

THE RED CROSS MOVEMENT - THE LAW AND THE LAUDABLE

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“Although the respective nature and goals of the United Nations and of the ICRC are completely different, the two institutions, nevertheless, spring from the same humanist philosophy. For the founders of the United Nations in 1945, as for the ICRC in 1864, and again, in 1949, the aim was to cast out the demons of war, in the aftermath of a devastating and deadly conflict by striving to define and express, in a tangible form, universal values capable of bringing all peoples together.”¹

INTRODUCTION

In spite of the fact that the Red Cross movement – including its constituent parts, like national societies, the ICRC and Federation have, essentially private origins, there can be no denying that the deliberations and actions of the International Red Cross are of concern to Public International Law.

It is worthwhile to keep the following points in mind:

- a) The Red Cross and Red Crescent institutions are subject to rules of Public International Law and carry out activities that are governed by the Law of Nations; it may, therefore, be argued that they possess some measure of international legal personality.
- b) The Red Cross and Red Crescent institutions themselves contribute to the formation of international humanitarian law, both by their activities and by the drafting of legal instruments, which are, then, submitted, to diplomatic conferences.
- c) States party to the Geneva Conventions are represented by delegates, who participate in the debates, and vote in accordance with the instructions of their governments. This participation of government delegates gives the international conference an element of public authority that cannot be disregarded by international law.

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¹ Statement of Mr. Cornelio Sommaruga, President of the ICRC, UNGA, 50th Session, Special Commemorative Meeting of the UNGA on the occasion of the 50th anniversary of the UN, reproduced from International Review of the Red Cross (IRRC), no. 308, Jan.-Oct. 1995, p. 571.

LEGAL BASIS AND EFFECT

Since the founding conference of October 1863, the question of the ICRC's organisation at the international level came up. Attempts were made to merge the ICRC and the League. However, the ICRC was firm that its independence was essential for its work.

It became doubly important to adopt a statutory structure designed to safeguard the unity of the movement and harmonize the activities of the National Societies, the ICRC and the League. The Thirteenth International Conference of the Red Cross at the Hague, in October 1928 adopted the statute.²

The present Red Cross structure is governed by the statutes adopted at the Twenty-fifth International Conference of the Red Cross in October 1986.³

Regarding the legal effect of such instruments, it is well established that:

“The constitutive instrument states, in a mandatory fashion, the rights and obligations of the members, and determine the powers of the statutory bodies; its obligatory nature necessarily stems from its constitutive status, since, by the will of the parties, it creates an association.”⁴

It is imperative to examine the statutes of the ICRC and Red Crescent movement separately, in relation to the movements' members on the one hand, and in relations to the states party to the Geneva Convention on the other.

As per Art. 4, Point 9 of the movements' statutes, a relief organisation that refused to adhere to the Movement; statutes could not be recognized as a Red Cross institution and could, in no circumstances, become a member of the movement.⁵ Equally, the members of the movement cannot demand of a new national society, that it abide by conditions that they themselves were not bound to observe.⁶ Thus, the statutes are binding in all respects, on every member of the movement.

With regard to the states party to the Geneva convention, the legal implications of the statute presents a somewhat more vexing problem. To begin with, the statutes were not adopted in the usual manner laid down in the law of treaties, but as a resolution of an International Conference of the Red Cross. Hence, they do not have the status of an international treaty. This, however, does not detract from their

2 The Eighteenth International Conference, (Toronto, Jul.-Aug. 1953) revised these statutes, however, they remained substantially the same.

3 Resolution XXXI, Twenty-fifth International Conference of the Red Cross, Geneva, 23-31 October, 1986, *Report*, pp. 121-122, 166.

