

International criminal jurisdiction, international humanitarian law and humanitarian action

by Jacques Stroun

Shortly after the Second World War the community of States, still shocked by the explosion of violence that had torn the world apart for more than five years, ratified an updated version of the Geneva Conventions in the hope of acquiring a sound legal instrument which would preserve human dignity even in times of war. They undertook to respect the fundamental rights of the individual in armed conflicts, whether international or otherwise, and to limit the use of force to what was strictly necessary to place an enemy *hors de combat*. Their resolve found confirmation in the two Additional Protocols of 1977.¹

But wars have not gone away in spite of the high hopes raised by the United Nations Charter. They inflict appalling suffering on an ever-growing proportion of individuals who are not or are no longer involved in the hostilities, be they war-wounded, prisoners or the host of civilians subjected to abuse by one side or the other, and all too often forced to flee the war zone and seek an increasingly precarious refuge in a neighbouring country.

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¹As at 15 October 1997, a total of 188 countries were bound by the four Geneva Conventions. By the same date, 148 States had ratified Additional Protocol I relating to international armed conflicts and 140 had ratified Additional Protocol II relating to non-international armed conflicts.

That is why non-governmental organizations and United Nations agencies are out there in the field, in the thick of the fighting, striving to bring immediate and practical assistance to all victims. Since the 1967 Biafran war in Nigeria, humanitarian action has gained so much ground that it has now become a parameter of international policy in situations of armed conflict, one which can no longer be circumvented.

The immediate humanitarian response to war victims and the codification of widely accepted rules of conduct have their roots in Antiquity, in the philosophical literature of several cultures and in the statements of a few enlightened monarchs. However, it was with *A Memory of Solferino*, written by Henry Dunant in 1862, and with the creation of the International Committee of the Red Cross (ICRC) that the modern version of those concepts came into being.

The international community's efforts to promote a set of rules regulating the use of violence in armed conflicts have been hampered by the inadequacy of mechanisms of repression. Article I common to the four Geneva Conventions of 1949 provides that the High Contracting Parties undertake «to respect and to ensure respect for [the established rules] in all circumstances», but any action taken in this regard varies widely according to the context and the method used is left to the discretion of governments.

The war crimes committed during the conflicts attending the break-up of the former Yugoslavia and during the Rwandan genocide of 1994 have been a glaring reminder of the international community's impotence to punish those responsible for violations of international humanitarian law. The outcry caused by those tragic events prompted the United Nations Security Council to set up two international criminal tribunals, one for the former Yugoslavia and the other for Rwanda, to prosecute grave breaches of international humanitarian law committed in those two territories. One year later, in November 1995, the General Assembly set up a preparatory committee to consider the creation of an international criminal court. This was the first move towards introducing a new monitoring and repression system independent of the political interests of States, its purpose being to strengthen the application of international humanitarian law.

Those decisions, which fulfilled the wishes of many humanitarian players and human rights protection agencies, still raise a number of substantive issues. This article will look at the impact that the introduction of such a legal system could have on humanitarian aid operations carried out in behalf of victims while the conflict is in progress.

Controlling violence in situations of armed conflict

The entire body of international humanitarian law is intended, in times of armed conflict, to restrict the use of violence to the lowest level compatible with military imperatives (proportionate use of force and a prohibition on indiscriminate attacks); in addition, it stipulates that respect for the dignity of the individual, even an enemy, must be preserved in all circumstances.

The application of humanitarian law involves four types of complementary action:

- preventive action to develop the law and ensure that combatants comply with it by spreading knowledge of its provisions;
- remedial action among victims to limit the consequences of any violations;
- reactive action to put a stop to ongoing violations by making immediate representations to the authorities;
- punitive action to prosecute violations already committed and punish the culprits.

Ever since its inception, the ICRC's primary objective has been to develop and disseminate rules; in the early days the institution saw itself as having a short-term role, useful only until all States adhered to the Geneva Convention of 1864. Very soon, however, the need for an aid organization capable of alleviating the suffering of victims on the spot prompted the ICRC to develop relief operations alongside its efforts to disseminate the law. A century later, from the 1960s onwards, a host of non-governmental humanitarian organizations came into being and have backed up the ICRC's assistance work in the field.

