

## **INTERNATIONAL HUMANITARIAN LAW: A TIME FOR ACTION**

Opening Address by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, at the Australian Defence Force Academy and University College, University of NSW, Conference "Prisoners Of War, Prisoners Of History: Captivity and Internment in Recent Conflicts 1939 to the Present", Canberra, 12 May 1994.

---

Like millions of other news viewers around the world a few months ago, I watched as two soldiers emerged from a burning, shell-ravaged building in Bosnia-Herzegovina. Clearly without weapons and their arms held high in the air, they walked towards their waiting captors when, without warning, a volley of shots rang out - and the two surrendering soldiers fell dead.

This was a chilling, brutal and extreme incident, but sadly, similar events are becoming increasingly part of the murderous conflicts occurring across the globe, whether in the former Yugoslavia, Rwanda, Burundi, Somalia, Angola or Tajikistan. And for every execution of a prisoner of war or civilian, there are countless other acts of violence, torture, starvation, deprivation and rape, many of which go unreported.

The international community in fact has no way of knowing just how many of these crimes are being committed, but we do know that, in the troubled aftermath of the Cold War, they are alarmingly on the rise. There are thousands of pages of testimony from governments, aid organisations and individuals on war crimes or crimes against humanity committed in Bosnia alone. The upsurge in nationalist, ethnic, religious and political divisions that have characterised this post-Cold War era have created disturbing and persistent habits of violence which are changing, in fundamental ways, the nature and dimension of armed conflicts. Most of the inhumane acts being committed are not committed in the heat of hostilities, but are outright acts of hatred and revenge. Regrettably, they are more often than not being perpetrated by the armed forces of states or agents of states which have an obligation to uphold the principles of international humanitarian law.

Even bloody war has its rules. And those rules exist, and have existed, across

civilisations for thousands of years. To quote the former Director of the Henri Dunant Institute, M. Meurant (February 1983):

Each civilisation of our planet throughout history has shown that the rules of international humanitarian law exist - in Islam, the African traditions and in Asian civilisations and religions ... this is a very basic truth that we should keep in mind: whatever their race, uniform, religious belief or political creed, victims everywhere are equal in their sufferings and undergo exactly the same pains. They all need mercy, help and care. Thus, whatever the language used to express them, the needs are the same, and so are the answers to these needs."

The *Article on War* (or "*Yi Bin Pian*") by Master Xun in the third century BC indicates that it was established custom in Ancient China to hold prisoners of war without harm until the cessation of war or until the conclusion of peace, when they were to be released. The *Article* also provides evidence of the custom of mutual release of prisoners of war, exchange of prisoners or release on payment of ransom. Other sources, such as the *Zuo Commentary* and the *Code of Si Ma Rang Ju*, suggest that these practices go back to the eighth century BC. Other civilisations had similar rules, although history teaches us that, sadly, they were often honoured more in the breach than in the observance.

In the modern world, since the beginning of the nineteenth century, however, it has been a clear rule of international law that combatants are entitled to protection when captured by an adversary. This and other humanitarian principles evolved into law as a direct result of the chaos and cruelty that typified armed conflict during the French Revolution and Napoleonic wars. The most recent precedents for the humanitarian treatment of prisoners were set at the trials of major war criminals in Nuremberg and Tokyo after World War II. The underlying principles were endorsed by the United Nations General Assembly and the United Nations International Law Commission and codified in the first three Geneva Conventions of 1949, (most specifically in Geneva Convention III governing the treatment of prisoners of war) and in Additional Protocol I of 1977. These instruments are widely regarded as encapsulating customary international law and, as such, apply regardless of whether or not an individual state has actually become party to the conventions or protocols.

Geneva Convention III imposes an obligation on the detaining power to keep prisoners of war alive and in good health, to treat them humanely, and to keep

them protected against acts of violence, intimidation or insults. Under the Geneva Conventions and Additional Protocol I, this responsibility rests equally with the individual soldier who captures the adversary and the detaining power.

It follows that if a soldier who has surrendered, or is attempting to surrender, is killed or mistreated by the soldiers of a state, that state is responsible under international law regardless of whether or not the atrocity was committed in the heat of battle, without orders, or in contravention of orders. The group of soldiers who murdered the two surrendering combatants I mentioned at the outset, and the state they served, were thus guilty of a gross violation of international law. The soldiers can best be characterised as war criminals; the state, as a sponsor of atrocities.

