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ON POSSIBLE ICRC CO-OPERATION WITH THE TRIBUNALS

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I thought that you do not want to hear a detailed description of what the ICRC does in Rwanda, but rather some words about the fundamental problem of co-operation between NGOs and the International Tribunals, with special reference to Rwanda and the specific problems for an organization like the ICRC to co-operate in some fields with the ad hoc tribunal. I already mentioned yesterday that not so much the establishment but the first two years of work of the Yugoslavia Tribunal has brought a revolution on the issue of impunity. The very existence of the Yugoslavia Tribunal have fundamentally changed the mentality of and the risks for leaders willing to commit war crimes. Those outside the former Yugoslavia may however still hope that the Security Council will never constitute a tribunal on the conflict where they are about to commit crimes.

The establishment of the Rwanda tribunal was very important to show that the international community does not take war crimes serious only in the former Yugoslavia, but until now this tribunal did not yet have its full practical impact. Theoretically the establishment of the Rwanda tribunal is an even greater revolution than the establishment of the Yugoslavia tribunal. While for the former Yugoslavia States tried to claim that all the conflicts in the former Yugoslavia were international ones, and thus to apply the traditional war crimes concept, for Rwanda they had, for the first time, to openly criminalize behaviour contrary to Article 3 common to the four Geneva Conventions and to Protocol II additional to the Geneva Conventions, that means to the law of non-international armed conflict.

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2 Record of oral introductory remarks made by Dr Marco Sassoli, Deputy Head of the Legal Division of the ICRC. The views expressed are those of the author and not to be attributed to the ICRC.
Now we hope that the Tribunal on Rwanda will have very soon a greater impact on the reality in Rwanda and on the reality in all other non-international armed conflicts.

Perhaps first simply a reminder on the rules on the repression of violations of international humanitarian law may be useful. As you know in the Geneva Conventions there are rules prescribing that each of the now 186 States Parties has to have a legislation enabling it to have jurisdiction over and to repress "grave breaches" which are detailed in a list at the end of each Geneva Convention. Each State Party has to establish jurisdiction over such crimes independently of where the crime has been committed, against whom the crime has been committed and who was the perpetrator of the crime. This universal jurisdiction exists since 1949 but unfortunately, it did not happen very often that people who committed war crimes were punished according to that existing obligation. Most States do not even have the legislation necessary to enable them to prosecute war crimes committed outside their territory and anyway the Geneva Conventions are never self-sufficient because no penalty is prescribed in the Conventions. The latter only define the crimes, but there is an absolute need for national legislation to lay down the penalties. The Statute of the Yugoslavia Tribunal solved the problem in the right way referring to the penalties laid down in the legislation of the former Yugoslavia.

Now we have to analyse how violations of international humanitarian law not qualified as "grave breaches" may be punished. They obviously may be punished under national criminal law. Simply there is no international obligation for all States to prosecute them and to establish universal jurisdiction on them. However, all States have to respect and to ensure respect for the Geneva Conventions. When confronted to a violation, even if it is not a grave breach, each State has an obligation not only to look to it that its own agents respect international humanitarian law, but also that others respect it and one of the traditional ways to get respect of rules is to punish those who do not respect the rules.

More specifically, as far as violations of the law of non-international armed conflicts are concerned, the ICRC always was of the opinion that there too criminalization is necessary, but States did not think so and therefore in the Geneva Conventions and the Additional Protocols there are no specific rules on criminalization of violations of the laws of non-
international armed conflict. The provisions on "grave breaches" do not apply to non-international armed conflict. The Appeals Chamber of the Yugoslav Tribunal has confirmed that. First an act can be a "grave breach" only if it is directed against "protected persons" and the concept of protected person is defined in the Geneva Conventions among others by referring to the nationality of a person. In an internal armed conflict everybody has the same nationality and therefore nobody is a "protected person" in that technical sense.

The second reason is that some of the "grave breaches" are clearly non-pertinent to non-international armed conflict. It is, e.g., a grave breach to force an enemy national into military service and this is logical in international armed conflict. It would however be difficult to argue that the Government of Bosnia and Herzegovina or the Government of Rwanda may not draft citizens who have hostile feelings against their Government.

Again this does not mean that violations of the law of non-international armed conflict may not and must not be punished, under national legislation. In addition, different international treaties like the Genocide Convention and the Torture Convention prescribe punishment of their violations. Furthermore, the Appeals Chamber of the Yugoslavia Tribunal has qualified certain violations of the law of non-international armed conflict as war crimes under customary international law. Indeed, under the Statute of the Yugoslavia Tribunal it seems logical that the "laws or customs of war" do not only refer to some customary law codified at the end of the last century in the Hague, but also to the treaties applicable to non-international armed conflicts.

In practice, unfortunately the whole system provided for by the Geneva Conventions does not work in a satisfactory manner. It is therefore understandable and very positive that ad hoc Tribunals were created for some contexts. In the long run however, there is a need to establish a permanent international criminal court. The big advantages will be that for the next conflict such a court is already established, it does not need the first three years to become fully operative. Second, such a court will not be dependant on the Security Council and it is very important that no war criminal may hope for a veto of permanent members of the Security Council against their prosecution, or against the establishment of
an ad hoc tribunal for a given context. Third, a permanent court will be perceived as more impartial and credible. Those in the former Yugoslavia may rightly consider that their crimes are not worse than what happened in Cambodia and in Afghanistan or in unfortunately a lot of other contexts. A permanent court will have, fourth an additional preventive effect.