When it found that knowledge of the rules did not always guarantee that they were respected, the ICRC initiated a dialogue based on confidentiality with those in charge of regular armies and all armed groups, so as to draw their attention to offences committed by their troops. That approach, which makes it possible to solve a number of problems, has been usefully supplemented by the activities of human rights bodies which have turned the public denunciation of violations into an instrument for exerting international pressure.

Striking a balance between those different forms of action is not always easy. Public denunciation, for instance, may sometimes compromise the dialogue with the authorities concerned and jeopardize work for victims in the field.

As long as there are no mechanisms for punishing those who flout the established rules, the system will remain weak. The humanitarian agencies can appeal to the international community to put diplomatic pressure on the authorities responsible for atrocities,² but no legal system will function unless the guilty are punished. In the absence of an international court, such measures of repression are left at the discretion of each State, which is alone responsible for judging any of its nationals who have committed offences against international humanitarian law.

The setting-up of an international court is therefore an important innovation because, by increasing the means of punishing violations, it endows the existing legal texts with the credibility which is their due.

Interaction between the different approaches

The complementary tasks of preventing violations, putting a stop to them, repairing the harm done and punishing the culprits are essential for regulating the use of violence in armed conflicts. Combatants caught up in the heat of battle will heed humanitarian injunctions only if they have been duly trained to do so beforehand. While the conflict is under way, arresting and sentencing those guilty of violations is often impossible because there is no international "police" to capture them. Such was the case throughout the conflict in the former Yugoslavia and the Rwandan genocide. Only when the fighting has stopped and a political settlement has been reached can prosecution be contemplated. Meanwhile, therefore, there must be a way of taking pragmatic action to try to limit the violence and relieve the suffering of victims by other means. That is what the humanitarian organizations in the field do through their protection and assistance programmes.

During the genocide in Rwanda, the ICRC managed to provide protection for some 50,000 people, including many wounded and those accompanying them, who had found refuge in an ICRC field hospital in Kigali where they were given medical treatment as needed. In the camps of Bosnia-Herzegovina, aid in the form of food and blankets helped the detainees to survive the harsh winters while waiting for international pressure to bring about their release.

As well as taking direct action to relieve suffering, the ICRC also tries to put a stop to violations, with no means other than its own powers of

² According to common Article 1, all States party to the four Geneva Conventions are jointly responsible for ensuring application of those instruments.

conviction which it deploys in a confidential dialogue with the parties to the conflict. That may not amount to much but it is often the only possible option pending the adoption of more efficient measures by the international community. In seeking direct dialogue with the combatants, the ICRC tries to influence their conduct. This approach is sometimes misunderstood and perceived as making concessions to killers at the expense of denunciation, which is regarded as more effective. Over and above the finer points of such arguments, however, it must be admitted that simple denunciation does nothing to alleviate the immediate plight of the victims. Even the extensive media coverage of the civil war in El Salvador in the early 1980s and repeated denunciations of the violations regularly committed by the security forces failed to halt the conflict, which went on for another ten years and was marked by numerous abuses on both sides. Throughout those years, humanitarian organizations like the ICRC were out in the field bringing aid to the civilian population, visiting political detainees and engaging in regular dialogue with the military and guerrilla leaders aimed at persuading them to limit the use of violence.

Yet it would be untrue to say that denunciation played no part. It helped to stir the public conscience both at the international level and within the country itself, and this heightened awareness eventually led to peace. Meanwhile it also helped to compel all those involved in the conflict to cooperate with the humanitarian agencies. Without the pressure exerted at the international level, humanitarian organizations like the ICRC would certainly have had a harder time establishing a constructive dialogue with combatants of all stripes. So, denunciation and direct action on the spot are like two legs on the same body: they make forward motion possible by taking the weight on first one, then the other.