Tragically, their actions highlight the recent disturbing decline in the effectiveness of, and respect for, the principles of international humanitarian law, particularly those governing the treatment of prisoners of war. This intolerable state of affairs represents a serious threat which the international community must redress, not simply because the credibility and integrity of international humanitarian law requires it, but because humanity demands it. Traditionally, international humanitarian law has provided at least a measure of compassion and decency in the horror and chaos of war. Without it, we cannot hope to build a more humane world.

The obscene acts we are witnessing in the world's all too many zones of conflict are crimes of universal jurisdiction and yet, in most instances, they are crimes without punishment. There is thus a glaringly urgent need for the international community to rethink its approach to the enforcement of international humanitarian law. The present definition of a war crime and the concept of individual responsibility for grave breaches of international humanitarian law, are firmly established in international law, but the crucial tasks of enforcing compliance and determining penal sanctions are left to individual states. The simple and sad fact of the matter is, however, that in past and present conflicts, states have consistently shown a lack of preparedness to take such responsibility or to hold their troops accountable for war crimes, even when those violations have been as obvious and as flagrant as those we have seen in Uganda, Iraq and the former Yugoslavia. The record since 1939 illustrates that the key issues of captivity and internment have never been dealt with adequately.

The deliberate and systematic nature of many of the breaches we are presently

seeing demands that every member of the international community cooperate in the development of mechanisms to provide a solution. The United Nations Security Council's decision to establish an ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, represents one positive and practical response. But everyone would do well to bear constantly in mind that crimes against humanity are an ugly, and growing, phenomenon occurring in territories across the globe, not just in the territory of the former Yugoslavia.

To be credible and effective in dealing with crimes against humanity, the international community must now consider rather more seriously than it has over the decades since Nuremberg, the establishment of an international court with universal jurisdiction to try war crimes, as well as a supporting independent prosecuting authority. The International Criminal Court presently being proposed by the International Law Commission could take on this function. The Australian Government for one supports the establishment of such a single international criminal court over the creation of a multiplicity of ad hoc tribunals, even though it could be some time before offenders can be brought before such a court. And we will be working with the International Law Commission to ensure the early adoption of a Statute for the Court and to ensure wide adherence to it.

But there are, of course, other and more immediate steps that can be taken to breathe new life into the international humanitarian law regime and build greater recognition of the laws of war. One such necessary step was taken recently when the international community convened the International Conference for the Protection of War Victims in Geneva last August, which was attended by 160 states, including Australia. In our assessment, the conference achieved its key objectives of raising the level of consciousness of the suffering caused by violations of international humanitarian law, and reiterating the need to respect, and, where necessary, strengthen that law.

On the last day of the Conference, the delegates issued a final declaration reminding all belligerents of their obligation to adhere scrupulously to international humanitarian law, condemning the torture and execution of prisoners of war, and reaffirming that the mistreatment of prisoners of war represents a grave breach of international humanitarian law. The declaration also called on the Swiss Government to convene an open-ended group of experts to study ways to promote respect for, and compliance with, international

humanitarian law and to prepare a report for submission to states in the context of the 1995 International Conference of the Red Cross and Red Crescent Societies.

At the War Victims Conference, Australia and a number of other countries argued that unless there was effective follow-up, the declaration's capacity to promote and enhance international humanitarian law could be lost. The Swiss Government and the International Committee of the Red Cross (ICRC) have subsequently begun a campaign to sensitise governments to the importance of alleviating the suffering of war victims. This campaign will include efforts to encourage states to provide humanitarian educational programs and courses for armed forces personnel and to do more to bring their domestic laws into line with international humanitarian law. The Swiss Government and the ICRC hope that the campaign will serve to maintain the international community's focus on the plight of war victims in preparation for the first meeting of the open-ended group of experts, which will be held in Geneva in September.

I personally reaffirmed to ICRC President Sommaruga, when I met him last September, the Australian Government's willingness to support this follow-up, and I have also made my position known on many occasions about various aspects of humanitarian law, most recently at a Conference on Landmines here in Canberra last November, and at a conference of the Medical Association for the Prevention of War in March.

My response flows naturally from Australia's long and committed support for international humanitarian law. This support is illustrated by our early ratification of all four Geneva Conventions of 1949 as well as the two Additional Protocols, and by our enactment of legislation to give domestic legal effect to Australia's obligations under them. The most important piece of legislation is the *Geneva Conventions Act 1957* which provides, in part, for life imprisonment as the maximum penalty where an offence involves the wilful killing of a person protected by the Geneva Conventions or Additional Protocol I. Offences involving other grave breaches of the Convention are punishable by 14 years imprisonment.

This commitment to international humanitarian law is further demonstrated by the Australian Defence Force's recent decision to extend training in international humanitarian law to all members of the Force. I understand that this training will focus on the treatment of prisoners and relations with civilians in a zone of occupation.

