration in 1987. Speaking at a workshop on "Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", Matheson stated at the outset that he appreciated the opportunity to offer "a presentation on the United States position" on the customary nature of Protocol I, and went on to say that:

> "[on the other hand] we do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in Article 45."[102]

The right of a captured person who does not appear to be a prisoner of war to assert entitlement to treatment as a prisoner of war and to have the

100 See notes 14-25 and accompanying text.

101 See Section Two on State practice with regard to Art. 5(2), especially practice of the US and the UK.

102 Quoted in M. Depuis, J. Heywood and M. Sarko, "The Sixth Annual American Red Cross — Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University International Law Review*, Vol. 2, No. 2, 1987.

matter adjudicated before a competent tribunal is contained in the 1997 US Army Regulation. Given the United States' non-ratification of Protocol I, this suggests that the right to assert entitlement to prisoner-of-war status and to subsequently have a determination made by a competent tribunal is considered a rule of customary law for the US.[103]

Conclusion

The Third Geneva Convention was designed to ensure the protection of one of the most vulnerable groups of victims of armed conflicts: combatants who are in the power of the enemy State. In keeping with the objectives and spirit of the Convention, prisoner-of-war status for a person who has committed a belligerent act may be cast in doubt only where there are substantial misgivings as to whether that person fits into the Article 4 categories of combatants or where the captured person, not accorded prisoner-of-war status, has claimed to be entitled thereto. Therefore, if a person or a group of persons has taken part in hostilities but does not appear to fit into the normal categories of combatants under the Convention, States should consider that a doubt has arisen and the Article 5(2) rule should apply.

If the combatant status of a captured person who has committed a belligerent act is in doubt, it is a violation of GC III and Protocol I (if applicable) not to submit such a determination to a competent tribunal and to have the matter decided by another authority. Moreover, as the *Commentary to Protocol I* emphatically states, "one thing is certain, and on this point the provision is quite clear: all persons who are captured and who are not considered either as prisoners of war or as civilians who have not participated in the hostilities, are treated there and then as prisoners of war until such time as their status has been determined by a competent tribunal."[104]

A competent tribunal is established by domestic law and the procedure must allow individual status determination. The tribunal should not be composed of a single individual, but it may be military, civilian, or administrative in character, including military commissions. Rules clarifying the tribunal's competence, composition and procedure must be provided by the detaining State. These rules should embody fundamental due process rights. Although there does not appear to be any time limit within which status determination should be made, it is reasonable, given the gravity of consequences of such a

103 Section 1-6(b) 1997 US Army Regulation, *op. cit.* (note 22).

104 *Commentary to Protocol I, op. cit.* (note 24), p. 550, para. 1743.

determination and the application of fundamental rights of due process, to assume that status determination should take place as soon as practicable.

Persons who are not held as prisoners of war, or whose status has not yet been determined, and who are to be tried by the detaining power for offences arising out of the hostilities, have the right to assert their right to prisoner-of-war status and to have that question adjudicated before a judicial tribunal or at least a tribunal guaranteeing all the fundamental fair trial rights. The status determination must take place before the criminal trial whenever possible. As status determination procedures may be seen as tantamount to a trial, given that a person can be found to have taken an illegal part in hostilities, having their status determined in an expeditious, fair and properly constituted way is not just an obligation on States under international humanitarian law[105] but is also strong evidence of a State's commitment to human rights and the rule of law.

105 Denial of the right to fair trial is a grave breach of both GC III (Art. 130) and GC IV (Art. 147). It is also a grave breach to deny the right to fair trial to a person protected by Art. 45 of Protocol I. This would include the judicial guarantees for status determination procedures under Art. 45(2).

Résumé

Statut de prisonnier de guerre «sujet à contestation»

Yasmin Naqvi

Le statut de prisonnier de guerre est capital tant sur le plan du statut juridique accordé à une personne capturée « tombée au pouvoir » d'une puissance hostile que du traitement dont cette personne bénéficie. Cet article examine comment le statut de prisonnier de guerre peut être « sujet à contestation » et comment la détermination de ce statut devrait être réglée conformément à l'alinéa 2 de l'article 5 de la IIIe Convention de Genève. L'analyse de la règle de droit qui figure dans cet article et l'examen de la pratique de l'État concerné permettent d'affirmer qu'une contestation peut apparaître s'il y a de fortes raisons de croire qu'un détenu n'entre pas dans la catégorie des définitions classiques d'un combattant ou si les personnes qui ne semblent pas entrer dans lesdites catégories demandent à être traitées en prisonniers de guerre. Un « tribunal compétent » ne doit pas nécessairement être un tribunal judiciaire et être tenu de garantir l'ensemble des droits accordés à une personne déférée devant un tribunal pénal, puisque les droits fondamentaux à une procédure régulière, dont le caractère coutumier est reconnu par le droit international humanitaire, sont indérogeables. Toute tentative des États à contourner ces garanties judiciaires minimales est contraire à l'esprit et à la lettre du droit international humanitaire et contrevient également à la législation des droits de l'homme régissant le droit des personnes qui détiennent un pouvoir.

Islam and international humanitarian law: From a clash to a conversation between civilizations

JAMES COCKAYNE*

In a world increasingly portrayed as beset by the 'clash of civilizations', especially between the West and Islam,[1] the universality of international humanitarian law (IHL) is increasingly threatened. What role can IHL, a product of European civilization, have in regulating the relations *between* civilizations?

Some scholars have, in the past, addressed this question by attempting to demonstrate that the core precepts of humanitarian law are shared by non-European civilizations, for example comparing the traditions, customs and laws of warfare in Islam with IHL.[2] With few exceptions,[3] these comparative analyses have two shortcomings. First, they tend to reduce both legal traditions (the Islamic and the Western) to static, monolithic constructs. Both are in fact complex legal traditions, both dynamic (varying over time) and plural (made up of varying sub-traditions).[4] Second, these comparative analyses tend to exhibit a subtle orientalism,[5] taking the Western system as a yardstick against which the adequacy or compatibility of the oriental Islamic 'other' is measured.[6]

This study attempts to introduce a historical element into this discussion. It suggests that the modern interaction between Islamic and Western civilizations has played an important part in shaping humanitarian law as we now know it. Looking to this historical interaction, it attempts to identify a mode of understanding humanitarian law that accommodates different 'civilizations'. This historical approach also avoids the pitfalls of the comparative analysis approach: it allows shifts in sub-traditions to emerge, and prevents us from assuming that either system stands in a privileged position.

* James Cockayne, B.A. Hons I, L.L.B. Hons I (University of Sydney), is a Senior Legal Officer in the International Crime Branch of the Australian Attorney-General's Department. The author would like to thank Dr. C. Roelofsen of Universeit Utrecht for the stimulating and erudite scholarship and encouragement which provoked this study.

The innovative influence of Islam on European laws and customs of war stretches back at least as far as the Crusades.[7] Delivering a course at the Hague Academy of International Law in 1926, Baron de Taube speculated that the modern public international law of declarations of war was a direct descendant of Islamic doctrine, having passed into chivalric codes during the Crusades, through the Christian church and

1 See, for example, Samuel P. Huntington, "The clash of civilizations?", *Foreign Affairs*, Vol. 72, No. 3, Summer 1993, p. 22. Compare Leon T. Hadar, "What green peril?", *Foreign Affairs*, Vol. 72, No. 2, Spring 1993, p. 27; contrast Judith Miller, "The challenge of radical Islam", *Foreign Affairs*, Vol. 72, No. 2, Spring 1993, p. 43.

2 See, for example, M. K. Ereksoussi, "Le Coran et les Conventions humanitaires", *Revue internationale de la Croix-Rouge*, No. 503, November 1960, pp. 641-650; Sobhi Mahmassani, "The principles of international law in the light of Islamic doctrine", *Recueil des cours*, 1966-I, p. 201; R.C. Algase, "Protection of civilian lives in warfare: A comparison between Islamic law and modern international law concerning the conduct of hostilities", *Military Law and Law of War Review*, 1977, p. 246; Yadh ben Achour, "Islam et droit international humanitaire", *Revue internationale de la Croix-Rouge*, No. 722, March-April 1980, p. 59; Hamid Sultan, "La conception islamique" in *Les dimensions internationales du droit humanitaire*, Pedone, UNESCO, Paris, and Institut Henry Dunant, Geneva, 1986, pp. 47-60; Said El-Dakkak, "Le droit international humanitaire entre la conception islamique et le droit international positif", *Revue internationale de la Croix-Rouge*, No. 782, March-April 1990, p. 111; J. Busuttil, "'*Slay them wherever you find them*': Humanitarian law in Islam", *Revue de droit militaire et de droit de la guerre*, Vol. 30, 1991, pp. 111-145; Mohammed Bedjaoui, "The Gulf War of 1980-1988 and the Islamic conception of international law" in Ige F. Dekker and Harry H.G. Post (eds), *The Gulf War of 1980-1988*, T.M.C. Asser Institute, The Hague, 1992, p. 282; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study*, Kluwer Academic, Norwell, MA, 1994; K. Bennoune, "As-Salamu 'Alaykum? Humanitarian law in Islamic jurisprudence", *Massachussets Journal of IL*, 1994, pp. 605-643; Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Éditions A. Pedone, Paris, 1997. Other useful expositions of classical Islamic warfare doctrine can be found in Majid Khadduri, *The Islamic Law of Nations, Shaybani's Siyar*, The John Hopkins Press, Baltimore, 1966; Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins University Press, Baltimore, 1984; James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, Greenwood Press, Westport, CT, 1990; Edward J. Jurji, "The Islamic theory of war", *Moslem World*, Vol. 30, 1940, pp. 332-342; R. Peters (trans. and annot.), *Jihad in Mediaeval and Modern Islam: The chapter on jihad from Averroes' Legal Handbook 'Bidayat al Mudjtahid' and The Treatise 'Koran and Fighting' by the late Shaykh Al-Azhar, Mahmud Shaltut*, E.J. Brill, Leiden, 1977; and G. Conrad, "Combat and prisoners of war in classical Islamic law: concepts formulated by Hanafi jurists of the 12th century", *Revue de droit pénal militaire et de droit de la guerre*, 1981, pp. 269-307.

3 Notably Bedjaoui, *op. cit.* (note 2).

4 On the notion of legal traditions see particularly H. Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2000.

5 On the concept of orientalism see Edward Said, *Orientalism*, Penguin Books, Harmondsworth, 1978.

6 See ben Achour, *op. cit.* (note 2), p. 59.

7 See for example Marcel Boisard, "On the probable influence of Islam on western public and international law", *International Journal of Middle East Studies*, Vol. 11, 1980, pp. 429-50.

on into the modern law of war.[8] Christopher Weeramantry has also offered evidence of the influence of Islamic doctrine in the writings of Hugo Grotius on the law of combat.[9]

There has, however, been little analysis of the role of Islam in shaping the modern European law of war and its progeny — international humanitarian law. This paper attempts to fill that gap, examining the influence of Islam on IHL since the acceptance of the Ottoman Empire as a sovereign State within the European State system, usually identified with its accession to the Treaty of Paris in 1856.[10]

The study is necessarily limited in two important respects. First, it provides only an overview, a rough outline, of the historical interaction of Islam and international humanitarian law. Second, it deals primarily with the conduct of hostilities, and not their causes – the *jus in bello*, and not the *jus ad bellum*.

1856 to 1899: the Islamic 'other' and the emergence of international humanitarian law

Islam and Islamic players are widely — but incorrectly — assumed to have had an insignificant role in the early development of international humanitarian law. From the entry of the Ottoman Empire into the European States' legal system in 1856 until the first Hague Peace Conference in 1899, Islamic players assumed only a minor role in the burgeoning development of the public international law of warfare. On close inspection, that role is revealed as highly significant in both the internationalization and humanization of the European law of war. As this section of the study demonstrates, Islam at first represented a critical oriental 'other' against which the emerging modernist law of war delineated itself. Because of its own universalist and humanist tendencies this law was, however, forced to accommodate subjects from different cultural-legal systems and consequently to abandon its

8 Baron Michel de Taube, "Études sur le développement historique du droit international dans l'Europe orientale" in *Recueil des Cours*, 1926-I, p. 341, pp. 393-394. See also *1907 Hague Convention Relative to the Opening of Hostilities*, Oct. 18, 1907, 36 Stat. 2259, 2271 (pt. 2) TS No. 538, 1 Bevans 619. Said El-Dakkak, in contrast, states that "*la conception islamique ne pose pas comme condition l'existence d'une guerre au sens traditionnel du terme, c'est-à-dire, selon une conception qui implique, outre l'existence de faits d'armes, l'exigence de la déclaration de guerre entre deux ou plusieurs Parties.*" See El-Dakkak, *op. cit.* (note 2), p. 112.

9 Christopher G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Houndmills, 1988, pp. 149-158.

10 *Declaration Respecting Maritime Law*, Paris, 16 April 1856.

Christian roots. Islam thus prompted the definition of international humanitarian law in secular, universalist terms.

IHL as we now know it differs greatly from the European law of war as it was in 1856, an artefact of the law of nations of the *respublica christiana*, embedded in the notion of a shared, pan-European Christian culture.[11] The European international law of war prior to 1856 largely treated those outside the European State system — notably American Indians and Muslims — as passive objects of the law, rather than as active subjects. The lesser protection offered to Muslims was exemplified by the crusade doctrine within the *jus ad bellum*, which legitimized war against Islam as 'just war', a manifestation of God's disapproving judgment.[12] The humanist trend of Europe's early Renaissance began to erode this asymmetry. Vittoria, while not countenancing the assimilation of treatment of Christian and Muslim men, the latter being infidel, suggested that it was unlawful to kill Muslim children (who are innocent) and women (who are presumed innocent).[13] Henry Dunant's insistence at Solferino in 1859, however, that the humanitarian assistance he and others spontaneously organized to relieve the suffering of soldiers should be offered to "Frenchmen and Arabs, Germans and Slavs" alike was, however, fundamentally different.[14]

What motivated Dunant's humanitarian response? Undoubtedly, Dunant was himself driven by a basic internationalism. What is often overlooked, though, is the extent to which his internationalism was coloured by a Christian ethic. The first steps towards a humanist international law limiting the conduct of war were explicitly framed in terms of "Christian charity".[15] Prior to founding the Red Cross movement, Dunant had founded an internationalist organization called the *Alliance universelle des Unions chrétiennes de jeunes gens* (Christian Unions), the purpose of which was to organize Christian youth on an international scale to perform works of Christian charity.[16] Similarly, while Dunant's primary purpose in travelling to Solferino

11 See for example Ahmed Rechid, "L'Islam et le droit des gens", *Recueil des Cours*, 1937-II, p. 371, pp. 378-380.

12 See Johnson and Kelsay, *op. cit.* (note 2); see also de Taube, *op. cit.* (note 8), pp. 387-390.

13 F. Vittoria, "The second relection on the Indians, or on the law of war made by the Spaniards on the barbarians" in A. Carnegie (ed.), *De Indis et de iure belli relectiones* (trans. J.P. Bate), New York, 1917, p. 179 (36).

14 H. Dunant, *A Memory of Solferino*, ICRC, 1986 (first published in French in 1882), excerpted in Pierre Boissier, *Histoire du Comité International de la Croix-Rouge: De Solferino à Tsushima*, Henry Dunant Institute, Geneva, 1978, p. 35. See also *ibid.*, p. 213, on the differing approaches to the European and Ottoman powers in the provision of medical assistance during the Crimean War.

15 *Ibid.*

16 *Ibid.*, pp. 11-12. See also ICRC, *La guerre et la charité*, ICRC, Geneva, 1866.

was to meet with Napoleon III to receive his authorization for a speculative business venture in Algeria, he was also propelled by an intention to deliver to the Emperor a manuscript he had written, entitled *L'Empire de Charlemagne rétabli ou Le Saint-Empire Romain reconstitué par Sa Majesté l'Empereur Napoléon III*.[17] The common thread between the humanitarian movement born at Solferino and Dunant's vision of a reinstated pan-European Christian empire under Napoleon III's leadership was Dunant's faith in the application at the international level of an "*esprit du christianisme*".[18] The Red Cross was not, in Dunant's conception, a purely secular organization, but an international body of 'Samaritans'[19] in the best tradition of Christian charity, tending to the wounded, sick and vulnerable. Such an essentially Christian enterprise could not, it would seem, easily accommodate Islamic participants or values.

If we look closely, however, we find Islamic roots subtly intertwined with these Christian roots from the very beginning. Boissier's account of the Battle of Solferino in his *History of the International Committee of the Red Cross* encapsulates the subconscious contrasting of the Christian humanitarian movement with an Islamic 'other'. Boissier hints that the terrible casualties at Solferino which prompted Dunant's humanitarian response were the result of the refusal by Islamic troops, fighting for Napoleon III, to give their Austrian adversaries quarter, despite the Austrian commander's appeal for respect for the "*droit des gens*".[20] Other sources suggest that the casualties resulted from the unexpected French tactics of shelling the Austrian reserve lines.[21] Whatever the truth, Boissier's account points to an early and fundamental distinction between Islamic 'barbarism' and Christian 'charity'.

Islamic players were confined to this passive role of 'other', against which the international humanitarian law movement contrasted and defined itself, for some time. No Islamic States were present at the Conference held in Geneva in 1863 which gave birth to the Red Cross Committee. Turkey did, however, ratify the 1864 Geneva Convention in 1865.[22] Persia followed in 1874,[23] the same year that Turkey was present at

17 See Richard Deming, *Heroes of the International Red Cross*, ICRC, New York, 1969, pp. 5, 8-10, 14.

18 Dunant writing in *Notice sur la Régence de Tunis* (1858), quoted in Boissier, *op. cit.* (note 14), p. 17.

19 Dunant writing in *La guerre et la charité*, *op. cit.* (note 16).

20 Boissier, *op. cit.* (note 14), pp. 24-25.

21 See, for example, Deming, *op. cit.* (note 17), p. 7.

22 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Geneva, 22 August 1864. Turkey ratified the Convention on 5 July 1865.

23 On 5 December 1874.

the Brussels Conference which was extremely significant in the codification of the laws and customs of war. In 1868, Turkey took part in both the Conference revising the Geneva Convention[24] and the St Petersburg Conference,[25] which famously defined the parameters of the humanitarian law of war by declaring "[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[26] In all these fora, though, Islamic participants played only minor roles. Moreover, what contribution they made was framed not in any Islamic discourse, but in the discourse of the European State system. Islamic players and Islamic rhetoric wielded little power or influence within this system, and correspondingly little power in the development of international humanitarian law.

The very possibility of achieving effective participation by Islamic players within the new IHL framework was doubted by many of the European powers. The French representative in Constantinople, Jägerschmidt, wrote to the Red Cross International Committee on 15 March 1868, explaining why he saw little prospect of successfully establishing a National Red Cross Society in Turkey:

"*On a, dans toute affaire, à lutter à Constantinople contre une force d'inertie dont rien ne peut donner l'idée; et il faudrait des efforts inouïs pour obtenir la formation sur le papier d'un comité qui ne fonctionnerait jamais et dont les Turcs ne comprendront jamais l'utilité, eux qui ramènent tout à la Providence et n'admettent pas qu'on cherche à se soustraire à ses décrets. Je sais toute la peine que nous avons eue à obtenir de la sorte qu'elle adhérât à la Convention de 1864, à laquelle elle ne comprenait absolument rien; elle a fini par se rendre lorsqu'on lui a expliqué qu'il ne s'agissait que d'apposer sa signature, pour faire comme tout le monde, au bas d'un acte d'accession qu'on lui a présenté et qui ne devait l'engager en rien.*"[27]

Jägerschmidt's comments indicate a belief not only that active participation in IHL mechanisms was beyond the capacities of the Turkish State, the sick man of Europe, but also that the new IHL approach was beyond Turkish comprehension. In effect, the belief was that Christian charity was

24 Turkey was one of the original signatories to the *Additional Articles relating to the Condition of the Wounded in War*, Geneva, 20 October 1868.

25 Turkey also signed and ratified the *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St Petersburg, 29 November/11 December 1868.

26 *Ibid.*

27 Quoted in Boissier, *op. cit.* (note 14), p. 288.

not to be expected of Muslims. International humanitarian law was — and, so believed those like Jägerschmidt, should remain — a Christian law.

This gulf between Christian players and Islamic others was bridged largely as a result of the leadership of Gustave Moynier, who effectively led the Red Cross movement after Dunant was bankrupted. Moynier acknowledged that international humanitarian law was a Christian artefact,[28] but insisted that its universal application was justified on the basis both of "*la science positive*"[29] and a natural law ("*la philosophie naturelle*")[30] transcending the particularities of any one religion. The humanitarian trend in the international law of war was, he argued, an expression of "*la conscience publique*",[31] "*d'idées d'ordre supérieur*"[32] and of "*solidarité internationale*"[33]. As he saw it in 1888,

"*[l]es promoteurs de la Croix-Rouge ne lui ont imprimé le sceau d'aucune religion particulière, et le drapeau arboré en 1863 doit être, malgré sa croix, considéré comme non moins neutre en religion qu'en politique.*"[34]

The importance of Moynier's contribution to the definition of the Red Cross movement was twofold. First, his leadership effected a change in the normative basis of the movement away from Christianity to a universal secularism predicated on a combination of natural law and international positivism. Second, Moynier worked to ensure the application of this law to and by followers of all religions, including Islam: he was a prime mover in the establishment of an Ottoman Red Cross Society in 1868.[35]

It was also during Moynier's tenure that civil war broke out in the Balkan region of the Ottoman Empire in 1875 between Christian insurgents and the Islamic government, the Sublime Porte. This civil war confronted the Red Cross movement with two key but interrelated issues: the relationship between the humanitarian principles of the movement and a) sovereignty, and b) Christianity. By forcing the Red Cross movement to address

28 In 1888 Moynier wrote that in the Red Cross "*il est impossible de ne pas voir un produit de la civilisation chrétienne*": G. Moynier, *Les causes du succès de la Croix-Rouge*, monograph, Geneva, 1888, republished as "Introduction" in *Le Mémorial des vingt-cinq premières années de la Croix-Rouge*, ICRC monograph, Geneva, 1888, excerpted in Boissier, *op. cit.* (note 14), p. 455.

29 ICRC, *La neutralité des militaires blessés*, pamphlet presented at the Paris Exhibition, excerpted in Boissier, *op. cit.* (note 14), p. 268.

30 *Ibid.*

31 *Ibid.*, p. 267.

32 *Ibid.*

33 ICRC, *La guerre et la charité*, excerpted in Boissier, *op. cit.* (note 14), p. 262.

34 *Ibid.*

35 *Ibid.*, pp. 287-289.

these issues, the Balkan crisis provided the occasion for a fundamental definitional process of international humanitarian law.

The Balkan crisis tested the relationship between the humanitarian principles of IHL and sovereignty on at least three fronts.

First, it raised the question of whether the Red Cross mandate extended to internal conflicts or was limited to armed conflict between States. If it was confined to inter-State conflict, as the traditional approach to sovereignty suggested, then the Red Cross had no role to play in the inter-civilizational conflict raging within the Ottoman Empire's boundaries. Moynier's advocacy of Red Cross intervention in the monthly *Bulletins* sent to the National Red Cross Societies[36] was crucial in ensuring that the Red Cross *did* assume a role in the conflict, setting an important precedent. Moynier justified this interpretation of the mandate by reference to a universalist humanism transcending statism. In Moynier's opinion, accession to the 1864 Geneva Convention did not simply establish rules applicable in situations of international armed conflict, rules applicable *between* sovereign States: it amounted to a "profession of faith, a moral code" binding in *all* circumstances, even *within* sovereign States.[37] Humanitarian principles thus transcended sovereignty — at least at an epistemological level; but those principles could not necessarily be applied unless States had submitted themselves to that application.

Second, the crisis highlighted the role of National Red Cross Societies in States not directly participating in, but affected by, a conflict: the massive flow of refugees into countries abutting the areas of hostilities, such as Serbia and Montenegro, raised the question of whether National Societies owed a duty of assistance to those fleeing to their countries. The quick response of the Red Cross, including its intervention in Montenegro to help establish a National Society there, established a clear precedent that National Red Cross Societies should assist in these situations.[38] Their primary allegiance was to the movement and its humanitarian principles, not to the nation-State within which they were constituted.

Third, the crisis served to emphasize the extent to which the Red Cross movement was dependent on the nation-State system as a host and resource for its activities. This became clear in Turkey. The problem was not simply, as

36 *Ibid.*, pp. 393-394.
37 *Ibid.*, p. 394.
38 *Ibid.*, pp. 391-398.

Jägerschmidt's comments had in part suggested, one of bureaucratic inertia. Rather, as the founder of the Ottoman Red Cross Society himself recognized, the core problem was the complete lack of solidarity between Ottoman subjects (who would be expected to supply medical aid to wounded soldiers through the Society) and the Ottoman army.[39] The mechanisms which had been chosen for the implementation of international humanitarian law — standing National Societies working closely with centralized government bureaucracies to provide medical assistance — were (and remain largely) rooted in the context of modern nation-States. They presupposed the nationalist solidarity that had been developed by the centralized States of Western Europe. The Ottoman Empire was not a modern nation-State, but an empire made up of diverse national units held together by Islamic faith and rule. This different constitutional basis affected the very potential for the implementation of humanitarian law by the prime Islamic player of the day. Thus the effective implementation of humanitarian principles was constrained by the framework of sovereignty within which IHL was embedded.

The Balkan crisis also raised the question of the relationship between IHL's humanitarian principles and Christianity.

Moynier's approach to the question of Red Cross involvement in internal conflict was crucial in taking the movement beyond Dunant's Christian internationalism. Moynier portrayed international humanitarian law as a universal moral code, transcending religious divisions. By acceding to the 1864 Geneva Convention, the Ottoman State had spontaneously undertaken to observe this code, not only in its dealings with Christian States, but also in its internal affairs.[40] Moynier's strategy inherently presented the Red Cross as not simply a universal, but also a *secular*, organization.

It was, however, the very emblem of the Red Cross which became a semiotic cipher for this controversy. In many ways the controversy over the emblem, still with us today, cuts to the central question in this study: whether international humanitarian law, as an artefact of Christian civilization, can accommodate other civilizations.

The emblem became an issue after Montenegro and Serbia, which were parties to the 1864 Geneva Convention, intervened in the civil war on

39 *Ibid.*, p. 288.

40 In 1882, in *La Croix-Rouge, son passé, son avenir*, Moynier repeated this sentiment, characterizing the Convention as "*une déclaration, comme une reconnaissance de certaines lois d'ordre supérieur, auxquelles telle ou telle nation s'honore de se soumettre spontanément, et dont le caractère impératif est absolu.*" *Ibid.*

the side of the Christian minorities. Turkish troops failed at first, in violation of Turkey's obligations as a party to the Geneva Convention, to recognize the protection conferred by the red cross emblem. Despite new Turkish laws clarifying this protection and the penalties for its violation adopted under pressure from the International Committee of the Red Cross (ICRC), the violations continued. These violations were not due to the ignorance of the troops, but to their deliberate targeting of the cross, which "gave offence to Muslim soldiers",[41] largely because they associated it with the Crusades. Although all parties agreed that the red cross had not been adopted in 1863 as a consciously religious symbol, they could not fail to see that such protestations were having little effect on the offence felt at the sight of the cross by Turkish troops in the field or the resultant bloodshed. So dire was the situation that when the Red Cross of Romania offered to send badly needed medical supplies to the Ottoman Society, the latter had to refuse because it could not guarantee the safety of the Romanian personnel.[42] The only solution was to push for the immediate introduction of a second protective emblem with an Islamic heritage which would at least allow the Turkish Society to carry out its work, namely the red crescent.

In throwing its weight behind this proposal, the ICRC adopted the fundamentally pragmatic approach to the realization of humanitarian ideals which it continues to manifest to this day. In the January 1877 edition of the *Bulletin* it wrote to the National Societies that if the signatory States wished:

"que les principes d'humanité qu'ils professent, pénètrent de proche en proche chez tous les peuples, quelle que soit leur religion, une question de forme extérieure ne doit pas être un obstacle insurmontable au développement de ces principes chez les peuples non chrétiens... On pourrait admettre même la modification de la croix rouge pour les États non chrétiens."[43]

After some correspondence,[44] the utilization of the red crescent in place of the red cross was allowed for the duration of the conflict. When Russia entered the war to lend further support to the Slav Christian minorities, it carefully negotiated guarantees with the Turks for the mutual recogni-

41 *Message from the Sublime Porte to the Federal Council, 16 November 1876*, quoted in the *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877, pp. 35-37, p. 36.

42 Boissier, *op. cit.* (note 14), p. 401.

43 *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877; see also Boissier, *op. cit.* (note 14), p. 402.