Generally speaking, an international court goes into action once active hostilities have ceased, or after a peace agreement has been signed, which leads one to believe that it should not interfere with humanitarian action. In order to function, however, the court needs witnesses and evidence, which it will naturally try to find among those who were working in the field and may have been eye-witnesses of the crimes committed. Even if it takes place in another time-frame, the work of a permanent international court is bound to have an impact on humanitarian action.

Justice done: a plus for victims and for the humanitarian ideal

As the saying goes, respect for the law starts with fear of the policeman. Matters are not very different in an armed conflict. While duly

acknowledging those who respect the rights of their enemies out of ethical or moral conviction, it must be admitted that most individuals are largely motivated by fear of the punishment they may incur.

The dialogue which the ICRC maintains with the warring parties is not based on any other assumption. In order to be effective, it must persuade the relevant authorities to repress any violations committed by their troops. The existence of an international court can only lend more weight to the humanitarian agencies' entreaties and strengthen their position in the field.

Furthermore, the safety of humanitarian workers has become a matter of constant concern in recent years. They are increasingly taken as targets, as shown by the many incidents in which staff of the ICRC, *Médecins sans frontières* and human rights organizations were killed in 1996 and 1997. Such crimes point up the limits of humanitarian dialogue, the borderline beyond which the power of conviction is no longer enough to deal with problems and only coercive action can hope to bring about an improvement in the situation and ensure greater respect for the law. The existence of an international court capable of punishing violations, even at a later date, should curb the use of force against those whose sole aim is to bring aid to victims.

An international court would also symbolize the determination of States to respect and ensure respect for the law in accordance with Article 1 common to the four Geneva Conventions. Until now, States alone were competent to take action in cases of failure to respect international humanitarian law. In delegating that competence to an independent court, they will be ceding a part of their autonomy for the sake of the victims and to uphold the credibility of international law. The establishment of such a court marks a watershed in the implementation of humanitarian law, because States will no longer be above justice.

Henceforth the field of international humanitarian law encompasses the three powers which Montesquieu identified in his *Spirit of Laws*, and which he said must be clearly separate from one another if institutions were to function properly. Legislative power lies with the international conferences which draft the laws; executive power devolves upon the signatory governments; and, finally, a separate judicial power is coming into being with the creation of the international court.

Coexistence of international courts with humanitarian action

If those accused of violating international humanitarian law are to be judged as objectively as possible, the court concerned needs witnesses. What could be more natural than to seek those witnesses among the staff of humanitarian organizations operating in the field, who are in direct contact with the victims and who have often already initiated a dialogue with the accused? Although such an approach seems both logical and desirable at first sight, it does raise problems for the smooth running of humanitarian operations.

The basic principles of humanitarian action and giving evidence before a court

The ambition of humanitarian action is to work among the victims so as to relieve their suffering. Going to a war zone, however, requires the agreement of the parties to the conflict. For example, it would be difficult to assist the displaced people in western Afghanistan without authorization from the Taliban who control that part of the country, and impossible to help the civilian population displaced in the Andean regions of Peru without gaining the trust of the army and the guerrilla movements fighting in the area. That is why the ICRC has always adopted a neutral and impartial approach which steers clear of political debate and is designed solely to alleviate suffering without taking sides. In addition, there is the ICRC's specific mandate as custodian of international humanitarian law, and its detention-related activities which oblige it to maintain a constant dialogue with all parties to the conflict. Indeed, gaining access to detainees is a prime example of an activity which would be impossible without the agreement of the detaining authorities.

If they are to be able to take action, therefore, the ICRC and other humanitarian organizations must establish a certain level of trust with all their contacts in the field. The security of their staff also depends on this. The ICRC has chosen confidential dialogue rather than public denunciation to achieve that aim.

