

ACTION BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS IN THE EVENT OF BREACHES OF INTERNATIONAL HUMANITARIAN LAW

Introduction

Supervision remains one of the most difficult problems in public international law and particularly in international humanitarian law applicable in armed conflicts.¹ Despite the system provided for under the Geneva Conventions and their additional Protocols and in default of an authority superior to States, grave violations are frequently committed without punishment or even prosecution.

The role which the International Committee of the Red Cross has to play in the event of such violations is delicate.

Firstly, the ICRC may take action on its own initiative, especially when its delegates are directly confronted with violations.

Secondly, the ICRC often receives complaints, and is generally expected to transmit them or to approach the authorities responsible, or to publicly state an opinion concerning the alleged violations.

Thirdly, the ICRC is sometimes asked to conduct an investigation to establish the truth of an alleged breach, or simply to record that violations have been committed.

¹ By "international humanitarian law applicable in armed conflicts" the ICRC means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law".

In all three cases the attitude to be adopted by the ICRC is determined essentially by one criterion, namely the interest of the victims whom its mandate requires it to protect and assist. Its specific role as a neutral intermediary between parties to a conflict and its duty to treat all the victims of armed conflicts without discrimination require the ICRC, when faced with actual or alleged violations of international humanitarian law, to react only after having carefully weighed all the consequences that its reaction may entail for the victims.

It must, moreover, be remembered that it is the States which are responsible for the respect of international law and, more particularly, of the treaties binding them. The Geneva Conventions even expressly require States not only to respect them but to ensure respect for them.¹ The ICRC is not superior to the contracting parties and cannot assume a judicial power which has not been given to it and which, moreover, it has never wished to possess.

The foregoing considerations and also the sum of experience acquired led the ICRC to establish a number of rules for its own guidance. They are often ill-known outside the institution, and the purpose of this document is to enable readers to gain a better understanding of them.

This document does not deal, however, with the position adopted by the ICRC and its delegates when faced with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the problem has been tackled from a different angle and the ICRC follows specific guidelines in such situations.

1. Action taken by the ICRC on its own initiative

During the missions of its delegates the ICRC remains in permanent contact with the authorities having control over the territory on which such missions are carried out. It therefore goes without saying that it will notify those authorities of any acts or omissions that in its opinion appear to be contrary to international humanitarian law. Such notifications depending on the importance of their contents may be made at various levels and may take various forms; they may range from an oral remark by a delegate to the director of a prison to a detailed report by the President of the ICRC to the government concerned.

¹ See article I common to the Geneva Conventions of 12 August 1949 and article I, para. 1 of their additional Protocol I.

As a rule the steps thus taken remain confidential. In the event of major repeated violations, however, the ICRC, if it considers necessary to bring the facts to the knowledge of the public, will express openly its opinion and request that such violations be brought to an end or warn the parties concerned of the dangers or of the suffering resulting from steps they might be threatening to take. Such a public statement is the more justified when, despite their gravity, the committed violations do not cause any step to be taken by a third State.

Public statements are inevitably more incriminating and the ICRC has recourse to them sparingly, when three specific conditions are fulfilled: firstly, the violations must be major breaches of international humanitarian law; secondly, the publicity given to them must be in the interest of the persons or population affected or threatened; and, thirdly, either the ICRC delegates must have witnessed them with their own eyes or the violations must be matters of common knowledge.

While remaining true to its traditional policy of discretion and to its concern for the interest of victims, and in addition to making general appeals to the parties to a conflict with a view to obtaining respect for international law and permission to carry out its assistance activities for victims, the ICRC may thus make public the specific steps taken in the event of major or repeated violations of that law.

As a rule the ICRC does not express opinions on the use of weapons or methods of warfare. Any reaction it has will be determined by the condition of the victims affected or threatened if unlawful or purportedly unlawful weapons or methods are employed. It may very well, however, undertake steps or even make public statements if it considers that the mere fact of using, or threatening to use, a given weapon gives rise to an exceptionally grave situation.

The general appeals which the ICRC may launch concerning weapons outside the specific context of an armed conflict are not dealt with in this document.

2. Reception and transmission of complaints

Under article 6 (4) of the Statutes of the International Red Cross the ICRC "takes cognizance of complaints regarding alleged breaches of the humanitarian Conventions".

The complaints referred to under this article may be divided into two categories.

The first category includes complaints or communications concerning the non-application or inadequate application of one or several provisions of the Conventions by the responsible Power in respect of persons pro-

tected by those Conventions, in circumstances where the ICRC can take direct action in favour such persons. The ICRC delegates are generally able to form an opinion on the validity of the complaints, which lead them to intensify their efforts. When taking suitable steps, such as visiting prisoner-of-war camps or civilian internee camps, the ICRC approaches the authorities to prevail on them to correct any malpractices or shortcomings reported by its delegates.

