

# The Laws of War



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delegation to the Diplomatic Conference in Rome that helped to create an International Criminal Court. She was special legal adviser to the Australian government at negotiations in Geneva to create a third Additional Protocol. She spoke to **OLGA YOLDI** about the Geneva Conventions.

**The Geneva Conventions have been ratified by every country in the world. However, they appear to be severely tested by modern warfare and the efforts to combat terrorism, which have sparked debates on issues such as the definition of ‘armed conflict’; the qualifications of individuals as ‘unlawful combatants’; ‘terrorists’ or ‘participating civilians’, or what degree of force can be considered appropriate. These challenges seem to have contributed to a growing lack of respect for international humanitarian law. Is this causing problems for the International Committee of the Red Cross since it is responsible for interpreting these laws and applying them? Do you think the principles behind the Geneva Conventions are becoming obsolete?**

**HD:** There has certainly been much public debate in recent years about whether the Geneva Conventions, their Additional Protocols and the other treaties can be applied in modern warfare.

The Red Cross would strongly disagree with the notion that they are becoming obsolete. The Conventions and all international humanitarian law are fundamentally based on the balance between military necessity and

humanity – the idea that in military operations, soldiers must take into consideration the impact of their actions on the civilians and on the people who have removed themselves from the combat, as well as their military objectives.

This basic idea remains as relevant today as when the Conventions were originally drafted, and can easily be applied to the current armed conflicts. The key principles found in this area of international law, like the requirement to distinguish between combatants and civilians and the need to be proportional in attacks, are essential to ensure that those engaged in military activities actually represent their countries views and values.

On the other hand, terrorists can often be seen to be using force without any reference to the laws of war or the international humanitarian law because they tend to attack indiscriminately and disproportionately against civilians.

I must say that civilian participation in armed conflict is an interesting one. Civilians have always contributed in wars in various ways, by providing food and shelter for combatants, or by offering political or financial support. But, it’s true that nowadays civilians are increasingly taking on traditional combat roles. This was not unknown when the Geneva Conventions were drafted, and this situation is dealt with under existing international humanitarian law.

The fact is that existing law doesn’t get in the way of the ability of soldiers to target civilians if they are taking part in armed conflict – they can be targeted in the same way as a soldier would be, for the duration of the time that they are engaging in hostilities. They can also be detained for as long as they are reasonably deemed a security threat, and can be tried for their actions under the domestic criminal legislation of the state.

International humanitarian law does not prevent soldiers from carrying out their duties - all it requires is that they abide by basic standards of humanity. This includes the prohibitions on torture, sexual violence and other forms of mistreatment, and the guarantee of a fair trial by a competent court.

Removing or relaxing these standards would do nothing to advance any legitimate military objectives; rather it would simply validate the use of abusive and brutal tactics in war.

The International Committee of the Red Cross is certainly aware of the need for international humanitarian law to keep up with developments in modern warfare, and has recently conducted a two-year study aimed at identifying areas where the law could stand to be strengthened. This includes the protection of the natural environment, protection for detainees, particularly



A joint conference by the FCO and the British Red Cross called “The 1949 Geneva Conventions - 60 Years On” was held in London, 9 July 2009. PHOTO COURTESY OF FOREIGN AND COMMONWEALTH OFFICE/2009

those detained during the course of non-international armed conflicts and protection of internally displaced people. Hopefully there will be political will among the international community in coming years for these areas to be strengthened and made truly robust.

**You were a member of the Red Cross delegation that contributed to the International Criminal Court (ICC) negotiations. What crimes can it prosecute? How can you bring a case before the court? What cases are currently before the ICC? And, what are the implications of this court for the future?**

**HD:** The ICC has jurisdiction over genocide, war crimes, crimes against humanity and aggression – these are described in the Rome Statute as ‘the most serious crimes of concern to the international community as a whole’. Cases can be brought before the court in three ways; by a state party to the ICC; by the Prosecutor and finally by the Security Council under Chapter VII of the UN Charter.