A brief comparison with the medical world and its rule of professional secrecy may be drawn here. The doctor's job is to keep his individual patients healthy, but also to preserve public health. He must therefore enjoy the trust of his patients, so that they will not be afraid to approach him and confide their problems when necessary. Accordingly, the doctor must assure his patients that he will not reveal their secrets to anyone. Were he to break that rule, his patients would not come back, would no

longer receive treatment and would jeopardize not only their own health but that of their community. Take the example of tuberculosis. If a patient thought he had the disease but was not sure that his case would be treated discreetly, he would not dare to approach the health services. Not only would he be placing his own life in danger but he would also risk propagating the disease among his family and friends. Hence, medical secrecy is essential to establish a relationship of trust.

The same applies to humanitarian operations in war-torn countries. Humanitarian organizations can try to control the violence only if they are able to win the confidence of the "patients", that is, those who resort to violence. This is possible only if confidentiality is observed in their dealings. Since that is the case, it would be difficult for a humanitarian agency to appear as a witness in a trial aimed at bringing to justice those same perpetrators of violence.

That is why the ICRC asked the Presidents of the International Criminal Tribunals for the former Yugoslavia and Rwanda not to call upon its staff members to give evidence in criminal proceedings. This position would not, however, prevent the ICRC from providing an international court with all the public documents in its possession which might be useful in seeking the truth.

It may be argued that the need to protect the neutral, impartial and confidential role of humanitarian organizations is justifiable only during the conflict itself, and that the requirement would no longer exist if an international court were set up after the hostilities had ended. While that could be true for the country or countries in question, allowance must also be made for the fact that, in this era of instant information, the credibility of humanitarian organizations depends on the consistency of their approach throughout the world. Were any one of them to testify against the same individuals with whom it had negotiated access to victims, it would certainly be regarded with great suspicion by those it might subsequently have to approach in connection with some other operation.

The humanitarian organizations are thus in an uncomfortable position: on the one hand they want the international community to show more firmness in ensuring respect for international humanitarian law; but on the other they are obliged to keep a certain distance from international courts in order to preserve their ability to work in the field while a conflict is going on.

Such an attitude becomes understandable and can be accepted only if the action taken by the international community is considered as a whole

and moves in successive stages towards a single goal. Emphasis is placed on one priority or the other, depending on the time and the situation. During the fighting, when the judiciary can neither investigate nor prosecute, humanitarian action in the field seeks to limit the effects of violence. Once the worst is over, justice can proceed and, after the event, punish the guilty with a view to preventing the repetition of any such crimes, thereby eventually securing respect for humanitarian action by all parties to future conflicts.

The international community cannot place limits on the instruments at its disposal if it wants to ensure respect for the law and protect victims, so the different players involved — the international criminal court, the political world and humanitarian organizations — should get to know, understand and respect one another. They should each regard their own work as part of a whole rather than as the only solution to the problem.

When humanitarian action is paralysed — the dilemma

This argument relies on the assumption that humanitarian action genuinely benefits victims and can therefore afford to keep its distance from the machinery for punishing those guilty of violations. So what happens when it is rendered powerless, paralysed by the parties to the conflict, and when dialogue is leading nowhere? Is its reticence still justifiable in such cases?

The humanitarian organizations and the ICRC are often faced with that dilemma, and the answer is a complex one.

On the basis of Article 1 common to the 1949 Geneva Conventions, the ICRC must alert the international community whenever serious and repeated violations of international humanitarian law occur and it is unable to remedy the situation. That was the case in 1983 and 1984, during the Iran-Iraq war: the ICRC sent the States party to the Geneva Conventions a memorandum informing them that prisoners of war were being concealed from its visiting teams. Another example occurred in 1992 when the ICRC took a public stand on the treatment of Palestinian detainees in the Israeli-occupied territories. Before taking such action, however, the ICRC must carefully gauge all the consequences and ensure that there will be no negative repercussions on the victims, for its primary objective is to improve their situation, not to denounce offenders. Two factors must therefore be taken into account. On the one hand, such action must make it possible to resume talks with the authorities concerned when the dialogue has been broken off or become unproductive. On the other, it is essential to avoid the risk that the publicity given to public statements

might be misunderstood by other belligerents elsewhere in the world and might alter their perception of the ICRC's humanitarian action and its neutrality.