44 See communications reproduced in the *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877, pp. 35-37; No. 30, April 1877, pp. 39-47; No. 31, July 1877, pp. 83-91; No. 32, October 1877, pp. 147-154.

tion of the two emblems (red cross and red crescent), though to little avail, since the massacres of red cross wearers continued.[45] The red crescent had, however, arrived, and remains to this day recognized as a distinctive protective emblem alongside the red cross.

Why was the emblem such a sticking point? At one level, the answer is obvious — the historical associations of the cross and its inappropriateness as a symbol of impartiality and neutral assistance. That the original committee should have chosen it as their emblem indicates, above all, that their internationalism was, at the very least, a subconsciously European phenomenon, taking no account of Islamic (or other) sensibilities. Even more, though, the emblem and its interpretation became a cipher for a larger debate about the self-definition of international humanitarian law. On the one hand, there were those (both European and Islamic) who recognized the cross as a religious emblem and suggested that different religions and civilizations should be accorded equal weight within IHL by recognition of their own emblems. Others adopted a more modernist, secularist approach, suggesting that there was no role for religious symbolism within IHL, which represented a natural human law that transcended religious particularities and should be represented by one unitary symbol of humanitarianism. The emblem was — and remains — important because it raises the issue of how a secular universalist system of governance and law can accommodate religious values. How can the two systems coexist? It is this question that lies at the heart of the encounter between Islam and European law within IHL.

What emerges from this review of the early years of international humanitarian law is the important role of Islam as an 'other' against which the law could define itself. At first, this took on the traditional dynamics of orientalism, in which the European Christian system drew strength into its own self-image (Christian 'charity') from denigration of the oriental Islamic 'other' (Turkish 'barbarism'). While both the Ottoman Empire and Persia participated in the IHL system on a formally equal footing, IHL was seen as inherently alien to Islamic values and systems.

Slowly, however, encounters with Islam and the universalizing tendencies of IHL's proponents, particularly Gustave Moynier, forced the law to adopt a secular modernism which transcended this primitive orientalism. IHL began to define itself in a way that attempted to accommodate the differences of the Islamic system, whether they were semiotic (such as the

45 See Boissier, *op. cit.* (note 14), p. 405.

emblem) or systematic (such as the difficulty of working within Ottoman administrative structures). This forced process of self-definition contributed much to the identity of the Red Cross movement and shaped the operation of much of IHL as we now know it. What remained troubling, however, was that the entire framework of action within IHL was based upon the notion of nation-State sovereignty, drawn from a European Christian tradition and alien to Islam.

1899-1945: Islam within international humanitarian law - umma, nation-States or civilization?

There are similarities between the roles Islamic representatives played in the emergence of international humanitarian law until 1899 and in its subsequent development. In both cases, that role appears minor at first sight; in both cases, Islamic participation was concerned with issues central to IHL and the form it was to take. From 1899 to 1945, the key issue was the compatibility of IHL, predicated on humanism and sovereignty, with Islam, predicated on the word of Allah and a universal community of faith.

Two Islamic delegations — from the Ottoman Empire and Persia — were present at the 1899 and 1907 Hague Peace Conferences.[46] Between them, they represented the majority of Muslims then on earth and were accordingly perceived as the representatives of Islam.[47] All the same, the individual delegates were both westernized and westernizers.[48] Both delegations were active in all domains of the Conference, though as 'small powers' both were relatively unassertive. However, their comments were particularly important in continuing the discussion on the ability of international humanitarian law to accommodate differing religious heritages.

As a result of the Islamic delegations' interventions, the Hague Peace Conferences officially confirmed the principle of religious non-discrimination as a central tenet of IHL. At the 1899 Conference the Persian delegation obtained assurances that the rule against the destruction of cultural or religious property did not distinguish mosques from other types of religious

46 See Arthur Eyffinger, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World*, Kluwer Law International, The Hague, 1999; William I. Hull, *The Two Hague Conferences and their Contributions to International Law*, Ginn & Company, Boston, 1908; reprinted Kraus Reprint Co., New York, 1970.

47 Compare Eyffinger, *op. cit.* (note 46), p. 97.

48 *Ibid.*, pp. 170-171, 193-194.

property.[49] Both the Ottoman and the Persian delegations secured recognition by some other delegations of their own protective emblems (the red crescent and the red lion and sun, respectively) in place of the red cross emblem.[50] This suggested that international humanitarian law could accommodate a range of different religious heritages and civilizations. However, the proliferation of neutral emblems threatened to undermine IHL's efficacy by abandoning the idea of one simple, universally recognized emblem. Discussion focused, therefore, on whether the religious overtones of the red cross were real or perceived. While other non-European delegations, such as the Japanese and Chinese, indicated that their States attached no religious significance to the sign of the red cross,[51] the Islamic States (and Siam) refused to accept the cross alone.[52] Given their stiff opposition, an uneasy compromise was reached. In 1899, the red cross remained the only formally sanctioned emblem, while some delegations gave more or less open recognition to the red crescent and red sun and lion. The 1906 Geneva Revision Conference specifically restated the general rule of the unity of the distinctive sign, while authorizing the Ottoman Empire and Persia to formulate reservations.[53]

The semiotic supremacy of the cross was simultaneously reinforced by formally recognizing it as a non-religious symbol: the inversion of the Swiss flag, long associated with neutrality.[54] In fact, it is far from clear whether the red cross was conceived as the inversion of the Swiss heraldic emblem, as the 1906 Conference suggested. The discussions at the 1863 Conference which led to the adoption of the emblem were poorly minuted, but what we do know of them suggests that the path to the emblem almost certainly did *not*

49 See Hull, *op. cit.* (note 46), pp. 253-4. Ironically, throughout the 1899 Conference, the Turkish delegation was dogged by allegations of religious discrimination within the Ottoman Empire of the Armenian Christian minority: see Eyffinger, *op. cit.* (note 46), pp. 349-351.

50 Eyffinger, *op. cit.* (note 46), pp. 268, 277-278, 279.

51 Boissier, *op. cit.* (note 14), p. 499.

52 See Hull, *op. cit.* (note 46), pp. 114-115, 118.

53 See François Bugnion, "The red cross and red crescent emblems", *International Review of the Red Cross*, No. 272, October 1989, p. 408; Hull, *op. cit.* (note 46), p. 118; see also *Actes de la Conférence de Révision réunie à Genève du 11 juin au 6 juillet 1906*, Imprimerie Henry Jarrys, Geneva, 1906, pp. 17, 63, 160-164, 175, 199, 214, 260 and 286.

54 See Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Art. 18: "As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, shall be retained as the emblem and distinctive sign of the Army Medical Services."

lead from the Swiss flag.[55] What is more important, though, than whether the emblem was *originally* conceived as a Christian emblem is how quickly and forcefully its secular interpretation was adopted as official doctrine, as the 1906 Conference brought home.[56]

The debates over the emblem also revealed that the fundamental divisions within the Islamic community were not simply religious, but civilizational. Two emblems, not one, were tacitly accepted as emblems for the Islamic powers involved in the conferences, Turkey and Persia. Their emblems — the red crescent and the red lion and sun — were representative not simply of different strands within Islam, but of deeper civilizational heritages pre-dating Islam. This was only reinforced by Turkey's retention of the red crescent following Ataturk's secularizing reforms in the 1920s.

This emblematic differentiation pointed to deep divisions within the notional *umma*. Those divisions began to multiply as the fracturing forces of modernity and nationalism took hold within the Islamic world. Bulgaria, an Ottoman principality still under Turkish suzerainty, was represented by a separate but subordinate sub-delegation in 1899. In 1907 the seats and signatures of her delegation were counted as independent of those of her suzerain.[57] The unity of the *umma* as an agent within the international humanitarian law system was further challenged by the creation of new nation-States in the post First World War peace conferences[58] and the abolition of the Caliphate, though this proliferation of Islamic nation-States did increase the absolute number of Islamic delegations involved in international conferences.

This quickly had important ramifications, leading to the official, rather than tacit, recognition of the use of the red crescent and red sun and lion by those States already using them (Turkey and Egypt; Persia), in Article 19 of the Geneva Convention of 27 July 1929.[59] On the face of it, the proliferation

55 See Boissier, *op. cit.* (note 14), pp. 105-107, 499.

56 Boissier suggests that the delegates at the 1899 Conference believed the version of events they enshrined, despite its inaccuracy. He notes that it was a version of events which "*Moynier lui-même a très curieusement accréditée dans plusieurs de ses écrits.*" Given Moynier's other efforts to promote the secularist moment in the Red Cross movement, it is perhaps not so curious that he should have accredited such a secularist version of events: *ibid.*, p. 499.

57 See Hull, *op. cit.* (note 46), pp. 11, 13; Eyffinger, *op. cit.* (note 46), pp. 96-99.

58 See D. Lloyd George, *The Truth About the Peace Treaties*, Victor Gollancz, London, 1938, especially at Chapters XXII-XXVI.

59 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Art. 19:

"As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed

of Islamic States therefore increased Islamic power to shape international humanitarian law and reinforced the protection of Islamic identity within the IHL system.

The reality was, however, quite different. The grudging acceptance by European powers of the formally equal participation of Islamic States within the system of public international law came only "at the moment of the decline of the power which gave it meaning, the Ottoman Empire".[60] The 'integration' of Islamic States into the modern community of nations in fact amounted to a form of 'subjugation', a kind of Europeanization predicated upon the reconstitution of the Islamic *umma* in distinct nation-State units.[61] Islamic participation in the nation-State system and in fora developing the body of IHL did not, this interpretation suggests, start from a position of equality.

Mohammed Bedjaoui has suggested that the nation-State system drove Islamic law from the field of public law at the constitutional, administrative and international levels and produced Islamic scholarship characterizing itself as a *merely* private law.[62] In many respects this appears true, at least in relation to humanitarian law. The participation of Islamic delegations in the inter-war IHL conferences was framed not in terms of Islam but of public international law, and few Islamic scholars addressed, during this time, the relationship between classical Islamic doctrine and humanitarian law. As John Kelsay emphasizes, Islamic scholars' participation in the development of IHL since this period has worked from *within* this law and has not attempted, until recently, to develop an independent Islamic approach to limiting the conduct of armed hostilities.[63]

forces. Nevertheless, in the case of countries which already use, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground as a distinctive sign, these emblems are also recognized by the terms of the present Convention."

See *Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la Révision de la Convention du 6 juillet 1906 pour l'Amélioration du Sort des Blessés et Malades dons les Armées en Campagne, et pour l'Elaboration d'une Convention relative au Traitement des Prisonniers de Guerre, réunie à Genève du 1er au 27 juillet 1929*, Imprimerie du Journal de Genève, Geneva, 1930, pp. 19, 247-254, 570, 615 and 666.

60 John Strawson, "Encountering Islamic law", available at ‹http://www.iiu.edu.my/deed/lawbase/jsrps.html›.

61 Majid Khadduri, "Islam and the modern law of nations", *American Journal of International Law*, Vol. 50, 1956, pp. 353-372, p. 358; Strawson, *op. cit.* (note 60), notes that Persia adopted a constitution based on the Belgian model in 1906, and was followed by Egypt in 1923.

62 Bedjaoui, *op. cit.* (note 2), pp. 295-296.

63 See John Kelsay, "Islam and the distinction between combatants and noncombatants", in Johnson and Kelsay, *op. cit.* (note 2), p.197, pp. 207-8.

There was, however, a significant trend between the wars that sought a way of retaining a distinctly Islamic character for this participation within public international law. With the *umma* divided, how could Islamic nation-States maintain and represent their collective identity within public international law? The answer presented by a number of Islamic scholars drew on Articles 9 and 38 of the Statute of the Permanent Court of International Justice. Article 9 provided:

"At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world."[64]

Article 38(3) then provided that the Court should apply, *inter alia*, "[t]he general principles of law recognized by civilized nations". These Islamic scholars argued that Islam constituted precisely one of the 'main forms of civilization' to which the Statute referred, and that Islamic law was one of the 'principal legal systems of the world', and that, accordingly, the Court was obliged to recognize Islamic law as a *source* of international law.[65] The idea was not confined to scholarly discussion, but was also formally submitted to the League of Nations and then, on its replacement, to the Conference of States creating the United Nations.[66]

This approach involved a characterization of international law as a universal system reaching across multiple civilizations, and thereby offered advantages to Islam by placing it on a level footing with European civilization and underscoring the supranational character of Islam within the public international legal system. It also represented two significant concessions: first, an apparent abandonment of any objection to the validity of the public international law system in Islamic States based on its cultural, historical and religious specificity (an argument which was to arise again in the context of human rights); and a recognition of the normative superiority of a system of secular law above Islamic law, at least between States.

64 Statute of the Permanent Court of International Justice, adopted pursuant to Article 14 of the League of Nations.

65 See "Proceedings of international conferences on comparative law of 1932, 1937, in *Bulletin trimestriel de la Société de législation comparée*, 1937, pp. 346-7.

66 See Memoranda presented in September 1939 to the League of Nations and on 17 April 1945 to the United Nations Conference in San Francisco; see also Mahmassani, *op. cit.* (note 2), p. 222. Articles 9 and 38(1)(c) of the Statute of the International Court of Justice, appended to the United Nations Charter, reproduce Articles 9 and 38(3) of the PCIJ Statute almost verbatim.

In the narrower sphere of IHL, this *civilizational* approach played out in two ways: first, in the active and routine participation of Islamic States in the State-based IHL system, signifying an accommodation by Islamic actors of international humanitarian law as a means of constructively engaging with non-Islamic actors within the international community; and second, in the formal recognition of the red crescent and red sun and lion, the protection of civilizational symbols within this larger IHL model. Nevertheless, the dominant characteristic of the encounters between IHL and Islam between 1899 and 1945 was the increasing importance of nationalism in the approach adopted by Islamic players.

1945-1977: Islam, nationalisms and international humanitarian law

From 1945 to 1977, Islamic representatives played important roles in reshaping international humanitarian law to deal with the realities of post-colonial conflict. Their participation was marked, however, not by transnational Islamism but by nationalism.

The controversies[67] which led to the 1973 call[68] for a diplomatic conference to amend the 1949 Geneva Conventions[69] included significant conflicts involving Islamic nationalist movements: the Arab-Israeli conflict that broke out in 1948, which squarely raised the question of the threshold of application of humanitarian law and the place of national liberation movements within it;[70] the Suez crisis of 1956; the Indo-Pakistani conflict of

67 See Elihu Lauterpacht, "The legal irrelevance of the 'state of war'", *ASIL Proceedings* 1968, pp. 58-68; Julius Stone, *Of Law and Nations*, 1974, p. 427 ff. Particularly important in this debate was the contribution by the Egyptian legal expert Georges Abi-Saab, both in his writings (see particularly G. Abi-Saab, "Wars of national liberation and the laws of war", *Annales d'Études Internationales*, Vol. 3, 1972, p. 93) and as an Egyptian delegate at the 1974-1977 Conference which led to adoption of the two Additional Protocols: see Jean J.A. Salmon, "Les guerres de libération nationale" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 55. See also the Reports by the Secretary-General entitled *Respect for Human Rights in Armed Conflict*, e.g. UN A/7720, 20 November 1969.

68 See Res. XXIII of 12 May 1968, *Final Act of the International Conference on Human Rights*, Tehran, 22 April - 13 May 1968 (A/Conf. 32/41); UNGA Res. 2444 (XXIII), 13 January 1969.

69 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; *Official Commentary to the 1949 Geneva Conventions*, Jean Pictet (ed.), ICRC, Geneva, 1965.

70 Dietrich Schindler, "State of war, belligerency, armed conflict" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 3 and 8.

September 1965;[71] and especially the Algerian war of liberation in the late 1950s and early 1960s, in which France's failure to recognize Algerian belligerency prevented Islamic insurgents from availing themselves of numerous protections under IHL.

At the resulting conference, Islamic participants — both States and non-State entities (most notably the Palestine Liberation Organization (PLO)) — played an important role in formulating Article 1 of Additional Protocol I to the Geneva Conventions,[72] which extended the protections of IHL to those fighting colonial domination, foreign occupation or racist regimes.[73] Article 1 (and even the presence of non-State entities) represented a fundamental shift in humanitarian law, beyond the statist model upon which it had long been predicated. This radical shift was, in many ways, the direct product of pressure from Islamic players. But it is crucial to realize that the identities of the latter were based primarily not on Islam, but on nationalism.[74]

The acceptance by international humanitarian law of the role of non-State entities was reflected in another shift, legitimizing the different methods of warfare such entities were forced to adopt. While modern nation-States could conduct conventional warfare through standing armies, non-State entities lacking such a centralized military bureaucratic infrastructure were often compelled to adopt guerrilla tactics, beyond what was permitted under the 1949 Geneva Conventions. As a result, the forms of violence to which they had recourse were largely outside IHL. Islamic participants played an important role in bringing these activities within the

71 *Ibid.*, pp. 9-10.

72 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977.

73 See Protocol I, *op. cit.* (note 72), Art 1(4). This text was adopted in draft in 1974 by a vote of 70 in favour (22 of which were States with an Islamic majority), 21 against (0 Islamic States) and 13 abstentions (1 Islamic State). At the final vote in 1977, the same text was passed by 87 for (24), 1 against (Israel), and 11 abstentions (0): see Salmon, *op. cit.* (note 67), pp. 65-66. The PLO was permitted to send a delegation to the conference (as were other recognized national liberation movements) and was seen by many of the Western States as the intended beneficiary of this expansion of international humanitarian law: see George H. Aldrich, "Prospects for United States ratification of Additional Protocol I to the 1949 Geneva Conventions", *American Journal of International Law*, Vol. 85, No. 1, 1991, p. 6. On the contribution by Georges Abi-Saab, Egyptian delegate, see *op. cit.* (note 67).

74 See, for example, Article 22 of the Palestine National Covenant, 1968, in Yehuda Lukacs (ed.), *Documents on the Israeli-Palestinian Conflict, 1967-83*, Cambridge University Press, Cambridge, 1984, p. 142.

scope of IHL, particularly in reformulating the notion of 'combatant'.[75] Interventions by Islamic delegates were particularly notable with regard to the legitimacy of the use of disguise and conditions relating to the open bearing of arms, issues Islamic national liberation groups (such as the PLO and Algerian groups) had already had to confront during operations.[76]

The Arab-Israeli conflict coloured all Islamic participants' interventions during the 1974-1977 Conference and the other participants' responses to them. The issue of the commission of inquiry was one example. Towards the end of the Conference, the Third World countries suggested making obligatory the international commission of inquiry mechanism that was to be established under draft Article 90 of Protocol I — at least with respect to violations of humanitarian law in occupied territories. What could have been a relatively 'neutral' issue thus became imbued with important political consequences, since any such mandatory commission of inquiry might quickly be used in the Arab-Israeli context. The proposal was rebuffed by the joint efforts of the Soviet bloc (which was by then suspicious of international arbitration *per se*) and the West, which saw it as an anti-Israeli ruse.[77] In this way, Islamic nationalisms may have unintentionally impeded the development of humanitarian law, at the same time as they were making the enormous contributions discussed above.

By 1977, Islamic players were clearly committed to working within the IHL framework. Not only were they using the nation-State system upon which it was predicated to develop the law to their own ends, but they were also employing a deliberately secular, humanist discourse as a means of justifying their actions to the community of nations. So much is clear from Yasser Arafat's 1974 speech to the United Nations General Assembly, in which he attempted to portray the Palestinian national liberation movement as a nationalist movement justified by humanist principles rather than religious sentiment:

"Since its inception, our revolution has not been motivated by racial or religious factors. Its target has never been the Jew, as a person, but racist

75 Protocol I, *op. cit.* (note 72), Arts 42-45.

76 See Salmon, *op. cit.* (note 67), pp. 103-104, 108-109. At one point the Arab countries presented a proposal for the absolute prohibition of attacks on objects designed for civilian use, such as houses, dwellings and means of transport, irrespective of whether they were used for military purposes: see Charles Lysaght, "The attitude of western countries" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 349, p. 364.

77 See Luigi Condorelli, "Les pays afro-asiatiques" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 386, pp. 394-5.

Zionism and aggression. In this sense, ours is also a revolution for the Jew, as a human being. We are struggling so that Jews, Christians and Muslims may live in equality, enjoying the same rights and assuming the same duties, free from racial or religious discrimination."[78]

Arafat's words reflect the trend of the previous 75 years: the suppression of particularized Islamic identity within the discourse of international humanitarian and public international law more generally, perhaps in an effort by Islamic actors to use those systems to their own ends, or perhaps a less controlled process of civilizational subjugation. However, at strategic points during the 1974-1977 conference, signs began to emerge of a fundamental change of attitude by some Islamic players towards the public international legal system in general, and especially towards IHL; a number of them began in particular to portray the Islamic legal order as an *alternative* to international humanitarian law rather than as a contributor to it. The records of discussions on Additional Protocol II,[79] which regulates internal conflicts, contain a few crucial indications of the emergence of this scepticism towards IHL.[80] These were early signs of a revolutionary move by some Islamic players away from the humanist basis of the IHL legal order to the theocratic normativity of Islam. The shift took root in the years to come and, as we shall see, now poses a fundamental challenge to the secular universalism of humanitarian law.

1977-1998: Humanist and religious universalisms – competing or compatible?

The Islamic Revolution in Iran signalled a revival of theocratic Islamic ideology and politics which fundamentally changed the relationship between Islamic players and the public international legal system, including IHL. Islam and humanitarian law are increasingly treated as competing normative systems. In this section, I examine two specific episodes to demonstrate this rivalry: the Iran-Iraq war of 1980-1988 and the gender controversy in the negotiation of the Rome Statute of the International Criminal Court.

78 Lukacs, *op. cit.* (note 74), p. 174.

79 *Op. cit.* (note 72).

80 See Howard S.Levie (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Martinus Nijhoff, Dordrecht, 1987, p. 5 (Egypt on compatibility of draft Protocol II with Islam), p. 65 (Saudi Arabia on compatability of Article 1 with Islamic law doctrine of full respect and protection for all human beings regardless of colour or race) and p. 301 (Saudi Arabia on penal provisions).

Following the Islamic Revolution, the Islamic Republic of Iran appeared to abandon nationalism in favour of a radical and universalist Islam. This shift from nationalist particularity to Islamic solidarity was expressed within the discourse of international humanitarian law by the note of 4 September 1980 in which Iran announced that it was adopting the red crescent emblem as the distinctive sign of its armed forces' medical services, instead of the red lion and sun.[81]

The conflict which broke out between Iran and Iraq in 1980 raised the question of how this Islamic solidarity would affect each party's conduct during hostilities. Outwardly, at least, both States appeared to be willing to work within the framework of international humanitarian law, as numerous public documents show.[82] The substantive reality was, however, quite different, both sides apparently violating IHL on a number of occasions.[83] Such discrepancies between rhetoric and action are not, unfortunately, unusual in IHL and do not tell us much about the commitment of either State to Islamic norms rather than those of IHL.

The rhetoric directed not at the external, international community but at each party's own internal constituency is more revealing. In domestic fora, the Iranian leadership consistently defined the war as a struggle to protect Islam against an "Iraqi non-Muslim Ba'thist" blasphemer (Saddam Hussein).[84] In contrast, the Iraqi leadership presented the war first as necessary to protect Iraqi sovereignty against an Iranian "revolution without borders" and later as a defence of Iraqi territorial integrity against Iranian aggression.[85] Iran looked to Islamic norms, while Iraq looked to public international law.

81 "Adoption of the red crescent by the Islamic Republic of Iran", *International Review of the Red Cross*, No. 219, November-December 1980, pp. 316-317.

82 See for example *Letter dated 28 June 1984 from the Deputy Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, UN Doc. S/16649, 28 June 1984; *Statement dated 17 July 1989 by the Foreign Ministry of the Islamic Republic of Iran*, UN Doc. S/20470, 19 July 1989, Annex.

83 See for example ICRC, Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of 12 August 1949 concerning the conflict between the Islamic Republic of Iran and Republic of Iraq, Geneva, 7 May 1983, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 978; and ICRC, Second Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of 12 August 1949 concerning the conflict between the Islamic Republic of Iran and Republic of Iraq, Geneva, 10 February 1984, reprinted in *ibid.*, p. 982; see also UN Doc. S/RES/540 (31 October 1983).

84 See Shahram Chubin and Charles Tripp, *Iran and Iraq at War*, I.B. Tauris and Company Ltd., London, 1988, p. 38.

85 Kelsay, *op. cit.* (note 63), p. 213.

These different approaches were not, however, merely rhetorical. They also impacted on the conduct of each party within the hostilities. The Iraqi High Command justified its deliberate targeting of Iranian civilians to its own people through *Kriegsräson*, arguing that humanitarian constraints did not apply in a 'war of survival' and that it was legitimate to target Iranian civilians to reduce their support for their leadership's military policy.[86] The argument received short shrift in international fora.[87] The Iranian leadership conversely adapted the notion of a 'people's war' which the PLO and other Islamic national liberation movements had so successfully pioneered in the 1970s, giving it an Islamic twist.[88] Iranian military planners aimed, they announced, to "do away with conventional warfare methods" in favour of "Islamic warfare".[89] This had two crucial implications for Iranian war planning: first, victory was to be defined not by outcomes (destruction of the enemy's military) but by process (the manifestation of faith through self-sacrifice); second, an Islamic people's war permitted war only against the heretical Iraqi leadership and not the faithful Iraqi people, who could be turned against that leadership.[90]

In some ways, this approach seemed to sit comfortably with international humanitarian law, arguing as it did for a distinction between Iraqi civilians and military structures. As time went on, it became clear that there was one major disjuncture between the two approaches: the object of Iranian military action was not that identified in the St Petersburg Declaration — the weakening of the military forces of the enemy — but a personal manifestation of faith through the spilling of one's own, or an infidel's, blood.[91] Human life was not valued in and of itself, but as a manifestation of subjugation (*islam*) to Allah. This both encouraged self-martyrdom and characterized those lives not conducted in the spirit of *islam* as inherently disposable. Preferential treatment was to be given to 'believer' over 'loyalist' prisoners of war.[92] When it became clear in 1984 that the Iraqi *shi'i* would not revolt against their Ba'thist government, Iranian plan-

86 *Ibid.*, p. 215; Chubin and Tripp, *op. cit.* (note 84), p. 60.

87 See for example UN Security Council Resolution 543, UN Doc. S/RES/543, 31 October 1983, para. 2.

88 Kelsay, *op. cit.* (note 63), pp. 215-216.

89 *Ibid.* See also Chubin and Tripp, *op. cit.* (note 84), p. 43.

90 *Ibid.*, pp. 213-214; Chubin and Tripp, *op. cit.* (note 84), pp. 40-46.

91 See Chubin and Tripp, *op. cit.* (note 84), p. 40.

92 See *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General*, UN Doc. S/16962, January 1985.

ners began, it now appears, to target civilians, beginning with the shelling of Basrah.[93]

The Islamic Revolution in Iran had, in this quiet way, flowed on into the norms of warfare. Iran had, in effect, issued a direct challenge to Islamic players to consider whether their conduct in war was governed by the norms of IHL or by Islam. No longer could Islamic players unequivocally accept that Islam was confined to the role of a contributor civilization under a neutral, secularist modern IHL canopy; instead, the two systems were now perceived to be in direct competition.

As IHL developed over the ensuing decade and the conduct in periods of armed conflict which it sanctioned became increasingly precisely defined, the question of gender relations became an important site of its contest with Islam. Nowhere was this more clear than in the negotiation of a Statute for an International Criminal Court at the 1998 Rome Diplomatic Conference ("Rome Statute").[94]

First, the gender controversy was triggered by the negotiation of provisions regulating gender balance in the personnel of the Court.[95] The Arab States opposed any attempt to impose a quota system. They successfully negotiated a compromise position removing the reference to gender and requiring States parties to take into account, in selecting the judges and other staff, the need for a "fair representation of female and male judges".[96]

Second, Islamic States challenged the definition of the term 'gender' itself and its application to substantive norms of criminality.[97] Many of them saw in the draft provisions of the Court's Statute a first step in the regulation by public international law of gender relations within their borders. While these States could accept that the application and interpretation of law by the ICC must be consistent with internationally recognized human rights, as a draft of the Statute provided, they could not accept (as the draft also pro-

93 See Kelsay, *op. cit.* (note 63), pp. 214-215; Chubin and Tripp, *op. cit.* (note 84), p. 51.

94 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998). See generally Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999.

95 See Cate Steains, "Gender issues" in Lee (ed.), *op. cit.* (note 94), p. 372.

96 Rome Statute, *op. cit.* (note 94), Arts 36(8)(iii) and 44(2). See also the comments by Algeria, Egypt, Jordan, Kuwait, Libyan Arab Jamahiriya and Qatar in the 1996 *Report by the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II (Compilation of Proposals), UNGA Official Records, Fifty-first Session, Supplement no. 22A, A/51/22 (1996) at 12.

