

Non-discrimination and armed conflict

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The Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance will take place in South Africa in the autumn of 2001. The ICRC has been actively participating in conference preparations with a view to reminding governments and other players that non-discrimination is not only a guiding principle of human rights law, but also a basic tenet of international humanitarian law. The text has been adapted from an ICRC submission to the conference organizers.

Racism, racial discrimination, xenophobia and related intolerance are not just problems that individual nations and the international community need to address in peacetime. It is equally important to address them in times of armed conflict as well. As a number of recent and ongoing conflicts around the world clearly show, the inequality or exclusion of peoples, groups and individuals is one of the root causes of conflict and, very often, one of its consequences.

The International Committee of the Red Cross (ICRC) therefore believes that the issue of non-discrimination in times of armed conflict should be given adequate consideration in preparation for the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (South Africa, 2001), and at the Conference itself. This paper aims to explain the importance of non-discrimination as an underlying principle of international humanitarian law, as a principle guiding the work of the International Red Cross and Red Crescent Movement and as a principle underlying humanitarian action.

Non-discrimination and international humanitarian law

The principle of non-discrimination underlies all international humanitarian law, which is a body of rules specifically intended to solve humanitarian problems arising directly from armed conflicts. The purpose of international humanitarian law is to protect persons and property that are, or may be, affected by an armed conflict, and to limit the rights of the parties to a conflict to use means and methods of warfare of their choice. International humanitarian law seeks to regulate armed conflicts that may be either international or non-international. International conflicts are wars involving two or more States, regardless of whether a declaration of war has been made or whether the parties recognize that there is a state of war. Non-international armed conflicts are those in which government forces are fighting with armed insurgents, or armed groups are fighting among themselves. Because international humanitarian law deals with exceptional situations — armed conflicts — no derogations whatsoever from its provisions are permitted. Just as importantly, international humanitarian law binds not only States, but also non-State parties to a conflict.

The beneficiaries of international humanitarian law are persons who do not take, or are no longer taking, part in hostilities. As their very titles indicate, the four Geneva Conventions of 1949¹ are geared to protecting the wounded and sick members of armed forces on land (First Convention), wounded, sick and shipwrecked members of armed forces at sea (Second Convention), prisoners of war (Third Convention), and individual civilians and civilian populations (Fourth Convention). The definition of civilians under Additional Protocol I of 1977,² which supplements the 1949 Conventions, includes refugees, stateless persons, journalists and other categories of

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949; Geneva Convention relative to the Treatment of

Prisoners of War, of 12 August 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

individuals who must be granted “protected person” status when they fall into the hands of an adverse party. While the body of rules applicable to non-international armed conflicts (Article 3 common to all four Geneva Conventions, and Additional Protocol II of 1977³) is tailored to take account of the fact that persons taking part in those conflicts are nationals of the same State, it too protects persons who are not, or are no longer, taking part in the hostilities. An important category of such persons are, for example, persons internally displaced by a conflict.

It was the need to provide aid to wounded and sick combatants on a non-discriminatory basis that motivated Henry Dunant, the founder of the ICRC, to spearhead efforts to draft the first-ever international humanitarian law treaty — the original Geneva Convention of 1864.⁴ This Convention established the principle that wounded and sick combatants must be cared for regardless of their nationality, provided for medical services to be recognized as neutral and led to the creation of the distinctive red cross emblem. The principle of non-discrimination has been a basic tenet of international humanitarian law ever since, obliging parties to an armed conflict to treat persons without distinctions of any kind save those based on the urgency of their needs. The principle of non-discrimination — the prohibited grounds for discrimination were subsequently expanded and made non-exhaustive — finds expression in many specific rules of the Geneva Conventions and their two Additional Protocols. Some examples are given below.

International armed conflict

The First and Second Geneva Conventions (Article 12, respectively) stipulate that wounded, sick and shipwrecked members of armed forces and other protected persons must be treated humanely and cared for by the party to the conflict in whose power they may be,

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864.

without any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria. Any attempts upon their lives, or violence to their person, are strictly prohibited. In particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments, or wilfully left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. The Conventions also specify that only urgent medical reasons will determine priority in the order of treatment to be administered, and emphasize that women must be treated with all consideration due to their sex.

The concept of no adverse distinction — to which parallels may be found in international human rights instruments — is applicable in both international and non-international armed conflicts. It means that in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may, and indeed must, be granted to them. International humanitarian law contains numerous provisions designed, for example, to provide special protection for women and children who may be affected by an armed conflict.

The Third Convention, which deals with the treatment of prisoners of war, provides another example of mandatory equality of treatment under international humanitarian law. Article 16 reads: “Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.”