4 Richard Perruchoud, *Les Résolutions des Conférences Internationales de la Croix-Rouge*, pp. 46-48, 394-395 (1979).

5 *IRRC*, no. 256, Jan.-Feb. 1987, p. 34

6 This would be against the precept of the equality of the national societies, an element of the movements's fundamental principle of universality, *ibid.* p. 28.

obligatory nature; states, in the ultimate analysis, are free to give their assent in any way they see fit. By voting for the statutes, they contributed to the adoption of a legal instrument enshrining the existence of the ICRC.⁷

It is not difficult to visualize the comic absurdity of a situation, wherein states impose obligations on members of the Movement - the ICRC, the Federation and the National Societies - without admitting that the rules are binding on them, as well.

Further, recognition of the obligatory nature of the statutory rules of the movement is implicit in States' participation in the ICRC - an organ of the Movement.

It may, therefore, be concluded correctly, that the International Committee is entitled to insist on the recognition by the States party to the Geneva Conventions of the powers it has been granted by the Movement's Statutes.⁸

THE MOVEMENT'S⁹ RECORD

Spreading Legal Awareness

In the late 1960's, the United Nations passed a series of resolutions on respect for Human Rights in armed conflicts. All of them provided a stimulus for the International Red Cross. The Twenty-first International Conference of the Red Cross, held in Istanbul in October 1969, gave a decisive impetus to this trend in its Resolution XIII on the Reaffirmation and Development of the Laws and Customs applicable in armed conflicts, which underlined "The necessity and urgency of reaffirming and developing humanitarian rules of International Law applicable in armed conflicts of all kinds, in order to strengthen the effective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949." This important decision marked a turning point in the history of humanitarian law over the last quarter century.

The ICRC in 1971 and 1972 convened conferences of government experts and specialists from the National Red Cross and Red Crescent Societies, representing the world's principal legal and social systems. As a result of these efforts, two draft

7 See, on this point, Richard Perruchoud, *Les Résolutions*, pp. 107-108. See further, Auguste-Reynold Werner, *La Croix-Rouge et la Conventions de Genève*, p. 79 (1943).

8 This was also reaffirmed while adopting the Movements' new statutes: "The states party to the Geneva Conventions co-operate with the components of the Movement in accordance with these conventions, the present statutes and resolutions of the International Conference." - Art. 2, para 1, of the Statutes, IRRC, no. 256, Jan-Feb. 1987, p. 108.

9 A reference to the Movement in this section denotes the International Red Cross and Red Crescent Movement - and wherever mentioned the ICRC.

Protocols were prepared.¹⁰ These drafts, were to serve as basic documents for the diplomatic conference on the Reaffirmation and Development of International Humanitarian Law applicable in armed conflicts.¹¹

The untiring efforts of the ICRC ensured that by 1994, fully two-thirds of the world's states were party to the Protocols and they were well on the way to universal acceptance.

The Movement over the past 20 years, has been instrumental in spreading knowledge of humanitarian law and the Fundamental Principles of the Red Cross.¹²

Red Cross Work in Periods of Armed Conflict

The ICRC Mandate Human Rights or Humanitarian Law?

In a broad sense, a humanitarian law can be tagged to human rights, which is the genus. However, humanitarian law is dealt with separately, because there is an element of suffering and distress in humanitarian law. Hitherto, humanitarian law devoted itself to sufferings during war only. In the present century, it has also taken up the role of minimizing the miseries of state arbitrariness, during peacetime as well. However, the ICRC's mandate is promotion of international humanitarian law during periods of armed conflict alone.¹³

As Art. 5, para. 2(c), of the Statutes of the International Red Cross and Red Crescent Movement prescribes, there are three categories of duties for the ICRC in armed conflicts.

- a) To undertake the tasks incumbent upon it under the Geneva Conventions;
- b) To work for the faithful application of international humanitarian law, applicable in armed conflicts, and;
- c) To take cognizance of any complaints based on an alleged breach of that law.

10 These related to a) The Protection of Victims of International Armed Conflicts and b) Protection of Victims of Non-International Armed Conflicts.