In addition, the Australian Government has actively pursued specific issues raised by the Declaration of the War Victims Conference, such as the problems posed by the indiscriminate use of anti-personnel mines and attacks on peace-keeping forces. We are a party to the 1980 Convention on Certain Conventional Weapons (more commonly referred to as the Inhumane Weapons Convention), which imposes limited restrictions on the use of land mines. At the 48th Session of the United Nations General Assembly last year, we co-sponsored a resolution endorsing the holding of a conference to review that Convention, and we have made extensive representations in South East Asia and the Pacific to encourage governments to accede to it. An Australian delegation also recently travelled to Geneva to attend the second meeting of the group of experts which will consider possible amendments to strengthen the Convention.

Similarly, we supported a New Zealand initiative in the United Nations for the development of an international convention to require parties to co-operate in the protection of United Nations peace-keeping personnel.

Australia has in fact sought ways not only to maintain the momentum of the Declaration of the War Victims Conference, but to extend its impact by encouraging a consistent and comprehensive international response to the breaches of international humanitarian law identified at the Conference. Unless we can enhance respect for, and strengthen observance of, international humanitarian law around the globe, we will continue to have a weak and grossly imperfect system. In recognition of this, we have been working towards achieving a comprehensive Asia Pacific response to the Declaration of the War Victims Conference.

Last year, my Department convened a round table meeting in Canberra to discuss a regional follow-up to the Conference. This resulted in a decision by the Australian Red Cross and the Australian Defence Studies Centre to convene what is being described as a Second Regional Conference on Humanitarian Law to reflect the fact that the first such conference or seminar of its type was held in Canberra, at the ANU, in 1983. The second regional conference will be held here at the Australian Defence Force Academy from 12 to 14 December 1994. The Swiss Government and the ICRC have already supported the concept and have agreed to present papers, and we would of course, be encouraging as wide attendance as possible from regional countries.

The second regional conference will use the Declaration of the War Victims Conference as its reference, and identify and explore fundamental issues in the field of international humanitarian law such as the question of enforcement; the contribution of international humanitarian law to peace keeping and peace enforcement; the relationship between the various international humanitarian law conventions and the existing norms of international humanitarian law; the problem of sexual violence and crimes against women and children in armed conflict situations; the protection of cultural property and the environment; the establishment of mechanisms for improving the plight of prisoners of war and refugees; and the removal of mines from post-war zones.

Another aim of the regional conference will be to develop a corpus of ideas and recommendations which can be linked to the work of similar conferences in other regions and fed into the open-ended group of experts to be established pursuant to the Declaration of the War Victim's Conference. Ultimately, the results of this process will be brought to the 1995 International Conference of the Red Cross and Red Crescent Societies and then, possibly, lead to formal treaty-making procedures.

Our own regional conference will also consider a proposal for the establishment of ongoing, part-time regional working groups (with both government and non-government representation) to concentrate on the application of international humanitarian law to a particular issue or set of issues raised at the War Victims Conference. In this way, the regional conference could provide an additional long-term framework for the promotion of international humanitarian law in the Asia Pacific and internationally.

I have outlined in some detail our hopes for the regional conference because we see it as an important further step in the pattern of global and regional activity which we are all trying to encourage as a means of furthering the development of international humanitarian law. This particular conference which I am opening today is yet another important stepping stone along that same pathway, and although it deals with one particular aspect of humanitarian law, many of the issues - and lessons - nevertheless apply across the whole spectrum.

The inclusion of eminent international speakers to give an account of American, British, German and Italian war experiences, will be of immense value to our study of the most recent abuses of the rights of prisoners of war and related political, legal and moral issues. History has shown that the exploitation of

prisoners of war is a recurring feature, although a most unhappy one, of armed conflicts, and will continue to be so in the future unless the international community is better able to deal with imperfections in the current international legal and moral framework.

We should thus all be grateful to the University College of the University of NSW and the Australian Defence Force Academy for their decision to host this conference today and tomorrow. By providing a broader contextual focus for the consideration of problems such as the capture and internment of prisoners of war than has previously been the case in Australia, this conference will be an excellent complement to the important role that ADFA and the University College, in conjunction with the Australian Defence Studies Centre, have already played to date in focusing national and - in many ways more importantly - international attention on other key humanitarian law issues such as landmines and peacekeeping.

I have no doubt that your combined and committed efforts will substantially strengthen the international community's capacity to see that prisoners of war and all other victims of the madness and suffering of war, are afforded the dignity and protection that international law must continue to provide in the name of humanity.

\* \* \* \*