

# Is there a '*droit d'ingérence*' in the sphere of information?

The right to information from the standpoint  
of international humanitarian law

by Yves Sandoz

International humanitarian law does not deal directly with the right to information, but it is useful to highlight some of the law's features in considering people's right to information in wartime.

## The right to indispensable items

International law stipulates that civilians have a right to items indispensable to their survival.<sup>1</sup> This entails an obligation for the parties to the

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<sup>1</sup> Art. 54 and Art. 69ff. (for occupied territories) 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); Art. 14 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). See also the commentaries on these articles: Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentaries on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff, Geneva, 1987.

conflict, both in enemy territory occupied by them and in their own territory, to allow international action to provide these items if they themselves are unable to do so.

Although objective information is not regarded as an indispensable item, it is nevertheless possible to draw a parallel with this idea, particularly as the warring party in question retains the right to refuse its consent.

So far as humanitarian action is concerned, the warring party concerned must, firstly, acknowledge that the population does indeed lack indispensable items and, secondly, decide whether the proposed activity is purely humanitarian, neutral and impartial. The major problem that then arises is the question whether such decisions are objective. The party required to give its consent does not have arbitrary power since it is bound by the principle that this action must be authorized if it is necessary.<sup>2</sup>

If this principle is clearly being flouted, the humanitarian organizations concerned have the right and the duty to insist on acting. This is the origin of the well-known debate on the 'right to intervene'. Since humanitarian organizations, for obvious reasons relating to their security, cannot impose large-scale relief activities in territory controlled by warring parties which do not want them, these organizations are forced in such cases to alert the international community. International humanitarian law in fact places a collective obligation on the States party to the Geneva Conventions and their Additional Protocols to respect and ensure respect for that law,<sup>3</sup> and this obligation may be invoked in such circumstances.

In practice, what is involved is not intervention as such but rather the alerting of the international community to an intolerable situation which, to the extent that a serious violation of human rights is regarded as a threat to international peace, could prompt the United Nations Security Council to decide on some form of intervention.

The crucial question, however, which shall be considered in the light of the right laid down by international humanitarian law to have access

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<sup>2</sup> Art. 70 of Protocol I and Commentary, *op.cit.* (note 1).

<sup>3</sup> Art. 1 common to the 1949 Geneva Conventions and Art. 1 of Protocol I; see also Luigi Condorelli and Laurence Boisson de Chazourmes, "Quelques remarques à propos de l'obligation des États 'de respecter et faire respecter le droit international humanitaire en toutes circonstances'", in Christophe Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp.17-35.

to items indispensable to one's survival, remains the approach taken by the media or individual journalists to a government which they feel is either abusing its power or not in a position to meet its obligations regarding the right to information.

### **Promoting and teaching international humanitarian law**

Experience with international humanitarian law is another factor, which is more directly connected with the spreading of information. Article 83 of Additional Protocol I stipulates, among other things, that the States party to it must "in time of peace as in time of armed conflict, disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population".

If the educational process is to be effective, it must start in peacetime, without the burden of emotion and hatred which an armed conflict inevitably imposes.<sup>4</sup> In peacetime, it is easier to accept the need for the protection provided for in humanitarian law. The emphasis should be placed, particularly when addressing young people, on the universality and validity in all circumstances of the values underlying international humanitarian law, especially compassion for those who suffer, solidarity, non-discrimination and respect for every person's dignity.

But the more imminent war becomes — to say nothing of when it has actually broken out — the less the teaching of international humanitarian law can be dissociated from everyday reality. The interpretation and presentation of the facts are often central to political and military strategies. The importance of the role played in Nazi Germany by Joseph Goebbels before and during the Second World War is well known, and it has to be recognized that dehumanizing and portraying the enemy as the devil incarnate is common practice in the psychological preparation of young people whose task will be to kill. Major studies of this question have recently been carried out.<sup>5</sup>

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<sup>4</sup> Marion Harroff-Tavel, "Promoting norms to limit violence in crisis situations: challenges, strategies and alliances", *IRRC*, March 1998, No. 322, pp. 5-20.

<sup>5</sup> See, in particular, Dave Grossman, *On killing: the psychological cost of learning to kill in war and society*, Little Brown, Boston, 1995.

