

# The establishment of a permanent international criminal court

## ICRC expectations of the Rome Diplomatic Conference

by **Toni Pfanner**

Violations of international humanitarian law are not a new phenomenon. Nor is the establishment of an international criminal court to counter such violations a new idea. The first project creating a link between violations of a humanitarian treaty — that is, the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field — and penal sanction by a permanent international judicial body was drawn up by Gustave Moynier, one of the founders of the ICRC.<sup>1</sup> Like so many other projects, it did not materialize, however.

International humanitarian law already provides for a repression mechanism that imposes on States the obligation to initiate legal proceedings and to search for persons alleged to have committed grave breaches,

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<sup>1</sup> Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute/ICRC, Geneva, 1985, pp. 197-218; Gustave Moynier, “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève”, *Bulletin international des Sociétés de secours aux militaires blessés*, No. 11, April 1872, pp. 122-131; Gustave Moynier, *Etude sur la Convention de Genève pour l’amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Cherbuliez, Paris, 1870, pp. 299-311.

wherever they may be. If this mechanism were duly applied, it would guarantee efficient and impartial repression of breaches in all circumstances. It must be acknowledged, however, that the reality is quite different.

It is important to set up mechanisms of accountability to ensure that those responsible for violations are not given blanket amnesties. Justice must be rendered for the sake of the victims, but it is also part of a series of measures that must be taken to prevent as well as put an end to violations. If it is to be taken seriously, the law must not only exist, it must be enforced. Hence the crucial need to establish an international criminal court to change the current pattern of impunity.<sup>2</sup>

In conducting its activities, the ICRC is confronted with atrocities which are all too often left unpunished. This situation simply cannot continue and the international community must ensure that those responsible are made accountable for their acts. Repression mechanisms are important not only because penal sanctions form an integral part of any properly constituted legal system, but also because they serve as a deterrent.

Since 1996, six meetings of State representatives have taken place to prepare a draft statute for an international criminal court, to be submitted to a diplomatic conference convened by the United Nations and scheduled to take place in Rome from 15 June to 17 July 1998,<sup>3</sup> which should eventually bring this long-standing project to fruition. Before adopting the statute, however, States must resolve such complex legal problems as the definition of crimes falling within the competence of the court (see below, Section 1); the complementarity between the proposed international criminal court and national criminal courts (Section 2); the court's automatic, or inherent, jurisdiction (Section 3); and the trigger mechanism (Section 4).

The following comments on some crucial issues regarding the draft statute of the court relate directly to international humanitarian law. It is essential to find satisfactory solutions to these problems if the international community is to establish a court empowered to take appropriate and effective action towards putting an end to impunity.

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<sup>2</sup> See "The administration of justice and the human rights of detainees: Question of the impunity of perpetrators of human rights violations (civil and political)", Final Report by Mr. Joinet, pursuant to Sub-Commission decision 1996/119, 26 June 1997, UN doc. E/CN.4/Sub.2/1997/20.

<sup>3</sup> UN General Assembly resolution 52/160 of 15 December 1997.

## 1. Definition of war crimes

In carrying out its mandate, the ICRC often encounters extremely serious crimes, in particular war crimes, crimes against humanity and the crime of genocide, in the face of which the international community as a whole cannot remain passive and indifferent. The definition of war crimes remains a particularly contentious issue. Several proposals have been put forward to define such crimes for the purpose of inclusion in the statute of the court. The ICRC considers it very important to maintain coherence between the war crimes defined in legal instruments already endorsed by a large majority of States — in particular the Geneva Conventions of 1949 and their Additional Protocols of 1977 — and those set out in the draft statute. The court should be given jurisdiction at least over the crimes which are most prevalent in today's conflicts.

(a) The commission *per se* of war crimes has already been recognized as unacceptable and has prompted the creation of international tribunals, namely those of Nuremberg and Tokyo and the tribunals for the former Yugoslavia and Rwanda. Never did these tribunals require that, in order to be considered as such, war crimes had to be committed in a widespread and systematic manner. To add any further requirement to the list of war crimes would therefore not only be superfluous, but it would also risk blurring the very notion of such crimes.