Even when it does take a public stance, the ICRC tries not to stir up controversy. Its statements are always sober and factual, with no value-judgements. It is up to the States which receive such information to draw their own conclusions and act accordingly.

This reserved approach becomes impossible to maintain when a court appearance is required, as arguments for the prosecution and the defence can hardly be confined to factual statements alone. So having ICRC delegates come to the witness stand might involve the institution in controversy which could tarnish its image of neutrality and, in the long term, undermine its credibility throughout the world.

Statutory role of the ICRC

In the ICRC's view, this issue cannot be considered only in terms of operational efficiency. Indeed, the ICRC occupies a special place among humanitarian organizations because the community of States has assigned it certain tasks relating to the application of international humanitarian law.

One of these tasks is to "take cognizance of any complaints based on alleged breaches of [international humanitarian] law".³ An international court responsible for punishing such breaches would obviously be the most appropriate body to assume that function.

Another of the ICRC's roles is to "work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof".⁴ There can be no doubt that the innovative jurisprudence emanating from an international criminal court would do much to disseminate and also to strengthen the law.

Finally, the ICRC is also required to "work for the faithful application of international humanitarian law",⁵ and is expressly named in the Conventions in connection with specific activities such as visiting prisoners

³ Statutes of the International Red Cross and Red Crescent Movement, Article 5, para. 2(c).

⁴ *Ibid.*, Article 5, para. 2(g).

⁵ *Ibid.*, Article 5, para. 2(c).

of war, undertaking relief actions and restoring family links through its Central Tracing Agency. The work of an international court responsible for punishing violations of international humanitarian law is bound to interfere with the ICRC's operational procedures in the area of victim protection. Indeed, in a trial, the confidential reports in which the ICRC informs the authorities of its findings during visits to places of detention or in connection with the conduct of hostilities might be used as evidence for the prosecution or the defence, and the very people to whom they were addressed might well hand them over to the judges for that purpose.

Towards stricter respect for international humanitarian law

In 1862 Henry Dunant ended his book *A Memory of Solferino* with a plea against the fatalism generated by uncertainty about the future:

“If the new and frightful weapons of destruction which are now at the disposal of the nations seem destined to abridge the duration of future wars, it appears likely (...) that future battles will only become more and more murderous. (...) And do not these considerations alone constitute more than adequate reason for taking precautions against surprise?”⁶

Unfortunately, those words are still all too relevant today. At the close of our century, wars have become even more deadly and the future more uncertain. Rejecting fatalism, the international community is seeking means of limiting suffering despite all odds. The means available are diverse but complementary, and they must include mutual understanding and respect.

Humanitarian action is designed to produce an immediate effect, either by taking direct measures to relieve suffering or, as is the case for the ICRC, by establishing a dialogue with the protagonists to convince them that they should change their behaviour and respect international law. These efforts are aimed primarily at the victims.

The judicial approach sets its sights on the long term. Punishing those who violate international humanitarian law upholds the credibility of the law, reminds the parties to conflict of their responsibilities and demon-

⁶ Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, p. 128.

strates the international community's determination to have the law applied. In this case, combatants are the prime target.

In an ideal world, respect for the law should be enough to protect individuals. As Henry Dunant pointed out over a century ago, however, our world is far from ideal and war is a particularly good time for abandoning illusions. In the thick of the fighting and in the prevailing climate of fear and hatred, men, women and children are subjected to atrocities which violate their fundamental rights. If they are to survive they need help, immediately and on the spot, irrespective of the possibility of punishing the culprits. That role can be fulfilled only by humanitarian action which is independent and neutral, and which is accepted by the very people committing the offences. For that to be the case, the warring parties must perceive the humanitarian agencies as being quite separate from any penal system; otherwise they will deny those agencies access to the victims. Moreover, combatants must be convinced that attacking humanitarian workers is a serious crime which will be prosecuted. It is around these two imperatives that the relationship between an international court and humanitarian players like the ICRC will have to be built.