Presenting international humanitarian law in wartime thus constitutes a delicate balancing act in which it is necessary to concentrate on averting the worst excesses, especially those committed against the civilian population, and explaining the role of and the rules governing the activities of humanitarian organizations.

It is certainly very important to provide people with objective and factual information in these areas, but this work will often be viewed as political in nature and those who aspire to it may very well find themselves rejected by one or more of the parties to the conflict. It should not be forgotten that war is no longer a legitimate means of achieving what it has not been possible to achieve by diplomacy, and that the justifications for it generally involve lies, on one side or the other.

Even if it has to be supported by specific examples — facts — wartime promotion of compliance with international humanitarian law must not be confused with the spreading of information.<sup>6</sup>

### **Establishing the facts and condemning violations of international humanitarian law**

Neutrality — one of the fundamental principles of the International Red Cross and Red Crescent Movement — is often presented as an obligation to remain silent. This is wrong. In the Red Cross context, the principle is defined as follows: “In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.<sup>7</sup> Periods of conflict are the most dramatic examples of this kind of controversy. However, the entire philosophy underlying international humanitarian law tends to consider compliance with that law, and consequently the values that it seeks to protect, as non-political and above controversy, even in the throes of war. As guardian of international humanitarian law, the ICRC cannot be accused of violating the principle of neutrality when it defends these values and condemns their violation.

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<sup>6</sup>In this connection see the proceedings of the 22nd Round Table of San Remo, International Institute of Humanitarian Law, 1997: “Impact of humanitarian assistance and of the mass media on the evolution of conflict situations”, to be published.

<sup>7</sup>The Principles and their definitions were adopted by Resolution VIII of the 20th International Conference of the Red Cross (Vienna, 1965). See the Conference Report and *IRRC*, No. 56, November 1965, p. 573.

It has no duty to remain silent in the face of violations of international humanitarian law, and public condemnation must be judged in terms of appropriateness, not of principle.

The ICRC has always believed that going public should be a last resort and that it is more effective to try dialogue and persuasion first. Immediate public condemnation without at least attempting dialogue may give rise to serious security problems for ICRC delegates and make concrete action to help the victims very risky, or even lead to the expulsion of ICRC staff. But reminding the States of their collective responsibility to respect international humanitarian law nevertheless remains, like public condemnation, a possibility should confidential moves fail.

One of the main problems facing us today, however, is the politicization of values which were meant to be above politics. Ethnic conflicts and other conflicts aimed at asserting group identity leave very little room for respect for the integrity and dignity of all, or for any distinction between civilians and combatants. It thus becomes difficult to condemn violations of international humanitarian law without at the same time condemning the policy of the party responsible, which runs counter to the values underpinning that law. This difficulty also faces protection and assistance operations because the very fact that you are assisting a given group, however needy, may run counter to this policy. In confronting this problem, the first priority must be to defend these values. However, practical solutions must also be urgently found in order to help as much as possible those in need. And it is particularly important here for responsibilities to be clearly shared and for journalists truly to fulfil their role of information providers.

### **Protection for journalists under international law**

Article 79 of Protocol I of 1977 contains provisions protecting journalists "engaged in dangerous professional missions".<sup>8</sup> It is a useful complement to Article 4 A. (4) of the Third Geneva Convention, which accords journalists prisoner-of-war status as "persons who accompany the armed forces without actually being members thereof", war correspondents being closely linked to one of the armed forces, working with their

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<sup>8</sup> Hans-Peter Gasser, "The protection of journalists engaged in dangerous professional missions", *IRRC*, January-February 1983, No. 232, p.3 ff., and Alain Modoux, "International humanitarian law and the journalist's mission", *ibid.*, p.19 ff.

consent and in general receiving their logistic and other support. Article 79 of Protocol I takes a different approach, referring to independent journalists “engaged in dangerous professional missions in areas of armed conflict” and emphasizing that they “shall be considered as civilians”. In so doing, this provision implicitly recognizes the legitimacy of such work and seeks to lessen the mistrust which journalists often arouse in these circumstances, and even to prevent the ill-treatment to which they are sometimes subjected.