(b) The 1949 Geneva Conventions and their Additional Protocol I have established a list of what are known as “grave breaches” or acts which have been widely accepted as representing the most serious violations of international humanitarian law; these are violations of such gravity as to impose upon States the obligation to prosecute or extradite those alleged to have committed or given the order to commit such crimes, regardless of the State on whose territory they were perpetrated or of the nationality of the accused. The ICRC considers that the notion of “war crime” should also include the grave breaches set out in Protocol I additional to the Geneva Conventions. Indeed, 150 States are now party to Protocol I, and most of the grave breaches listed therein are considered as having crystallized customary international law.

Grave breaches are regarded as war crimes. They are, however, not the only crimes that fall within this category. “Other serious violations of international humanitarian law” are also recognized as constituting war crimes. They encompass, for example, violations of treaties such as the Fourth Hague Convention of 1907 or of customary rules regulating warfare. To the list of grave breaches of the Geneva Conventions and

Additional Protocol I, the ICRC has proposed adding other serious violations of humanitarian law applicable in international armed conflicts. These include violations of the laws and customs of war which, although not mentioned in the Conventions and Additional Protocol I, relate to means and methods of warfare that are considered unacceptable or are regarded as clear violations of the rules of customary international law. Most of the prohibitions involved date back to the beginning of the twentieth century.

(c) Since the majority of armed conflicts today are internal in nature, it is imperative to ensure that the court's jurisdiction extends to serious violations committed in *non-international* armed conflicts, namely violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. A total of 140 States are now party to Protocol II additional to the said Conventions, an instrument specifically designed to apply in non-international armed conflicts. It will be noted that the ad hoc International Tribunals for Rwanda and for the former Yugoslavia deal, in full or in part, with situations of internal conflict. The proposed permanent court must have jurisdiction over all serious violations of humanitarian law.

War crimes committed during non-international armed conflicts are therefore of particular concern to the ICRC. Violations of the most fundamental principles as codified in Article 3 common to the Geneva Conventions, as well as crimes considered as totally inadmissible whether perpetrated in international or in non-international armed conflicts should form part of the list of war crimes. As stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife".<sup>4</sup>

## **2. Complementarity between national and international jurisdiction**

As mentioned earlier, the Geneva Conventions enjoy almost universal acceptance, and practically every State is bound by the duty to prosecute or extradite persons alleged to have committed, or to have ordered the commission of, grave breaches.<sup>5</sup> States have also agreed to take all

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<sup>4</sup> *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR-72. Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), p. 64, para. 119.

<sup>5</sup> Articles 49/50/129/146 of the four Geneva Conventions of 12 August 1949.

requisite steps to enact legislation providing for effective penal sanctions against the perpetrators and to suppress all acts contrary to the Conventions. Hence, the duty to prosecute exists, regardless of the State on whose territory the acts in question were committed or of the nationality of the accused.

It is not the role of the proposed international criminal court to act as a substitute for national courts and thus to detract from the existing obligation of States to repress such crimes at the national level. Pursuant to the complementarity principle, the international criminal court would leave the primary responsibility for action to States and would institute proceedings only in cases where national courts had failed to do so. It is therefore necessary to endow the court with the powers required to ensure its effectiveness and its ability to provide an adequate judicial response to crimes of international concern which have not been suppressed by States. In this connection, it should be pointed out that the ICRC intends to continue to contribute to the efforts being made to strengthen implementation of international humanitarian law at the national level through its Advisory Service, recently set up for that purpose.<sup>6</sup>

However, in cases where trial procedures in national criminal justice systems are not available or ineffective, a permanent international criminal court would have an especially vital role to play. An efficient, widely accepted court offering maximum guarantees of fair trial, free of any political pressure, and designed to complement national justice systems, would send a clear message, both to the perpetrators of serious crimes under international law and to their victims, that immunity from prosecution will no longer be tolerated.