97 See Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Nomos, Baden-Baden, 1999, pp. 164-165.

vided) that the application and interpretation of the law must be without any adverse distinction founded on the grounds of gender.[98] The Islamic States feared that, by accepting such a statement, they would at best prevent the ICC from interpreting international law in accordance with *shari'a*, and at worst place the Court in a position of judgment over domestic practices admitted as compatible with internationally recognized human rights but involving an apparent 'distinction' based on gender. This was not simply a matter of conflicting Islamic and international humanitarian law duties, but more of finding a way to allow for Islamic difference within IHL. It raised a critical question: is there a place for Islamic civilization within international humanitarian law?

The Arab Islamic States were joined in their opposition to the 'no adverse distinction' clause by conservative Christian States particularly concerned about the use of the clause to criminalize State actions aimed at discouraging homosexuality.[99] Some States appeared willing to retain the no adverse distinction clause, providing 'gender' was removed altogether, or perhaps replaced by the term 'sex', which would avoid the 'problem' of homosexuality. This proposal met with defeat at the hands of a coalition of primarily western, liberal Christian-majority States.[100]

Since 'gender' was set to stay in the Statute, the controversy shifted to the definition of that term. All participants realized that it was the sociological aspect of the concept which was problematic, so negotiations focused on language allowing for sociological difference in the construction of gender roles. Proposals including language such as "males and females, in the context of society *and the traditional family unit*" were rejected, as was "males and females in the context of *their* society".[101] The removal of 'their' in the final wording of the definition[102] is important. The Rome Statute presents a definition of gender within international humanitarian law which involves an abstracted, universal concept of society, not particularized to any civilization or tradition. Exactly how that abstracted notion is conceived and applied by the judges and Prosecutor of the ICC in any given case will play a major role in determining whether and how IHL can accommodate different civilizations.

98 Steains, *op. cit.* (note 95), p. 372.

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*, p. 374.

102 Rome Statute, *op. cit.* (note 94), Art. 7(3): "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

We can speculate how this process of accommodation may occur by looking to the third manifestation of the gender controversy in the negotiation of the Rome Statute — the definition of 'forced pregnancy'.[103] A number of Arab Islamic States, again joined by Catholic powers including the Holy See, at first refused to accept the inclusion of forced pregnancy as a crime against humanity because they feared it would impose an international obligation upon them to give forcibly impregnated women access to abortion.[104] They argued that prosecution of the conduct in question could occur through charges of rape and unlawful detention, both of which were crimes already included in the Statute. These States were opposed by a broad coalition, notably including Turkey.[105] A solution was finally reached through a special series of meetings which established the consensus position that the crime would be included along with a specific clarification that it should not be construed to interfere with national laws concerning abortion or pregnancy.[106]

The central question in the forced pregnancy debate was again whether IHL could accommodate conflicting social visions, different civilizations. Its successful resolution demonstrates that humanitarian law can work as a product of dialogue, a conversation between civilizations. The humanism of IHL may be a European and even Christian artefact, but it is a principle which all civilizations now appear to entertain.[107] What is needed in developing and applying IHL is a conversation between these civilizations to find ways in which their common humanity can be maintained and expressed, while allowing for the application of rules and norms in different civilizational contexts.

103 See Triffterer, *op. cit.* (note 97), pp. 164-165.

104 See Steaines, *op. cit.* (note 95) pp. 366-367.

105 *Ibid.*

106 *Ibid.*, p. 367. Art. 7(2)(f) now provides: " 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

107 Notable in this respect is the ratification by Saudi Arabia on 28 November 2001 of the Second Additional Protocol. This is, perhaps, an important sign that at least one Islamic actor believes that international humanitarian law and Islamic law can sit comfortably together, even in situations of non-international armed conflict. It may be an important indicator of the willingness of Islamic actors to engage in that conversation of civilizations which, as I describe below, I believe lies at the heart of the future and process of IHL.

Conflict and conversation

In 1856, at the beginning of the period of interaction between Islam and international humanitarian law which this paper has reviewed, there were considerable divergences between Islamic doctrine and IHL. Today, those divergences have significantly diminished, partly as a result of the interaction between European and Islamic civilization and the adaptation of humanitarian law that interaction produced. Other writers have mapped the now substantial congruence between Islamic and IHL norms of conduct in armed conflict,[108] on such diverse issues as the subjects of those norms,[109] crimes,[110] the limitation of belligerent conduct,[111] protection of civilians[112] (including restrictions on targeting women, children and elderly persons),[113] prisoners of war,[114] restrictions on the treatment of occupied territory and property,[115] spies,[116] perfidy,[117] ruses of war,[118] illegal means of warfare,[119] and criminal responsibility.[120]

The emblem debate reminds us, however, that there is an underlying controversy which calls this apparent compatibility into question. That controversy asks, simply, how religious norms, which draw their authority from a transcendental source (Allah),[121] and humanist norms, which draw their

108 See generally Ereksoussi, *op. cit.* (note 2); Busuttil, *op. cit.* (note 2); Algase, *op. cit.* (note 2).

109 Malekian, *op. cit.* (note 2), pp. 36-38.

110 *Ibid.*, pp. 38-41 (on criminality), 45-63 (aggression), 63-73 (war crimes), 74-75 (restricted weapons), 76-78 (crimes against humanity), 79-89 (slavery), 90-93 (genocide), 94-97 (apartheid), 98-106 (torture), 107-112 (internationally protected persons), 113-115 (hostages), 116-120 (drug offences), and 132-134 (piracy).

111 Taube, *op. cit.* (note 8), pp. 390-394; Rechid, *op. cit.* (note 11), pp. 385-386; El-Dakkak, *op. cit.* (note 2), pp. 115-124; Malekian, *op. cit.* (note 2), pp. 135-147.

112 Melakian, *op. cit.* (note 2), pp. 154-159; see also Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Éditions A. Pedone, Paris, 1997; Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr (634 CE), p. 392 citing Marghinani; ben Achour, *op. cit.* (note 2), pp. 61-63; El-Dakkak, *op. cit.* (note 2), p. 119; Zemmali, *op. cit.* (note 2) p. 132 ; Bedjaoui, *op. cit.* (note 2), p. 292.

113 See generally ben Achour, *op. cit.* (note 2), p. 65; El-Dakkak, *op. cit.* (note 2), pp. 121-124; Zemmali, *op. cit.* (note 2), pp. 131-132; Bedjaoui, *op. cit.* (note 2), p. 290; Malekian, *op. cit.* (note 2), pp. 149-153.

114 Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr (680 CE).

115 Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr; p. 392, citing Marghinani's *Hidayah* (1196 CE); Zemmali, *op. cit.* (note 2), p. 133.

116 Zemmali, *op. cit.* (note 2), p. 131.

117 Taube, *op. cit.* (note 8), p. 392, citing Marghinani; El-Dakkak, *op. cit.* (note 2) pp. 116-118.

118 El-Dakkak, *op. cit.* (note 2), pp. 118-119.

119 Taube, *op. cit.* (note 8), pp. 392-3, citing Mahmoud el Mahboud's *Vikayah* (1280 CE); Bedjaoui, *op. cit.* (note 2), p. 291.

120 Malekian, *op. cit.* (note 2), pp. 172-178.

121 Cf. Rechid, *op. cit.* (note 11), p. 392.

authority from their immanent, human conception, can be reconciled. Do Islamic soldiers and diplomats owe their ultimate duty to Allah or to humanity? If rules of Islam and rules of international humanitarian law conflict, which one stands higher in the normative hierarchy?

We might attempt to wriggle out of the problem by suggesting that Islamic law is a "local custom" within public international law, binding between Islamic States, within a larger universal framework.[122] That approach would, however, create terrible problems, especially in conflicts involving parties with mixed Islamic and non-Islamic populations. Would Islamic soldiers be bound by Islamic law in relation to Islamic civilians, but by different rules of international humanitarian law in relation to other civilians? This risks reviving the mediaeval Christian doctrine of just war and undermining the universality of IHL. Moreover, it may simply be impossible to demonstrate the continuing existence of an Islamic local custom within IHL, given the degree to which Islamic States have adopted the IHL framework.[123] Any Islamic local custom which did once exist may well have fallen into desuetude.

A better solution, I suggest, is to understand international humanitarian law as a *conversation between civilizations*. Islam is just one of the civilizations (in the sense of Article 9 of the PCIJ and ICJ Statutes) engaged in this conversation, just one of the jurisprudential sources which may be tapped in the quest to identify "general principles of law recognized by civilized nations".[124]

This is not to say that international humanitarian law is a static, supranational code negotiated by different civilizations.[125] Instead, we should understand it as the *process* of conversation between civilizations, the *process of* deliberate non-violent adjustment, dialogue and negotiation between competing sources of norms governing violent conflict.[126] Treaties and other

122 See M.H. Mendelson, "The formation of customary international law", *Recueil des Cours*, Vol. 272, 1998, p. 155, pp. 215-7; G. Cohen-Jonathan, "La coutume locale", *Annuaire français de droit international*, Vol. 7, 1961, p. 119. Local customs can be bilateral (e.g. *Right of Passage over Indian Territory* (*India* v. *Portugal*), (1960) ICJ Reports 6 at 39), regional (as was considered in the *Asylum case* (*Peru* v. *Colombia*), (1950) ICJ Reports 266) or common to a "particular ideological group, or a group which shares the same policies on a specific issue, irrespective of their location": Mendelson, *op. cit.*, p. 216.

123 Compare Bedjaoui, *op. cit.* (note 2), p. 295.

124 See ICJ Statute, Art 38(1)(c).

125 Compare Bartram S. Brown, "Nationality and internationality in international humanitarian law", *Stanford Journal of International Law*, Vol. 34, No. 2, 1998, pp. 347-406.

126 Compare International Law Association, *Report of the Sixty-Fifth Conference* (1992), El-Fania, Cairo, 1993, p. 4; see also Strawson, *op. cit.* (note 60).

IHL texts are, of course, records of the obligations that have been adopted by participants in that conversation during its course. The conversation is predicated upon equal participation — or, as we know it, sovereignty — so these are *self-imposed* obligations. International humanitarian law becomes a consensual process of pooling sovereignty to limit the harmful effects of violent conflict. The humanism of the process lies precisely in the commitment to creating limitations upon violent conflict; but each participant in the process remains free to perceive as they wish the source of the normative force of the obligations the process produces. Each State can characterize the ultimate source of the bindingness of IHL norms differently, *so long as that bindingness is recognized.* Thus for one State, the stimulus for participation in the humanitarian law process may be transcendental, while for others it may be immanent. Whatever the source of bindingness, that authority is transferred, through the sovereign consent which underpins each player's participation in the process, *on to* the legal norms and solutions which emerge from the process.[127] In this sense, IHL processes and norms reflect multiple values and multiple sources of authority: they are *multivalent.*[128]

The Rome Statute and the emblem provide excellent examples of how understanding international humanitarian law as a process of conversation between civilizations allows us to avoid both the problem of normative hierarchy and the problem of orientalism. Both involve the construction of compromise solutions through dialogue which respects difference. Each solution permitted Islamic identity to be maintained without jeopardizing Islamic participation in the IHL process. Both were produced by conversation between civilizations, *"une technique de production d'unité à partir de la pluralité reconnue."*[129]

This technique is probably compatible with Islamic doctrine, in particular *ikhtilaf* and the *hadith* indicating that "Difference in opinion ... is a sign of the bounty of God."[130] In this way,

> *"[l]e droit islamique pourrait devenir — et devrait devenir — un facteur essentiel et efficace pour garantir l'universalisme du droit international humanitaire."*[131]

127 Compare Mahmassani, *op. cit.* (note 2), p. 233.

128 On multivalence in the reconciliation of legal traditions, see Glenn, *op. cit.* (note 4), pp. 324-327.

129 Guy de Lacharrière, "Le point de vue juriste: la production et l'application du droit international dans une monde multiculturel", in R.J. Dupuy (ed.), *L'avenir du droit international dans un monde multiculturel*, Colloque, La Haye, 17-19 Novembre 1983, Martinus Nijhoff, The Hague, 1984, p. 67.

130 Glenn, *op. cit.* (note 4), p. 325; see also Bedjaoui, *op. cit.* (note 2), p. 284.

131 El-Dakkak, *op. cit.* (note 2), p. 125.

Because of its multivalence, this universalism need not be homogenizing or dominating. International humanitarian law should be able to accommodate difference. In fact, the very strength of this body of law is that it protects difference while simultaneously protecting our common humanity.[132] It offers a non-violent system for the regulation of differences,[133] a means of turning the 'clash' of civilizations into a conversation between them.

132 Compare S. Sucharitkul, "L'Humanité en tant qu'élément contribuant au développement progressif du droit international contemporain", in Dupuy (ed.), *op. cit.* (note 17), p. 415; R. J. Dupuy, "Conclusions du colloque", in Dupuy (ed.), *op. cit.* (note 128), p. 447, pp. 456-467.

133 See Glenn, *op. cit.* (note 4), p. 338.

Résumé

Islam et Droit international humanitaire: du «choc de civilisations» au «dialogue entre civilisations»

James Cockayne

Dans un monde perçu comme un «choc de civilisations», l'Islam et le droit international humanitaire apparaissent de plus en plus comme concurrents. Les comparaisons déjà tentées de l'Islam et du droit humanitaire présentent chacun des systèmes comme statique et monolithique et dénotent une certaine vision «orientaliste». Si l'on passe en revue le rôle des protagonistes musulmans dans l'évolution du droit humanitaire de 1856 à nos jours, on peut discerner la nature changeante de la corrélation qui existe entre ces deux systèmes. Face à cet «Autre» islamique par opposition auquel le droit humanitaire s'est défini, l'Islam est apparu tout d'abord comme un apport à la «civilisation», puis comme une force nationaliste, et enfin comme un concurrent du droit humanitaire. L'apport de l'Islam montre que le droit international humanitaire est lui-même un processus du «dialogue entre civilisations».

Affaires courantes et commentaires
Current issues and comments

An identity of strength
Personal thoughts on women in Afghanistan

TAIBA RAHIM*

The desire in the female for the male
is so that they may perfect each other's work.
God put desire in man and woman
in order that the world should be preserved by this union.

Mevlana Jalaluddin RUMI (1207-1273), Mathnawi III (4414-4416).[1]

The fate of Afghan women during the Taliban regime and following the 11 September 2001 attacks has been the focus of considerable attention in both Western media and academia. There was a significant amount of debate in human rights and governmental circles about their suffering. Documentaries, at times produced at great personal risk to their authors, and even cinema productions such as *Kandahar*, the film by the Iranian director Mohsen Makhmalbaf, have dealt with their plight.

After more than two decades of conflict, hardship and pain, many of us felt both moved by and grateful for such attention. There was a sense of emerging from a period of oblivion and looking ahead to dedicated support for change. At the same time, one was led to reflect about the nature of the coverage that took place and the types of perceptions that were communicated. Which were the issues that made the headlines with particular intensity? The role of women in Islam, the "dictatorship" of the *burka*,[2] a systematic image of women as victims, among others. Yet the more one read and the more one watched, the more difficult it became to escape the feeling

* Taiba Rahim has a degree in pedagogical studies from the University of Kabul. She worked as a teacher in Kabul in the early 1990s until the conflict led to the closure of the University. Between 1993 and 1995, she worked for the International Committee of the Red Cross (ICRC) in Kabul in the field of dissemination of international humanitarian law. From mid-1995 to early 1997, she worked for the ICRC in Bosnia and Herzegovina in the fields of protection and dissemination. The author is currently involved in a variety of initiatives related to Afghanistan.

that, while a great deal had been heard *about* Afghan women, little had actually been heard *from* them. This was disturbing, since true understanding can result only from dialogue and thus from a readiness, not first of all to judge and to project one's certainty on to *others*, but to listen to and learn from *others*.

It is important in analysing the identity and situation of women in Afghanistan to accept that nothing is simply black and white but necessarily complex. In the following pages, I shall make a modest attempt to address some of the issues at hand.

Women and Islam

For every Afghan woman Islam is a determining factor which essentially influences every aspect of life. To discuss matters of religion when one is neither a scholar nor a student in that field may be a sensitive undertaking. However, I come from a family in which the Holy Quran was the central reference and its verses were both recited and debated. My father was a man of principle and values, who saw no contradiction between adhering fully to the teachings of the Prophet and encouraging his daughters to seek an education.

Islam is often considered as a religion oppressive towards women. Yet if one goes back to the early days, one finds that the rulings of the first Muslims included progress in aspects such as marriage, inheritance, the outlawing of female infanticide, etc. Arguably not sufficient to live up to the expectations of men or women in many 21st-century societies, but certainly important at the time.

The Prophet Muhammad established a tradition whereby his fellow Muslims were instructed, when he set out on a journey beyond Medina, to consult his wife Aisha if they had any problems of a religious nature to settle. After Muhammad's death, Aisha remained a central authority on the Prophet's life and religious practice.

Professor Leila Ahmed, an Egyptian-born scholar, stresses in one of her books that Islam originally set out on a struggle for equity. Women initially asked Muhammad why the Quran referred only to men, despite the fact that women also followed God and his Prophet. It appears that this questioning "led to the revelation of the Quranic verses explicitly addressing women as

1 Mevlana Jalaluddin Rumi, *Jewels of Remembrance*, selected and translated by Camille and Kabir Helminski, Threshold Books, Putney, Vermont, 1996, p. 48.

2 Also known as *chadri*, the *burka* is a garment that covers the entire body, including the face.

well as men (...), a response that unequivocally shows Muhammad's (and God's) readiness to hear women".[3]

In other words, "Among the remarkable features, particularly in comparison with the scriptures of other monotheistic traditions, is that women are explicitly addressed: one passage in which this occurs declares (...) the absolute moral and spiritual equality of men and women.

For Muslim men and women,
For believing men and women,
For devout men and women,
For true (truthful) men and women,
For men and women who are
Patient and constant, for men
And women who humble themselves,
For men and women who give
In charity, for men and women
Who fast (and deny themselves),
For men and women who
Guard their chastity,
For men and women who
Engage in God's praise,
For them has God prepared
Forgiveness and a great reward."[4]

This little known or mostly misunderstood dimension of the Islamic tradition is of great significance to many women in Muslim societies today. "The unmistakable presence of an ethical egalitarianism explains why Muslim women frequently insist, often inexplicably to non-Muslims, that Islam is not sexist. They hear and read in its sacred text, justly and legitimately, a different message from that heard by the makers and enforcers of orthodox, androcentric Islam."[5]

It is an unfortunate reality that the Quran has since then frequently been used to justify the social status quo and gender inequality. This may be illustrated by the issue of polygamy, originally conceived by the Prophet Muhammad as a way of protecting women. It allowed, for example, girls who had been orphaned to be married, while insisting that a man could take

3 Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, Yale University Press, Yale, 1992, p. 72.

4 Holy Quran, Sura 33:35, quoted in Ahmed, *ibid.*, pp. 64-65.

5 *Ibid.*, p. 66.

more than one wife only if he could ensure a decent administration of her property. Today, that notion of social legislation has unfortunately been turned into a pretext for many men to justify outright chauvinism. This is, however, hardly limited to Islam alone and is certainly no justification to belittle its achievements, teachings and values altogether.

The following comment from Karen Armstrong, a respected religious writer, is interesting in that context:

> "In Europe we are beginning to realize that we have often misinterpreted and undermined other traditional cultures in our former colonies and protectorates, and many Muslim women today, even those who have been brought up in the West, find it extremely offensive when Western feminists condemn their culture as misogynist. Most religions have been male affairs and have a patriarchal bias, but it is a mistake to see Islam as more at fault in that respect than any other tradition. (...) It is often a rejection of the Western (...) attitude which claims to understand their tradition better than they do themselves."[6]

It may be worth noting that many of us Muslim women in fact feel a mixture of attraction and rejection. We are attracted to the apparent freedom enjoyed by Western men and women, yet we do indeed find offensive the patronizing tone with which our traditions are at times portrayed.

One of the main flaws in the Western attitude is the inescapable impression that its focus on certain countries or situations is politically motivated. Take the example of Iran, where many women faced immense hardship during the reign of the Shah. However, their plight became an issue in the West mainly after the regime changed in 1979 and the country — now an Islamic Republic — moved from the status of an ally to that of a foe. Today women in Iran still face significant difficulties and oppression, but they go to school and university, occupy important positions in parliament, work as lawyers, engineers, and so forth. This is far more than can be said of Saudi Arabia, a traditional Western ally. Yet it takes no long investigation of media records to find that the fate of Saudi women is much less the object of review than that of their Iranian sisters.

Ironically, therefore, what emerges is an image of a West particularly concerned about the women in countries where its actual ability to influence change is limited (Iran, Afghanistan during the Taliban regime), whereas, in countries where it possesses both the contacts and the clout that would enable it to contribute to gradual change, it appears less eager to do so.

6 Karen Armstrong, *Muhammad: A Biography of the Prophet*, Victor Gollancz, London, 1991, p. 199.

Another result of a generally negative coverage of the situation of women in Muslim societies is a tendency to overlook the importance of their roles. The repetitive use of the word "victim" dehumanizes women. In a country affected by a long war, such as Afghanistan, this phenomenon is accentuated even more. Coverage of the situation of women and girls in conflict focuses almost exclusively on their perceived vulnerability. As was pointed out in a study by the International Committee of the Red Cross (ICRC):

> "Women (...) tend to be categorized as only 'vulnerable', yet they are not necessarily vulnerable and even display remarkable strength. (...) women throughout the world are showing not only that they can be extremely courageous and resilient but also that they can put their ingenuity and coping skills to full use in their daily roles as heads of household, breadwinners, and care-providers within their families, and active participants in the life of their communities, as employees of international organizations and NGOs, and as campaigners for change, agents for peace, etc."[7]

In Afghanistan, despite numerous obstacles — social, religious and others — women have played a very important part in holding society together and are likely to do so again in the upcoming reconstruction process.

Women in Afghanistan

Afghanistan is a country with a proud sense of its traditions and religion. It is a country where the status of women differs greatly from one region to another. In general terms, women in rural areas lead a harsh and unforgiving life. Their main role is to run the family and raise the children, but they also carry out difficult agricultural work, planting the fields or acting as shepherds. In some of Afghanistan's northern provinces, girls and women make carpets, another painful job. Levels of education normally remain low, aiming mainly to provide the basic knowledge required for these occupations.

In towns, opportunities for education, in particular before the war, were more widespread for girls. In Kabul, for example, my parents' generation saw the gradually increasing employment of women as secretaries, nurses, etc. Later, when I went to university, there were quite a number of female teachers, engineers and doctors being trained.

An element that women in urban and rural areas have traditionally had in common is their responsibility in keeping the household together, in

7 Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, ICRC, Geneva, 2001, p. 29.

particular by controlling the family's budget. Whatever amount of money made its way into the family would rapidly be taken over by the wife or mother. The role of women in this regard has been recognized as crucial in many developing nations. In Afghanistan, too, the greater sense of discipline and responsibility found in women was important in managing the limited resources available. In my own family, for instance, with an average of twelve to fourteen people to take care of at any given time, my mother often performed miracles, managing to feed us on my father's modest salary.

One of the greatest tragedies experienced by many Afghan women is the high level of illiteracy. This is true throughout the country, but very much so in the Hazara community.[8] For a combination of political, economic and social reasons women of this ethnic group traditionally enjoyed fewer opportunities in terms of education, although their fathers and husbands were on the whole open to such prospects.

The first of Afghanistan's rulers to have given the issue of equal rights a measure of consideration was King Amanullah, who reigned from 1919 to 1929. He placed great emphasis on education and introduced "a number of measures designed to improve the position of women and girls and to change gender-related customs. He banned child-marriage, transferred the regulation of family affairs from the clergy to the state, outlawed polygamy among civil servants, permitted women to discard the veil (...)".[9] Like other subsequent reformers he found, however, that in many conservative circles in the country such changes were perceived as a threat.

Nevertheless, with every passing decade, small advances were made. But the war which broke out in the late 1970s exacerbated what was already a harsh reality. The twenty-two years of conflict have resulted in tremendous instability and great suffering for our people. This has been particularly true for women. As I have personally witnessed both in my own country and later in Bosnia-Herzegovina, civilians, and in particular women and girls, are among the first to be attacked. There is nothing more humiliating to the male combatant or civilian than to see his wife, sister or mother harassed or violated. This is precisely the enemy's intention when targeting women.

8 The Hazara are one of Afghanistan's ethnic communities, representing approximately 20 per cent of the population. They are of the Shi'a faith and have traditionally been subjected to political and economic oppression.

9 Peter Marsden, *The Taliban: War, Religion and the New Order in Afghanistan*, Zed Books Ltd., London, 1998, p. 93.

"Gross violations of international humanitarian law regarding personal safety are frequently committed. These acts or threats can occur in all phases of a conflict, whether the victims remain within their homes or communities, whilst fleeing, whilst displaced, when returning, during periods of tension leading up to the conflict, during the conflict or after the conflict has ended. (...) Armed conflict may dramatically increase the number of armed forces and weapons in an area populated by civilians, heightening tension and bringing the conflict close to the civilians. (...) Owing to the proximity of the fighting and/or the presence of arms bearers, women invariably have to restrict their movements: this severely limits their access to supplies of water and food and limits their ability to tend their animals and crops, to exchange news and information and to seek community or family support."[10]

In Afghanistan, women have on the one hand been directly affected by the fighting, facing death, injury, threats to their lives and personal integrity. On the other hand, they have had to take great risks in trying to provide for the survival of their families and their own survival. Simple things such as collecting water from what used to be a nearby well became a nightmare when minefields were laid, as did trying to reach a once accessible local market when a checkpoint suddenly appeared on the way. It is difficult to describe the gut-wrenching fear, the cold sweat, the trembling of the entire body when faced with the sheer unpredictability of a group of fighters. When they board the bus you are travelling on, you know that at any time they have the power and self-proclaimed right to remove you or another passenger from the vehicle. The feeling of being so totally at someone's mercy is a fear that never leaves you. You simply do not look at other human beings in quite the same way ever again.

One of the war's most lasting effects is the reality of widowhood. As a result of the conflict in my country, countless men lost their lives or disappeared without a trace, leaving women to cope with the trauma and the consequences. In Kabul alone, estimates of the number of widows run into the tens of thousands. This has had and will continue to have a huge impact on our social development.

At the same time, it must also be said that the strong internal solidarity, the powerful tradition of hospitality and the special importance of the family bond mean that Afghan society as a whole has been able to absorb some of the shocks it has experienced. Even today, after so much pain

10 Lindsey, *op. cit.* (note 7), pp. 43-44.

inflicted, it is possible to travel to remote and impoverished places in my country and be welcomed and fed in a generous manner.

The strong sense of family and the resulting obligation to protect the honour of women have led to the remarriage of a number of widows to the brothers or cousins of their deceased husbands. This might appear contrary to the ideal of free choice, but in a society like that of Afghanistan, where resources are few and where war has devastated the social safety net, these local traditions and practices are important surviving factors of stability.

The solidarity between women was strengthened by gatherings such as those during religious festivals. Throughout the war, *Eid* and *Nawruz* celebrations were opportunities to dress nicely, visit friends, relatives and neighbours, share sweets and chat. While the holidays lasted officially between one and three days, among women the gatherings would extend over a couple of weeks. Women would obviously also get together on sadder occasions, for instance when visiting the mother, wife, sister or daughter of someone killed or missing.

Women under the Taliban regime

To describe in a few words the experience of war is not easy. One day, it simply engulfs you, your family, community and village. Everything you took for granted — the simple, reassuring things of life — disappears from one moment to the next. With every passing day you are convinced that it will all soon be over, and then all at once, 22 years later, you realize that you are still caught up in it and begin to think it will never end.

Men in my country have suffered immensely. They were recruited, many times against their will, they were arrested, tortured and so often killed in brutal ways. Women have faced humiliation, rape, beatings, forced separation and endless exile.

What we experienced under the Taliban, however, went beyond anything that could be imagined in the worst of times.[11] They seized power with a promise to restore security and dignity for all. After the chaos of the early nineties there were some improvements on the security front, but this came at an unbearable price.

11 The Taliban, literally meaning "the students", appeared as a group in 1994. I left Kabul in 1995, a few months after the Taliban took control of Kandahar. I thus have no firsthand experience of my country under their rule. My comments are based on my knowledge of Afghanistan and on the information I gathered over the years.

