Twelfth Round Table of the International Institute of Humanitarian Law (San Remo, September 1987)

The International Institute of Humanitarian Law was founded on 26 September 1970 in San Remo (Italy), with the objective of promoting the development, implementation and dissemination of international humanitarian law and related subjects, such as refugee law.

It is therefore quite natural that, since its inception, the Institute should have maintained close working relations with the International Committee of the Red Cross, each respecting the independence of the other. With the passage of time, that fruitful co-operation has been broadened and extended to other organizations, in particular the League of Red Cross and Red Crescent Societies, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Committee for Migration (ICM).

Among the more significant regular activities of the Institute, special mention should be made of the traditional annual Round Tables. The first took place in 1974. Since 1975, each Round Table has been supplemented by a one-day meeting devoted to a Red Cross and Red Crescent symposium. Questions relating to refugee law have also been discussed from time to time at the meetings.

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The September 1987 session was divided into two days on international humanitarian law, the Twelfth Round Table proper, Refugee Day and the day devoted to the Red Cross and Red Crescent symposium.

There were no less than 130 participants, all of whom took an active part in the discussions. They came from all five continents and many

diverse but complementary sectors, representing governmental authorities, academic circles, international organizations, numerous National Red Cross and Red Crescent Societies as well as the League of Red Cross and Red Crescent Societies and the International Committee of the Red Cross.

The opening ceremony was marked by a strong plea by Professor Patrnogic, President of the Institute, in favour of the Protocols additional to the Geneva Conventions of 12 August 1949, on the occasion of the tenth anniversary of the adoption of those Protocols.

A. General Topic of the Round Table

The general topic on the agenda of the Round Table on international humanitarian law was

"Implementation of international humanitarian law"

Under the expert chairmanship of Mr. Kéba M'Baye, Vice President of the Institute and Vice President of the International Court of Justice (ICJ), three specific aspects of implementation were examined in detail.

1. "National measures for the implementation of international humanitarian law—an outline of the present situation illustrating some of the main problems"

The introductory address by Mr. Zidane Mériboute, member of the Legal Division of the ICRC, stressed the main failings in the conduct of many States which are formally bound by the humanitarian treaties. In particular:

— the failure to incorporate international humanitarian law into domestic or internal law;
— the failure to adopt the necessary internal implementation measures and rules, in particular those prescribed by the Conventions themselves;
— the failure on the part of governmental authorities to transmit to the other States party to the humanitarian treaties the texts of the laws, codes and regulations for implementation adopted by them.

The debate that ensued was rich in constructive proposals and, in particular, the following observations and suggestions emerged.

— Certain rules of the Conventions and Protocols—such as those relating to the repression of grave breaches—absolutely require the adoption of national legislation for implementation.
— Although the special protection granted to medical personnel and units is unambiguous, the State must still adopt adequate internal measures which, with due regard for the structure of its own medical services, specify clearly the categories of persons and objects which are covered.
— This special protection can be effectively implemented only by adopting all the necessary national administrative measures and regulations relating to the use of the protective emblems.
— In a more general way, the adoption or non-adoption by the States of internal implementation measures is an indication of their true intentions as to the application of and respect for international humanitarian law.

Among the various proposals put forward for the purpose of improving the present unsatisfactory situation, the following were singled out.

— A comparative study should be made of means and techniques for promoting the adoption of national measures relating to other branches of international law.
— The type of measures to be adopted, in particular organizational, educational, administrative and legislative measures, must be identified clearly, so that priorities can be established and the tasks to be performed can be assigned accordingly.
— A carefully thought out information campaign should be carried out to overcome the psychological barrier that frequently arises because the adoption of measures for the implementation of international humanitarian law are equated with preparation for war.
— Since international humanitarian law—or the law of armed conflict—is complex, States must transpose its content into texts understandable by the different levels and categories of persons responsible for its implementation, in particular within the armed forces.
— States, in accordance with the obligation incumbent upon them, should systematically communicate to each other, through the depositary and the ICRC, information on the measures adopted by them.

2. *"Prevention and repression of breaches of international humanitarian law—preliminary legislative and other measures for an effective application of international humanitarian law"*

Professor Michael Bothe, introducing the topic, recalled that it was only after the First World War that a peace treaty for the first time

provided for the punishment of war criminals instead of for an amnesty. Moreover, the only prosecutions brought so far under the Geneva Conventions have been before national courts and not international courts.

