

INTERNATIONAL HUMANITARIAN LAW AFTER BOSNIA

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To start, I would like to thank Professor Paust for inviting the International Committee of the Red Cross (I.C.R.C.) to participate in this panel. Its subject is indeed closely linked to the I.C.R.C.

In my brief presentation, I would like to comment on the following issues which are related to the theme of this panel: 1) Is present humanitarian law still adapted to the needs of modern wars?; 2) How should war criminals be prosecuted?; and finally 3) How safe can *safe areas* be?

As most of you know, the I.C.R.C.'s activities are based on the Geneva Conventions of 1949 and the statutes of the International Red Cross and Red Crescent Movement. Its mandate is to protect and assist victims of armed conflicts and internal disturbances.

First, the I.C.R.C. protects and assists the victims in the field. It protects the civilian population, it visits prisoners of war and other detained persons, provides food, medical and other assistance, re-establishes the link between separated family members through *Red Cross Messages*, tries to find persons who went missing during the conflict, and reunites family members.

Second, the I.C.R.C. is mandated by the international community to act as promoter and guardian of international humanitarian law. Its delegates in the field, which number about one thousand, *monitor* respect of humanitarian law and, in the case of violations, they intervene with the party concerned. These interventions are made at all levels. The I.C.R.C. seeks to establish a constructive dialogue with all the parties concerned, with governmental authorities as well as with armed opposition groups, which, and this should be underlined, are also bound by humanitarian law.

This dialogue with the parties is the reason why the I.C.R.C. treats its findings and representations in a discreet and confidential way. The principle of confidentiality is thus not an end in itself, but rather a *working method*. It has its limits: when severe violations of humanitarian law continue even after the I.C.R.C. has intervened, it reserves the right to denounce such violations publicly. The I.C.R.C. has made a more liberal use of this policy in the last few years, in particular, during the war in the former Yugoslavia.

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After these general comments, let me turn to the question of whether present law is still adapted to the needs of modern warfare.

Since the end of the Cold War, the nature of many armed conflicts has changed. Bosnia is a case on point. We have witnessed there, I think in particular of the atrocious policy of *ethnic cleansing*, types of behaviors which were in complete contradiction with the most fundamental principles of humanitarian law.

In Rwanda and Burundi, ethnic wars have claimed hundreds of thousands of victims, and the present situation in Zaire is extremely preoccupying.

In other parts of the world, such as Liberia, state structures have disintegrated and collapsed to a point where the total lack of discipline and the apparently unlimited availability of light weapons make it impossible for humanitarian organizations to work. Combatants, which often include young children, do not fight for an ideology anymore, but for mere survival.

What lessons should we draw from this grim picture? Is existing law insufficient, and should we therefore advocate new law?

Let me say briefly that the mere fact that a rule is violated does not mean that it is bad. This may sound trivial, but in the ongoing debate, there is a widespread confusion between the quality of the rule and its effective implementation. These are two different things. We are convinced that humanitarian law offers *adequate* protection. The problem is often a manifest lack of political will to apply the law.

When state structures disintegrate, the problem becomes more specific, as civilian and military command lines, which are essential for the respect of humanitarian law (and law in general), have ceased to exist. There does not seem to be a ready-made solution for this problem. Better law is certainly not a solution, as it would not be enforced. It is then rather the responsibility of states to intervene, as humanitarian actors reach the limits of their work. But this is a political, rather than a legal, issue.

Let me add that these situations of failed, disintegrated states are, at least for the time being, not so frequent. They are certainly much less frequent than people think! Take Bosnia: it was not in the process of disintegration in the sense previously mentioned, even though this argument was often used as an *excuse*. There was generally no lack of command lines, as the violations of humanitarian law were mainly the result of clear-cut policies. Forcing people to flee had become part of a political strategy. Moreover, the rules of humanitarian law were often well known.

So the problem is often more *political* than legal. The parties to an armed conflict have to accept more readily the application of humanitarian

law. At the same time, states have to assume their international responsibility and *ensure respect* for the Geneva Conventions as stipulated in Common Article 1.