From one day to the next, women were forced to abandon their workplaces and to withdraw to their homes; they were prevented from engaging in any type of activity outside their immediate family circle and were not authorized to move beyond their homes in the absence of a male member of the family. The zeal of the Taliban focused in particular on urban centres like Kabul and Mazar, where the religious police took the harshest action. In areas such as the south and south-east of the country, the situation was much as it always had been. For example, while female employment in health centres in Kabul was a complex struggle throughout the Taliban rule, the hospital in Kandahar had women nurses at all times.

One of the things that the Taliban will be most seriously blamed for is the disastrous image and reputation they have given our country. Internally, they rubbed salt into numerous wounds inflicted upon the population during the previous fifteen years of conflict. They instilled a fear in people's minds from which it will be difficult to recover. Every passing day seemed to be a year. People tried to adapt to the strict regulations imposed, but the environment remained entirely unpredictable. People could be suddenly arrested, beaten ...

Women, who were traditionally forced to live under male domination, were now confronted with a religious extremism that sought to maintain them in submission. The treatment was cruel to an extent that is hard to describe. On the other hand, there is little doubt in my mind that the women who endured this terrible time lost little of their determination and creativity. If anything, they knew even more clearly what matters in life.

From a distance, one thing I came to regret was that the international community appeared on the whole reluctant to challenge the Taliban leadership through dialogue. I am not suggesting that this would have been an easy thing. I am uneasy, however, about the nature of the demonization that took place, such as when any member of a Pashtun tribe was immediately considered a Taliban.

The lack of dialogue meant a number of lost opportunities to address matters of importance to the population. To make general statements of concern about the situation of women and to call upon the Taliban to abide by international standards from the relative distance and security of Western capitals may at times have been important, but was certainly not sufficient. To sit down with the Taliban and negotiate specific issues, *inter alia* improved conditions for women, might have proved more effective. Under the prevailing circumstances, the prospects for Western statements about the situation

of women — or, to give another example, the preservation of the Bamiyan Buddhas[12] — to have an impact on the Taliban were poor.

This is in contrast to attempts by international agencies to negotiate on the spot with the Taliban leadership. Discussions took place, for instance, over the summer of 1997 between the International Committee of the Red Cross and the Taliban and were partly successful in ensuring *equal access to health care for women.*[13]

The *burka* and women's identity

One issue that became highly publicized in the West during the Taliban rule is the *burka*, a traditional garment that covers women from head to toe. In the eyes of many, the *burka* came to symbolize the suffering of Afghan women at the hands of the Taliban.

It is important to note that the *burka* was by no means introduced by the Taliban. Afghan women have been wearing it for several centuries and it is generally considered to have made its way into Afghanistan from the Indian subcontinent. It is part of the everyday life of many women. This is true within my own family. Interestingly, it was more widespread in towns than in villages. Indeed, for women involved in hard agricultural work, a *burka* is a very impractical piece of clothing. Women in rural areas would wear a simple shawl and use the *burka* only when travelling.

There have been attempts in the history of Afghanistan to put an end to its use. As I mentioned above, King Amanullah tried to have it banned. Then during the late seventies, when the regime changed and the Soviet-backed government took over, the leadership tried to push through changes in a way that was too sudden and brutal for many Afghans. They used intimidation in the attempt to force women to abandon the *burka*. Although the objective was something positive, namely to enhance their participation in social life, the approach was misguided. It provoked a traditionalist response to a sensitive issue.

My point here is by no means to advocate the apparent merits of the *burka*. I personally never liked it and rarely used it. Its most disagreeable fea-

12 See in this regard the interesting review, by a long-standing Afghanistan expert, of the process that led to their destruction in the spring of 2001: Pierre Centlivres, *Les Buddhas d'Afghanistan*, Favre, Lausanne, 2001.

13 For an overview of the relations between international organizations and the Taliban, see Peter Marsden, *op. cit.* (note 9).

ture is its deeply dehumanizing effect, concealing a woman's face — and thus her identity — entirely.

Conversely, to make an obsession out of the *burka* as such does little to reveal that identity. Behind the *burka*, women laugh and cry, hope and despair. They sing and fall in love and follow a beloved man with their eyes. One expression thereof may be found among the Pashtun women, who are famous for their short songs — known as *landay* — filled with worries and hopes, which celebrate nature, mountains, valleys, forests, rivers, dawn and dusk, and seek inspiration in war and honour, shame and love, beauty and death:

"*En secret je brûle, en secret je pleure,*
Je suis la femme pashtoune qui ne peut dévoiler
son amour."[14]

In a society where feelings were repressed and freedom of movement often limited, the *burka* ironically became a means to move unnoticed and to take part more actively in social life than most people would imagine. In that sense, women behind the *burka* were no less determined, no less strong, no less filled with emotions and projects than any other women on this planet.

Having lived and worked in Europe in recent years, I was very much struck by the extent to which the media made that item of clothing a central issue. This had positive aspects, such as raising awareness. I have met many people who were very genuinely concerned and supportive about our future. A number of journalists, several of them women, travelled to Afghanistan to collect testimonies from their Afghan sisters about their life and suffering.

The mass of reporting has had less appealing sides as well. Frequently, the focus on women and on the *burka* was used to ridicule Muslim societies and Afghanistan as a whole. The underlying message was of a backward country and people, unable to join the mainstream values and behaviour of the "modern world". It is interesting to compare this with observations made by Leila Ahmed about similar trends in the late nineteenth and early twentieth centuries:

> "(...) the thesis of the new colonial discourse of Islam (centered on women) was that Islam was innately and immutably oppressive to women, that the veil and segregation epitomized that oppression, and that these customs were the fundamental reasons for the backwardness of Islamic societies. Only if these practices "intrinsic" to Islam (and there-

14 Sayd Bahodine Majrouh, *Le suicide et le chant: poésie populaire des femmes pashtounes*, Gallimard, Paris, 1994, p. 47.

fore Islam itself) were cast off could Muslim societies begin to move forward on the path of civilization. Veiling — to Western eyes, the most visible marker of the differentness and inferiority of Islamic societies — became the symbol now of both the oppression of women (...) and the backwardness of Islam, and it became the open target of colonial attack and the spearhead of the assault on Muslim societies. (...) colonialism's use of feminism to promote the culture of the colonizers and undermine native culture has ever since imparted to feminism in non-Western societies the taint of having served as an instrument of colonial domination, rendering it suspect (...) and vulnerable to the charge of being an ally of colonial interests. That taint has undoubtedly hindered the feminist struggle within Muslim societies."[15]

In today's environment, the message from Western women has on many occasions been one of genuine solidarity. On the other hand, however, the mainstream reporting was frequently characterized by an irritating superiority complex, implying that the freedom that Western women today enjoy has always been there, something of a trademark. My knowledge of European history is incomplete, but my understanding is that the important progress accomplished in the status and position of women was not the simple result of a decree. It came after years, decades and centuries of struggle, often of very resolute struggle.

Generations that followed began to take these achievements for granted and understandably made the most of them. Many of these achievements are distinctly envied in the Muslim world. However, it would be mistaken to think that each society moves at the same pace, along the same path, at the same time. I would dare to go as far as suggesting that the women with the greatest strength in the world are today found in the developing world. They are the ones engaged in struggles, very determined struggles. They are the ones — like their European sisters previously — who are seeking to obtain more respect, better security, improved employment opportunities.

This brings me back to why the media focus on the *burka* surprised me so much. There are women throughout Afghanistan who feel strongly that the *burka* should be thrown away. They should be allowed to do so. There are others who feel strongly that it should be kept. They should also be allowed to do so. In practical terms, though, this is far from being the most urgent problem facing Afghan women. Security, access to health facilities, to education and to jobs are far more important. Obtaining the means to resume a

15 Ahmed, *op. cit.* (note 3), pp.152-153 and 167.

normal life is a pressing need after so many years of conflict. International staff or observers in Afghanistan should not judge or analyse the Afghan situation on the basis of how many women will be seen to no longer wear the *burka* in months to come. International media should not confine themselves to hailing the "reopening of schools for girls". They should check if the government gave the means to build the benches, to buy the blackboard or to pay a teacher.

A look to the future

During a recent trip to London, I spent time in some of the bookshops there in search of material that might prove useful in preparing this article, but to my surprise there was little to be found on the shelves of sections dealing with Central Asia, Religion or Gender. Attentive staff eagerly browsed through their computer files, highlighting a few titles and apologizing for the somewhat lengthy delivery periods to be expected. Had the situation of women in my country, I came to wonder, truly moved out of sight again so quickly?

I realized that it was legitimate that interest and focus had moved to the Middle East, to southern Africa and Kashmir. In any case, the answer to Afghanistan's problems will first and foremost have to come from inside. Just as, more broadly, the evolution of the situation of women in Muslim societies will continue from within.

Like many other people, I followed the *Loya Jirgah*[16] that took place in early June this year. There were some interesting aspects to this gathering. First of all, over 200 of 1,500 delegates were women, an unprecedented event, and several of them made statements very critical of the Mujaheddin factions. Secondly, of the three persons to stand for the post of President of Afghanistan, one was a woman, Massouda Jalal, who spoke of her ambition to work for all Afghans, both women and men. Finally, President Hamid Karzai made specific reference to his vision of a greater role for women in Afghan society.

It may be wondered where these women came from, after so many years when little was heard from them or reported about them. Well, they were in the shadows, in their compounds, behind their *burkas* or in exile. They were among those who had benefited from an education in the 1960s, 70s and 80s and were prepared to engage in political debate. But now, as one observer

16 Grand Assembly of elders, religious and tribal leaders.

noted: "It is up to us (women) to operate in a politically disciplined and mature manner and ensure that we present a common voice. We will be working not against men but on behalf of all Afghanistan, yet we can expect some harsh responses (...)."[17]

I firmly believe that women in Afghanistan, despite the tremendous pain they have endured, are very different from the simplistic image of victims that normally accompanies them. There are many examples of countries where women's rights were taken into greater consideration during or at the end of a conflict: "Armed conflicts greatly affect the lives of women and can completely change their role in the family and the 'public' domain. (...) The breakdown or disintegration of family and community networks forces women to assume new roles."[18]

Afghanistan has experienced this situation as well and will continue to do so, albeit in its own way. Whether men like it or not, women will inevitably assume more active roles outside their homes in the future. We will bring about our own transformation and will do so in accordance with our own core values and traditions, first among them those arising from Islam.

Jamila Mujahed sums up the feeling of many when she writes that:

> "We are also hoping for (...) sustained support from the international women's community. Afghans are saddened by the events of September 11 but they also know that but for that tragedy, no one would have come to our aid, none of the great changes in Afghanistan would have occurred (...)."[19]

In the months ahead, the foremost concern for both men and women will be that of security, and UN Secretary-General Kofi Annan is right to have repeatedly called for a broadening of the mandate of the International Security Assistance Force. Beyond that, education will be crucial and should remain high on the list of priorities of the government of President Karzai.

Hundreds of civil servants in Foreign and Cooperation Ministries in industrialized nations, members of their embassies, diplomats and staff at the UN in New York and Geneva, as well as representatives of humanitarian organizations, deal with one aspect or another of the situation of my country. Some of them undoubtedly have the future of women on their agendas.

17 Jamila Mujahed, *Stepping out of the Shadows*, Institute for War and Peace Reporting, 17 June 2002, available at: ‹http://www.iwpr.net›.

18 Lindsey, *op. cit.* (note 7), p. 30.

19 Mujahed, *op. cit.* (note 17).

My conviction is that the best way to support women in my country is to help create an environment conducive to change, but in the end to let the women of Afghanistan themselves choose the way, the speed and the priorities.

Afghanistan: An ICRC perspective on bringing assistance and protection to women during the Taliban regime

CHARLOTTE LINDSAY CURTET*

The fall of the Taliban regime in Afghanistan has opened the way for considerable debate on the country's future, and the part to be played by women in that future is now being widely analysed and discussed. Much has being written about the fate of women under the Taliban. This short article aims to review the activities of the International Committee of the Red Cross (ICRC) in Afghanistan during the Taliban rule, with particular focus on its impact on women to see what lessons could be learned in terms of how to provide the widest and most effective humanitarian assistance despite massive political and logistical constraints. Before continuing, it should be pointed out that prior to Taliban rule the situation of women in Kabul and other large towns (where their access to education and work and their freedom of movement were greater) differed considerably from that of women in rural areas (where the approach towards them was generally more conservative). So when the Taliban took power, their impact varied throughout the country.

The ICRC has a long history of humanitarian work in Afghanistan, where it has been present since 1986, and has seen political and military factions come and go. It was based in Kandahar when the Taliban first came to power there before taking Kabul, and thus already had some experience of working in an area controlled by an authority with extreme views on the role of women. Its "all-victims approach" — i.e. to provide a comprehensive response to the needs of all populations affected by armed conflict or internal disturbances — has been viewed by some outside the ICRC as precluding the targeting of assistance and protection specifically for women in situations

* Charlotte Lindsay Curtet, Head, Women and War Project, ICRC, Geneva

such as that which prevailed under the Taliban in Afghanistan. From the ICRC's point of view, this approach is crucial in enabling it to come to the aid of the most vulnerable, whoever they may be. However, the very notion of vulnerability calls for an understanding of what makes people vulnerable. This can differ according to whether they are male or female, adults or children, and the particular circumstances of the persons concerned, such as detention or displacement. The aforesaid approach should therefore allow the ICRC to better assess and respond to the needs of women, and should not in any way exclude them.

The situation of women in Afghanistan has long been of concern to the ICRC's Women and War Project and the subject of numerous discussions on what policies and actions would be in the best interests of those whom the ICRC was trying to help. The basic question was how could the ICRC, whose predominantly male staff based in Afghanistan were severely restricted in their access to Afghan women, know just what was in the best interests of women there? The ICRC's Women and War Project made two visits to Afghanistan to try to assess whether the needs of women were being met through the ICRC's programmes. In the absence of quality access to female members of the Afghan population, the only way to carry out the assessment was to examine some examples of the ICRC's work in Afghanistan during the period of Taliban control in Kabul, namely detention-related and medical activities, assistance, protection, restoring family contact, and dissemination.

Women in detention

The situation of detained persons in Afghanistan was complex because of the large number of detainees spread throughout the country in a variety of places of detention, many of them completely makeshift. The ICRC visited approximately 80 places of detention in the year 2000, of which 15 held women. Out of the several thousand detainees being held, only 100 were women. The ICRC's visits to detained women had shown that they were not deprived of their liberty for reasons related to the armed conflict — as were security detainees or civilian internees. They were being held for offences or common law crimes which could, for instance, include being seen in a taxi with a man who was not a member of their family. These women were neither clearly within the traditional mandate of the ICRC, which visits persons deprived of their liberty for reasons related to an armed conflict or internal disturbance, nor were they housed among a population normally visited

by the ICRC. However, they were clearly in need.[1] For security reasons or because the means of communication had been severed, relatives had been prevented from visiting them by the armed conflict and/or the Taliban. This restricted or eliminated the possibility for detainees, particularly women, to receive the necessary physical and psychological support to cope with their detention — food, medical care, contact with family members, etc. Out of necessity, many of these women also had their children in detention with them, which increased their humanitarian needs. For several months the ICRC was unable to visit women in detention because of a lack of female staff, particularly those with the necessary language skills to be able to interact with Afghan women.

The ICRC often relies on hiring national staff for translation, interpreting and field officer roles, but owing to the Taliban ban on female employment these were roles from which women were excluded. In Kabul the ICRC had one of its female health delegates learn Dari in order to facilitate visits to detained women, but this solution was not as practicable as anticipated. The Women and War Project therefore proposed that a female delegate and an interpreter be sent to Afghanistan with the specific task of conducting a full evaluation of the situation of women detainees there. Within weeks two women, one a Farsi speaker, left for Afghanistan for three months with a countrywide brief not only to examine the situation of women in detention, but also to decide what further action the ICRC could take to alleviate the plight of women in general. In this way a Farsi-speaking female ICRC delegate was able to speak directly with Afghan women about the problems facing them as a result of the armed conflict.

Women in need of medical help

The ICRC had already been providing surgical and other medical supplies and some personnel for hospitals and medical facilities throughout Afghanistan, including substantial assistance to two hospitals in Kabul which had originally been set up by the ICRC.[2] In October 1996, the

1 As a general policy, the ICRC does consider that its mandate includes people held in detention (not necessarily for reasons related to the armed conflict) whose basic humanitarian needs are jeopardized by the armed conflict, owing to the breakdown in the normal functioning of the State.

2 The ICRC also runs a major orthopaedic rehabilitation centre in Kabul which has continued to employ Afghan women, even throughout the Taliban regime, and provides prosthetic and rehabilitation services for women. Women account for approximately 7% of the beneficiaries, and girls under 14 years of age for 3% of the beneficiaries.

Taliban took control of Kabul and the Committee to Promote Good and Fight Evil decreed 16 rules of conduct, one of which prohibited women from working anywhere other than in the medical professions; even there they were subject to restrictions. This provoked a variety of reactions by international organizations. Some completely suspended activities which under this decree had become inaccessible to women. Others closed down non-essential projects, with threats that they would review their other programmes. Yet others, the ICRC among them, sought "innovative solutions in harmony with local customs, while at the same time endeavouring to sensitize the Taliban leadership to the problem with the aim of bringing about a more flexible government policy".[3] This was never an easy or comfortable position to be in — engaging in a policy of dialogue whilst trying to uphold the fundamental principles which govern the work of the ICRC and the International Red Cross and Red Crescent Movement as a whole, in particular, non-discrimination which forms part of the principle of impartiality.[4] What the dialogue policy meant in practice was the need to somehow balance principle with pragmatism.

This policy was put to the test in September 1997, when the Afghan Ministry of Public Health issued a new decree that all female patients and female medical staff would have to use a specific "women only" medical facility. The ICRC was totally opposed to this idea because: the proposed building could accommodate only 120 beds, well below the number required for an estimated female population in Kabul of 500,000. Moreover, the location of the hospital made it almost inaccessible, and for

3 ICRC press statement, quoted in C. von Flüe and P. Daudin (eds), *Protection Toward Professional Standards, Report of the Workshop*, 17-19 March 1998, ICRC, Geneva, 1998, p. 116.

4 The principle of impartiality requires the ICRC to make no discrimination as to nationality, race, religious beliefs, class or political opinions. In endeavouring to relieve the suffering of individuals, it is guided solely by needs and gives priority to the most urgent cases. In terms of humanitarian ethics, non-discrimination requires that any objective distinction between individuals be ignored. In practice, all the components of the International Red Cross Movement (composed of the ICRC, the National Red Cross and Red Crescent Societies and the International Federation of Red Cross and Red Crescent Societies) must strictly avoid any form of discrimination when providing medical treatment or other humanitarian aid. See generally, *The Fundamental Principles of the Red Cross*, ICRC, Geneva, 1996. The International Court of Justice has held that "if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of another State, it must be limited to the purposes hallowed in the practice of the Red Cross, and above all be given without discrimination." See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, paras. 239-245.

people with serious illnesses the time it took to get there could prove fatal; there were not enough female medical personnel to staff the facility; and, with women banned from education, there would be no future prospects of recruiting female staff. These difficulties were compounded by the fact that the proposed building was in ruins, with no running water, no windows, no operating theatre and an inadequate electricity supply. The ICRC was convinced that the idea of a medical facility solely for women would deprive them of access to normal medical care, and would thus be a violation of international humanitarian law[5] and contrary to the principles of humanity and impartiality. The ICRC did not suspend its activities, choosing instead to continue dialogue with the Taliban authorities with the aim of ensuring that women received appropriate medical treatment. It publicly stated that it "considers that such practices, which endanger the lives of many ill and war-wounded women, are unacceptable (...)" and requested "that the Taliban in Kabul reconsider their decision." Its view was that the "measures taken by the Taliban authorities are in violation of the written agreement concluded between representatives of the organization and the representatives of the Ministry of Public Health of the Islamic Republic of Afghanistan on 1 May 1997, which stipulates that care provided at establishments supported by the ICRC must be free of any discrimination based on gender, political views or ethnic affiliation."[6] It is important to note that the ICRC had formally informed the Taliban authorities that, under the conditions imposed by them with regard to female access to medical care, it would not be able to continue its assistance. The ICRC risked, and was threatened with, expulsion from Afghanistan, but stood its ground. It thereby helped to bring about the change in the Taliban's position on this issue, the re-engagement of a significant number of female personnel to work in medical structures in Kabul and an increase in the number of female patients admitted to hospitals. This result showed that engaging in dialogue with the Taliban was not completely fruitless. It also

5 As a State party to the Geneva Conventions of 1949, Afghanistan was bound during the rule of the Taliban to apply Article 3 common to those Conventions, which is applicable in the case of armed conflicts not of an international character. This provision guarantees that persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse disctinction founded, *inter alia*, on their sex (Art. 3(1)). In particular, the wounded and sick must be collected and cared for (Art. 3(2)).

6 Quoted in C. von Flüe and P. Daudin (eds), *op. cit.* (note 3), p. 116.

demonstrated that the ICRC could use the Fundamental Principles, together with its legal mandate,[7] as an effective platform from which to negotiate on policy and practical issues with the regime.

It took two months of negotiations with the Taliban authorities through a specially appointed committee[8] to arrive at a tenable solution. In reality, this meant a Taliban-imposed strict segregation of the wards separating men and women in hospitals in Kabul, with wards for women completely closed off to men, including male relatives, and the provision of a separate emergency room and outpatients department for women. There was also a separation of male and female medical personnel in hospitals, although there was some contact between male and female colleagues for professional reasons.

The ICRC had taken a strong position with regard to the Taliban decrees on medical care for women, but the overall medical situation of Afghan women in Kabul was still very serious. The two main hospitals in Kabul now provided a separate place within the hospital to accommodate women. For most of the time these beds were always full and there was a waiting list, with some non-priority cases — maternity, malarial and orthopaedic cases, TB, non-urgent elective cases such as bowel problems, bladder and kidney stones, and untreatable cases (cancer) — turned away by the hospital for lack of space. These hospitals were also outside the centre of the town and approximately 20-25 minutes away by car, which placed constraints on access for patients.[9] Moreover, women invariably needed a male relative's permission to go to hospital and had to be accompanied by a male relative. This meant that illnesses often went untreated for a long period of time, making eventual treatment more difficult. There was no possibility for women to seek assistance for any psychological problems related to illness, the armed conflict, their loss of independence or any other trauma with which they had to contend.

7 Under common Article 3 of the Geneva Conventions of 1949, an impartial humanitarian body, such as the ICRC, may offer its services to the parties to a conflict (Art. 3(2)). While this does not mean that the said parties are bound to accept the offer of service, in practice it is rarely refused.

8 The committee, composed of the Ministry of Public Health, the United Nations, the ICRC and various NGOs, was set up by the Afghan government to find practical solutions allowing both sexes to be present in hospitals.

9 For example, the price of a taxi shared by 3-4 people cost 4,000 Afghan roubles to travel from the centre of town to hospital in May 2000. Finding such a sum of money was out of the question for most people, who took a bus or walked.

Protection of women

Women in detention and medical facilities were relatively speaking "easier" to reach and assist in that their location was known and evaluation of their needs was theoretically possible, though often subject to restrictions. Outside such facilities the situation of women was much more difficult to assess for several reasons, among them the very real security concerns linked to the ongoing conflict and to the Taliban decrees which forbade and/or strictly limited the potential for contact with women by humanitarian organizations. For the ICRC this resulted in an almost total lack of information on the civilian population's needs for protection, and particularly those of women. "ICRC protection activities aim at protecting people caught up in armed conflict or internal disturbances from the dangers, abuses and suffering to which they are exposed in order to preserve their rights, offer support and ensure that they are heard."[10] For the ICRC it was very difficult to separate what was happening to women as a result of the armed conflict from the problems besetting women as a result of the Taliban regime and policies. Certainly, the fact that the Taliban were one of the parties to the armed conflict meant that these factors were inextricably linked. It was important to bear in mind that the ICRC's job was to help as many war-affected women as possible and not to take a stance on the Taliban's treatment of women, except insofar as this treatment violated rules and principles of international humanitarian law or, in terms of the ICRC's work, the Fundamental Principles, particularly humanity and impartiality. This approach of the ICRC, which is based both on its legal mandate under the Geneva Conventions of 1949 and its working principle of neutrality,[11] reflects the specific and unique function of the organization in conflict situations. It contrasts sharply with that of human rights or other humanitarian organizations which adopt policies of publicly identifying and denouncing human rights violations by governments and rebel groups. Furthermore, the ICRC's principle of neutrality meant that women against whom serious violations had been committed by the other parties to the armed conflict also came within the purview of the ICRC's protection programmes.

10 *Women Facing War*, ICRC study on the impact of armed conflict on women, ICRC, Geneva, 2001, p. 61.

11 The Fundamental Principle of neutrality means that the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature. See *The Fundamental Principles of the Red Cross, op. cit.* (note 4).

The situation of women was also linked to the impact of the armed conflict on Afghan men, particularly civilian men, who were their relatives, breadwinners, "protectors" and often their lifeline to the outside world. The men in Afghanistan were likewise severely affected by the armed conflict and the Taliban regime — as a result of the hostilities many men were missing, detained, wounded, or had died — generating enormous humanitarian needs for the entire population.

For the ICRC the main problems in carrying out protection activities for men and women stemmed from restrictions on access for security reasons, refusal by military commanders or inability to meet with the latter in order to try to put an end to violations being committed. In particular, assessment of the security situation of women necessarily involved talking with the women concerned, and this meant that the presence of female ICRC personnel with local language skills was crucial because of the restrictions placed on the employment of local female interpreters (who anyway would not have been allowed to travel). In addition, female personnel were not able to meet and discuss with Afghan male interlocutors, and thus a male delegate was also needed in order to deal with such contacts in Taliban-controlled areas. Alternative sources of information on the situation of women therefore had to be found. This included contact with women in facilities where access to them was less limited, for example, medical and orthopaedic facilities. Since the fall of the Taliban regime accusations have abounded of serious violations committed against women, such as their being kidnapped and forced to be "wives" to commanders, raped, or abducted and forced into servitude in third countries, and of children being sold by families in order to buy food and other commodities. During the Taliban regime there were rumours of rapes and abductions of women by all parties to the armed conflict, but the ICRC had no means of verifying these at the time and was not approached by victims or victims' families.[12]

12 There were various reasons for the non-reporting of sexual violence against women, including the long duration and severity of the conflict which had made seriously violent crimes seem commonplace to many Afghans; the fear (especially of women) to approach international organizations, the lack of belief that any action would be taken as a result of reporting, and the shame and dishonour that might be brought on the victim and her family if the offence was made public.

Family reunification

Besides protection, the ICRC also had to cope with particular difficulties when arranging for the reunification of families. In Afghanistan this generally involved transporting vulnerable persons — considered to be unaccompanied women, children under 16 years of age, persons aged over 60 and persons with disabilities — across front lines to reunite them with family members in "safer" areas. Again there were particular problems in transporting women because they were not able to travel by themselves; the ICRC therefore had to bring the women's male family members to collect them. This was not always possible if the journey involved crossing a front line as the family member's life could be endangered, a risk which was considered too high. This situation further demonstrated the need for the ICRC to negotiate security measures with the authority in power and highlighted the importance of good information as to the location of front lines.

Dissemination

Throughout the armed conflict the ICRC endeavoured to teach basic humanitarian principles and where possible the rules of war (international humanitarian law) to combatants. The main message passed with regard to women was that as non-combatants women should be protected and respected.[13] During the years of the Taliban regime when there was little fighting in many Taliban-controlled areas, the main problems for women were related to their essential rights (they were not allowed to work or to be formally educated, had limited freedom of movement, and lacked access to medical facilities). In areas where there was ongoing fighting, women were victims of indiscriminate attacks in that the warring parties considered all people on the "other side" as the enemy, whether or not they were civilians. They were also denied access to medical care, food, shelter, and water — the basic means for survival. The ICRC came up against many difficulties in spreading information in Afghanistan: there was a largely illiterate populace restricted from seeing pictures of the human form, thus limiting the material which would normally be used to convey humanitarian messages to those lacking reading and writing skills; it was very hard to gain access, for dissemination activities, to those who were fighting; and the Taliban's suspicion as to the purpose of such dissemination activities also hampered efforts. To convey messages about the specific protection of women was also particularly

13 In Afghanistan in recent years women have not taken part in the armed conflict as combatants.

problematic because of the whole outcry provoked by the Taliban edicts, which caused the Taliban to distrust and react negatively to any activity that involved discussion of the subject of women. To inform women themselves about the laws protecting them was practically impossible, owing to the fact *inter alia* that women could not gather publicly and were barred from education. As for the issue of sexual violence, even very basic messages about its prohibition were taboo.

