

How does law protect in war?

Speech given by Jim Backwell from Australian Red Cross at the Law Week lunches in Darwin and Alice Springs.

Abu Ghraib prison: Baghdad, Iraq. The images of prisoner abuse have confronted and shocked us. The images have also become the central focal point for the Coalition occupation of Iraq.

Systematic abuse and humiliation – isn't this a natural part of war? In all conflicts death, dehumanisation and misery occur – what is so different about the Iraq occupation?

The answer – nothing, the same rules of war govern the Coalition. The same rules are being abused AND are being adhered to. Does this mean that International Humanitarian Law (IHL), the Laws of Armed Conflict, are merely platitudes to be ignored? Like so many legal discussions the answer is: yes and no....

International Humanitarian Law (IHL) is a set of rules that, for humanitarian reasons, seeks to limit the effects of armed conflict. It protects those who are not, or are no longer, taking part in fighting, and restricts the means and methods of warfare.

IHL is found in international laws based on Treaties, Conventions and customs and practise of states. Some of the principle instruments are the revised Geneva Conventions of 1949 and their Additional Protocols.

Laws of war are surprising to many – how can the barbarity of warfare be regulated? The reality is that human beings have been fighting each other for tens of thousands of years. Even Neanderthals are believed to have experienced warfare amongst themselves. What we also know is that almost every form of human society has had some form of regulation of the manner in which wars have been fought – who can fight, when you are allowed to fight and who you can kill are features of many of these customs and practices. IHL is merely the latest manifestation of restraint in warfare – a codification of concepts that were crystallising in the nineteenth century.

The principle treaties such as the Geneva Conventions are almost universally

subscribed to – 191 of 193 countries of the world are party to them. The lack of adherence to them must also be balanced with the reality of compliance. The fact is that every day the Geneva Conventions are broken and every day they are adhered to. Every time a wounded soldier is cared for – the First Geneva Convention is working. Every time a shipwreck sailor is picked up, the Second Geneva Convention works. Every time a prisoner is treated humanely, the Third Convention is adhered to and every time a civilian is spared the Fourth achieves its goal.

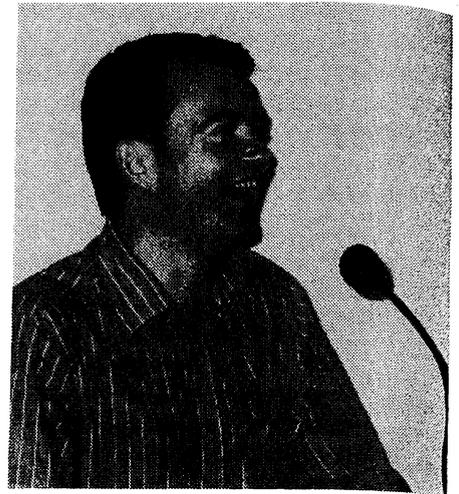
The Conventions provide enforceable law and create a normative environment that the world community has declared shall be the minimum standard of behaviour in war. In reality this may be aspirational but such aspirations should not be discounted.

To be clear in relation to Iraq – all of the Four Geneva Conventions are applicable. Common Article 2 of the Conventions state:

“... The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

Actual enforcement of the law is the responsibility of the states party to the Conventions – it is the responsibility of the United States to prosecute those responsible for the abuses at Abu Ghraib.

Around the world prosecution for offences is a daily occurrence but so to is the lack of enforcement. Major advances are occurring, stimulated by the creation of the International Criminal Court (ICC). Australia, for example, now has comprehensive war crimes legislation. No potential Australian war criminal will appear before the ICC so long as the Attorney General (Cth) authorises the indictments in accordance with the *Criminal Code* 1995 (Cth). Only when a country, which



is party to the ICC, is 'unable or unwilling' to prosecute will the ICC Statute come into play.

To return to the Coalition forces in Iraq, the United States is not party to the ICC and cannot be bound by it in Iraq. The Australian and British Forces are. In this case what implementing mechanisms exist to ensure the operation of the Geneva Conventions?

This shall be the main discussion point today – how one international institution – the International Committee of the Red Cross (ICRC) attempts to apply law and see it protect in war.