More generally, the repression of violations is a cornerstone of the mechanisms ensuring the respect of international humanitarian law. Punishment has a preventive effect. Punishment has also a stigmatising effect. Even if there is very limited punishment, in every society it is clear that a punished behaviour was not right. Even more important is that punishment leads to the individualisation of responsibility and repression. It clarifies that the incredible crimes witnessed by our century were not committed by "the Serbs", "the Croats", "the Germans" or "the Hutus" but by criminal individuals. Against criminals you do not wage war but you punish them. As long as the responsibility remains with a people or a State, conversely, we have the germ for future new armed conflicts.

The repression of violations in Rwanda is even more important than in the former Yugoslavia because it is not only a question of principle but also the only solution to a very practical humanitarian problem. Today we have 56,000 prisoners in the prisons of Rwanda. I would not even dare to say that they are suspected of war crimes because they have never seen a judge and on most of them, there is not even a file. I do not know how many are innocent or guilty but from a legal point of view we have to presume them to be innocent. Those 56,000 people are in prisons, but there is no infrastructure for so many prisoners, the prison system having a capacity of some 10,000 prison places - and this is calculated according to African standards. Therefore more and more of those prisoners risked to die because they could not sit down, they could not lay down, they had to stand and the legs of people start to foul if they are standing for days and days and cannot rest. In a normal context, wherever in the world we would have found such conditions in a prison system, we would have appealed to the government that if it cannot treat its prisoners humanely it must release them, especially if there is no charge against them. In the context of Rwanda, however, due to the genocide that has happened there, such an approach would not have been very realistic because public opinion and the victims of the
genocide would not have permitted to the authorities to do that and if they did it there would have been the risk that those released, even the innocent ones, had been killed immediately by their neighbours. In addition, a call for a general release would have constituted also a moral problem for the ICRC because some of the prisoners perhaps a lot of them, may have participated in the genocide. Could we really ask for the release of those who have been involved in the killing of 500,000 people? There is presently no judicial system functioning in Rwanda and for a long time to come the judicial system will not be able to deal with all those cases. How could the national judicial system even clarify how and why the suspects were arrested? Some were arrested because a neighbour identified them as having participated in the genocide. Why did the neighbour claim that? Perhaps because he only wanted the cow of his neighbour. All of this will not contribute to a reconciliation but rather to additional hate. Finally, there is not only the question of the 56,000 prisoners but also that of 1 million refugees. They too, according to us, cannot go home today because the atmosphere is not yet ripe. The Tribunal could have a direct impact on the fate of all those people. Among the population in Rwanda and in the Government, there is a psychological need for recognition of the genocide and the international community has largely refused that recognition. I would therefore claim that twenty indictments, by the tribunal, against the right people could completely change the atmosphere in Rwanda, for the prisoners and for the refugees.

We therefore see the Tribunal as having an incredibly important role. Nevertheless there are limits to our co-operation with the Tribunals. It is impossible for ICRC delegates to give evidence before the Yugoslav or Rwanda Tribunals. First of all ICRC delegates do not have the information which would permit sentencing of a person in a fair trial. We are looking for other kinds of information. When we are confronted with a victim of rape we do not try to check whether it is true that there was a rape and who committed the rape and to which ethnic group those responsible belong, but we try to help the victim and I think this is also important. The criminal enquiry is something else, equally important, but the same people cannot pursue both aims and the way of collecting evidence depends on the aim you have. Our aim is to help the victim and to make representations with the authorities. If we had to make only representations with the authorities in cases where we have a case which we could press before a court against an individual responsible, we
should, most of the time, not make any step with the authorities. I have made many representations on cases of torture where I did not have a sufficient case in court against a person who committed the torture. The authorities are responsible independently of that. When there are grave breaches, the ICRC delegates have the main mandate to help the victims and to see to it that they are not repeated.

It is furthermore essential for the victims that the ICRC is present in the field in the interest of those who suffer and obviously if those who give access to the victims know that one day we will give evidence before a court against them, they will very often no longer give us access. In addition there is good legal argument to argue an immunity against giving evidence inherent in the mandate given to ICRC in the Geneva Conventions. If we have the mandate to visit prisoners and to interview them without witnesses it is implied that we do not have to testify on what the prisoners told us. We cannot even transmit confidential information under Rule 70 of the rules of procedure of the Yugoslav Tribunal. Firstly, secrecy will never work within humanitarian organizations. Secondly, it is essential for our credibility in the long run that even in twenty years it will not come out that we told the Tribunals everything also we claimed the contrary. Our credibility depends very much on our transparency, including towards war criminals. Unfortunately under our mandate we have to work frequently with war criminals because in armed conflict the majority of the leaders have committed some grave breaches and are therefore technically war criminals.

We are finally ready to discuss legal questions with ad hoc tribunals and we do that quite often with the Hague Tribunal and with its judges. Moreover, we visit detainees, for the time being those of the Yugoslav Tribunal, unfortunately not yet detainees of the Rwanda Tribunal, because there is no one. We are however ready to do that.