### **3. Requirement of State consent**

Another issue of concern to the ICRC is the regime which requires the consent of the custodial and territorial — or other — States before the court can exercise its jurisdiction. In order for the court to serve as an effective complement to national courts (since it would exercise its jurisdiction only in the event that States had failed to act), it should not be impeded by extra obstacles, such as the requirement of State consent.

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<sup>6</sup> Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *International Review of the Red Cross*, No. 312, May-June 1996, pp. 338-347.

Under the existing principle of universal jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other State.<sup>7</sup> This principle simply reaffirms the fundamental notion that war criminals are not immune from prosecution; those responsible for committing war crimes are accountable for their acts and must be brought to justice, wherever they may be. Hence, if the court is to act only when States have not done so, and if yet another hurdle — that of consent — is imposed on the court before it may exercise its jurisdiction, that goal will never be achieved. Additional conditions, such as obtaining the consent of the State on whose territory the crime was committed, that of the State of which the victims are nationals, that of the State of which the presumed perpetrator is a national, and that of other States concerned, would make it difficult for the court to function or might even give it a *de facto* optional character. If, by establishing an international criminal court, the objective is indeed to ensure the effective prosecution and suppression of crimes of international concern, the proposed court must have inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.

#### **4. Independence and impartiality of the court**

The last matter of close concern to the ICRC is to ensure that the court will offer all the necessary guarantees of independence and impartiality. One proposal provides that while the United Nations Security Council is dealing with a situation covered by Chapter VII of the UN Charter, no prosecution arising from that situation may be commenced — unless the Council otherwise decides. It seems difficult, however, to reconcile the principle of an independent and impartial court with the fact that, in certain cases, the court would be dependent on the Security Council or subordinated to its action, and might thus be prevented from performing its duties freely.

In order to ensure respect for the basic principle of law that a court must be *impartial and independent*, prosecutions should not be subordinated to a prerogative conferred on the Security Council to prevent or delay prosecutions when it is dealing with a situation under Chapter VII of the Charter. Hence, the Prosecutor should be empowered to initiate investigations and institute proceedings *ex officio*.

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<sup>7</sup> See note 5 above.

## Conclusion

Acting as it does as a neutral intermediary between warring parties in order to assist and protect the victims of armed conflict in close cooperation with the parties concerned, the ICRC seeks to prevent violations of international humanitarian law, but it does not take part in judicial proceedings so as not to jeopardize its operational activities during armed conflicts.<sup>8</sup> It is neither an investigating body nor a judicial body competent to deal with violations of humanitarian law.

On the other hand, the ICRC also has the mandate to promote respect for international humanitarian law and to enhance its implementation. It is convinced that an independent and impartial international criminal court would be able not only to strengthen compliance with humanitarian law but also to ensure more effective application of its provisions. The obligation of States to prosecute violations of humanitarian law is often either ignored or very inadequately fulfilled in practice. It is therefore of prime importance to establish a permanent international court which will make certain that the perpetrators of war crimes, crimes against humanity and the crime of genocide are brought to justice. The momentum gained so far must not be lost, and it is vital that the proceedings of the forthcoming diplomatic conference in Rome should come to a successful and rapid conclusion.

It is equally crucial that in the near future States show the firm political will to ensure that persons suspected of having committed war crimes are duly prosecuted, whether at the national or at the international level. This would lend credibility to the international community's desire to eliminate crimes under international law. An independent and efficient international criminal court would serve as a serious deterrent, saving countless persons in the future from the horrors and suffering caused by such crimes. The objective is clear: the atrocities must cease, those responsible for them must be held accountable, and all necessary measures must be taken to achieve this goal.

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<sup>8</sup> María-Teresa Dutli and Cristina Pellandini, "The International Committee of the Red Cross and the implementation of a system to repress breaches of international humanitarian law", *IRRC*, May-June 1994, No. 300, pp. 240-254.