However, journalists are protected only “provided that they take no action adversely affecting their status as civilians”. This is especially important in situations in which seeking information can easily serve as a pretext for accusations of spying. Article 79 does not in fact give journalists the right to enter a territory without the consent of the authority controlling it.

The effectiveness of this provision is thus limited, even though the implicit recognition of the legitimacy of a journalist’s work in conflict zones is far from negligible. We should also be aware that granting any additional international guarantees would inevitably entail stricter monitoring. The parties to a conflict are often quite willing to accompany journalists, but though their safety is a real problem, it often also serves as a pretext for controlling their work. Journalists know this and often prefer to take risks rather than to subject themselves to the rigours of control.

An analysis of the security problems encountered by representatives of humanitarian organizations in conflict zones reveals, in addition to those stemming from the very nature of war, the confusion caused by the increasing number of such organizations. Emergency relief is an undertaking much more complex than it seems as it can seriously influence the outcome of the war or the socio-economic fabric of an entire region. The restrictive measures taken by some States faced with this disorderly influx are therefore understandable. To ensure that measures resulting from excesses committed by certain humanitarian organizations do not penalize them all, the International Red Cross and Red Crescent Movement has drawn up a Code of Conduct which it has, with some success, promoted among the main humanitarian organizations.<sup>9</sup>

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<sup>9</sup> 26th International Conference of the Red Cross and Red Crescent, Resolution 4: “Principles and action in international humanitarian assistance and protection”, *IRRC*, January-February 1996, No. 310, p. 69; Council of Delegates, Resolution 3: “Future of the Movement: report of the Policy and Planning Advisory Commission established by Resolution 1/1993”, *ibid.*, p. 142.

Can the principles and contents of such a Code inspire journalists? Some of its features, such as respect for local cultures and customs and, in particular, the commitment to respect the dignity of victims when engaged in the spreading of information, are certainly of interest for journalists. We believe, however, that there is a fundamental difference between "humanitarian" and "journalist", in the broad sense of these terms.

The humanitarian is expected to be disinterested in his setting of objectives to meet strict requirements. This is not necessarily the case for the journalist, whose trade also brings with it the need for commercial success. He may also be held responsible for what he says in relation to information which may harm persons or groups of persons, as defamation, calumny and incitement to racial hatred are prohibited internationally and regarded, in varying degrees, as criminal offences under national legislation. Journalists' codes of ethics probably hinge on these factors. In any event, it is clear that journalists on the whole cannot be required to avoid acting in accordance with political or religious convictions. This is, however, precisely one of the principles set out in the Red Cross and Red Crescent Movement's Code of Conduct. Journalists do not have an obligation to be neutral.

More specifically, the question remains open regarding the rules which international journalists engaged in the spreading of information might set for themselves in conflict zones or areas in which there are lesser disturbances. Are they ready to tackle this issue? Is there any chance that such rules will find sufficient support within their profession to enable their overall image to be appreciably improved, and with it the degree to which they are welcome in conflict zones?

### **Is there a 'right to intervene' in the sphere of information?**

There is no simple answer to this question. The right to information must be considered on three levels. Firstly, it puts forward the principle of freedom of information. It then softens this principle by permitting derogations in certain circumstances, particularly with a view to guaranteeing public order. Finally, it sets limits to that right to derogate. The problem is to know who judges these things, and who judges the judge.

International arrangements do not work with sufficient coherence to provide exact answers to these questions. True, the 1966 International Covenant on Civil and Political Rights set up the Human Rights Committee, but its mandate is too limited for it truly to act as a universal arbiter.

The 1952 Convention on the International Right of Correction also stipulates, in Article V, that “any dispute between any two or more Contracting Parties concerning the interpretation or application of the present Convention which is not settled by negotiations shall be referred to the International Court of Justice for decision unless the Contracting States agree to another mode of settlement.” However, this obligatory manner of settling disputes — clearly loses much of its importance by reason of the fact that the Convention is binding on only a few States.<sup>10</sup>

The real questions concern the role that civil society must play in defence of human rights and the balance which must be sought between that society, governments and supranational organizations in consolidating the international order. It is proper and legitimate that everyone should feel concerned and should mobilize, within the limits of his means and respective sphere of competence, against violations or other failings in the sphere of human rights. This is doubtless how we should understand the words of Dostoevsky which stand at the entrance to the International museum of the Red Cross and the Red Crescent in Geneva: “Every one of us is responsible to all men for everyone and everything.” We might speak of a moral duty to remain vigilant. However, action in this area also involves responsibility, i.e. irreproachable motivation and competence in the action undertaken. It has been said that humanitarian endeavour can kill, and it is true that goodwill alone is not always enough, especially on an international scale.