Likewise, the Fourth Convention in Article 13 provides that measures for the general protection of civilian populations against certain consequences of war (e.g. the establishment of hospital and safety zones and of neutralized zones, the protection of civilian hospitals and their staff, the free passage of relief supplies, etc.) cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or

political opinion. Under Article 27 of the Convention, civilians are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They must at all times be treated humanely and be protected especially against all acts of violence or threats thereof, as well as against insults and public curiosity. Women must be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons must be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

Additional Protocol I of 1977, relating to the protection of victims of international armed conflicts, also contains important provisions on non-discrimination. Article 75, entitled “Fundamental Guarantees”, aims to provide minimum standards for the treatment of persons who are in the power of a party to an international conflict and who do not benefit from more favourable treatment under other provisions. It specifies that all such persons shall be treated humanely and shall enjoy, as a minimum, the protection provided by that article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Article 75 prohibits the following acts: violence to life, health, or physical or mental well-being (in particular murder, torture, corporal punishment and mutilation), outrages upon personal dignity (in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault), the taking of hostages, collective punishments, and threats to commit any of the above-listed acts. It also contains a series of detailed provisions on judicial guarantees that must be observed in criminal proceedings against persons suspected of an offence related to the armed conflict, as well as principles that shall apply in the prosecution and trial of persons accused of war crimes and crimes against humanity.

Additional Protocol I lists a series of acts that are considered to be grave breaches of the Protocol. Among them are: “practices

of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”.⁵ Grave breaches are acts considered so harmful to the interests of the international community that they are subject to mandatory universal jurisdiction, which means that all States have a duty to search for the perpetrators of such acts and to bring them, regardless of nationality, before their own courts, or to surrender them for trial to another State that has made out a *prima facie* case.

Non-international armed conflict

Article 3 common to the Geneva Conventions lays down rules applicable to situations of non-international armed conflict, which is the most widespread form of conflict today. It provides that humane treatment and non-discrimination are the basic principles which must guide the behaviour of the parties to the conflict vis-à-vis persons not taking part in it, and presents a list of rules which, according to the International Court of Justice, are an expression of “elementary considerations of humanity”.⁶ It is thus not only binding as treaty law, but as part of customary international law belonging to the category of *jus cogens*. Article 3 reads:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at

⁵ Protocol I, Art. 85, para. 4(c).

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para 218.

any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (...)"

Additional Protocol II of 1977 relating to the protection of victims of non-international armed conflict develops and supplements Article 3 common to the Geneva Conventions. It is applicable to conflicts occurring within the territory of a State Party between its armed forces and dissident armed forces which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. While the Protocol thus has a higher threshold of application than Article 3 of the Conventions, it too emphasizes the fundamental importance of the principle of non-discrimination. Article 2 of the Protocol, entitled "Personal field of application", stipulates that the Protocol shall be applied to all persons affected by an armed conflict without any adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.

The obligation of parties not to discriminate is reiterated in the Protocol's provisions on "Fundamental guarantees", under the heading "Humane treatment". The Protocol provides that: "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction." Specifically prohibited by the Protocol, "at any time and in any place whatsoever", are the following acts:

- “(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.”⁷

In view of the provisions of international humanitarian law which are outlined above, the ICRC believes that the Third World Conference Against Racism would be a good opportunity to remind governments that non-discrimination is a basic tenet not only of human rights law, but also of international humanitarian law. Preparations for the Conference and the draft conference documents should, in the ICRC's view, reflect the importance of non-discrimination in situations of armed conflict, whether international or non-international. The Conference should urge States that have not yet done so to adhere, without reservations, to the Geneva Conventions and their two Additional Protocols, as well as to other instruments of international humanitarian law. States should also be called on to fully abide by their obligations under international humanitarian law as a means of ensuring non-discrimination in times of armed conflict.

Implementation of international humanitarian law

As the guardian of international humanitarian law, the ICRC has a particular interest in seeing that international humanitarian law rules are respected and that respect for them is ensured in all circumstances, as provided for by Article 1 of the Geneva Conventions and of Additional Protocol I. Respect for international humanitarian

⁷ Protocol II, Part II, Art. 4.

law means that States have a duty to take a number of legal and practical measures aimed at ensuring full compliance with their treaty obligations. Among the former is the obligation to adopt legislation implementing the treaties and, in particular, the obligation to provide in domestic law for the prosecution and punishment of persons suspected of having committed grave breaches of the Conventions and of Protocol I. As already mentioned, the list of grave breaches includes “practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”. Compliance with treaty obligations also includes the duty of States to disseminate the rules of international humanitarian law as widely as possible both among members of the armed forces and among the civilian population, in time of peace as well as in time of armed conflict.