Humanitarian assistance

Humanitarian assistance programmes were to some extent easier to carry out, although also subject to Taliban restrictions. For example, for several years the ICRC ran a programme for widows and disabled persons in Kabul, assisting nearly 15,000 widows and 8,000 households headed by disabled persons to try to improve their food security; a project to provide highly nutritional bread (with a low commercial value) for the destitute; a poultry project to provide a source of income for vulnerable persons, improve household economic security and prevent malnutrition; and a kitchen garden programme in Kabul — started in 1998 for widows and households headed by disabled persons who had uncultivated gardens — in order to decrease dependency on food aid, improve food availability, create income, reduce living costs and strengthen coping mechanisms. The ICRC also carried out major food programmes, such as bringing food — rice, wheat and ghee — to remote areas to feed hundreds of thousands of men, women and children.

Female personnel

This article has focused thus far on the impact of the Taliban regime on Afghan women as victims or beneficiaries of ICRC programmes. Another interesting angle is the impact on women as staff of the ICRC. First and foremost there was the situation of the Afghan female staff. Prior to the arrival of the Taliban, the ICRC had employed a significant number of Afghan women in Kabul. Under the decree forbidding women to work (except in medical programmes) it had to replace them with men. However, it continued to pay the salaries of these women and many of them carried out paid work in their homes for the ICRC, for example, doing the laundry of ICRC personnel. It also negotiated with the authorities to allow some of its female Afghan personnel to go and work in Mazar-i-Sharif and Peshawar, Pakistan, where women could be employed in its offices. The ICRC furthermore paid

financial incentives to female hospital employees employed by the authorities in Kabul, thus enabling them to earn some money as salaries were rarely paid. As for international female staff, most of them could not be given a post in Afghanistan because of the Taliban-imposed constraints and/or serious security concerns with regard to women's work in many parts of the country. Much of the ICRC's work is carried out through painstaking negotiation with the parties — all the parties — to an armed conflict. By virtue of being female, the majority of women in the ICRC were precluded from such roles. Not being able to go to a country where the needs of women were so enormous was hugely frustrating for female ICRC staff. Their inability to work there was also harmful for women within Afghanistan, given that any direct assistance was dependent on female humanitarian workers because the interaction of Afghan women with men outside their family was forbidden. Those international women who were able to go to Afghanistan during the Taliban rule worked predominantly in the health sector, where needs were tremendous, but this meant that the possibilities to respond to the other needs of women who were victims of violations, threats, detention or displacement, etc. were limited.

Conclusion

In bringing assistance and protection to women during the Taliban regime, the ICRC constantly had to strike a balance between maintaining international standards for the rights of women and working within the framework of the sensitivities of Afghan culture and the policies of the Taliban authorities. A number of points were pre-eminent for the ICRC, namely to have independent access to female victims of the armed conflict; to make sure that women received the same standard of treatment as men in hospitals and orthopaedic centres supported by the ICRC; to ensure that women were able to work in medical and orthopaedic structures; and to find ways of guaranteeing that ICRC assistance programmes reached female beneficiaries. Working within the constraints imposed by the Taliban regime, the ICRC was able to improve the situation of women to some extent – most notably with regard to detention and access to medical services, but also by bringing vitally needed food, water, hygiene necessities and agricultural supplies to populations in need, including women. Could more have been done? With hindsight, it is easy to say certainly. But in reality, war is uncertain. The ICRC had to juggle many competing humanitarian priorities with limited resources while working in a situation unparalleled in the rest of the world.

It is, however, possible to identify some important lessons learned from that experience. Every crisis situation is different, but past experience can always be used as a guide for future practice, whether by negative or positive example. In the case of the ICRC's work to protect and assist women under the Taliban regime, the following points can be made. Where the ICRC is faced with a regime with extreme policies on women, objectives must be prioritized with a view to bringing assistance to as many war-affected women as possible. This means concentrating on policies and activities which are feasible and effective. Maintaining a dialogue with the authorities is vital to negotiate tenable working conditions. For the ICRC, use of the Fundamental Principles as a platform for negotiations helped to allay the suspicions of the Taliban about humanitarian assistance to women and to secure work for female personnel in medical establishments. The experience in Afghanistan also underscored the need for the ICRC to stay keenly aware of its specific mandate, but to interpret that mandate broadly, so that women whose rights are seriously impaired by armed conflict can seek assistance from it.

Women, armed conflict and international law

HELEN DURHAM*

"IHL takes a particular male perspective on armed conflict, as a norm against which to measure equality. In a world where women are not equals of men, and armed conflict impacts upon men and women in a fundamentally different way, a general category of rules that is not inclusive of the reality for women cannot respond to their situation."[1]

A number of feminist academics increasingly maintain that international humanitarian law (IHL) continues to fail women. The authors of an excellent new book entitled *Women, Armed Conflict and International Law*, from which the above quotation is taken, have argued this point in an articulate and aggressive manner for many years. The crux of the debate is the "all victims" approach taken by international humanitarian law and the ICRC, versus a specific gender-based analysis of social norms. These two ways of grappling with the horrors faced by women in times of armed conflict do not sit easily together. Dialogue between their respective proponents (feminist academic and operational) can at times tend to be disjointed, as the starting points differ. However, it must never be forgotten that the general aim of reducing suffering is exactly the same for both sides, and that each side has something valuable to learn from their divergence of views.

An example of this "tension" can be found in *Women, Armed Conflict and International Law*, in which the authors, Gardam and Jarvis, demonstrate their capacity for analytical rigour and the breadth of their feminist and international legal expertise. They assert that international humanitarian law, philosophically based on chivalric ideals of women, addresses women in terms of their relationships with others and not as individuals in their own right. Pointing out that of the forty-two provisions focusing upon women in the 1949 Geneva Conventions and their 1977 Additional Protocols, nine-

* Helen Durham is Ph.D. in Law, national IHL Manager, Australian Red Cross. The views expressed are purely those of the author and in no way reflect the views of the Australian Red Cross.

teen deal with women as mothers, they hold that the protection of the unborn child and small children is "the rationale for many of these provisions". Overall, Gardam and Jarvis are critical of international humanitarian law's limited focus upon the "biological" difference of women and contend that even the treatment of sexual violence is couched in terms relating to chastity and modesty. They write: "Generally, women are valued in IHL in terms of sexual and reproductive aspects of their lives".[2]

Another issue of concern raised in the book relates to what is termed a "hierarchy of the rules". In general in international law, the authors argue, legal norms dealing with women are seen as having lesser status. They go on to say that in international humanitarian law the provisions relating to women are articulated in terms of protection rather than prohibition (for example Article 76(1) of Protocol I, as opposed to language used to deal with men in Article 13 of the Third Convention). It is noted that no mention is made of sexual violence in the "grave breach" provisions, despite current interpretation of the capacity to prosecute rape under those sections. The authors contend that international humanitarian law is a legal regime based on the distinction between combatants and civilians, with more protection accorded to combatants than to non-combatants. They claim that this system *per se* is not a matter of concern, except when the distinction incorporates an assumption as to the value of lives. In the ensuing discussion the issue of the protection of victims of armed conflict is seen as constantly taking second place to a plea of military necessity. Furthermore, the influence of the military in both the development and application of international humanitarian law is considered disquieting. Indeed, the legitimacy of the term "international humanitarian law" is questioned, with the claim that it is misleading owing to the extent it focuses upon humanitarian rather than military concerns.

Compelling examples of the inadequacy of international humanitarian law in providing real protection for women are given throughout the book. The comprehensive regime of protection afforded to prisoners of war (mostly men) compared to the lack of regulation relating to people in refugee camps (mostly women), the violence suffered by women from all participants in armed conflict, including their "own" side and peacekeepers sent to protect; the re-enforcing of stereotypes and detrimental representations of women

1 J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, The Hague, 2001, p. 93.

2 *Ibid.*, p. 94.

found in the laws which do exist, and the lack of post-conflict assistance, are all deemed unacceptable. The authors do acknowledge in their discussions that women are not the only victims and that gender cannot always explain a lesser degree of protection, especially as regards the limited scope of law pertaining to internal armed conflict.

A subject on which detailed debate would have been desirable and is frequently lacking in such discussions is the tension between the aims of international humanitarian law, which are limited and pragmatic, and the expectations often placed in this area of the law. For example, in the introduction to *Women, Armed Conflict and International Law* the authors comment that "one of our major criticisms of IHL is its unrealistic boundaries".[3] In this writer's view it is the critics, and not the law itself, who attribute a greater capacity to international humanitarian law than it actually has — and thus more failure. International humanitarian law has very precise boundaries. It seeks only to limit suffering during times of armed conflict, not to redress social inequalities or assist in rebuilding post-conflict communities. The accusation is made in the book that:

> "IHL in addressing humanitarian needs in armed conflict assumes a population in which there is no systemic gender inequality. The system fails to recognize the unequal situation of men and women in society generally."[4]

This accusation overlooks the fact that international humanitarian law makes no claim to deal with the basis of social structure in general. Rather its aims are extremely restricted and focus upon ensuring survival for as many people as possible during the most extreme circumstances a society can experience. International humanitarian law strictly abstains from any attempt to determine the validity of the reasons for a conflict, be they based on discriminatory practices or not. It is this limited mandate which accounts for the successes in international humanitarian law (and there are many) and lies at the heart of this whole legal regime.

Much feminist theory, on the other hand, requires an analysis that looks deeply into the very fabric of a society and locates itself in the belief that there is no universal experience. It demands that what is deemed the "norm" is questioned vigorously. It exposes the major dichotomies between the public and private, logic and emotion, body and mind as merely constructed dualism. It listens for the silences and does not assume there is one

3 *Ibid.*, p. 18.
4 *Ibid.*, p. 97.

truth. It aims to question the very things taken for granted. International humanitarian law does not and cannot aim for such scope or examination; to do so would draw it into a quagmire of moral and ethical argument which would render its rules useless. It would open international humanitarian law up to "just war" theories and a range of attempts to justify avoiding application of this area of law, such as is currently claimed in the fight against "terrorism". These limitations of international humanitarian law and the need for it to avoid inherently questioning a society are complex and require further examination and debate. This may also explain why there is occasionally bitter disagreement between those advocating increased adherence to and enforcement of international humanitarian law and those arguing along feminist lines.

At times theorists such as Gardam and Jarvis have directly criticized the methods employed by the ICRC to address the suffering of women, and indeed the patriarchal nature of the institution itself. Whilst acknowledging a recent "sea change" within the ICRC in its approach to this issue, some sections in *Women, Armed Conflict and International Law* are unduly disparaging in claiming that the ICRC does too little too late and is institutionally not able to grapple deeply with the inherent complexities of a gender perspective.

The ICRC, like any other part of the humanitarian community, must constantly reconsider its capacity to incorporate gender issues into its operational work. The pledge made at the 27th International Conference, specifically addressing the issue of women and armed conflict, and the Women and War project are obvious examples of an institution seriously committed to reducing the suffering of women. The ICRC's Women Facing War study, which resulted from the Women and War project, is far more than an academic piece of literature. Undertaken with the practical aim of alleviating the plight of women in times of armed conflict and reviewing operational responses to their real concerns, it helps the ICRC to understand and meet the needs of female members of the population who are the most vulnerable victims of war. The future will show what the ICRC does with this information and how the feminist academic community responds. However, too much work remains to be done in this field for academics and organizations such as the ICRC to spend time in constant disagreement rather than find common ground.

There is an underlying and restrained passion in *Women, Armed Conflict and International Law* and in much general feminist debate on that

subject — anger and frustration at the lack of action, and acknowledgement of the diverse horrors suffered by women during and after armed conflict. And so there should be. Anyone working in this field cannot but help become angry at what is and what is not talked about in relation to women and war. The silence and lack of public knowledge about the women kept confined and raped in Fiji's constitutional crisis; the lack of women representatives at formal peace negotiations in Afghanistan despite the fact that the vast bulk of the backbreaking and heartbreaking work of rebuilding the country will fall upon their shoulders; the consistent use of women's bodies as battlefields, their private suffering only deemed serious when it is seen to impact upon the public; the treatment of women who are combatants in regular and irregular armed forces — at times it appears that the world refuses to listen and act appropriately to address real issues of humane concern. International humanitarian law needs a comprehensive gender-based critique, which is what *Women, Armed Conflict and International Law* has provided. It is now up to all who strive to give women increased protection during times of armed conflict, both theorists and practitioners, academics and operational personnel, to work together (albeit uncomfortably) to find the right solutions.

Faits et documents
Reports and documents

Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001)

PIERRE-YVES FUX ET MIRKO ZAMBELLI*

La mise en œuvre de la première disposition commune aux Conventions de Genève a récemment connu un développement dans le contexte des violations du droit international humanitaire liées au conflit israélo-palestinien. Ce conflit, qui a donné lieu à de nombreuses résolutions et décisions sur le plan politique, en particulier au sein de l'ONU, a également fait l'objet d'une action multilatérale des États parties en tant que tels, sur la base de l'article premier commun. Entre 1997 et 2001, s'est déroulé dans une certaine discrétion un processus qui, sur le plan juridique, a montré voire ouvert une voie, peut-être nouvelle, sur la manière dont les États parties, compte tenu de leur obligation première en matière de mise en œuvre des Conventions de Genève[1], comprennent leur rôle, y compris face à l'ONU, aux parties à un conflit et aux acteurs humanitaires (en particulier le CICR). Au-delà du contexte proche-oriental, la Conférence de Hautes Parties Contractantes à la Quatrième Convention de Genève (5 décembre 2001) exprime l'interprétation dominante de l'article premier commun aux Conventions de Genève, sous la forme d'une Déclaration[2] qui réaffirme les obligations des États parties; l'Assemblée générale de l'ONU a comme entériné cette Déclaration sur le plan politique. Cette interprétation de l'article premier commun s'est cristallisée au cours d'un processus multilatéral qui a duré quatre ans, et dont les principales étapes sont retracées ici:
- appel de la communauté internationale en 1997;
- recherche d'une solution multilatérale originale en 1998;
- Conférence d'États parties, 15 juillet 1999;
- Conférence d'États parties, 5 décembre 2001.

* Pierre-Yves Fux, docteur ès lettres, et Mirko Zambelli, docteur en droit, sont collaborateurs diplomatiques à la division politique IV du département fédéral des Affaires étrangères (Berne), en charge de questions de politique humanitaire. Ils ont notamment participé à la préparation de la Conférence du 5 décembre 2001.

La communauté internationale et les événements de 1967

Trente ans avant que l'Assemblée générale de l'ONU n'invite à tenir une Conférence des États parties à la Quatrième Convention de Genève, la communauté internationale avait réagi: dans le contexte des événements de juin 1967 (guerre des six-jours), sans se borner au *jus ad bellum*, elle s'était saisie de la question sur le plan du *jus in bello*. Le franchissement de la «ligne verte» par l'armée israélienne avait en effet abouti à l'occupation militaire de territoires administrés depuis 1948 par l'Égypte et par la Jordanie. Le 22 novembre 1967, le Conseil de sécurité affirmait implicitement l'applicabilité de la quatrième Convention aux territoires occupés par Israël dans la résolution 242, qui demande «le retrait des forces armées israéliennes des territoires occupés lors du récent conflit», reprenant en cela la terminologie utilisée par les Conventions de Genève[3]. Cette résolution n'a pas été mise en œuvre; à l'issue de la guerre du Kippour, la résolution 338 (22 octobre 1973) demande «aux parties intéressées de commencer immédiatement après le cessez-le-feu à appliquer la résolution 242 (1967) dans toutes ses dispositions».

Fait rare, l'occupation va être durable. Fait probablement unique, la XXIVe Conférence internationale de la Croix-Rouge (Manille 1981) adopte une résolution relative à l'application de la Quatrième Convention de Genève «aux territoires occupés du Moyen-Orient»[4]. En se disant «profondément préoccupée par le refus continuel de la Puissance occupante de reconnaître l'applicabilité de la Quatrième Convention de Genève (...) et de remplir la totalité de ses obligations», la Conférence «réaffirme l'applicabilité de la Quatrième Convention de Genève aux territoires occupés du Moyen-Orient» et en particulier «affirme que les colonies de peuplement installées dans les territoires occupés sont incompatibles avec les articles 27 et 49 de la Quatrième Convention de Genève».

1 Cf. Laurence Boisson de Chazournes/ Luigi Condorelli, «Common Article 1 of the Geneva Conventions revisited: Protecting collective interests», *RICR* 837 (2000), pp. 67-87.

2 Le texte de la déclaration se trouve à l'annexe 1.

3 Cette applicabilité découle *ipso facto* de l'occupation d'un territoire lors d'un conflit armé et peut être considérée comme un fait obvie. Elle est du reste expressément affirmée dans d'autres résolutions, postérieures, du Conseil de sécurité: par exemple 446, 452 (1979); 465, 468, 469, 476, 478, 484 (1980); 592 (1986); 605 (1987); 607 (1988); 636, 641 (1989); 672, 681 (1990); 694 (1991); 726, 799 (1992); 904 (1994). D'autres résolutions du Conseil de sécurité y font implicitement référence, la dernière en date étant la résolution 1397 (2002).

4 Cf. *Manuel du Mouvement international de la Croix-Rouge et du Croissant-Rouge*, Genève 1994, pp. 770-771.

En 1997, soit trente ans après la guerre des six-jours, l'occupation de la Cisjordanie et de Gaza n'avait pas pris fin et le processus de paix entrait dans une situation de crise. Le processus d'Oslo n'avait pas mis un terme à l'occupation et n'était pas parvenu à enrayer le problème des colonies de peuplement. Face à cette violation du droit qui pesait sur le processus de paix, l'Assemblée générale de l'ONU ne s'est pas bornée à la référence politique – classique – aux résolutions 242 et 338 du Conseil de sécurité. Elle a aussi mis l'accent sur l'applicabilité de la Quatrième Convention de Genève (jusque-là contestée uniquement par la Puissance occupante, l'État d'Israël[5]). Le fait qu'une enceinte politique universelle traite d'une question humanitaire spécifique laissait espérer une meilleure prise en compte de la dimension humanitaire du conflit proche-oriental, au risque d'une instrumentalisation politique du droit humanitaire[6]. Concrètement, se posait la question des rapports entre l'Assemblée générale et d'autres acteurs (États parties, dépositaire, CICR), en particulier dans le domaine de la mise en œuvre des règles humanitaires. Plus généralement, était posé le dilemme classique entre l'objectif politique d'une paix (au prix, si besoin, de concessions pragmatiques) et l'impératif du respect du droit (au moyen, si possible, de mesures efficaces pour éviter violations et impunité).

Session spéciale d'urgence de l'Assemblée générale de l'ONU (dès 1997)

Engagé au début des années 1990, le processus d'Oslo n'a pas mis fin à l'occupation et à la politique d'implantation de colonies de peuplement dans les territoires occupés. En février 1997, l'approbation par le gouvernement

5 Cf. Ruth Lapidoth, «The expulsion of civilians from Areas which came under Israeli Control in 1967: Some Legal Issues», *European Journal of International Law*, 2 (1991), p. 100: «According to the [opinion of the Government of Israel], since the West Bank and Gaza have been illegally occupied by Jordan and by Egypt respectively in 1948, and the West Bank was illegally annexed by Jordan in 1950, these areas cannot be considered to be part of 'the territory of a High Contracting Party' within the meaning of the second paragraph of [Art. 2 of the Fourth Geneva Convention]». Israël a d'une part fait valoir cette opposition de principe au cours des consultations et d'autre part cherché à «limiter les dégâts» en évitant une condamnation unilatérale à l'issue de réunions multilatérales polémiques et politisées. Sur ce second point, en vertu d'une logique humanitaire, Israël a pu obtenir satisfaction ; pour les autres États parties, l'applicabilité *de jure* de la Quatrième Convention constituait au contraire une base juridique non négociable.

6 Israël non seulement refusait l'applicabilité de la Quatrième Convention (et donc l'objet du processus ici envisagé) mais aussi contestait, avec les États-Unis d'Amérique (et, en 1999, quelques autres États), l'opportunité et même la légalité, d'une action collective et multilatérale des États parties pour «faire respecter» la Convention au sens de son article 1er. Dès le début et par principe, il n'était donc pas question pour Israël de participer ou d'assister en qualité d'observateur à la Conférence voulue par les instigateurs du processus.

israélien des plans d'une colonie de peuplement située entre Jérusalem et Bethléem (Djebel Abou Ghneim/Har Homa), très contestée, n'a pas provoqué de décision du Conseil de sécurité (blocage par veto) et a conduit l'Assemblée générale de l'ONU à se saisir de la question sur la base de la résolution 377 (V) de 1950 (« Union pour le maintien de la paix »). L'ensemble du processus ici envisagé a été lancé par la 10e session extraordinaire d'urgence de l'Assemblée générale, dont les résolutions ES-10/3 à ES-10/9 ont accompagné l'action multilatérale menée par les États parties sous l'égide du dépositaire.

Le 15 juillet 1997, la résolution ES-10/3 prend acte de l'absence de suite donnée par Israël aux requêtes formulées précédemment et, au point 10 de son dispositif, « recommande aux Hautes Parties contractantes à la Convention de Genève relative à la protection des personnes civiles en temps de guerre de convoquer une conférence sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem, et la faire respecter, comme elles y sont tenues conformément à l'article premier commun aux quatre Conventions de Genève, et prie le Secrétaire général de lui faire rapport à ce sujet dans les trois mois ». Le secrétaire général s'est alors adressé au dépositaire, qui a recueilli les réactions des États parties sur le principe et l'opportunité d'une telle Conférence.

Le 13 novembre 1997, l'Assemblée générale prend connaissance du rapport du Secrétaire général[7] (établi sur la base des informations communiquées par le dépositaire). Elle adopte la résolution ES-10/4 qui réitère la recommandation susmentionnée et, se tournant vers le dépositaire (points 5 et 6 du dispositif), « recommande au Gouvernement suisse, en sa qualité de Dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, de prendre les mesures nécessaires, notamment de convoquer, dans les meilleurs délais, en principe à la fin de février 1998 au plus tard, une réunion d'experts chargée d'examiner la suite donnée à la recommandation susmentionnée » et « demande au Gouvernement suisse d'inviter l'Organisation de libération de la Palestine à participer à la conférence susmentionnée ainsi qu'à tous ses travaux préparatoires ».

Le CICR a pris la parole devant l'Assemblée générale pour rappeler l'applicabilité de la Quatrième Convention de Genève aux territoires occupés par Israël en 1967 et le fait que les colonies de peuplement constituent, parmi d'autres, une violation de cette Convention. Sans se

7 A/ES10/16–S/1997/798 et Add.1; cf. *Documents officiels du Conseil de sécurité, 52e année, Supplément d'octobre, novembre et décembre 1997*, document S/1997/798.

prononcer sur l'idée d'une Conférence, le CICR souligne l'obligation des États parties de « faire respecter » les Conven-tions de Genève « en toutes circonstances », saluant toute initiative individuelle ou collective des États à cet égard et rappelant qu'ils ont une responsabilité propre, juridique et politique. À cette occasion, le CICR a demandé que sa neutralité et son indépendance soient respectées et insisté sur le fait que « les réponses internationales à des problèmes humanitaires récurrents devraient être évaluées à la lumière des résultats concrets, dans l'intérêt de la population protégée ».

Le dépositaire pouvait sans difficultés se rallier au point de vue exprimé par le CICR mais sa position était particulièrement délicate. Alors qu'elle n'était pas membre de l'ONU et qu'elle ne jouissait donc pas du droit de vote à l'Assemblée générale, la Suisse recevait de la communauté internationale une recommandation qu'une partie au conflit contestait avec force mais qui portait sur un problème humanitaire réel. Conformément à sa tradition humanitaire et dans le cadre de ses attributions de dépositaire, la Suisse ne pouvait ni ne voulait se dérober à la conduite de consultations des États parties. Elle a pris la parole devant l'Assemblée générale pour y résumer, sous la forme de trois principes ou maximes, les préoccupations recueillies au cours de ses consultations. Ceux-ci guideront par la suite tout le processus, jusque et y compris le 15 juillet 1999, et seront communément admis. Ces principes sont les suivants:

- au plan humanitaire, contribuer à une amélioration réelle de la situation sur le terrain;
- au plan politique, ne rien faire qui puisse porter préjudice aux efforts de paix;
- à l'articulation de ces deux plans, éviter tout politisation du droit et de l'action humanitaires.

Concrètement, la prise en compte de ces principes impliquait la « nécessité d'une préparation soigneuse (...) en vue d'assurer si possible son succès et d'obtenir une participation aussi large que possible ».

Recherche d'une solution multilatérale originale (1998)

Tout en fixant un délai (*de facto* techniquement difficile à respecter), la résolution ES-10/4 n'était pas immédiatement exécutoire du fait de son statut (recommandations non contraignantes), de son contenu (indications générales), ainsi que de l'absence de consensus entre les États parties, relevée par la Suisse qui a également précisé, lors du débat du 13 novembre 1997, que

« certaines Parties Contractantes ont présenté des propositions de solutions alternatives et complémentaires ou d'étapes préalables à la tenue de la Conférence ».

Le 17 mars 1998, l'Assemblée générale prend acte du fait que la Conférence ne s'est pas tenue dans les délais souhaités et, par la résolution ES-10/5, réitère ses recommandations et demandes, en prolongeant le délai jusqu'à fin avril 1998. Cette résolution a amené la Suisse à rendre public devant l'Assemblée générale l'objet de « consultations informelles afin d'élaborer une formule donnant suite aux paragraphes 4 et 5 [de la résolution ES-10/3] et susceptible d'être acceptable pour toutes les parties principalement intéressées ». Dans sa déclaration, la Suisse précise que « le fruit de cette réflexion approfondie est une proposition qui a été soumise le 5 mars dernier aux principaux intéressés. La Suisse propose d'accueillir une réunion à huis clos, renouvelable si nécessaire, de représentants d'Israël et de l'OLP. La Suisse estime que la présence du CICR, vu son rôle de gardien du droit international humanitaire, serait hautement souhaitable. La Suisse participerait à ce dialogue en sa qualité de dépositaire des Conventions de Genève ». La résolution ES-10/5 – à la négociation de laquelle la Suisse n'a pas été en mesure de participer, étant donné son statut de l'époque – ne tient pas compte de cette proposition alors en cours de négociation. Le représentant suisse conclut son intervention sur ces mots: « Tout en étant à la disposition des parties aux Conventions de Genève, la Suisse maintient sa proposition et ne manquera pas de la mettre en œuvre aussitôt que possible. »

En juin 1998, cette proposition – acceptée fin mai par tous les intéressés – s'est concrétisée et a été présentée sous la forme d'un communiqué de presse commun, publié par le département fédéral suisse des Affaires étrangères: « Une réunion d'experts sur l'application de la Quatrième Convention de Genève s'est tenue à la Villa Sarasin, près de Genève, du 9 au 11 juin 1998. Présidée par la Suisse, la rencontre a réuni des représentants israéliens et palestiniens en présence du Comité international de la Croix-Rouge. (...) Ayant à l'esprit plusieurs résolutions de l'Assemblée générale des Nations Unies, réunie en session d'urgence, la Suisse, dépositaire des Conventions de Genève, a convoqué cette réunion après d'intenses consultations avec les Hautes Parties Contractantes et en particulier avec les États et organisations concernés. » Cette réunion est décrite en ces termes (agréés par les participants): « Des problèmes importants ont été évoqués quant à l'application de la Quatrième Convention de Genève. Des divergences conceptuelles significatives sont apparues en ce qui concerne la mise en

œuvre de la Quatrième Convention, ses relations avec le processus de paix au Proche-Orient et le contexte de sécurité. (...) Les représentants israéliens et palestiniens ont accepté de suivre les trois principes proposés par la Suisse[8] pour des réunions sur cette question:

- contribuer à une amélioration réelle du respect du droit international humanitaire;
- éviter toute politisation du droit international humanitaire;
- soutenir le processus de paix au Proche-Orient.

Les parties ont procédé à un échange de vues sur la possibilité d'établir des mécanismes et de prendre des mesures concrètes pour mettre en œuvre la Quatrième Convention de Genève. Toutes les délégations ont réaffirmé que les Conventions de Genève consacrent des valeurs fondamentales du droit international et qu'elles doivent être respectées. De manière à poursuivre le dialogue, les parties sont convenues de se réunir à nouveau pour examiner les idées et suggestions propres à promouvoir le respect de la Quatrième Convention de Genève».

Objet d'intenses consultations, la seconde réunion, qui devait se tenir du 15 au 17 novembre 1998, n'a finalement pas eu lieu. Plus que la nature du processus lui-même (controverses autour de l'idée d'un mécanisme ad hoc, finalement abandonnée), ce sont des questions d'agenda politique, puis les difficultés du processus de paix (mise en œuvre des accords de Wye Plantation) qui ont fait obstacle à la tenue de cette réunion.