The work of the Fondation Hironnelle can be seen in this general context of a moral duty to remain vigilant and a responsibility to act with integrity and competence. It seems to us completely justified that an open discussion should be initiated in countries where it does not already exist. Despite everything which can be said about the ‘CNN effect’ and the danger which certain information can pose, it seems clear that we cannot build a future based on obscurantist doctrines and that we can no longer imagine a peace founded on keeping peoples in ignorance.

However, this action must be carried out with a great deal of caution, carefully weighing its scope and respecting local values and sensitivities. In particular, we cannot disregard the fact that in some regions of the world social cohesion is accorded more importance than individual freedom.

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<sup>10</sup>At present 20 States.

Once these precautions have been taken, we believe that moves in this direction are quite legitimate, even if they contradict formal legality. A consensual approach is naturally preferable, but we cannot make ourselves completely dependent on the goodwill of tyrants, and it will always be legitimate to combat discrimination based on "race, colour, sex, language, religion or social origin", to quote the list set out in Article 4 of the International Covenant on Civil and Political Rights, items that cannot be subject to any derogation.

We can indeed, therefore, speak of a 'right to intervene' in the sphere of information. However, it is important to make clear what we mean by it: when faced with the violation of fundamental rules, it becomes legitimate in certain extreme cases to infringe laws which may be in force locally. To do so is not to infringe a State's national sovereignty but to rectify violations committed in its name.

The practical difference between humanitarian action and providing information lies in the fact that, in contrast with the requirements for relief work, physical presence in the territory concerned is not necessarily essential for the spreading of information, which can be more easily undertaken without the consent of the authorities controlling the territory. In the sphere of information, intervention corresponds to a reality over which States increasingly no longer have any control. The debate about the existence and contents of such a right may therefore be rapidly overtaken by facts on the ground. The non-availability of technology continues to shelter many governments from this reality, but they will inevitably diminish in number.

In our view, this reality should strengthen the 'right to intervene' of those who aspire to use it only as a last resort and within the limits set by human rights law. The assault which a flood of unsorted information of all kinds represents should be a matter of concern for each one of us and for all societies. We see no other answer, however, than education. Only education can enable everyone to develop a critical mind. And it is through education that we can try not only to develop a right to information but to cultivate a duty to remain informed. By recognizing this duty and helping to fulfil it we shall be able to advance in the direction of a peace based on individual responsibility.

The very ambitious nature of this role and the great responsibility which it entails should also be stressed. In our view, the objective cannot be limited to respect for international humanitarian law. The open dissemination of information and the establishment of a dialogue between communities which are tearing themselves apart should be more ambitiously

aimed at restoring peace. The objective is therefore political, in the noble sense of the term; as a result, it must be seen as different from the much more mundane, but nevertheless necessary, objective of international humanitarian law, even if it contributes to attaining that objective. The conclusions of a round table organized by the International Institute of Humanitarian Law, in San Remo, which considered the respective roles of the staff of humanitarian organizations and of journalists<sup>11</sup> has confirmed this. It was recognized that humanitarian endeavour and providing information are both such complex tasks as to require great professional competence, especially when carried out in connection with conflict. Although the importance was noted of better understanding the *modus operandi* of the two groups, it was also stressed that cooperation must be within strict limits and must not lead to any confusion of roles. We believe that this conclusion remains very relevant, even if the complementarity of the two roles needs to be emphasized.

Lastly, it cannot be stressed enough that the ambitious nature of the objective implies great responsibility. The legitimacy and acceptability of any information activity are dependent on the clarity of its criteria, the rigour with which they are applied and the critical, open and constant monitoring of the manner in which that activity is carried out.

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<sup>11</sup>See note 6.