Grave breaches have two special aspects. One is the duty of States to take legislative measures necessary to establish appropriate penal sanctions for persons who have committed, or have ordered the commission of, grave breaches. The other is that grave breaches are subject to mandatory universal jurisdiction. This means that States have a duty to search for persons alleged to have committed, or to have ordered the commission of, these crimes. In accordance with the principle of *aut dedere aut judicare*, a State must either bring the alleged perpetrator — regardless of his or her nationality — before its own courts, or it must hand that person over for trial to another State which has made out a *prima facie* case.⁸

While Article 3 common to the Geneva Conventions and Additional Protocol II not explicitly provide for international criminal responsibility of persons suspected of having violated their provisions, it is meanwhile well-established that certain acts perpetrated in non-international armed conflict are also war crimes over which States may exercise universal jurisdiction. Proof of this view was most recently given by the inclusion of war crimes committed in internal armed conflict within the jurisdiction of the International Criminal

⁸ Geneva Conventions, Arts 49 f., 50 f., 129 f. and 146 f., respectively.

Court (ICC), and in subsequent work done by the UN Preparatory Commission on the ICC to define the elements of such crimes.

The ICRC believes that appropriate attention in preparation for the World Conference and in the draft conference documents should be given to the issue of combating impunity for violations of international humanitarian law, and to ways of strengthening implementation mechanisms. Moreover, the World Conference should call on States to enact national legislation implementing their obligations under the Geneva Conventions and the two Additional Protocols thereto. Such legislation should, in particular, focus on prohibiting and punishing war crimes and enable application of the principle of universal jurisdiction in the prosecution of these acts. The Conference should also recall the importance of ratifying other international instruments conducive to combating impunity for war crimes, whether committed in international or internal armed conflict, such as the 1998 Rome treaty establishing a permanent International Criminal Court.

Impartiality as a fundamental principle of the Red Cross and Red Crescent Movement

Non-discrimination is a key element of impartiality, which is one of the seven Fundamental Principles guiding the mission of the International Red Cross and Red Crescent Movement. According to its Statutes, the Red Cross and Red Crescent Movement — of which the ICRC is a component part — “makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.”⁹ This means that all individuals are recognized as equal and must be treated as such, and that the needs of the victims are the only relevant criterion for providing them with assistance and protection.

⁹ Statutes of the International Red Cross and Red Crescent Movement (October 1986), preambular para. “Impartiality”.

In addition, according to the fundamental principle of neutrality, the Red Cross and Red Crescent Movement “may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.¹⁰

While the activities of the International Committee of the Red Cross are based on these fundamental principles, the ICRC believes that it is useful to remind States of the need to enable their continued and consistent application in practice. Conference participants should be aware of the importance of the fundamental principles guiding the Red Cross and Red Crescent Movement — in particular the principles of impartiality and neutrality — and make every effort to ensure that components of the Movement are in all circumstances allowed to carry out their activities in keeping with those principles.

Impartiality as the basis for humanitarian action

The principle of impartiality also underlies and guides humanitarian action in general, including activities aimed at providing assistance to persons in need. While a detailed rendition of the relevant provisions of international humanitarian law is outside the scope of this paper, a couple of examples will be provided.

Under Article 70 of Additional Protocol I, impartiality is a key condition for relief actions undertaken in situations of international armed conflict. The Protocol stipulates that relief actions shall be undertaken when the population is not adequately provided with supplies. It specifies that such actions must be “humanitarian and impartial in character and conducted without any adverse distinction”. While the Protocol mentions that relief actions are subject to the agreement of the parties concerned, it should be noted that according to a generally accepted interpretation, a State *must* accept relief actions when the aforesaid conditions are met, i.e. when the civilian population is not adequately supplied and when relief, which is humanitarian and impartial in nature, is available. Similarly, impartiality is mentioned as a condition for the delivery, under Article 59 of the Fourth Convention,

¹⁰ *Ibid.*, “Neutrality”.

of assistance by humanitarian organizations to the populations of occupied territories.

The rules of international humanitarian law applicable in internal armed conflicts contain similar provisions. Thus, Article 3 common to the Geneva Conventions provides that: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." Such an offer cannot be arbitrarily refused when made by an impartial body. Additional Protocol II elaborates on relief actions that may be undertaken in situations of non-international armed conflict. Pursuant to Article 18, relief actions "which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned". What has already been said above remains valid: if the party in question receives an offer of assistance from a humanitarian organization fulfilling the required conditions of impartiality, such an offer cannot be refused without good reason.