In the first two cases of referral it is a requirement that either the state on which the crime was committed,

or the state from which the accused is a national, have accepted the court’s jurisdiction. This is not required in the situation of a referral from the Security Council.

The ICC has launched full investigations into five situations of armed conflict; Northern Uganda; the Central African Republic; the Democratic Republic of the Congo; Darfur and Kenya. Indictments have been issued against 16 people so far, all senior politicians, militia leaders or high-ranking soldiers accused of bearing responsibility for such crimes as willful killing, forcible displacement, sexual slavery, use of child soldiers and numerous other charges.

The Prosecutor is also currently conducting preliminary investigations in a number of countries, with a view to monitoring ongoing issues there and determining whether a full investigation is warranted. These countries include Afghanistan, Georgia, Colombia, Palestine, Cote d’Ivoire and Guinea.

The existence and operation of the ICC has enormous potential implications for the exercise of international justice. As a permanent body with wide-ranging jurisdiction and relative autonomy from states and the UN, it has the potential to drastically reduce or to end impunity for grave international crimes, and increase

compliance with international law in the field.

The ICC has the potential to strengthen national capacity to prosecute war crimes, crimes against humanity and genocide. It is intended to function as a complementary court. I need to clarify that its jurisdiction is only triggered when the courts of the relevant country are unable or unwilling to prosecute alleged perpetrators.

Where states hold credible and vigorous trials of all plausible allegations of war crimes, their citizens will never need to appear before the ICC. ICC member states therefore have a solid incentive to put in place strong frameworks to support the exercise of their own domestic jurisdiction over war crimes, genocide and crimes against humanity.

As part of the ICRC delegation in negotiations in Rome for the ICC I witnessed the genuine goodwill amongst many countries to ensure that those accused of terrible atrocities do not go unpunished. There is much politics that needs to be worked through in the area of international criminal law, especially when leaders in countries are accused of crimes whilst still in positions of power. However when the ICC was created the world made a step in the right direction towards the goal of ending impunity.

#### **Are members of the UN Security Council members of the ICC? Can they refer cases to the ICC?**

**HD:** Members of the Security Council do not automatically become members of the ICC – states must independently sign and ratify the Rome Statute. Permanent Security Council members, the United Kingdom and France have done so, and have acted as vocal supporters of the court's work. Of the 10 current non-permanent members, eight are full ICC member states and one (Japan) has assumed individual responsibility for approximately 20 per cent of the court's funding.

It is important to understand that the ICC is legally and functionally independent from the Security Council. However, the Rome Statute does give some powers to the Security Council, as appropriate within the scope of its mandate to maintain international peace and security. The Security Council can refer situations to the court which would otherwise fall outside its jurisdiction.

So far, it has done so once, with regard to the conflict in Darfur. The ICC would not otherwise have been able to investigate, as Sudan is not a member state. The Security Council can also request that the court delay or suspend investigations into a matter for a period of 12 months – this request can be extended indefinitely by resolution.

#### **How successful have been the tribunals created by the United Nations Security Council to prosecute war criminals? I am referring to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).**

**HD:** The ICTY and ICTR have both made enormous and important contributions to the development of international humanitarian law over the last decade or so. These tribunals have, among other achievements, tried two former heads of state for their respective roles in the conflicts. They have solidified the law surrounding sexual genocide and incitement to commit genocide, and have brought justice to thousands of victims during their relatively short periods of operation.

While neither body is structurally or procedurally perfect by any means, both represent an enormous leap forward in the enforcement of international justice, which will hopefully be continued in the work of the ICC. These enforcement mechanisms also remind states that they have the primary responsibility of prosecuting those accused of war crimes and other serious international crimes and both the ICTY and ICTR have certainly raised attention to the importance of taking this responsibility seriously.