11 Geneva, Feb. 1974 - Jun. 1977.

12 For some well-written articles on this topic, see, Stanislaw E. Szulc, "A Brief Outline of International Humanitarian Law", IRRC, no. 241, Jul.-Aug. 1984, pp. 187-226; and, "Praxis, Synopses I-IX, published in IRRC, between 1985 and 1989, Technical note on the Protocol of 8th June, 1977, additional to the Geneva Conventions, IRRC, no. 242, Sept.-Oct. 1984, pp. 274-277.

13 For arguments in favour of the application of humanitarian law, and proposals for the advancement of the observance of humanitarian law, and the ICRC's role, see, Michel Veuthey, "The Global Reach of International Humanitarian Law", in R. G. S. Ingorani, *Humanitarian Law*, 52 (1987).

Fulfilling the ICRC's Duties under Humanitarian Law

These relate to the specific provisions of the Geneva Conventions and the Additional Protocols by virtue of which the ICRC visits prisoners of war and civilian internees; interviews them without witnesses; repeats such visits to make sure that the prisoners are not killed or ill-treated; provides assistance to prisoners in some cases such as blankets, medicines, soap, warm clothing, food, educational material, medical care and recreational supplies; provides relief to the population of occupied territories; has established a Central Tracing Agency (CTA), which collects information on prisoners of war and civilians in occupied territories (particularly those who were interned), so that contact can be established and maintained with their families; searches for persons missing in the event of armed conflict; monitors the return of children to their families; helps to establish and clearly mark, hospitals and safety zones protected from international armed conflict; may, under common Art. 3 of the four Geneva Conventions, take humanitarian initiatives to offer its services to the parties in assisting victims and carrying out activities similar to those it performs in the event of international conflict.

Encouraging Application of Humanitarian Law

The second category of duties identified by Art. 5 of the Statutes derives from the stipulation that the ICRC should, "Work for the faithful application of International Humanitarian Law." The ICRC, thus, assesses whether all the provisions of the four Geneva Conventions and two Protocols are implemented by the parties.

The ICRC's three principal methods for assessing the fulfillment of these humanitarian law norms, are: Visiting places of detention, making official or unofficial approaches to the authorities, and making use of its right to take humanitarian initiatives.

Receiving Complaints Concerning Alleged Breaches of International Humanitarian Law

The ICRC may receive complaints about alleged breaches of international humanitarian law, and approach the authorities to prevail on them to correct any shortcomings notified on the spot and reported by its delegates. If the ICRC is unable to take direct action to help the victims, for example, because it has no access to the scene of hostilities, the procedure it follows is "Not to forward the protests, unless there is no other regular channel for doing so and a neutral intermediary is necessary and where such protests do not come from third parties."¹⁴

¹⁴ *The Red Cross and Human Rights* (1983), (ICRC Doc. CD/7/1).

ICRC's work in Present Day Armed Conflicts: Some Examples

The Gulf War: Using Force to Implement UN Resolutions

When the coalition forces went into action in January 1991, the ICRC launched an operation to bring impartial and independent assistance to all the victims of war.

The ICRC visited 88,221 Iraqi Prisoners of War held by the coalition forces; in the months following the end of hostilities, it distributed medicines and medical supplies worth over 20,500,000 Sw. Fr. in Iraqi hospitals, and used trucks to deliver 250 million litres of drinking water throughout the country, the supply systems in many towns having been damaged. Almost 40 ICRC engineers helped repair a score of water treatment plants in southern Iraq and Baghdad.

In Bosnia: Mediation and Protection for the Civilian Population

As a result of ICRC's efforts on 1st October 1992, an agreement was signed for the unconditional release of all detainees. Over 9000 detainees have since been freed, more than 5,500 of them under ICRC auspices. In addition, considerable material support has been given.