Le 2 juillet 1998, le dépositaire adresse à chacun des 188 États parties une note reprenant les termes du communiqué susmentionné et présentant un second volet de la proposition négociée auparavant, à savoir l'idée d'«une réunion d'experts des Hautes Parties contractantes aux Conventions de Genève sur des problèmes relatifs à la Quatrième Convention de Genève (en général, et en particulier dans des territoires occupés), (...) prévue pour le début de l'automne 1998». La note envoyée par le dépositaire précise: «Par son objet et son format, cette réunion d'experts serait analogue à la première Réunion périodique sur le droit international humanitaire, qui s'est tenue à Genève du 19 au 23 janvier 1998. Dans l'esprit des réunions périodiques, telles que les a conçues la XXVIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge, les problèmes à examiner "ne se rapporteront pas à telle ou telle situation particulière, mais revêtiront un caractère tout à fait général, susceptible d'intéresser l'ensemble des États". (...)

8 Ces trois principes ou maximes ont été énoncés pour la première fois dans la déclaration de la Suisse devant l'Assemblée générale de l'ONU le 13 novembre 1997 ; cf. *supra*.

Conformément à la pratique établie pour la première Réunion périodique, la réunion proposée devrait revêtir le caractère d'un échange de vues qui pourrait être structuré de la façon suivante:
– identification des problèmes et de leurs causes;
– éléments de solution possibles;
– suivi possible.

Vu la nature informelle des débats, aucun règlement de procédure ne serait appliqué; il n'y aurait pas de bureau et la réunion serait présidée par un représentant du dépositaire. Les discussions seraient reflétées dans un rapport du président, qui serait transmis aux États parties et au Secrétaire général des Nations Unies.»

Cette Réunion d'experts *ad hoc*, convoquée par la Suisse au Centre international de Conférences de Genève, a donc eu lieu du 27 au 29 octobre 1998. Elle a réuni 118 États parties (y compris Israël et les États-Unis d'Amérique) et 15 délégations d'observateurs. Son président, l'ambassadeur Walter Gyger, a produit un rapport auquel la Déclaration de la Conférence du 5 décembre 2001 fera référence dans son paragraphe 11[9].

Conférence d'États parties du 15 juillet 1999

Le 9 février 1999, l'Assemblée générale reprend l'initiative. Elle adopte la résolution ES-10/6 qui, dans son préambule, prend note des deux réunions susmentionnées et remercie «le Gouvernement suisse, en sa qualité de dépositaire des quatre Conventions de Genève, et le Comité international de la Croix-Rouge de leurs efforts visant à maintenir l'intégrité des Conventions» et exprime sa préoccupation concernant d'une part la persistance des violations de la Quatrième Convention et d'autre part «la suspension, le 20 décembre 1998, par le Gouvernement israélien, de l'application du Mémorandum de Wye River».

À la différence de ce qu'elle avait fait en 1998, l'Assemblée générale va au-delà des déclarations d'intention et ne se contente pas de fixer un délai théorique. Elle recommande à nouveau aux États parties de convoquer la Conférence (à laquelle la Palestine doit prendre part), mais elle donne un lieu et une date. La résolution «recommande (...) aux Hautes Parties contractantes de convoquer ladite conférence le 15 juillet 1999 à l'Office des Nations Unies à Genève» et «prie le Secrétaire général de mettre les installations nécessaires à la disposition des Hautes Parties contractantes afin

9 Le texte de la déclaration se trouve à l'annexe 1.

qu'elles puissent tenir la conférence». C'est dans ce contexte que l'Assemblée «invite le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève, à prendre toutes les dispositions nécessaires en vue de la tenue de cette conférence».

Durant les débats, la Suisse a adopté une position plus ouverte qu'en 1998: la proposition faite dans la résolution est réali-sable et la proposition de pourparlers de type «Villa Sarasin», expressément maintenue par la Suisse, est toujours une chance à saisir. «L'espoir de contribuer à une amélioration rapide de la situation sur le terrain ne s'est pas concrétisé jusqu'ici. Cependant, la Suisse estime que ce type de réunion peut apporter des résultats positifs en termes d'améliorations concrètes sur le terrain, étant entendu que le principe du respect des dispositions de la Convention n'est pas mis en question.» Entrant en matière sur la préparation de la Conférence prévue pour le 15 juillet, la Suisse explique pourquoi la Conférence recommandée par les résolutions précédentes n'a pas pu avoir lieu et relève un certain nombre de questions encore ouvertes (valables en l'espèce et en général): initiative; procédure de convocation; prise en compte ou non des objections de parties principalement concernées; modalités et logistique. Ces questions sont ensuite formellement posées dans une note que le dépositaire adresse en mars 1999 aux 188 États parties.

En mai 1999, les réponses reçues n'ont pas pu être synthétisées dans un rapport écrit dont se seraient dégagées des tendances permettant soit une mise en œuvre immédiate, soit une nouvelle consultation sur un ou plusieurs modèles bien définis. En outre, rien ne laisse envisager un changement de position des États parties sur le principe même de la tenue de la Conférence à la date et au lieu dits. Le dépositaire a donc repris les consultations informelles, bilatérales ou au sein de groupes d'États. Ces consultations ont fini par trouver un cadre, celui d'un groupe représentatif de 25 États, formé des membres permanents du Conseil de sécurité, des acteurs clef ayant introduit et soutenu la résolution ES-10/6 (troïka de la Ligue des États arabes, des non-alignés et de l'Union européenne) et de représentants de divers groupes régionaux. Les parties au conflit ont, elles, été informées bilatéralement.

Le 23 juin 1999, le dépositaire adresse aux 188 États parties une note indiquant l'état des consultations et des préparatifs concernant la Conférence, y compris le fait que «deux parties, dont une partie prenante, sont fortement opposées à la Conférence» et qu'«un certain nombre de Hautes Parties contractantes considèrent qu'eu égard aux nouvelles circonstances, la date de la Conférence n'est pas appropriée et que celle-ci doit donc

être reportée ». La note fait allusion aux élections israéliennes, dont les vainqueurs ont été élus sur un programme faisant de la reprise du processus de paix une priorité. De même que fin 1998 la crise du processus de paix avait relancé celui de la Conférence, les chances d'une reprise des pourparlers de paix ont remis en cause l'opportunité d'une telle Conférence aux yeux de certains États.

Le même jour, dans ces circonstances très particulières, la Suisse adresse aux États parties un formulaire d'inscription ainsi que des renseignements pratiques sur une Conférence que le dépositaire se doit de rendre possible, sans chercher ni à la favoriser ni à l'empêcher. La Suisse ne convoque pas cette réunion, mais se borne à signaler où et quand elle peut se tenir, tout en soulignant que « les questions relatives aux modalités de la Conférence et aux résultats attendus sont toujours ouvertes et nécessitent des éclaircissements supplémentaires. Par conséquent, la question de la présidence demeure également ouverte ».

Le 14 juillet 1999, les consultations n'avaient pas encore abouti et il n'était pas certain que la Conférence se tiendrait le lendemain. Les ultimes pourparlers ont eu lieu entre des représentants de l'Union européenne et de la Ligue arabe (en l'espèce, négociateurs palestiniens) sous l'égide de la Suisse, qui était appelée à présider la Conférence (mais qui ne l'acceptait qu'à certaines conditions). Un accord entre ces deux groupes d'États était susceptible de rallier un large consensus parmi les autres États parties. Le principe d'une Conférence très brève et sans vote, réunie puis reportée, semblait acquis et la négociation a surtout porté sur le contenu d'un document final (question du report et du suivi) et sur les termes utilisés dans ce texte (titre du document et de la Conférence, désignation de la Puissance occupante, etc.)[10]. Un compromis a pu être atteint.

Le 15 juillet 1999, le compromis négocié *in extremis* a été entériné par le consensus des participants. Concrètement, la Suisse a réuni de manière informelle les États qui s'étaient inscrits et leur a lu l'intégralité des textes qui devaient être présentés à la Conférence (discours d'ouverture du président, Déclaration et conclusion). Après un bref débat, il est apparu qu'aucun des 103 États présents n'avait d'objection. La Conférence a donc pu se tenir, à huis clos, dans la Salle des assemblées du Palais des Nations. Présidée par l'ambassadeur Walter Gyger, elle a duré 17 minutes.

La Conférence a suscité parmi les États des réactions de satisfaction ou, chez les plus réticents, de soulagement. Les modalités de la Conférence, qui

10 Voir ‹http://www.eda.admin.ch/eda/f/home/foreign/hupol/4gc/documt.html›.

visaient à éviter des débats polémiques et à garantir une large participation, ont provoqué dans l'opinion publique des critiques parfois vives, parfois mêlées d'ironie. Cela étant, la Déclaration de la Conférence exprimait un message humanitaire substantiel, puisque 103 États parties rappelaient collectivement l'applicabilité de *jure* de la Quatrième Convention « au Territoire palestinien occupé, y compris Jérusalem-Est » et demandaient son respect intégral. Certes, la Conférence était reportée sur la base de considérations politiques (chances de reprise du processus de paix), mais elle pourrait être réunie à nouveau sur la base de considérations humanitaires (évolution de la situation sur le terrain).

Au lendemain du 15 juillet, l'exercice semblait (au moins provisoirement) clos, une fois effectuée la transmission, par le dépositaire, des documents officiels (Déclaration et liste des participants) aux États parties. Toute l'attention de la communauté internationale se concentrait sur les pourparlers de paix, destinés à rendre finalement sans objet la Quatrième Convention, grâce à la fin de l'occupation militaire dans le cadre d'une solution politique.

Vers la Conférence d'États parties du 5 décembre 2001

Le 28 septembre 2000, les troubles consécutifs à la visite du futur premier ministre israélien sur l'Esplanade des Mosquées/le Mont du Temple, dans un contexte électoral tendu, ont marqué le début d'une nouvelle Intifada. Le nombre élevé de morts et la multiplication rapide des mesures dites de sécurité, contraires aux dispositions de la Quatrième Convention, ont amené les États parties membres de la Ligue arabe, soutenus par ceux de l'Organisation de la Conférence islamique, à s'adresser au dépositaire, sur la base de la Déclaration du 15 juillet 1999. Leur demande, exprimée dans une lettre datée du 13 octobre 2000, a été soutenue par la résolution ES-10/7 de l'Assemblée générale réunie en session extraordinaire d'urgence le 20 octobre, invitant « le Dépositaire de la Quatrième Convention de Genève à s'enquérir de l'évolution de la situation humanitaire sur le terrain, conformément à la Déclaration adoptée le 15 juillet 1999 (...), en vue de faire respecter la Convention en toutes circonstances, conformément à l'article premier commun aux quatre Conventions ».

En novembre 2000, le dépositaire a donc consulté les 189 États parties sur l'opportunité et, le cas échéant, les objectifs d'une nouvelle réunion de la Conférence envisagée, à la lumière de l'évolution de la situation humanitaire sur le terrain. Indéniablement, la situation politique et humanitaire était de

plus en plus grave, ce qui a du reste provoqué la réunion d'une session extraordinaire de la Commission des droits de l'homme de l'ONU le 5 décembre 2000. Néanmoins, la communauté internationale a estimé que des espoirs de paix subsistaient, ce qui a conduit le dépositaire à informer, en janvier 2001, les États parties de la nécessité de prolonger le délai de la consultation, certains États ayant exprimé « le souhait de pouvoir, avant de répondre à la consultation, tenir compte d'échéances politiques ou de pourparlers susceptibles d'affecter l'évolution de la situation humanitaire sur le terrain ».

Le 22 mars 2001, le dépositaire est en mesure d'informer les États parties sous la forme d'un rapport des résultats de ses démarches. Ce document fait état des diverses réponses reçues au sujet du principe d'une telle Conférence (approuvé par de nombreux États, contesté par un petit nombre d'États), et relève qu'« un nombre significatif d'États est en principe en faveur d'une nouvelle réunion de la Conférence mais exprime des réserves concernant son calendrier », d'autres États insistant « pour que soit fixée une date à brève échéance ». Outre la question de la date, celle des objectifs précis et des modalités de la Conférence nécessitent d'autres consultations et le dépositaire indique dans sa note qu'il continuera « ses consultations en vue de trouver un consensus aussi large que possible concernant le calendrier, les objectifs et les modalités d'une éventuelle nouvelle réunion de la Conférence ».

Les États parties et le dépositaire se trouvent à ce moment-là dans une situation analogue à celle du printemps 1999 : ce sont moins les divergences que les questions ouvertes qui tendent à bloquer le processus et à créer une indétermination problématique pour tous – en nuisant à la crédibilité de la communauté internationale, voire du droit international humanitaire face à un problème grave. Le précédent du 15 juillet n'est pas transposable tel quel – il n'est pas question d'ouvrir et de suspendre une réunion d'États parties, qui plus est dans la si-tuation humanitaire et politique du moment – et aucune date n'a été proposée. Pour le dépositaire, la solution la plus sûre semble être de s'adresser principalement (mais non exclusivement) aux instigateurs et aux promoteurs de la Conférence, afin qu'ils précisent leurs intentions, de manière à pouvoir, le moment venu, soumettre à l'ensemble des États parties une (ou des) proposition(s) concrète(s) et détaillée(s) sur un modèle de Conférence. Développant la note du 22 mars 2001, le dépositaire fait circuler un document informel en trois points (calendrier ; objectifs ; modalités), avec des questions ouvertes et des éléments de réponses

possibles[11]. Les réactions ont permis d'élaborer progressivement deux textes, dont la version finale sera soumise le 7 novembre 2001 à l'ensemble des États parties: un projet de document final de la Conférence et un texte reprenant la structure du document informel et apportant des réponses aux questions ouvertes qui y figuraient[12]. Pour en arriver là, il a fallu trouver un mode de consultation acceptable par tous. C'est celui du mois de juin 1999 (groupe d'environ 25 «Amis du dépositaire»), actualisé et adapté en particulier en fonction des présidences de groupes régionaux, qui a été retenu. Ce groupe s'est réuni cinq fois à Genève, entre le 11 septembre et le 1er novembre 2001.

Entre le 7 novembre et le 5 décembre, une partie du débat est devenue publique, ce qui a conduit la Suisse à mettre en œuvre une politique d'information active, à la fois pour apporter des réponses factuelles et juridiques à des polémiques surgies de part et d'autre (surtout du côté des ONG) et, à cette occasion, pour mieux diffuser le droit international humanitaire. Aux informations générales sur la Quatrième Convention se sont ajoutées des explications sur la tenue à huis clos et sans vote de la Conférence (questions qui ont été très vite réglées par les États parties durant les consultations), et sur le fait que la Conférence n'était pas convoquée par la Suisse mais par un nombre important d'États parties.

Le 4 décembre 2001, le dépositaire a convoqué une réunion ouverte à tous, afin d'apporter aux États parties intéressés «toute information pertinente en lien avec la Conférence (réponses et réactions reçues; questions techniques)». Après une communication détaillée du dépositaire sur les résultats de la consultation et sur des questions telles que la liste des orateurs, l'absence d'objections ou de remarques de la part de la centaine d'États représentés a permis de constater l'existence d'un large consensus. La convocation et le déroulement de la Conférence exigeaient en effet un accord préalable, étant donné que celle-ci ne comporterait ni négociation, ni vote, ni débat contradictoire. Ce résultat était en soi remarquable, vu que la Conférence s'est tenue quelques jours après des attentats terroristes en Israël et pendant des mesures de représailles militaires, qui ont retenu dans la région le chef désigné de la délégation palestinienne. Dans un souci de

11 Par exemple: «Participation (only High Contracting Parties/admission of other participants or observers (which ones? with possibility to take the floor)? status and denomination of Palestinian representatives?)? presence of the media and public?».

12 Timing and venue (1. Date, etc.; 2. Programme; 3. Participation; 4. Reconvening; 5. Logistics and costs); Objectives (6. General; 7. Substantial); Modalities (8. Chair and Secretariat; 9. Procedure of the Conference; 10. Procedure of follow-up).

cohésion, les États participants n'ont pas dévié de la ligne préalablement négociée. Ils ont au contraire souligné la pertinence plus actuelle que jamais du message humanitaire fondé en droit que devait délivrer la Conférence.

Déroulement de la Conférence du 5 décembre 2001

La Conférence a duré environ 2 heures 30 et a réuni 123 délégations, dont 115 États parties ainsi que la Palestine en tant que participant, et sept observateurs (acteurs humanitaires comme le CICR ou institutions telles que la Commission européenne). Après le discours d'ouverture du président suisse de la Conférence (ambassadeur Peter Maurer), trois acteurs humanitaires ont évoqué la situation humanitaire sur le terrain et les difficultés qu'ils y rencontrent: le CICR (M. François Bugnion, directeur); le haut commissaire aux droits de l'homme (Mme Mary Robinson); le commissaire général de l'UNRWA (M. Peter Hansen). Ont ensuite pris la parole des représentants gouvernementaux de diverses régions ou groupes d'États du monde: la Jordanie (M. Abdel-Elah Khatib, ministre des Affaires étrangères) pour les États de la Ligue arabe, la Belgique pour les États de l'Union européenne (et pour d'autres États, candidats à l'adhésion ou pas, comme l'Ukraine et la Nouvelle-Zélande); la Malaisie pour les États de l'Organisation de la Conférence islamique; l'Afrique du Sud pour les États non alignés, ainsi que la Chine, le Canada et la Russie.

Ces allocutions, prononcées dans une atmosphère sereine et solennelle, ont toutes souligné l'applicabilité *de jure* de la Quatrième Convention, l'importance et la pertinence de cet instrument et la gravité des violations. Les messages délivrés, tout en étant très concrets, sont restés dans un cadre humanitaire et juridique, en ce qu'ils se sont concentrés sur la Quatrième Convention et donc sur la protection des victimes, sans exclure aucune catégorie de civils[13], sans nier que les Palestiniens ont des obligations en vertu du

13 Ainsi, le représentant des États de la Ligue arabe a déclaré: «We condemn in the strongest possible terms the killings and targeting of Palestinian and Israeli civilians in the unfolding wave of violence that swept the Palestinian Occupied Territories». Celui du CICR a précisé: «Le fait que les colonies ont été créées en violations des dispositions de la Quatrième Convention de Genève ne signifie pas que les civils qui y résident peuvent faire l'objet d'attaques. Ils sont protégés par le droit humanitaire en tant que civils, dans la mesure où ils ne prennent pas activement part aux combats». Le haut commissaire aux droits de l'homme a déclaré de même: «Despite the fact that the settlers' presence in the occupied Palestinian territories is illegal, those who are not taking part in military hostilities remain civilians».

droit international humanitaire[14], mais sans mettre ces obligations sur le même plan que celles de la Puissance occupante.

Au terme de ces allocutions, le président suisse de la Conférence a donné lecture de la Déclaration, en soulignant que ce document « reflète la perception commune des États participants ». Après l'adoption de la Déclaration par acclamation, le président a prononcé le discours de clôture et a ainsi déclaré close la Conférence de Hautes Parties Contractantes.

Déclaration du 5 décembre 2001

Le résultat de la Conférence prend la forme d'une Déclaration exprimant le consensus des « États parties participants ». Ce texte détaillé constitue un message capital, émanant d'un nombre important d'États de la communauté internationale. Conformément à l'approche suivie dans tout le processus qui a abouti à la Conférence, la Déclaration a une orientation juridique et humanitaire.

Sur le plan du droit, elle se fonde sur la Quatrième Convention de Genève afin de rappeler, en faisant usage de la terminologie même de la Convention, l'ensemble des règles humanitaires pertinentes et applicables au « territoire palestinien occupé, y compris Jérusalem-Est », sans exclure les cas directement liés à cette occupation[15]. Le texte de la Déclaration est articulé en trois parties principales:

- un rappel général des obligations de tous les États parties, sur la base de l'article premier commun aux Conventions de Genève,
- un rappel des obligations respectives des parties au conflit (de toutes les parties – Israéliens comme Palestiniens – et de tous les niveaux – autorités

14 Le CICR a souligné « que les groupes armés palestiniens qui opèrent à l'intérieur ou à l'extérieur des territoires occupés sont également liés par les principes du droit international humanitaire (...). Ces règles stipulent notamment que seuls des objectifs militaires peuvent être attaqués. Par conséquent, les attaques indiscriminées – telles que des attentats à l'explosif par des groupes ou individus palestiniens armés dirigés contre des civils israéliens ou les actes ayant pour but de répandre la terreur au sein de la population civile – sont absolument et inconditionnellement interdites (...). Les manifestations de la population civile sous occupation contre les forces occupantes, les émeutes, ne sont pas des actes de guerre. Par conséquent, il ne convient pas d'y faire face par des méthodes ou des moyens militaires. Lorsqu'elles sont confrontées à la population civile, les forces israéliennes doivent faire preuve de retenue (...) ». Pour le texte intégral, voir annexe 2.

15 Il faut relever à ce sujet que la Déclaration se rapporte au conflit israélo-arabe et au contexte israélo-palestinien. Elle concerne donc la situation dans les territoires palestiniens occupés, y compris Jérusalem-Est, mais n'ignore pas les conséquences de cette situation au-delà de cette zone, en particulier en Israël: par exemple, les actes de terrorisme commis par des personnes provenant des territoires occupés et qui font donc déborder l'usage de la force et la violence au-delà de ces territoires, ou encore la détention (illégale) de prisonniers palestiniens en Israël.

comme individus), sur la base des règles humanitaires conventionnelles ou coutumières inscrites notamment dans la Quatrième Convention de Genève,

- et un rappel des obligations spécifiques d'Israël en tant que Puissance occupante, sur la base des dispositions de la Quatrième Convention de Genève.

L'orientation humanitaire de la Déclaration apparaît dans son souci premier de la protection des victimes (sans exclusion et donc sans indication spécifique de nationalité) et aussi dans le fait qu'aucune question politique n'y est traitée (hormis un encouragement à la reprise des négociations afin d'aboutir à une paix juste et durable). La substance même de ce document porte ainsi sur l'urgence, à savoir la nécessité de protéger tous les civils des effets de la violence. Loin de constituer un «substitut» ou une «entrave» aux efforts de paix[16], le message délivré par les États parties se présente comme un code de conduite (rassemblant les règles universelles pertinentes dans le cas d'espèce) à mettre immédiatement en œuvre dans une situation humanitaire grave et ce, sans attendre qu'un accord de paix ait mis fin au conflit et à l'occupation.

Pour ce qui est du suivi, à la différence de la Conférence du 15 juillet 1999, il n'est pas prévu de nouvelle réunion. Le suivi de la Conférence réside essentiellement dans la mise en œuvre des règles rappelées dans la Déclaration, avec un souci d'exhaustivité, par tous ceux qu'elles lient (qu'ils aient ou non participé à la Conférence). La Déclaration ne met pas sur pied de nouveaux mécanismes, et se limite à soutenir le fonctionnement actuel ou la mise en œuvre éventuelle de ceux qui existent déjà (y compris les mécanismes extra-conventionnels qui peuvent se référer à la Quatrième Convention et contribuent à son application ou à la réalisation de ses objectifs généraux), et bien sûr de ceux que prévoit la Quatrième Convention.

16 À cet égard, la déclaration du Canada à la Conférence est significative: «Vous vous rappellerez que nous n'avons pas assisté à la première réunion en juillet 1999, parce que nous pensions qu'une telle réunion pourrait s'avérer nuisible au processus de paix et risquer de politiser les Conventions de Genève. (...). La présence du Canada aujourd'hui démontre donc avec plus d'intensité notre engagement ferme envers le droit international humanitaire, consacré dans les Conventions de Genève. (...) Nous sommes venus parce qu'il est d'autant plus urgent aujourd'hui que les parties mettent fin à la violence et reprennent les négociations». On peut citer également la conclusion du discours de l'UE, qui rend «hommage à tous ceux qui, du côté palestinien aussi bien que du côté israélien, continuent à œuvrer pour la paix et la réconciliation. J'ai l'espoir que cette conférence les encouragera dans leur détermination».

Conclusion: mettre en œuvre l'article premier commun aux Conventions de Genève

Sur le plan diplomatique, la Conférence du 5 décembre 2001 constitue certainement un événement important: elle peut être considérée, en quelque sorte, comme la plus importante démarche collective entreprise à ce jour en faveur du respect du droit international humanitaire dans une crise spécifique. La communauté internationale n'a pas tardé à saluer la tenue de cette Conférence: le 21 décembre 2001, l'Assemblée générale de l'ONU a adopté, dans une session extraordinaire d'urgence, la résolution ES-10/9 qui se félicite de la tenue de la Conférence du 5 décembre 2001 et qui soutient activement et sans réserve le contenu de sa Déclaration. Le résultat du vote permet d'élargir encore le cercle des États soutenant la Déclaration, puisque 20 États non participants à la Conférence ont exprimé un vote positif[17].

Sur le plan humanitaire proprement dit, la réalité du terrain empêche évidemment de parler de succès, sinon en ce qui concerne la mise en évidence de la dimension humanitaire (et non uniquement sécuritaire ou politique) de la crise au Proche-Orient et, en général, la diffusion du droit. Le président de la Conférence l'a lui-même souligné: s'il est vrai que la Conférence constitue un événement unique, car aucun suivi institutionnel spécifique n'a été prévu, elle ne doit pas rester sans lendemain. Concrètement, le succès de la Conférence se mesurera, comme son objet, en termes humanitaires: le respect de la Quatrième Convention[18] – ou du moins une amélioration effective de la situation humanitaire sur le terrain (grâce à un meilleur respect du droit) et une action plus résolue et plus efficace pour le promouvoir et le défendre.

Sur le plan juridique, comme cela a déjà été signalé en introduction, la Conférence confirme, voire introduit, une interprétation extensive de l'article premier commun aux Conventions de Genève. En outre, elle constitue une percée et un nouveau développement dans les efforts déployés pour rendre effective l'obligation qu'ont tous les États parties de «faire respecter» ces Conventions. En se plaçant sur le terrain exclusif du droit et en évitant ainsi

17 Le résultat du vote était de 133 oui, quatre non (dont les deux États qui avaient expressément refusé de participer à la Conférence) et 16 abstentions (dont deux États qui avaient pris part à la Conférence).

18 Le président suisse de la Conférence a ainsi déclaré dans son discours de clôture: «L'espoir que j'exprime maintenant en votre nom à tous est que cette Déclaration sera suivie d'effets concrets sur la situation humanitaire dans le contexte israélo-palestinien. C'est à cela que se mesurera le succès ou non de la Conférence de ce jour, et non à la question de savoir qui est venu, qui n'est pas venu, ou ce qui aurait pu être fait autrement ou ce qui devrait être fait en plus, ici ou ailleurs. Le véritable suivi de cette Confé-rence devra être la mise en œuvre du droit humanitaire. Tout simplement.»

une condamnation analogue à celles qu'expriment des enceintes politiques, les États ont ainsi montré, voire ouvert, une voie permettant de donner une réponse humanitaire sur la base des règles internationales existantes. Il est certainement trop tôt pour prévoir quelle sera la tendance qui se dégagera à l'avenir; il n'en reste pas moins qu'un pas important a peut-être été fait le 5 décembre 2001. Comme l'a déclaré le président suisse de la Conférence: « L'avenir dira comment les États parties, sur la base notamment de l'expérience de ce jour, voudront mettre en œuvre leur responsabilité, conformément à l'article premier des Conventions de Genève, pour apporter ensemble une réponse humanitaire à une situation de crise spécifique » [19].

La Conférence du 5 décembre 2001 a donc donné une illustration des possibilités offertes par l'article premier commun aux Conventions de Genève. Cette Conférence, que les participants ont voulue en raison de l'existence persistante de violations et parce que les instruments de protection disponibles n'étaient pas en mesure de fonctionner correctement, a également une fois de plus souligné – si cela était encore nécessaire – que le droit international humanitaire présente des lacunes non pas quant à ses règles mais au niveau de son application. Il s'agit en effet non pas tant de développer des nouvelles normes, mais de tout simplement les appliquer dans les faits. Il s'agit en outre d'éviter la création artificielle d'un vide juridique en refusant unilatéralement l'applicabilité des règles existantes, et de renforcer le cadre juridique à travers la ratification d'instruments supplémentaires. Dans le cas envisagé, l'application immédiate du Protocole I aux Conventions de Genève et le recours à la Commission internationale d'établissement des faits (prévue par l'art. 90 de ce Protocole) seraient indéniablement utiles pour faire respecter le droit international humanitaire ainsi que pour ramener la confiance et réprimer les violations commises – mais ces moyens ne sont formellement pas applicables du fait d'un défaut de ratification. Ce qui paraît aujourd'hui comme hier peu probable en raison du contexte politique n'en garde pas moins sa pleine et entière validité sur le plan humanitaire. Des mécanismes universels demeurent toujours disponibles pour identifier, réprimer et donc prévenir des violations du droit international en matière de protection de la population civile dans les situations de conflit armé.