#### **There are a number of protracted conflicts, particularly in Africa, where many of the groups fighting at some stage have been victims as well as perpetrators of crimes against humanity. If individuals cannot bring cases before the ICC, in such cases, how could those responsible be brought before the court?**

**HD:** When a situation is referred to the ICC, the prosecutor will investigate all crimes alleged to have occurred within its jurisdiction, regardless of which side committed them. In situations where there is crossover between victims and perpetrators, the prosecutor will still examine the actions of all parties to the conflict, taking into account only the gravity of the alleged crimes and the credibility of supporting information.

A good example of this impartial approach can be found in the Prosecutor's investigation into the conflict in Darfur. All sides in the conflict are accused of having committed serious breaches of international law, including violence directed against the civilian population and attacks on peacekeepers. The ICC has issued indictments against senior figures in the Sudanese government and government-linked militia groups, and also against three commanders of a Darfuri rebel group, the Justice and Equality Movement.

The ICC also makes extensive provision for

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victims to be personally involved in proceedings before the court. Victims have the opportunity to participate at all stages of the prosecution at the discretion of the court, and can apply to introduce evidence, to access filings, to participate in hearings and to challenge evidence introduced by parties, among other actions.

Many victims have enthusiastically taken up this opportunity – over 100 victims are registered to participate in the trial of Thomas Lubanga, one of the first cases to proceed through the ICC. So although the victims cannot directly bring cases themselves, they certainly do have the opportunity to have their voices heard and to influence the direction of cases before the court. The victims are able to provide information to the Prosecutor to assist him in the consideration of indictments, so there is a stronger role for victims to play than many people think.

#### **Sexual assault is a weapon of war. Is it considered a war crime?**

**HD:** Rape is a war crime under the Geneva Conventions, along with indecent assault and forced prostitution, and humiliating and degrading treatment (which encompasses sexualised interrogation or detention practices). The ICC Statute also criminalises numerous forms of sexual violence, including rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and outrages upon personal dignity.

Cases from the ICTY and ICTR have confirmed that rape can be used in war as a form of genocide, and have solidified the status of systematic rape and sexual enslavement as crimes against humanity.

The UN Security Council also adopted a resolution in 2008 calling upon all parties engaged in armed conflict to take action to halt rape and other forms of sexual violence against civilians, in recognition that sexual violence in war is a serious violation of the principles

of international humanitarian law, with the potential to devastate entire communities as well as individual victims.

The ICRC recognises the severity of all forms of sexual violence in armed conflict, and has a strong focus on prevention as well as support for victims. In the field, the ICRC works with parties to armed conflicts to ensure that combatants are fully aware of their obligation under international humanitarian law to refrain from using any form of sexual violence.

They also work with victims of sexual violence to ensure their access to appropriate medical treatment, including emergency contraception, preventative treatment for HIV and other sexually transmitted diseases, and other physical and mental health support.

The ICRC provides specialised training, supplies and ongoing support to healthcare and counselling workers, as well as encouraging communities to accept and understand the needs of victims of sexual violence. All of this is in recognition of the fact that the use of sexual violence in armed conflict is both an individual tragedy and potentially a destabilising force for communities already traumatised by war.

#### **International humanitarian law cannot be applied if politicians are not willing to support its enforcement and the military isn't committed to uphold its principles in the field. How could the legal profession, politicians and the military work together to serve and strengthen one another in their common goal? Is this already happening?**

**HD:** Promoting respect for international humanitarian law is an important part of the work of Australian Red Cross, and direct engagement with military, political and legal stakeholders forms a large part of that. Members of the Australian Defence Force (ADF) need to have an understanding of this law, and to respect the limitations placed on their actions during deployments. I must say that well trained ADF legal officers are mostly responsible for providing international humanitarian law advice in the field.

Increasingly, the Australian Federal Police, government employees, journalists and the humanitarian sector are working in areas of armed conflict as well – it's vitally important that they also receive training and resources about their rights and responsibilities under international humanitarian law. The Australian Red Cross regularly runs courses and events across the country aimed at providing ongoing education for these groups, with an emphasis on the importance of humanity. **R**