The second category includes protests against grave breaches of international humanitarian law committed in circumstances where the ICRC is unable to take direct action to help the victims. Such breaches may be acts violating rules whose application the ICRC cannot appraise, such as rules relating to the conduct of hostilities, or may be violations committed on the scene of hostilities to which the ICRC has no, or only very limited, access.

The procedure established between the two world wars by the International Red Cross Conferences for this second category of complaints, and followed especially during the Second World War, consisted, for the ICRC, in simply transmitting protests to the party incriminated, requesting that an inquiry be carried out and offering to forward the reply. Complaints from a National Society were sent to the Society of the country involved. Protests raised by a government were transmitted directly to the government concerned. The ICRC did not undertake to forward complaints by individual persons.

After the Second World War the ICRC realized that this procedure had yielded hardly any tangible results. It accordingly expressed its concern in a report to the Seventeenth International Red Cross Conference held in Stockholm in 1948. The Conference requested the ICRC to continue transmitting complaints but it strongly recommended that National Societies "do all in their power to ensure that their governments make a thorough investigation, the results of which shall be communicated without delay to the International Committee of the Red Cross".

Experience in the course of the following years, however, proved just as disappointing. The ICRC laid the matter once more before the International Conference at its Twentieth Session in Vienna in 1965. This time the Conference lightened the traditional procedure by taking note that "the ICRC will no longer transmit such protests, except in the absence of any other regular channel, where there is need of a neutral intermediary between two countries directly concerned". From then on the ICRC had all the more reason to refuse to transmit protests from third parties.

3. Requests for inquiries

The Geneva Conventions of 1949 stipulate that “at the request of a party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention”.¹

This article does not provide for any action by the ICRC, but the institution was nevertheless called upon a number of times to initiate inquiries: in 1936, for instance, when various incidents occurred in the course of the conflict opposing Italy and Ethiopia; in 1943, for the Katyn affair and in 1952, when a request was submitted for an inquiry into the alleged use of bacteriological weapons during the Korean war.

The weakness of the above provision lies in the fact that, in practice, it subjects the opening of an inquiry to consent by the parties involved. Violations committed in times of war raise difficult problems, for States in conflict are highly susceptible and by no means inclined to come to an understanding. This provision therefore never led to any result. In the last two instances mentioned above, one of the parties did not agree to an inquiry; in the first instance the two States involved had given their consent in principle, but the conflict ended before the procedure even began.

Already in 1939, at the beginning of the Second World War, the ICRC had determined the attitude it would observe in such situations and had made that attitude public. Its position has not varied since. In brief, the ICRC could not open an inquiry on its own initiative; the most it could do would be to take part in the setting up of a commission of inquiry, on request by the parties concerned. The ICRC then would merely make a selection, outside the institution, of persons qualified to form part of that commission.

In fact, the ICRC has never wished to be proposed as a body responsible for such inquiries, because that would be the first step of a judicial procedure, which does not lie within its purview. Moreover, by assuming that role the ICRC would find its neutrality called in question by at least one of the two parties, to the detriment of the unquestionably useful humanitarian activities carried out on that party's territory, and for an illusory result.

4. Requests to take note of violations

Without being asked to open an inquiry, the ICRC may be called upon to record the result of violations of international humanitarian

¹ Convention I, art. 52; II, art. 53; III, art. 132; IV, art. 149. (A similar provision was introduced in 1929 in the Convention relating to the wounded and sick.)

law. As was already mentioned, the ICRC is no judge above the parties involved. Moreover, it cannot engage in controversies that would only jeopardize its activities for the victims. The ICRC will therefore only comply with such requests if the presence of its delegates can facilitate its humanitarian tasks and if it has been assured that their presence will not be used to political ends.

GUIDELINES IN THE EVENT OF BREACHES OF INTERNATIONAL HUMANITARIAN LAW

1. Steps taken by the ICRC on its own initiative

General rule

The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved. However, they are subject to the following conditions:

Confidential character of steps taken

In principle these steps will remain confidential.

Public statements

The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the following conditions are fulfilled:

- the violations are major and repeated;
- the steps taken confidentially have not succeeded in putting an end to the violations;
- such publicity is in the interest of the persons or populations affected or threatened;
- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources.

Special rule

The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

2. Reception and transmission of complaints

Legal basis

In conformity with article 6 (4) of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of “complaints regarding alleged breaches of the humanitarian Conventions”.

Complaints from a party to a conflict or from the National Society of a party to a conflict

The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties

Complaints from third parties (governments, National Societies, governmental or non-governmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided that the violation has been recorded by its delegates or is common knowledge, and insofar as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received

As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. Requests for inquiries

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality.

4. Requests to record violations

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends.