“The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and co-ordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.”¹

The ICRC has a unique mandate in the international community. Its mandate is determined by the Geneva Conventions and by the States Party to the Conventions. Very specifically, ICRC has the right to visit prisoners of war and civilians detained by an Occupying Power. This right has been exercised in Iraq.

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ICRC Visits to Prisoners of War

The ICRC has been visiting PWs since the Prusso-Danish War of 1864.² It was the First World War however that truly began to shape the role of the Red Cross in the protection of PWs. With the international legal regime in relation to PWs being very sparse the ICRC used its initiative to establish its basic working modalities, most of which look very similar to today's work. This involves the two primary purposes of Red Cross visits to prisons:

1. To register prisoners so that an international, independent organization has an account of their existence and location, and:
2. To examine the conditions of detention and undertake dialogue with the detaining authorities.

Individual prisoner registration is important for a variety of reasons, including communication that the person is alive and not Missing in Action (MIA). In many of today's wars it helps prevent extra-judicial executions or 'disappearances' of detained persons.

One important development in World War One was the establishment of the International Prisoners of War Agency that was to become the Central Tracing Agency. The task of this agency was to ensure the collection and of information on captured combatants and the distribution of relief parcels. Today the Agency is included in the Geneva Conventions and its operations are maintained by the ICRC.

The experience of the First World War shaped the direction of ICRC and the international protection regime for PWs. One only needs to walk through the Red Cross/Red Crescent Museum in Geneva to see the immense number of files maintained by the ICRC for PWs, creating a demand for accuracy and thoroughness still evidenced in ICRC work today.

In 2003 the ICRC visited 470,000 detainees last year in almost 2,000

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LAWASIA Down Under 2005

Set to take place from March 21-24, at the glorious Queensland Gold Coast, *LAWASIA Down Under 2005* will undoubtedly be the leading legal conference for Asia and the Pacific in 2005.

LAWASIA Down Under 2005 will combine the international interest created by LAWASIA's traditional biennial conference, with the national profile of the Law Council of Australia's 34th Australian Legal Convention.

The conference is proudly arranged and hosted by the Queensland Law Society, and its 44th Queensland Law Symposium will be held under the *LAWASIA Down Under 2005* banner, providing unique networking opportunities.

Importantly, the conference will run concurrently with the 12th Conference of Chief Justices of Asia and the Pacific, with the Chief Justices combining their activities with those of *LAWASIA Down Under 2005* at various times throughout the week.

What to expect from the program

The work program will cover nine separate streams:

- * Criminal Law;
- * Dispute Resolution/Litigation;
- * Human Rights and Constitutional Law;
- * Trade and Business Law;
- * Intellectual Property Law;
- * Legal Practice;
- * Family Law;
- * Property and Succession Law; and
- * Legal Education.

A panel of high profile practitioners, academics and others has been appointed as session rapporteurs, and to them goes the honour of arranging some sixty sessions within those streams. The work program will cater to the practical, the esoteric, the commercial, the inspirational and the need to collect CLE points, and each session will include expert speakers at regional, national and state level.

Bringing the profession together from around the region

Traditionally, delegates at a LAWASIA Biennial Conference come from as many as 30 different countries from around the region and beyond, and tend to be drawn from amongst the leading law firms and chambers.

LAWASIA's national member organisations send representatives, so there is the invaluable opportunity for delegates to mix with the leaders of profession from the Asia-Pacific region.

LAWASIA Down Under 2005, as an educational event, will provide a climate that promotes open and informed discussion aimed at fostering regional uniformity and understanding in the increasingly cross-jurisdictional legal world. As a professional event, it will bring together those who have an active interest in the development of the profession and the welfare of those who practice in it. As a networking event, it creates opportunity to develop state, national and international relationships.

The social program will combine formal and informal occasions that will deliver a uniquely Australian social experience to overseas guests, and that will bring Australian colleagues together to celebrate the sense of belonging to an international legal community.

An exciting new venue

The conference venue, the Gold Coast Convention and Exhibition Centre, is a brand new facility in the heart of this popular destination and one that needs no introduction to Australian delegates. Those coming from overseas will enjoy the chance to explore some of the area's attractions, which include endless white sandy beaches, breathtaking hinterlands, golf at over 30 world class courses, international shopping, casinos, theme parks and zoos.