At the same time, one should remain *pragmatic*: the law may need to be developed in certain *specific* fields. A case in point is the adoption, in May of this year, of a Protocol prohibiting the use of blinding laser weapons.¹ Its Protocol II on land-mines was also revised.

There has also been a debate on whether persons displaced within their own country were sufficiently protected. The representative of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng, has clarified the issue by publishing his *Compilation and Analysis of Legal Norms* protecting the internally displaced. He came to the conclusion that most of the protection needs of the internally displaced were adequately covered.

Here again, what is lacking is the proper *implementation* of existing rules: humanitarian and human rights law. Respect of that law would help *prevent* many population displacements, because it is their violation which forces entire populations to flee their homes.

Let me now turn briefly to the prosecution of war crimes. First, I would like to recall that the Geneva Conventions introduced a system of universal jurisdiction. This means that states have an obligation to prosecute suspected war criminals. It is regrettable that this system has not worked. The ad hoc tribunals for the Former Yugoslavia and Rwanda are an important step. This selective approach is, however, insufficient. There is a need for a permanent international criminal court, as the present impunity cannot last forever.

In the I.C.R.C.'s view, such a court should have the following characteristics:

- a) It should be complementary to national courts, the system of universal jurisdiction should remain in place.
- b) The court should also deal with internal, armed conflicts, and prosecute those who have committed serious violations of common Article 3 of the Geneva Conventions and of Protocol II of 1977, even though these violations may not constitute grave breaches.
- c) The court should be impartial and independent; the prosecutor should be able to open investigations on his own initiative, and the court should not have to obtain permission from concerned states.
- d) The court should be independent from the Security Council, which should not be able to block the activities of the court.

1. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Apr. 10, 1981, Protocol IV, 19 I.L.M. 1523 (1980).

In order to have the system of universal jurisdiction work, it is essential that states adopt proper national legislation allowing for the prosecution of war crimes. In order to assist states, the I.C.R.C. has recently set up an *Advisory Service*. Lawyers based at I.C.R.C. headquarters in Geneva, as well as experts based in the field, seek to assist states in adopting such national laws.

To conclude, I would like to say a few words about the concept of *safe areas*. When speaking about Bosnia, one will of course remember the tragic events surrounding the town of Srebrenica. Srebrenica had, though, been declared a *safe area* by the Security Council. The question we have to ask ourselves is: How safe can *safe areas* be?

When discussing this issue, it is important to clarify the terms being used, as there exists quite some confusion.

The Geneva Conventions and their Additional Protocols contain several rules about the establishment of *protected zones*. They are intended to protect the military sick and wounded, or the civilian population, against hostilities. I cannot go into the details of such zones here, and shall limit myself to say that these zones are based on the consent of the parties. In addition, they have to be *demilitarized*, which necessitates a strict control of the concerned zones.

In practice, there have been great difficulties in establishing such *protected zones* because of the lack of trust between the fighting parties. The I.C.R.C., on its part, has managed to create some *neutralized zones*, though limited in space and in time.

The *safe areas* established by the United Nations are very different in nature. They are *imposed* on the parties, as it happened in the former Yugoslavia, on the basis of Chapter VII of the United Nations Charter. The consequence of this is that these zones are very fragile, and need a very strong protection force in order to be implemented. This was not the case in Bosnia, where the United Nations protection forces were clearly insufficient. Moreover, the zones in Bosnia were not even demilitarized, and could, therefore, be seen as legitimate military targets.

We know the sad results. Not only were the people in these zones not adequately protected, but, worse, the civilian population was given a *false* sense of security and protection.

What lessons should we draw from this experience?

- 1) It is very difficult and risky to establish *safe areas*. That means that one has to think twice before acting.
- 2) If special protection zones are to be created, the principles and rules of humanitarian law should more readily be taken into account.

- 3) If they have to be imposed, which may be justified in certain instances, they should be *completely demilitarized and effectively protected*. And, last but not least,
- 4) Humanitarian law protects the civilian population *as a whole*; zones under special protection should under no circumstances undermine this general immunity.