In Somalia: ICRC Relief Operations Carried out, in Exceptionally Dangerous Conditions

In January 1992, the ICRC launched one of its largest food relief operations ever: In a little over 1 year, it distributed 180,000 tons of food, and, 1,680 tons of seed, vaccinated over 500,000 head of cattle and provided medical aid on a large scale. Due to its political neutrality, the ICRC won the confidence of all the clans, who came to an agreement on guaranteeing the safety of the institution's humanitarian activities.

In Sri Lanka: Food Convoys Bound for Jaffna Protected by ICRC Neutrality

The shortage of food and medicine could have threatened the survival of the civilian population. The ICRC chartered 3 ships that, every month, ferried 7,000 to 10,000 tons of essential goods, (food and medicines) supplied by the authorities in Colombo. The ships are loaded and offloaded under ICRC supervision, thereby guaranteeing that their cargo is used strictly for humanitarian purposes.

The Challenges and the Response

Within the International Red Cross and Red Crescent Movement, it is the ICRC's role to coordinate humanitarian operations in situations of armed conflict. Both with the components of the movement and with its other partners in the field, the ICRC engages in this permanent consultation process in a spirit of openness, complementarity and solidarity, with due respect for each entities' specific mandate.

When a conflict breaks out, the ICRC is often the only organization on the spot. There are two reasons for this: first, its presence in all the world's troubled areas through its network of delegations; And, secondly, its rapid response to the crisis. Here, some suggestions are in order:

- a) Through co-operation and complementarity, an effort must be made to improve the planning of humanitarian action in terms of time and space. The concentration of the agencies in the same theatre of operation, spotlighted by the media, then their withdrawal without any gradual progression to reconstruction and development programmes, are examples of poor co-ordination and planning, and it is the victims who pay the price.
- b) Assistance programmes must be carried through to the end. Agencies specialising in emergency operations and those more concerned with reconstruction and development programmes must come to an arrangement among themselves: the former must prepare the way for the latter to take over.

CONCLUDING REMARKS

The ICRC's main task is not to take action itself, but to approach those in power to ensure that they are aware of, and meet their humanitarian responsibilities. It is to convince the leaders of a nation or community, that, in doing so, they are leading, "Men, made of flesh and blood, men who are born, suffer and die against their will, men who are ends in themselves and not only means to an end; men whose virtue is being what they are, and not otherwise, last but not the least, men who aspire to what we call happiness."¹⁵

15 Miguel de Unamuno (1864-1936) quoted by Haroff-Torrel Morrison, *IRRC* no. 306, May-Jun. 1996, p. 220.

TERRORISM AND THE SENTENCING POLICY OF THE SUPREME COURT

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In recent times, terrorism and disruption are spearheading many activities throughout the world. They are waging a domestic war against the sovereignty of their respective nations or against a race or community in order to create an embryonic imbalance and nervous disorder in society.

India is, and has been a country with a terminal terrorist problem. We have fallen in the grip of spiralling violence and have been caught up in the problems of disruptive activities. This has led to unprecedented and unprovoked repression and disruption, unmindful of security of the nation, personal liberty and rights. This terrorism can be understood as the systematic use of terror as a means of coercion, the most reprehensible part of which is that its victims are usually innocent persons.

Terrorism is an evil which cannot be tolerated by any society as it is opposed to democratic values and more importantly to basic humanity. Realising this, Parliament introduced the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985 which was re-promulgated in 1987 to curb this growing menace. 'Terrorism' and 'disruptive activities' were explained in an elaborate way, intending to include all types of activities committed by terrorists, even mere possession of unauthorised arms and ammunition. Some of the principal features of the Act with regard to judicial discretion are:

- * Stringent punishments were prescribed.
- * Minimum punishment prescribed in all cases (5 years).
- * No judicial discretion given in any proviso for reducing this minimum punishment under any circumstances by giving 'special reasons'.
- * Possibility of forfeiture of property of the convicted, fines, life imprisonment and death penalty.
- * Possible to detain person without bail for 1 year, no anticipatory bail permissible.
- * Burden of proof on the accused.

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