The relationship between the law of armed conflict and national criminal law depends both on the constitutional system involved and on the content of the rule in question (according to whether or not the rule is "self-executing", in particular because it does not specify any penalty).

Professor Bothe accordingly saw three fundamental options:

(a) absence of any special provisions covering war crimes by internal law and consequently application of general criminal law;
(b) global reference by national law to the offences defined by international humanitarian law;
(c) explicit incrimination of violations of international humanitarian law by specific provisions of internal law.

All these various options have their advantages and their drawbacks. The fact remains, according to Professor Bothe, that the adoption of national legislation must be urged because in its absence too many questions would remain unclear. Lastly, even the formula of adopting standard laws or a model code has its disadvantages; there must be at least an exchange of information and experience, not only between administrations but also between lawyers on a personal basis.

In the discussion which followed, many interesting comments and suggestions were made, including the following.

The decision to prosecute offences is based all too frequently on considerations of expediency or of reciprocity rather than on legal considerations.

In internal conflicts, which are often more cruel than international conflicts, only general criminal law is applied.

Among the courses open to overcome these difficulties, the following were stressed:

— to incorporate in military codes national penal rules governing the conduct in combat of members of the armed forces, regardless of the nature of the conflict;
— to provide combatants with constant training in humanitarian law, valid in all circumstances and set forth in military manuals.

3. *"Implementation of international humanitarian law and rules of international law on States' responsibility for illicit acts"*

According to Professor Marina Spinedi, who introduced the subject, the Conventions and Protocol I contain several rules on the responsibility of States for violations, but do not constitute a complete system (to employ

the terminology of the ICJ, they do not constitute a "self-contained régime"). Thus the rules of customary law must also be examined to see whether they have been incorporated in or modified by the Conventions and Protocol I. To determine the content of the customary rules, Professor Spinedi relied mainly on research carried out for the codification work of the International Law Commission (ILC).

The basic rule, according to which an internationally wrongful act committed by a State entails its responsibility, is confirmed by Article 91 of Protocol I. What conditions must be present?

According to the ILC, these conditions are required according to custom for an act to be regarded as wrongful in international law.

— the conduct concerned (act or omission) must be attributable to a State;
— the conduct must constitute a breach of international law;
— there must be no grounds precluding responsibility.

The conduct of any person having the status of an agent of the State under the internal law of the State concerned is attributable to that State, even if the person exceeded his competence or acted contrary to instructions received. This rule also applies to the acts of organs of public entities and of persons who act *de facto* on behalf of the State (it must be noted, with reference to international humanitarian law, that this may cover acts of the legislative branch and of the judiciary).

The circumstances which could preclude wrongfulness include the conduct of the injured party and the state of necessity; but the International Court of Justice has considered that these grounds cannot be invoked in respect of breaches of international humanitarian law.

Is the injured State the only one which can invoke the responsibility of the State or are all the States party to the treaties able to do so? With regard to international humanitarian law, it might be thought that all the members of the international community have the capacity to act (within the meaning of the *Barcelona Traction* judgment) with regard to breaches of obligations *erga omnes*, a matter on which there is much discussion. The ILC draft provides for three cases:

— where the wrongful act constitutes the breach of an obligation essential for the international community as a whole;
— where there has been the breach of an obligation contained in a multilateral treaty safeguarding the collective interests of the parties;
— where there has been the breach of a treaty for the protection of human rights and fundamental freedoms.

It can safely be asserted that the Conventions and the two Protocols do contain obligations *erga omnes* (collective interests and protection of

human rights); this is confirmed by Article 1 common to the Conventions and Article 1, paragraph 1 of Protocol I, which must be read as providing not only for a right but also for a duty to take action on the part of all States.

From the remarks made by Professor Kalshoven and Mr. Jakovljevic and from the debate which followed, the following assertions may be singled out.

There is an apparent divergence between the rules on responsibility embodied in the humanitarian treaties and the ILC draft because certain irregular armed forces are not covered by Articles 5 and 6 of that draft, the provisions of which apply only to State organs within the meaning of internal law. This, however, does not affect Article 91 of Protocol I, which constitutes a *lex specialis*.