One of the major benefits of this destination is the comprehensive variety of accommodation on offer. Conrad's Jupiter Hotel, attached to the Convention Centre, will be the 5-star jewel in the accommodation crown, but other possibilities, including apartments for families and 3 and 4 star hotels for the budget-conscious, will be readily available and within easy reach of the conference venue.

In that context, potential delegates might note that the conference dates are set to lead into the Easter vacation, and there

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places of detention in around 80 countries.³

Access to PWs is not a matter of good will, but is a legal requirement.⁴ Access to detainees in internal armed conflict arises from agreement with the detaining authority. The legal requirement or agreement guarantees the respect of basic modalities such as the right to inspect all facilities, when the ICRC requests to, returning as many times as it requires, and to interview prisoners privately. Interpreters must be provided by the detaining power in accordance with Art. 8⁵, though this is almost never used. Instead the ICRC trains its people in the languages to be used, provides its own interpreters or arranges for other prisoners to interpret for them.

Experience has shown the ICRC that long-term dialogue and presence has a greater impact than denouncement and condemnation of prison conditions. This goes to the ICRC choice of modality based on persuasion. The philosophy is based on convincing authorities to change behaviour rather than attempting to force them, in the hope that such change is permanent.

Confidential reports by the ICRC to the detaining authorities deal with positive and negative aspects of the prison conditions and treatments of detainees. The standards we expect are based upon the Geneva Conventions but they are adapted to the particular conditions of the country of origin of the detainees. If the population sleeps on mats, the ICRC is not going to demand four-poster beds.

When will the ICRC speak out?

Making public statements about matters arising from prison visits is a very rare occurrence for the ICRC. Public appeals and denouncements are more regular in relation to other aspects of the operations, but detention work has proven that public denouncement or comment is very much a last resort. The ICRC lists

some basic generic criteria about when such statements may be made, which may be read even *more* strictly in relation to detention:

- the violations are major and repeated;
- the steps taken confidentially have not succeeded in putting an end to the violations;
- such publicity is in the interest of the persons or populations affected or threatened;
- *the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources.*⁶

If the calculation of the ICRC is that the matter will not assist the victims then the decision will probably lean towards silence.

In relation to the Abu Ghraib situation the ICRC was presented with the publication of part of its reports. It needed to set the record straight as to what it has been doing in relation to the welfare of the detainees. Its challenge is not to be drawn into the political quagmire that is now unfolding.

There have been some calls for ICRC reports not to be secret – that the world has a right to know what is going on and what the ICRC sees. With respect to those commentators, this demand lacks a reality of field experience and will not actually improve the situation for victims of abuse in detention.

Why? Firstly, publication of ICRC reports may lead to reduced access to many prisons around the world. The access granted is primarily on the agreement of the detaining authorities rather than rights under the Geneva Conventions. If the Conventions do not apply, strictly the rights do not exist either. Access granted on the grounds of confidentiality can be removed.

Secondly, the release of ICRC reports could result in the politicisation of the ICRC. Imagine a situation where a

new government sought political advantage on the release of reports directed to a previous government. The reports, and therefore their author – the ICRC – become a political football.

The preferred position to demanding the release of ICRC reports would be the demands for wider scrutiny of prison facilities by other organisations. Leave the ICRC to do its work but call for the inspection of facilities by other capable organisations, so long as this does not undermine the protection of the prisoners' rights.

Conclusions

The existence of law in war does not necessarily mean that the protections afforded by this law are granted to the persons it seeks to protect. In the same way that murder is prohibited in our society, the existence of the law does not guarantee adherence. Implementing IHL in times of armed conflict is by no means a simple challenge and it is one that the ICRC struggles with each day. Yet, the existence of the law, the moral authority of the ICRC and its proven modalities ensure that law does protect in war.

Endnotes

¹ 'The Mission of the ICRC, www.icrc.org.

² Pictet, J., Commentary to the Third Geneva Convention, 1960, 605.

³ ICRC Annual Report, www.icrc.org

⁴ Article 126 3 GC.

⁵ Pictet, above n. 2, 610.

⁶ International Review of the Red Cross (March – April 1981).^①