19 Discours de clôture du président suisse de la Conférence.

Annexe 1

Conférence de Hautes Parties Contractantes à la Quatrième Convention de Genève

Genève, 5 décembre 2001

Déclaration

1. Cette Déclaration reflète la communauté de vues à laquelle sont parvenues les Hautes Parties Contractantes participant à nouvelle réunion de la Conférence de Hautes Parties Contractantes à la Quatrième Convention de Genève. La Conférence du 15 juillet 1999, recommandée par la Résolution ES-10/6 de l'Assemblée générale des Nations Unies réunie en session spéciale d'urgence, a produit la déclaration (statement) suivante:

> «...Les Hautes Parties Contractantes participantes ont réaffirmé que la Quatrième Convention de Genève était applicable au Territoire Palestinien Occupé, y compris Jérusalem-Est. En outre, elles ont réaffirmé la nécessité de respecter intégralement les dispositions de ladite Convention sur ce Territoire. Compte tenu de l'amélioration du climat dans l'ensemble du Proche-Orient, la Conférence a été déclarée close étant entendu qu'elle se réunirait à nouveau à la lumière de consultations sur l'évolution de la situation humanitaire sur le terrain.»

2. Les Hautes Parties Contractantes participantes expriment leur profonde préoccupation au sujet de l'aggravation de la situation humanitaire sur le terrain. Elles déplorent le nombre élevé de victimes civiles, en particulier parmi les enfants et d'autres groupes vulnérables, causés par l'usage indiscriminé ou disproportionné de la force et causés par un manque de respect du droit international humanitaire.

3. Prenant en compte l'article 1er de la Quatrième Convention de Genève de 1949 et ayant à l'esprit la Résolution ES-10/7 de l'Assemblée générale des Nations Unies, les Hautes Parties Contractantes participantes réaffirment l'applicabilité de la Convention au Territoire Palestinien Occupé, y compris Jérusalem-Est, et redisent la nécessité de respecter pleinement les dispositions de ladite Convention sur ce Territoire. Par la présente Déclaration, elles rappellent en particulier les obligations respectives, au titre de la Convention, de toutes les Hautes Parties Contractantes (par. 4 à 7), des parties au conflit (par. 8 à 11) et de l'État d'Israël en tant que Puissance occupante (par. 12 à 15).

4. Les Hautes Parties Contractantes participantes appellent toutes les parties, impliquées directement dans le conflit ou non, de respecter et de faire respecter les Conventions de Genève en toutes circonstances, de les diffuser et de prendre toutes les mesures nécessaires pour prévenir et faire cesser les infractions aux Conventions. Elles réaffirment les obligations des Hautes Parties Contractantes au titre des articles 146, 147 et 148 de la Quatrième Convention de Genève concernant les sanctions pénales, les infractions graves et les responsabilités des Hautes Parties Contractantes.
5. Les Hautes Parties Contractantes participantes soulignent que la Quatrième Convention de Genève, qui prend pleinement en compte les impératifs et nécessités militaires doit être respectée en toutes circonstances.
6. Les Hautes Parties Contractantes participantes estiment nécessaire de rappeler les règles humanitaires fondamentales concernant les personnes qui ne participent pas directement aux hostilités, qui doivent être traitées avec humanité, sans aucune discrimination, et de rappeler l'interdiction, en tout temps et en tout lieu, des atteintes à la vie et à l'intégrité corporelle, de la torture, des atteintes à la dignité des personnes et des exécutions arbitraires ou extra-judiciaires.
7. Les Hautes Parties Contractantes participantes expriment leur soutien pour l'engagement des sociétés de secours humanitaires sur le terrain pour assurer que les blessés et les malades reçoivent une assistance, et pour les activités du Comité international de la Croix-Rouge (CICR), de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine (UNRWA) et d'autres organisations humanitaires impartiales. Elles expriment également leur soutien pour les efforts du Haut Commissaire des Nations Unies aux droits de l'homme et des Rapporteurs spéciaux de l'ONU en vue d'évaluer la situation sur le terrain, et elles prennent note des rapports et recommandations du Haut Commissaire aux droits de l'homme (E/CN/4/2001/114) et de la Commission d'enquête (E/CN/4/2001/121).
8. Les Hautes Parties Contractantes participantes appellent les parties au conflit à assurer le respect et la protection de la population civile et des biens civils et à opérer en tous temps une distinction entre la population civile et les combattants ainsi qu'entre les biens civils et les objectifs militaires. Elles appellent aussi les parties à s'abstenir de toutes brutalités ou violences contre la population civile, qu'elles soient le fait d'agents civils ou d'agents militaires, et à s'abstenir d'exposer la po-pulation civile aux opérations militaires.
9. Les Hautes Parties Contractantes participantes appellent les parties au conflit à respecter et à protéger en tous temps les établissements fixes et les

formations sanitaires mobiles des Services de santé, et de faciliter les opérations des sociétés de secours humanitaires sur le terrain, y compris le libre passage de leurs ambulances et personnel médical, et de garantir leur protection.

10. Les Hautes Parties Contractantes participantes appellent les parties au conflit à faciliter les activités du CICR dans le cadre du rôle spécifique qui lui est conféré par les Conventions de Genève, de l'UNRWA et d'autres organismes humanitaires impartiaux. Elles reconnaissent et soutiennent leurs efforts en vue d'évaluer et d'améliorer la situation humanitaire sur le terrain. Elles invitent les parties au conflit à coopérer avec les observateurs indépendants et impartiaux tels que la Présence temporaire internationale dans la ville d'Hébron (TIPH).

11. Les Hautes Parties Contractantes participantes appellent les parties au conflit à considérer à nouveau les suggestions faites lors de la réunion d'experts de Hautes Parties Contractantes en 1998 afin de résoudre des problèmes d'application de la Quatrième Convention de Genève et de respecter et faire respecter en toutes circonstances les règles du droit international humanitaire, et de coopérer dans le cadre de contacts directs, y compris les procédures d'enquête et de conciliation. Elles encouragent tous les arrangements ou accords soutenus par les parties au conflit au sujet du déploiement d'observateurs indépendants et impartiaux afin de relever, entre autres, des infractions à la Quatrième Convention de Genève, en tant que mesure de protection et d'établissement de la confiance, dans le but d'assurer la mise en œuvre effective des règles humanitaires.

12. Les Hautes Parties Contractantes participantes appellent la Puissance occupante à respecter pleinement et effectivement la Quatrième Convention de Genève dans le Territoire Palestinien Occupé, y compris Jérusalem-Est, et de s'abstenir de commettre toute violation de la Convention. Elles réaffirment l'illégalité des colonies de peuplement dans lesdits territoires ainsi que de leur extension. Elles rappellent la nécessité de sauvegarder et de garantir les droits d'accès aux Lieux saints pour tous les habitants.

13. Les Hautes Parties Contractantes participantes appellent la Puissance occupante à s'abstenir immédiatement de commettre des infractions graves qui comportent l'un ou l'autre des actes mentionnés dans l'article 147 de la Quatrième Convention de Genève, tels que l'homicide intentionnel, la torture, la déportation illégale, le fait de priver (une personne protégée) de son droit d'être jugée régulièrement et impartialement, la destruction et

l'appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire. Les Hautes Parties Contractantes participantes rappellent que selon l'article 148 aucune Haute Partie Contractante ne pourra s'exonérer elle-même des responsabilités encourues par elle-même en raison des infractions graves. Les Hautes Parties Contractantes participantes rappellent également les respon-sabilités de la Puissances occupante selon l'article 29 de la Quatrième Convention de Genève concernant le traitement des personnes protégées.

14. Les Hautes Parties Contractantes participantes appellent également la Puissance occupante à s'abstenir de commettre toute autre violation de la Convention, en particulier les mesures de représailles à l'égard des personnes protégées et de leurs biens, les peines collectives, les restrictions injustifiées de la liberté de mouvement, et à traiter les personnes protégées avec humanité, sans aucune distinction de caractère défavorable basée sur la race, la couleur, la religion ou la croyance, le sexe, la naissance ou la fortune, ou tout autre critère analogue.

15. Les Hautes Parties Contractantes participantes appellent la Puissance occupante à faciliter les opérations de secours et le libre passage du CICR, de l'UNRWA ainsi que de tout autre organisme humanitaire impartial, à assurer leur protection et, si le cas se présente, à s'abstenir de percevoir des taxes et d'imposer des charges financières indues à ces organismes.

16. Les Hautes Parties Contractantes participantes soulignent que le respect de la Quatrième Convention de Genève et du droit international humanitaire en général est essentiel pour améliorer la situation humanitaire sur le terrain et pour réaliser une paix juste et durable. Les Hautes Parties Contractantes participantes invitent les parties concernées à mettre fin au conflit par le biais de la négociation et à résoudre leurs différends en accord avec le droit international applicable.

17. Les Hautes Parties Contractantes participantes saluent et encouragent les initiatives prises par des États Parties, aussi bien individuellement que collectivement, conformément à l'article 1 de la Convention et visant à faire respecter la Convention, et elles soulignent la nécessité pour les Parties d'assurer un suivi à la mise en œuvre de la présente Déclaration.

18. Les Hautes Parties Contractantes participantes expriment leur gratitude au Dépositaire de la Quatrième Convention de Genève pour ses bons services et offices.

Annex 1

Conference of High Contracting Parties to the Fourth Geneva Convention

Geneva, 5 December 2001

Declaration

1. This Declaration reflects the common understanding reached by the participating High Contracting Parties to the reconvened Conference of High Contracting Parties to the Fourth Geneva Convention. The Conference of 15 July 1999, recommended by United Nations' General Assembly Resolution ES-10/6 in an Emergency Special Session, issued a statement as follows:

> "...The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory. Taking into consideration the improved atmosphere in the Middle East as a whole, the Conference was adjourned on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field."

2. The participating High Contracting Parties express deep concern about the deterioration of the humanitarian situation in the field. They deplore the great number of civilian victims, in particular children and other vulnerable groups, due to indiscriminate or disproportionate use of force and due to lack of respect for international humanitarian law.

3. Taking into account art. 1 of the Fourth Geneva Convention of 1949 and bearing in mind the United Nations' General Assembly Resolution ES-10/7, the participating High Contracting Parties reaffirm the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory. Through the present Declaration, they recall in particular the respective obligations under the Convention of all High Contracting Parties (para 4-7), of the parties to the conflict (para 8-11) and of the State of Israel as the Occupying Power (para 12-15).

4. The participating High Contracting Parties call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures

necessary for the prevention and suppression of breaches of the Conventions. They reaffirm the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties.

5. The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.

6. The participating High Contracting Parties see the need to recall basic humanitarian rules with regard to persons taking no active part in the hostilities, which shall be treated humanely without any discrimination, and to recall the prohibition at any time and in any place whatsoever of acts of violence to life and person, torture, outrages upon personal dignity and of arbitrary or extra-judiciary executions.

7. The participating High Contracting Parties express their support for the endeavours of the humanitarian relief societies in the field in ensuring that the wounded and sick receive assistance, and for the activities of the International Committee of the Red Cross (ICRC), the United Nations Relief and Works Agency in the Near East (UNRWA) and of other impartial humanitarian organisations. They also express their support for the efforts of the United Nations High Commissioner for Human Rights and of UN Special Rapporteurs in order to assess the situation in the field and they take note of the reports and recommandations of the High Commissioner for Human Rights (E/CN/4/2001/114) and of the Commission of Inquiry (E/CN/4/2001/121).

8. The participating High Contracting Parties call upon the parties to the conflict to ensure respect for and protection of the civilian population and civilian objects and to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. They also call upon the parties to abstain from any measures of brutality and violence against the civilian population whether applied by civilian or military agents and to abstain from exposing the civilian population to military operations.

9. The participating High Contracting Parties call upon the parties to the conflict to respect and to protect at all times the fixed establishments and mobile medical units of the Medical Services and to facilitate the operations of the humanitarian relief societies in the field, including the free passage of their ambulances and medical personnel, and to guarantee their protection.

10. The participating High Contracting Parties call upon the parties to the conflict to facilitate the activities of the ICRC, within its particular role conferred upon it by the Geneva Conventions, the UNRWA and of other impartial humanitarian organisations. They recognise and support their efforts to assess and to improve the humanitarian situation in the field. They invite the parties to the conflict to co-operate with independent and impartial observers such as the Temporary International Presence in the City of Hebron (TIPH).
11. The participating High Contracting Parties call upon the parties to the conflict to consider anew suggestions made at the meeting of experts of High Contracting Parties in 1998 to resolve problems of implementation of the Fourth Geneva Convention and to respect and to ensure respect in all circumstances for the rules of international humanitarian law and to co-operate within the framework of direct contacts, including procedures of inquiry and of conciliation. They encourage any arrangements and agreements supported by the parties to the conflict on the deployment of independent and impartial observers to monitor, inter alia, breaches of the Fourth Geneva Convention as a protection and confidence building measure, with the aim to ensure effectiveness of humanitarian rules.
12. The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof. They recall the need to safeguard and guarantee the rights and access of all inhabitants to the Holy Places.
13. The participating High Contracting Parties call upon the Occupying Power to immediately refrain from committing grave breaches involving any of the acts mentioned in art. 147 of the Fourth Geneva Convention, such as wilful killing, torture, unlawful deportation, wilful depriving of the rights of fair and regular trial, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The participating High Contracting Parties recall that according to art. 148 no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches. The participating High Contracting Parties also recall the responsibilities of the Occupying Power according to art. 29 of the Fourth Geneva Convention for the treatment of protected persons.

14. The participating High Contracting Parties also call upon the Occupying Power to refrain from perpetrating any other violation of the Convention, in particular reprisals against protected persons and their property, collective penalties, unjustified restrictions of free movement, and to treat the protected persons humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
15. The participating High Contracting Parties call upon the Occupying Power to facilitate the relief operations and free passage of the ICRC, UNRWA, as well as any other impartial humanitarian organisation, to guarantee their protection and, where applicable, to refrain from levying taxes and imposing undue financial burdens on these organisations.
16. The participating High Contracting Parties stress that respect for the Fourth Geneva Convention and international humanitarian law in general is essential to improve the humanitarian situation in the field and to achieve a just and lasting peace. The participating High Contracting Parties invite the parties concerned to bring the conflict to an end by means of negotiation and to settle their disputes in accordance with applicable international law.
17. The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.
18. The participating High Contracting Parties express their gratitude to the Depositary of the Fourth Geneva Convention for its good services and offices.

Annexe 2

Conférence de Hautes Parties Contractantes à la Quatrième Convention de Genève

Genève, 5 décembre 2001

Déclaration du Comité international de la Croix-Rouge

1. En vertu des dispositions pertinentes du droit international humanitaire et du mandat qui lui a été conféré par les États parties aux Conventions de Genève de 1949, le Comité international de la Croix-Rouge (CICR) a établi en 1967 une présence permanente en Israël, dans les pays arabes voisins et dans les territoires occupés, afin de mener à bien ses activités humanitaires dans la région et d'œuvrer à l'application fidèle du droit international humanitaire.

2. Conformément à diverses résolutions adoptées par l'Assemblée générale et le Conseil de sécurité des Nations Unies et par la Conférence internationale de la Croix-Rouge et du Croissant-Rouge, qui reflètent la position de la communauté internationale, le CICR a toujours affirmé l'applicabilité *de jure* de la IVe Convention de Genève aux territoires occupés depuis 1967 par l'État d'Israël, y compris Jérusalem-Est. Cette Convention, qui a été ratifiée par Israël en 1951, reste pleinement applicable et pertinente dans le contexte de violence actuel. En sa qualité de Puissance occupante, Israël est également lié par d'autres règles de droit coutumier relatives à l'occupation, qui sont énoncées dans le Règlement annexé à la Convention de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre.

3. De manière générale, la IVe Convention de Genève protège la population civile en territoire occupé contre tout abus de la part de la Puissance occupante. Elle le fait notamment en garantissant que cette population ne fera l'objet d'aucune discrimination, qu'elle sera protégée contre toute forme de violence et que, en dépit de l'occupation et de la guerre, elle aura la possibilité de mener une vie aussi normale que possible, conformément à ses propres lois, à sa culture et à ses traditions. Si le droit humanitaire confère certains droits à la Puissance occupante, il impose également des limites à l'étendue de ses pouvoirs. N'étant que l'administrateur temporaire du territoire occupé, la Puissance occupante ne doit pas s'ingérer dans les structures économiques et sociales, l'organisation, le système juridique ou la démographie qui existaient préalablement à l'occupation. Elle doit également garantir la pro-

tection, la sécurité et le bien-être de la population qui vit sous occupation. Cela signifie que le développement normal du territoire doit être autorisé si l'occupation dure pendant une période prolongée.

4. Plus précisément, la IVe Convention de Genève énonce des règles qui ont pour but de sauvegarder la dignité et l'intégrité physique des personnes vivant sous occupation, y compris les détenus. Elle interdit toute forme de mauvais traitements physiques ou psychiques, la contrainte, les punitions collectives, ainsi que les mesures de représailles à l'égard des personnes ou des biens protégés. Elle interdit également le transfert d'une partie de la population civile de la Puissance occupante dans le territoire occupé par elle, les transferts forcés ou la déportation de personnes protégées hors du territoire occupé, ainsi que la destruction de biens immobiliers ou personnels, sauf lorsque cette destruction est rendue absolument nécessaire par les opérations militaires.

5. À l'occasion de ses activités dans les territoires occupés par Israël, le CICR a, à maintes reprises, constaté des violations de diverses dispositions du droit international humanitaire, telles que le transfert par Israël de parties de sa population dans les territoires occupés, la destruction de maisons, le non-respect des activités médicales, ainsi que la détention de personnes protégées en dehors des territoires occupés. Certaines pratiques qui enfreignent les dispositions de la IVe Convention de Genève ont été incorporées dans des lois ou des directives administratives et consacrées par les plus hautes autorités judiciaires. Tout en appréciant les facilités qui lui ont été accordées pour la conduite de ses activités humanitaires, le CICR a régulièrement attiré l'attention des autorités israéliennes sur les souffrances de la population palestinienne et sur le lourd fardeau qu'elle supporte en raison de la politique d'occupation. Conformément à sa manière habituelle de procéder, le CICR a fait part de sa préoccupation par des démarches bilatérales et multilatérales et par des appels publics. En particulier, le CICR a fait part de son inquiétude croissante quant aux conséquences, sur le plan humanitaire, de l'établissement de colonies israéliennes dans les territoires occupés, en violation de la IVe Convention de Genève. Cette politique de colonisation a souvent impliqué la destruction de maisons palestiniennes, la confiscation de terres ou de ressources en eau, et le démembrement de fait des territoires. Les mesures prises pour étendre les colonies et protéger les colons – ce qui a entraîné la destruction de maisons, la réquisition de terres, la fermeture de certaines zones, la mise en place de barrages routiers et l'imposition de couvre-feux prolongés – ont, de plus, gravement entravé la vie quotidienne

de la population palestinienne. Toutefois, le fait que les colonies ont été créées en violation des dispositions de la IVe Convention de Genève ne signifie pas que les civils qui y résident peuvent faire l'objet d'attaques. Ils sont protégés par le droit humanitaire en tant que civils, dans la mesure où ils ne prennent pas activement part aux combats.

6. Le CICR a également attiré l'attention des autorités israéliennes sur les effets des couvre-feux prolongés et du bouclage de certaines zones par les Forces de défense israéliennes. Les restrictions de mouvement qui en découlent ont des conséquences dramatiques pour la population palestinienne tout entière. Elles entravent les activités des services médicaux d'urgence ainsi que l'accès aux soins médicaux, aux lieux de travail, aux écoles et aux lieux de culte, et ont un effet désastreux sur l'économie. Elles empêchent également, des mois durant, les familles palestiniennes de visiter leurs proches détenus en Israël. La préoccupation quant à ces pratiques a considérablement augmenté au cours des 14 derniers mois, les mesures prises pour contenir la flambée de violence ayant entraîné une nouvelle détérioration des conditions de vie de la population sous occupation.

7. Le CICR a rappelé à tous ceux qui prennent part à la violence que, lorsque la force armée est employée, le choix des moyens et des méthodes de guerre n'est pas illimité. Actuellement, compte tenu de l'intensification des affrontements armés, le CICR doit souligner que les groupes armés palestiniens qui opèrent à l'intérieur ou à l'extérieur des territoires occupés sont également liés par les principes du droit international humanitaire. Outre la IVe Convention de Genève, relative à la protection de la population civile, il existe d'autres règles et principes universellement acceptés de droit international humanitaire qui traitent de la conduite des opérations militaires. Ces règles stipulent notamment que seuls des objectifs militaires peuvent être attaqués. Par conséquent, les attaques indiscriminées – telles que des attentats à l'explosif par des groupes ou individus palestiniens armés dirigés contre des civils israéliens ou les actes ayant pour but de répandre la terreur au sein de la population civile – sont absolument et inconditionnellement interdites. Cela s'applique également aux meurtres et aux attaques dirigées par les autorités israéliennes contre des Palestiniens qui ne prennent pas directement part aux hostilités ou ne mettent pas immédiatement en danger la vie humaine. Les représailles contre les civils et leurs biens sont également interdites. Lorsqu'un objectif militaire est visé, toutes les mesures de précaution possibles doivent être prises pour limiter le nombre des victimes civiles et les dommages causés aux biens civils. Pour éviter de mettre en danger la popula-

tion civile, les personnes qui portent des armes et celles qui participent à la violence armée doivent se distinguer des civils.

8. Les manifestations de la population civile sous occupation contre les forces occupantes ou les émeutes ne sont pas des actes de guerre. Par conséquent, il ne convient pas d'y faire face par des méthodes et des moyens militaires. Lorsqu'elles sont confrontées à la population civile, les forces israéliennes doivent faire preuve de retenue: tout usage de la force doit être proportionnel, toutes les précautions nécessaires doivent être prises pour éviter de faire des victimes, et l'emploi d'armes à feu doit être strictement limité à ce qui est inévitable en tant que mesure immédiate pour protéger la vie.

9. L'accès aux services médicaux d'urgence pour toutes les personnes qui en ont besoin est également d'une importante capitale dans la situation actuelle. Un tel accès ne peut pas être retardé sans droit ou refusé. Les ambulances et le personnel médical doivent être autorisés à se déplacer en toute sécurité et ne doivent pas être empêchés de remplir leurs fonctions. Toutes les personnes qui participent à la violence doivent respecter et assister les services médicaux, qu'ils soient déployés par les forces armées, des organisations civiles, le Croissant-Rouge palestinien, le Magen David Adom, le CICR, la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge ou d'autres organisations humanitaires.

10. L'article 1 commun aux quatre Conventions de Genève stipule que les «Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances». C'est dans cette perspective qu'il s'agit de considérer la présente conférence. Le CICR s'est toujours félicité des efforts individuels et conjoints accomplis par les États parties aux Conventions de Genève pour remplir cette obligation et veiller au respect du droit international humanitaire. Ces efforts sont d'autant plus nécessaires que les violations du droit humanitaire sont bien trop répandues à travers le monde.

11. Il appartient naturellement aux États de décider des moyens utilisés pour s'acquitter de ces responsabilités juridiques et politiques. Toutefois, quels que soient ces moyens, le CICR tient à souligner que toute action qu'un État décide d'entreprendre sur le plan international doit avoir pour objectif de parvenir à des résultats pratiques et de garantir l'application du droit international humanitaire et le respect de ses dispositions, dans l'intérêt de la population protégée.

12. Au-delà de toutes considérations juridiques et compte tenu de la situation humanitaire actuelle, le CICR exhorte une fois de plus toutes les par-

ties concernées à faire tout ce qui est en leur pouvoir pour épargner la vie des civils et préserver un minimum d'humanité.

13. Pour sa part, le CICR continuera à faire tout ce qui est en son pouvoir pour assister et protéger toutes les victimes, conformément à son mandat et aux principes de neutralité, d'impartialité et d'indépendance qui régissent son action humanitaire. Il compte sur le soutien total des parties concernées pour faire respecter les règles du droit humanitaire et faciliter les activités humanitaires, qui peuvent également aider à préparer le terrain pour l'instauration de la paix entre tous les peuples et toutes les nations de la région.

14. La détérioration constante de la situation humanitaire au cours des récents mois et, en particulier, les événements tragiques des derniers jours ont mis en évidence la nécessité de rompre la spirale de la violence et de rétablir le respect du droit international humanitaire.

Annex 2

Conference of High Contracting Parties to the Fourth Geneva Convention

Geneva, 5 December 2001

Statement by the International Committee of the Red Cross

1. Pursuant to the relevant provisions of international humanitarian law and to the mandate conferred on it by the States party to the 1949 Geneva Conventions, the International Committee of the Red Cross (ICRC) established a permanent presence in Israel, the neighbouring Arab countries and the occupied territories in 1967 with a view to carrying out its humanitarian tasks in the region and to working for the faithful application of international humanitarian law.

2. In accordance with a number of resolutions adopted by the United Nations General Assembly and Security Council and by the International Conference of the Red Cross and Red Crescent, which reflect the view of the international community, the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. This Convention, ratified by Israel in 1951, remains fully applicable and relevant in the current context of violence. As an Occupying Power, Israel is also bound by other customary rules relating to occupation, expressed in the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.

3. In general terms, the Fourth Geneva Convention protects the civilian population of occupied territories against abuses on the part of an Occupying Power, in particular by ensuring that it is not discriminated against, that it is protected against all forms of violence, and that despite occupation and war it is allowed to live as normal a life as possible, in accordance with its own laws, culture and traditions. While humanitarian law confers certain rights on the Occupying Power, it also imposes limits on the scope of its powers. Being only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography. It must ensure the protection, security and welfare of the population living under occupation. This also implies allowing the normal development of the territory, if the occupation lasts for a prolonged period of time.

4. More precisely, the Fourth Geneva Convention sets out rules aimed at safeguarding the dignity and physical integrity of persons living under occupation, including detainees. It prohibits all forms of physical and mental ill-treatment and coercion, collective punishment, and reprisals against protected persons or property. It also prohibits the transfer of parts of the Occupying Power's civilian population into the occupied territory, forcible transfer or deportation of protected persons from the occupied territory, and destruction of real or personal property, except when such destruction is rendered absolutely necessary by military operations.

5. In the course of its activities in the territories occupied by Israel, the ICRC has repeatedly noted breaches of various provisions of international humanitarian law, such as the transfer by Israel of parts of its population into the occupied territories, the destruction of houses, failure to respect medical activities, and detention of protected persons outside the occupied territories. Certain practices which contravene the Fourth Geneva Convention have been incorporated into laws and administrative guidelines and have been sanctioned by the highest judicial authorities. While acknowledging the facilities it has been granted for the conduct of its humanitarian tasks, the ICRC has regularly drawn the attention of the Israeli authorities to the suffering and the heavy burden borne by the Palestinian population owing to the occupation policy and, in line with its standard practice, has increasingly expressed its concern through bilateral and multilateral representations and in public appeals. In particular, the ICRC has expressed growing concern about the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, in violation of the Fourth Geneva Convention. The settlement policy has often meant the destruction of Palestinian homes, the confiscation of land and water resources and the parcelling out of the territories. Measures taken to extend the settlements and to protect the settlers, entailing the destruction of houses, land requisitions, the sealing-off of areas, roadblocks and the imposition of long curfews, have also seriously hindered the daily life of the Palestinian population. However, the fact that settlements have been established in violation of the provisions of the Fourth Geneva Convention does not mean that civilians residing in those settlements can be the object of attack. They are protected by humanitarian law as civilians as long as they do not take an active part in fighting.

6. The ICRC has also drawn the attention of the Israeli authorities to the effects of prolonged curfews and the sealing-off of certain areas by the Israel Defense Forces. The resulting restrictions on movements have disastrous consequences for the entire Palestinian population. They hamper the activities of emergency medical services as well as access to health care, workplaces, schools and places of worship, and have a devastating effect on the economy. They also prevent, for months on end, Palestinian families from visiting relatives detained in Israel. The concern caused by these practices has grown considerably during the past 14 months as measures taken to contain the upsurge of violence have led to a further deterioration in the living conditions of the population under occupation.