It must not be forgotten that States other than the injured State can invoke the responsibility of the defaulting State because grave offences constitute international crimes. Moreover, apart from the question of civil and criminal responsibility, all concerned must see to the designation of a Protecting Power and/or allow the ICRC to take action.

Several references were made to the ICJ judgment in the *Nicaragua versus United States of America* case. In that connection, one speaker pointed out that, for State responsibility to ensue, there must be a primary obligation to prevent the result or the action in question.

It emerged from the discussion that much progress remains to be made with regard to countermeasures and reprisals, since it is obvious that there are no universally accepted rules in the matter. Moreover, the ILC has not yet formulated draft rules in that regard.

Lastly, it was pointed out that, by virtue of Article 1 common to the four Conventions in particular, all the members of the international community can invoke the responsibility of a third party but that reparation, such as damages, can be claimed only by the injured State.

B. Refugee day

Topic: "The international protection of refugees: trends and developments"

This took the form of a broad panel discussion with the participation of distinguished specialists in refugee law. The panel was presided over by Mr. J.-P. Hocké, United Nations High Commissioner for Refugees.

In the very unrestricted atmosphere of the San Remo Institute, where all the participants speak in their personal capacity, the speakers gave

expression to a number of strong, even controversial ideas with the aim of stimulating reflection and encouraging the measures so vital for the protection of refugees, asylum-seekers and displaced persons.

Interesting comparisons were made between two categories which may be designated as "human rights refugees" and "humanitarian law refugees". Further study is necessary with regard to criteria applied to the second category, and the possibilities of returning them to their respective countries. Until the Second World War, attention was concentrated on persons fleeing from conflicts, whereas at present the focus is rather on those fleeing human rights abuses.

Strong concern was voiced by a number of speakers regarding the more restrictive attitude being adopted by traditional host countries with regard to asylum-seekers. It was stressed that economic pretexts should not be used to turn away persons in danger.

Although the High Commissioner's mandate goes beyond the 1951 definition of refugees, it was felt by many that that definition should be reviewed and modified to correspond more closely to present needs for protection. Reference was made to an interesting and very positive experiment, that of the Declaration of Cartagena concerning the countries of Latin America. This instrument, although not formally binding, was converted immediately into custom by the agreement of all the countries concerned on the mandatory character of the rules it contained.

With regard to the questions mentioned above, as well as other problems, several speakers stressed the importance of co-operation and co-ordination between the organizations concerned and in particular between the UNHCR and the ICRC. Emphasis was also laid on the need to bring the internal legislation of States into line with international law and thereby improve the protection of asylum-seekers and refugees.

One speaker put forward three priorities which may serve as a conclusion:

1. to arrive at a more precise definition of acceptance criteria and the responsibilities of countries of first asylum;
2. to encourage the broadening of criteria for granting asylum;
3. to devise humane solutions for the problem of refugees who are shuttled from place to place.

C. Red Cross and Red Crescent Symposium

This Symposium was placed under the honorary chairmanship of Mr. Ahmad Abu Goura, the late Mr. Enrique de la Mata and Mr. Cornelio Sommaruga and was presided over by Mr. Jovica Patrnogic. The

Symposium dealt this year with the nature and scope of the agreements of the National Societies with their respective governments which regulate their role as auxiliaries to the medical services in armed conflicts.

The subject was introduced by Mr. Guy Hullebroeck (Belgian Red Cross), who described developments in the relevant agreements in his country and by Mr. Jules Johnson (Red Cross of Benin) who placed the emphasis on an analysis of the provisions of international humanitarian law.

In the discussion that followed these introductory statements, the representatives of a number of National Societies described the state of relations between them and their respective governments and the various ministers concerned, setting forth in the process the responsibilites incumbent upon them in conflict situations. The position in that respect varies from one country to another: certain National Societies have entered into agreements with the authorities specifying, in particular, the role of mobile medical teams and the use of the emblem, whereas others have only broached the dialogue with the authorities.

During the discussion the need was stressed for the National Societies to prepare themselves in peacetime to play their part as auxiliaries to the medical services in time of armed conflict.