7. The ICRC has reminded all those taking part in the violence that whenever armed force is used the choice of means and methods employed is not unlimited. Today, in view of the sharp increase in armed confrontations, the ICRC has to stress that Palestinian armed groups operating within or outside the occupied territories are also bound by the principles of international humanitarian law. Apart from the Fourth Geneva Convention, which relates to the protection of the civilian population, there are other universally accepted rules and principles of international humanitarian law that deal with the conduct of military operations. They stipulate in particular that only military objectives may be attacked. Thus indiscriminate attacks, such as bomb attacks by Palestinian individuals or armed groups against Israeli civilians, and acts intended to spread terror among the civilian population are absolutely and unconditionally prohibited. The same applies to targeted attacks on and the killing of Palestinian individuals by the Israeli authorities while those individuals are not directly taking part in the hostilities or immediately endangering human life. Reprisals against civilians and their property are also prohibited. When a military objective is targeted, all feasible precautions must be taken to minimize civilian casualties and damage to civilian property. To avoid endangering the civilian population, those bearing weapons and those taking part in armed violence must distinguish themselves from civilians.

8. Demonstrations against the occupying forces by the civilian population under occupation or stand-offs between them are not acts of war. They should therefore not be dealt with by military methods and means. When faced with the civilian population, Israeli forces must exercise restraint: any use of force must be proportionate, all necessary precautions must be taken to avoid casualties, and the lethal use of firearms must be strictly limited to what is unavoidable as an immediate measure to protect life.

9. Access to emergency medical services for all those in need is also of paramount importance in the current situation. Such access must not be unduly delayed or denied. Ambulances and medical personnel must be allowed to move about unharmed and must not be prevented from discharging their medical duties. All those taking part in the violence must respect and assist the medical services, whether deployed by the armed forces, civilian organizations, the Palestine Red Crescent Society, the Magen David Adom, the ICRC, the International Federation of Red Cross and Red Crescent Societies or other humanitarian organizations.

10. Article 1 common to the four Geneva Conventions stipulates that the "High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances". This conference is to be viewed within that context. The ICRC has always welcomed all individual and joint efforts made by States party to the Geneva Conventions to fulfil this obligation and ensure respect for international humanitarian law. These efforts are all the more vital as violations of humanitarian law are far too common around the globe.

11. The means used to meet these legal and political responsibilities are naturally a matter to be decided upon by States. Whatever the means chosen, however, the ICRC wishes to emphasize that any action States may decide to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population.

12. Beyond all legal considerations and in view of the current humanitarian situation, the ICRC again calls upon all parties concerned to make every possible effort to spare civilian lives and preserve a measure of humanity.

13. For its part, the ICRC will continue to do its utmost to assist and protect all victims in accordance with its mandate and with the principles of neutrality, impartiality and independence which govern its humanitarian work. It counts on the full support of the parties concerned in promoting compliance with the humanitarian rules and facilitating humanitarian activities, which may also help pave the way towards the establishment of peace between all peoples and nations in the region.

14. The steady deterioration of the humanitarian situation over the last few months and, in particular, the tragic events of the past few days have highlighted the need to break the spiral of violence and restore respect for international humanitarian law.

Protection of cultural property during hostilities: Meeting of experts in Latin America

JAN HLADÍK*

The Advisory Service on International Humanitarian Law of the International Committee of the Red Cross (ICRC) organized a Regional Expert Meeting for Latin American Countries on 13 and 14 May 2002 in Lima (Peru) on the subject "To protect cultural property in the event of armed conflict: implementation of international regulations in this field at national level". The meeting was held with the support of the Peruvian authorities, the National Institute of Culture and the National Commission for the Study and Application of International Humanitarian Law. After a previous expert meeting on the protection of cultural property during hostilities, which took place in Chavannes-de-Bogis (Geneva) on 5 and 6 October 2000,[1] this was the first decentralized meeting.

The main aims of the meeting were to spread knowledge of international regulations on the protection of objects and cultural property in the event of armed conflict; to share information and consider technical methods used by certain countries with a view to identifying and inventorying cultural property and adopting measures to safeguard and protect it during such situations, as well as sanctions for violations of the relevant rules; to facilitate exchanges of information between the competent national authorities and entities in Latin America; and to disseminate the *Practical Advice for the Protection of Cultural Property in the Event of Armed Conflict*, published by the ICRC as a result of the October 2000 expert meeting in Geneva.[2] This advice is an essential aid to motivate and guide the national authorities and committees in the implementation of humanitarian law in this field.

* Programme Specialist, International Standards Section, Division of Cultural Heritage, UNESCO. The author is responsible for the choice and presentation of the facts contained in this article and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

Of the Latin American countries, Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela took part in the meeting.[3] It was also attended by Spain.[4]

The first day was devoted to general presentations and the national experience of Argentina, El Salvador and Spain. It was brought to a close with a presentation on the dissemination within armed forces of rules on the protection of cultural property in the event of armed conflict.

The second day of the meeting was assigned to the deliberations of three working groups: Working Group I dealt with the division of competences and responsibilities and regional and sub-regional cooperation; Working Group II considered the legal protection of cultural property, national legislation and penal issues; and Working Group III discussed dissemination and promotion of the provisions of the Convention and its Second Protocol within the general public and target groups such as the armed forces or civil servants.

Working Group II focused on specific legal issues such as legislative measures, definition of cultural property, implementation of the provisions of the Hague Convention in the event of natural disasters, use of the distinctive sign of the Hague Convention and penal sanctions for violations against cultural property. During the discussion a very interesting legal issue arose – the possibility of application of the Hague Convention to the intangible cultural heritage, a subject on which the attention of a number of Latin American countries, mindful of their oral traditions, is centred. It is not for the UNESCO Secretariat to provide an "official" interpretation of the Convention. That prerogative belongs only to States Parties thereto, and possibly to the International Court of Justice if asked to exercise its jurisdiction in a legal dispute concerning the interpretation of a treaty.[5] However, it may be argued that the definition of cultural property in Article 1 of the

1 For a more detailed report on the Geneva 2000 expert meeting, see my article "Expert Meeting on the National Implementation of Rules for the Protection of Cultural Property in the Event of Armed Conflict", *International Journal of Cultural Property*, Vol. 10, No. 1, 2001, pp. 134-136.

2 See note 1 above.

3 Of these States, Argentina, Brazil, Colombia, Cuba, El Salvador, Guatemala, Mexico, Nicaragua, Panama and Peru are party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; Brazil, Colombia, Cuba, Guatemala, Mexico, Nicaragua, Panama and Peru are party to the 1954 Protocol; and Argentina, Nicaragua and Panama are party to the 1999 Second Protocol.

4 Spain is party to the Hague Convention and its two Protocols.

5 See Article 36(2)(a) of the Statute of the International Court of Justice.

Convention (movable or immovable property of great importance to the cultural heritage of every people, buildings aimed at preserving and exhibiting movable cultural property, and centres containing monuments) does not extend to the intangible cultural heritage.

The deliberations of the working groups resulted in a presentation of recommendations.

To sum up, the Regional Expert Meeting held in Lima in May 2002 on the protection of cultural property in the event of armed conflict helped to make the Hague Convention and its Second Protocol better known in Latin America. It also provided an opportunity for information-sharing and networking by the region's cultural heritage professionals, civilian and military lawyers and civil servants. It furthermore showed the paramount importance of the close cooperation between UNESCO, the depositary of the Hague Convention and its two Protocols and the implementing agency of those agreements, and the ICRC, the implementing agency of the four Geneva Conventions of 1949 for the protection of war victims and their 1977 Additional Protocols, with a view to promoting and implementing legal instruments on protection of the cultural heritage during hostilities. Lastly, three Latin American countries (Bolivia, Costa Rica and Honduras) announced during the meeting that they are about to join the Second Protocol, thus increasing the rate of participation of Latin American countries in this agreement.

National implementation of international humanitarian law

Biannual update on national legislation and case law
January - June 2002

A) Legislation

Armenia

The Law of the Republic of Armenia on the use and protection of the emblems of the red cross and red crescent was adopted on 5 February 2002, was promulgated on 2 March 2002 and entered into force the same day.[1] It sets out rules for the emblem's use as a protective device (by the medical and religious personnel of the armed forces, troops of the Ministry of the Interior, border guards, other military formations and public authorities responsible for action in emergencies, civilian medical units, and the medical personnel of the Armenian Red Cross Society and other National Red Cross or Red Crescent Societies) and as an indicative device (by bodies belonging to the International Red Cross and Red Crescent Movement and, in peacetime, by authorized ambulances and aid stations providing free treatment to the injured and sick). The law also mentions the use by organizations that do not need any special authorization (the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies) and includes rules on the distinctive emblems and the names "Red Cross" and "Red Crescent". It states that any person who violates the law will be held accountable by virtue of the legislation of Armenia. In the event of contradictions between the law and treaties listed in the law itself, the treaties take precedence.

Azerbaijan

In application of the Law of the Republic of Azerbaijan "on the use and protection of the red cross and red crescent emblems", the law "on the changes and additions to the Criminal Code of the Republic of Azerbaijan and the

1 Not yet published on 30 June 2002.

Code of Administrative Offences of the Republic of Azerbaijan" was adopted and promulgated on 16 April 2002. It was published and entered into force on 23 June 2002.[2] Essentially, it amends the Criminal Code in order to add penalties for misuse in wartime of the distinctive signals and the names "Red Cross" and "Red Crescent" and of signs that constitute an imitation of the red cross or red crescent emblems. It also adds penalties to the Code of Administrative Offences for such misuse in time of peace.

Bolivia

Law No. 2390 on the use and protection of the red cross emblem was adopted on 14 May 2002, was promulgated on 23 May 2002 and entered into force on 19 June 2002.[3] It sets out in particular the different authorized uses of the emblem (use as a protective device by the medical and religious services of the armed forces, civilian hospitals, medical units and religious personnel attached thereto, and by the Bolivian Red Cross; use as an indicative device by this Society and by other National Red Cross or Red Crescent Societies; and use by the International Red Cross organizations) and provides for the punishment of misuse, including perfidious use in time of war, in accordance with the Criminal Code and/or the Military Criminal Code. The illegal marking with the emblem of various documents (letters, leaflets, etc.) or goods or their packaging, and the selling or putting on the market of items so marked, are subject to a specific sanction. The red crescent emblem, the names "Red Cross" and "Red Crescent" and the distinctive signals for the identification of medical units or transports are also covered by this law.

Bosnia and Herzegovina

The Law on the use and protection of the red cross emblem and the title of the Red Cross Society of Bosnia and Herzegovina was adopted on 29 April 2002. It was published on 30 May 2002 and entered into force on 8 June 2002.[4] It sets out rules on the use of the red cross and red crescent emblems

2 *Law of the Republic of Azerbaijan "on the changes and additions to the criminal code of the Republic of Azerbaijan and the code of administrative offences of the Republic of Azerbaijan" in keeping with the law "on the use and protection of the red cross and red crescent emblems"*, Azerbaijan (Official Gazette), No. 141 (3153) of 23 June 2002.

3 *Ley nº 2390: "El uso y la protección del emblema de la Cruz Roja", Gaceta Oficial de Bolivia*, 19 June 2002.

4 *Law on the Use and Protection of the Red Cross Emblem and the Title of the Red Cross Society of Bosnia and Herzegovina, Official Gazette*, Bosnia and Herzegovina, Year VI, No. 11, 30 May 2002, pp. 274-276.

and names, of the distinctive signals for the identification of medical units and transports, and of the title of the Red Cross Society of Bosnia and Herzegovina. It distinguishes between protective and indicative use and, in connection with the latter, between time of war and time of peace. It lists in detail the establishments, units, means of transport and persons entitled to use the names and emblems for different purposes, and lays down the conditions governing such use. The International Red Cross organizations are expressly permitted to use the emblems at any time for all their activities. The law also provides for the dissemination of the text of the Geneva Conventions among members of the armed forces, health workers, university students and the population in general. Misuse of the emblems and, for certain medical or religious personnel, failure to wear the armlet or carry an identity card when performing relevant duties, or failure to return such items after losing the corresponding status, are punishable by a fine. Perfidious use of an emblem or distinctive signal is considered a war crime which is to be punished in accordance with the provisions of the Criminal Code.

Burkina Faso

Decree No. 2001-180/PRES/PM/SECU of 2 May 2001 on the prohibition of anti-personnel mines in Burkina Faso, which entered into force on 2 May 2001,[5] was adopted to implement the 1997 Ottawa Convention on Landmines. The decree prohibits the development, manufacturing, production, acquisition, stockpiling, retention, offer, import, export and transfer of anti-personnel mines. It stipulates the maximum number of mines (500) that may be held by State services for training in detection, demining and destruction techniques. It also includes provisions for the operation of a fact-finding mission in Burkina Faso in accordance with Article 8 of the Convention. This decree refers to the Penal Code and stipulates sentences of one to five years, imprisonment and/or a fine for breaches of its provisions.

Cambodia

The Royal Decree on the use and protection of the red cross or red crescent emblem was adopted on 6 May 2002 and immediately entered into force. It regulates the different authorized uses of the emblems (as a protective device by the medical and religious services of the armed forces, by civilian hospitals and medical personnel, transports and units, and by religious personnel

5 *Décret n° 2001-180/PRES/PM/SECU du 2 mai 2001, Journal officiel*, No. 20, 2001.

attached to such units, and by the Cambodian Red Cross; use as an indicative device by the Cambodian Red Cross and other National Red Cross or Red Crescent Societies; and use by the international components of the Movement). It provides for punishment of misuse, including perfidious use in time of war, which qualifies as a war crime under the applicable law.

Colombia

The new Disciplinary Code (Law No. 734) was adopted on 5 February 2002, was published on 13 February 2002 and entered into force on 5 May 2002.[6] It contains disciplinary rules that must be observed by public officials. Article 34 provides in particular that every public official must "accomplish and ensure accomplishment of duties contained in international humanitarian law treaties", and Article 48 states that "committing serious violations of international humanitarian law" and "failure to obey orders and instructions contained in Presidential Orders intended to promote human rights or implement international humanitarian law" are considered to be very serious offences.

The Republic of the Congo

On 20 January 2002 the new Constitution was approved by referendum. Article 10 of the new Constitution states that no one is bound to obey an order which would obviously constitute a violation of human rights or of any public freedom. Likewise, such violations cannot be justified by citing superior orders. Article 11 states that war crimes, crimes against humanity and the crime of genocide will be punished in accordance with the law and that such crimes are not subject to statutory limitations.

Costa Rica

Law No. 8231 on the prohibition of anti-personnel mines, adopted on 18 March 2002 and promulgated on 2 April 2002, was published and entered into force on 17 April 2002.[7] This law was adopted in order to implement the 1997 Ottawa Convention on Landmines. In particular, it makes it illegal to use and to encourage the use of mines, to develop, produce, acquire, stockpile, retain, import, export, possess, transfer, trade or move about, directly or indirectly, mines, anti-handling devices, constituent parts or raw material for

6 *Código disciplinario único, Diario Oficial,* No. 44708, 13 February 2002.

7 *Ley nº 8231: prohibición de minas antipersonales, La Gaceta: Diario Oficial,* No. 73, 17 April 2002.

the manufacture thereof. It provides for the destruction of all mines and other prohibited objects in accordance with Article 4 of the Ottawa Convention and for the creation of a special unit to this end. Any violation of this law is punishable by three to six years, imprisonment regardless of any penal or civil action that may arise in connection with the death of or injury to a person, or damage to private or public property.

Law No. 8272 on penal repression to sanction war crimes and crimes against humanity, adopted on 25 April 2002 and promulgated on 2 May 2002, was published and entered into force on 22 May 2002.[8] It amends Article 7 of the Penal Code to include acts committed in contravention of international humanitarian law in the list of acts punishable under national law irrespective of the law applicable at the place where they were committed and irrespective of the nationality of the perpetrator, and adds two new articles (378 and 379) that define and fix penalties for war crimes (serious violations of or war crimes under an international humanitarian law treaty) and crimes against humanity (crimes against humanity under a human rights treaty or under the Rome Statute of the International Criminal Court).

France

Law No. 2002-268 of 26 February 2002 on cooperation with the International Criminal Court[9] spells out the conditions for French cooperation with the Court. It regulates judicial cooperation and lays down rules for the arrest and transfer of persons, as well as for the enforcement of sentences or compensation measures pronounced by the International Criminal Court. It achieves this by amending certain provisions of the Code of Penal Procedure and, in particular, by adding a series of new provisions to the code. The law also adds a chapter to Law No. 95-1 of 2 January 1995 adapting French legislation to the provisions of United Nations Security Council Resolution 827, which established the International Criminal Tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The new chapter refers to the new provisions on enforcement of prison sentences added to the Code of Penal Procedure, which also apply *mutatis mutandis*.

8 *Ley nº 8272: represión penal como castigo por los crímenes de guerra y de lesa humanidad, La Gaceta: Diario Oficial*, No. 97, 22 May 2002.

9 *Loi nº 2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale, Journal officiel de la République française*, 27 February 2002, pp. 3684-3687.

Germany

The Law to introduce the Code of Crimes against International Law was adopted on 26 June 2002, was published on 29 June 2002 and entered into force the next day.[10] It introduces into national legislation a new code to deal specifically with the repression of genocide, crimes against humanity and war crimes. The latter are split into different categories (war crimes against persons, against property and other rights, against humanitarian operations and emblems, war crimes consisting of prohibited methods of warfare and war crimes consisting of prohibited means of warfare). Two related crimes are added to the three main categories (violation of the duty of supervision and failure to report a crime). It includes provisions on general principles of criminal law that need to be adapted to the crimes covered, such as rules regarding superior orders, the responsibility of commanders and statutory limitations. General rules of criminal law are, however, also applicable to the crimes covered by this law, as far as nothing to the contrary is provided for. The law also includes provisions amending other laws, such as the Penal Code, the Code of Criminal Procedure and the law governing the constitution of courts.

The Law implementing the Rome Statute of the International Criminal Court was adopted on 21 June 2002, was published on 28 June 2002 and entered into force on 1 July 2002.[11] It provides rules and procedures for cooperation between German courts and authorities with the International Criminal Court. It includes rules on the arrest and surrender of persons, on the execution of sentences and other orders of the International Criminal Court, and on other forms of assistance pursuant to Article 93 of the Rome Statute, including requests for assistance from the Court in respect of ongoing investigation or prosecution. It amends a dozen existing laws, for instance the Code of Criminal Procedure, the law governing the constitution of courts, the law on international cooperation in criminal matters, and the two laws on cooperation with the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

10 *Gesetz zur Einführung des Völkerstrafgesetzbuches, Bundesgesetzblatt 2002,* Teil I., No. 42, 29 June 2002, pp. 2254-2260.

11 *Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes vom 17. Juli 1998, Bundesgesetzblatt 2002,* Teil I., No. 41, 28 June 2002, pp. 2144-2165.

Ireland

With the adoption of the Twenty-third Amendment of the Constitution Act, 2001, Ireland added a ninth paragraph to Section 29 of its Constitution, authorizing ratification of the Rome Statute of the International Criminal Court. This amendment was considered necessary since submission to the jurisdiction of the Court entails a partial transfer to the Court of the sovereign power of the State to administer criminal justice. The proposal was accepted by referendum on 7 June 2001 and signed by the President on 27 March 2002.

Mali

A new Penal Code was adopted on 30 June 2001, was promulgated on 20 August 2001 and entered into force the same day.[12] The first section of the code ("crimes against humanity") includes articles on genocide, crimes against humanity and war crimes. The text of the provisions defining these crimes (Articles 29 to 31) is essentially based on Articles 6 to 8 of the Rome Statute of the International Criminal Court with, however, some important differences as far as war crimes are concerned. Article 32 of the code provides for the inadmissibility of statutory limitations and for the death penalty to be used against violators.

The Netherlands

The International Criminal Court Implementation Law was promulgated on 20 June 2002 and entered into force on 1 July 2002.[13] It enables the Court to operate in the Netherlands and governs the country's cooperation with it. It includes provisions on the transfer of persons to the Court, on other forms of cooperation with the Court as provided for in Article 93 of its Statute, on the execution of sentences passed by the Court and on the assistance provided to it by the Netherlands as host State. Also promulgated on the same day was another law to adapt the Criminal Code, the Code of Criminal Procedure and other laws to the provisions of the International Criminal Court Implementation Law. This law entered into force on

12 *Loi n° 01-079 du 20 août 2001 portant code pénal, Journal officiel de la République du Mali*, 43rd year, 1 February 2002.

13 *Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof)*, Staatsblad 2002, No. 314; Decision on its entry into force: Staatsblad 2002, No. 315.

8 August 2002.[14] The second phase of the implementation of the Rome Statute by the Netherlands should be the adoption of the Bill on international offences, which was first submitted to Parliament on 19 April 2002.

Nicaragua

Law No. 418 on the protection and use of the name and emblem of the Red Cross was adopted on 26 February 2002, promulgated on 15 March 2002 and published on 22 March 2002.[15] It entered into force on the day of its publication. It sets out in particular the different authorized uses of the red cross emblem (use as a protective device by the medical and religious services of the armed forces, civilian hospitals, medical units and religious personnel attached to them, and the Nicaraguan Red Cross; use as an indicative device by this Society and by other National Red Cross or Red Crescent Societies; and use by the International Red Cross organizations) and provides for the punishment of misuse, including perfidious use in time of war, according to the applicable law. The red crescent emblem, the distinctive signals for the identification of medical units or transports, and all other emblems or signs that may be adopted in future international treaties and used for purposes similar to the red cross or red crescent are also covered by this law.

Peru

Law No. 27741 setting up education policy in the field of human rights and a national plan for their dissemination and teaching was adopted on 9 May 2002, was promulgated on 28 May 2002 and entered into force two days later for most of its provisions.[16] It provides for the compulsory teaching of the country's Constitution, human rights and international humanitarian law at all levels of the education system, civilian or military. It asks the executive power to adopt a national plan for the implementation of this provision within 120 days following publication of the law.

14 *Wet van 20 juni 2002 tot aanpassing van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten aan de Uitvoeringswet Internationaal Strafhof*, Staatsblad 2002, No. 316; Decision on its entry into force: Staatsblad 2002, No. 317.

15 *Ley nº 418 de Protección y Uso del Nombre y del Emblema de la Cruz Roja, La Gaceta: Diario Oficial*, No. 57, 22 March 2002, pp. 1995-1998.

16 *Ley nº 27741 que establece la política educativa en materia de Derechos Humanos y crea un plan nacional para su difusión y enseñanza, El Peruano: Diario Oficial*, 29 May 2002, p. 223774.

Tajikistan

On 4 February 2002, the government published a decree entitled Resolution No. 28 on the implementation of the law of the Republic of Tajikistan "on the usage and protection of the red cross and red crescent emblems and appellations in the Republic of Tajikistan". The purpose of the decree is to assign responsibilities to the various ministries for the following activities: marking medical establishments, health-care units and transports of medical equipment with the red crescent emblem in accordance with the law; providing medical personnel with identification material; producing armlets, identification cards and the equipment necessary for the sending of distinctive signals; preventing misuse of the red cross and red crescent emblems and names; designing a distinctive sign with which to mark medical and pharmaceutical establishments providing paid services; designing new road signs to mark first-aid posts and hospitals; and working out a draft law for Tajikistan "on the Red Crescent Society of Tajikistan".

Yugoslavia

The Law on Cooperation of the Federal Republic of Yugoslavia with the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was adopted and published on 11 April 2002 and entered into force the following day.[17] The law sets out rules for the provision of legal assistance to the International Tribunal, for the operation of its officers on the territory of the Federal Republic of Yugoslavia, for the transmittal of criminal proceedings or the transfer of indictees to the International Tribunal, and for the execution of its sentences by the Yugoslav authorities.

B) Case law

Belgium

On 9 January 2002, the Belgian Court of Cassation issued a decision on the case of three Rwandans — a manufacturer and two nuns — accused of violations of the 1949 Geneva Conventions, their Additional Protocols of 1977,

17 *Law on Cooperation of the Federal Republic of Yugoslavia with the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Official Gazette of the Federal Republic of Yugoslavia,* No. 18, 11 April 2002.

the Belgian law of 16 June 1993 on the punishment of grave breaches of international humanitarian law and the Rwandan Penal Code — all with regard to acts committed during the events that took place in Rwanda in 1994. The accused had argued that the decision of the Brussels Appeals Court (Accusation Chamber) of 27 June 2000 was ill-founded, as were the decisions of the Brussels Court of Assizes of 18 April, 7 June and 8 June 2001.[18] The Appeals Court had ruled that the case should proceed further and referred it to the Court of Assizes despite the fact that in the case of the manufacturer the International Criminal Tribunal for Rwanda had decided to reject the prosecutor's indictment. The accused's case was based on a number of international legal instruments, including the United Nations Charter, the Statute of the International Criminal Tribunal for Rwanda and the European Convention for the Protection of Human Rights and Fundamental Freedoms, several provisions of national law, including the Constitution, the Code of Criminal Procedure and the law of 22 March 1996 on recognition of the International Tribunal for the former Yugoslavia and of the International Tribunal for Rwanda and cooperation with these Tribunals, and on general principles of law, including the right to a fair trial, the *non bis in idem* principle, the principle that international rules directly applicable to national rules take precedence, and the principle that national law should be interpreted in accordance with international rules. The Court dismissed the case partly on the merits and partly as inadmissible.

On 16 April 2002, in a case relating to acts allegedly committed in their country by senior public officials of the Democratic Republic of the Congo, the Appeals Court of Brussels (Accusation Chamber) ruled that, as no specific indication to the contrary exists, the offences set out in the law of 16 June 1993 on the punishment of grave breaches of international humanitarian law are subject to the application of Articles 6 to 14 of the law of 17 April 1878 (Code of Criminal Procedure: prosecution of offences committed abroad) and in particular to Article 12, which requires the presence of the suspect on national territory. This not being the case for any of the four suspects, the Court declared the case inadmissible. On 26 June 2002, the same Court adopted an identical position in the case of senior public officials of Israel and Côte d'Ivoire.

18 See biannual update January-June 2001, *International Review of the Red Cross*, No. 843, p. 858.

United States

On 29 April 2002, in a civil action against a Bosnian Serb,[19] the District Court of the Northern District of Georgia found that the accused had committed and was liable to prosecution for torture, cruel, inhuman or degrading treatment, arbitrary detention, war crimes, crimes against humanity, assault and battery, false imprisonment, intentional infliction of emotional distress and civil conspiracy. More specifically regarding war crimes, the court found that the man had committed torture and other abuses against civilians in the context of an armed conflict and that he had therefore violated Article 3 common to the four Geneva Conventions of 1949 and the customary international humanitarian standards enshrined in it, and at the same time committed a grave breach of those Conventions in that he had wilfully caused great suffering or serious injury and unlawful confinement. The Court's jurisdiction regarding these matters was based on the Alien Tort Claims Act and the Torture Victim Protection Act. The Court ordered the defendant to pay damages to each of the four victims who brought the lawsuit.

Yugoslavia

On 30 November 2001, the Supreme Court of Kosovo[20] overruled a decision taken on 6 March 2001 by the District Court of Gjilan[21] and returned the case — which related to attempted murder, illegal detention of weapons and explosive material, war crimes and crimes against humanity — to the District Court for retrial. The accused claimed that essential criminal procedure and criminal law standards had been violated and that facts had been wrongfully and incompletely established. The Court found that the facts had been erroneously established in relation to all charges and that violations of several essential rules of criminal procedure had occurred.

C) National Committees on international humanitarian law

Slovakia

A Committee on International Law was established by a decision of the Ministry of Foreign Affairs on 20 September 2001 and entered into force on 1 January 2002. Chaired by the Ministry of Foreign Affairs and with the

19 *Mehinovic* v. *Vuckovic*, US District Court for the Northern District of Georgia, 29 April 2002.

20 *Trajkovic*, Supreme Court of Kosovo, Case 145/2001, 30 November 2001.

21 *Trajkovic*, District Court of Gjilan, Case 68/2000, 6 March 2001. See Biannual update January-June 2001, *International Review of the Red Cross*, No. 843, p. 859.

Slovak Red Cross providing the secretariat, it includes representatives of the Ministries of Foreign Affairs, Defence, Justice, Interior, Health, Education and Culture, the Office of the Ombudsman, the armed forces and the Slovak Red Cross itself. The Commission's mandate is to analyse the degree of implementation of international humanitarian law in national law and its application by national courts and administrative authorities, to propose to the authorities the adoption of measures to ensure effective implementation of this body of law, to propose Slovakia's participation in other humanitarian law treaties, to help spread knowledge of this body of law in schools, the armed forces and the police, and to cooperate with national committees of other countries and with international organizations.

ICRC
ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW

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Rédacteur en chef: Toni Pfanner

Adresse:
Revue internationale de la Croix-Rouge
Avenue de la Paix 19
CH – 1202 Genève, Suisse
T (++41 22) 734 60 01
F (++41 22) 733 20 57
e-mail: review.gva@icrc.org

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