INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONAL DE DROIT HUMANITAIRE
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CURRENT PROBLEMS

OF INTERNATIONAL HUMANITARIAN LAW

28th Round Table, Sanremo, 2-4 September 2004

STRENGTHENING MEASURES FOR THE RESPECT AND IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW AND OTHER RULES PROTECTING HUMAN DIGNITY IN ARMED CONFLICT

- CHALLENGES AND PROSPECTS -

~ PROCEEDINGS ~

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INTERNATIONAL HUMANITARIAN LAW: TODAY AND TOMORROW
- SOME THOUGHTS -

Jovan PATRNOGIC*
President of the International Institute of Humanitarian Law

International Humanitarian Law (IHL) is a branch of international law comprising the rules relating to the conduct of hostilities and the protection of war victims. It is *jus in bello* as opposed to *jus ad bellum*, the rules regulating the question of who has the right to use armed force to attain their objectives. This branch of law is comparatively old and well developed. Unfortunately, the problem of its application arises every day. Numerous armed conflicts are present in all parts of the world. They serve to achieve political aims, but at the cost of a huge number of victims and great damage to property and the human environment. Therefore, IHL is of great importance both to the community of nations and to many nations individually. For these reasons, IHL deserves great attention by all those concerned for the respect and implementation of humanitarian standards.

It is always useful to go back to the fundamental question that should be answered. IHL is a branch of law, or legal regime which has been continuously and gravely violated on a large scale and by many actors. The question to be asked is why is this law still valid in spite of so many flagrant violations committed against its fundamental principles? Some people with no legal knowledge would say: "*What is the value of a law which nobody respects?*". In reply it can be said, firstly, that it is not true that IHL is not respected at all. There are many cases of its respect but this does not make news while, unfortunately, its violation does. Secondly, nobody can deny that, on the basis of IHL, large-scale and important humanitarian actions and assistance are being carried out the world over, effectively reducing human suffering. All those concerned, including the media, should pay adequate attention to this fact and so change the distorted image the general public has.

In the general effort to defend IHL and its important role nowadays, its doctrine should be considered as a standard of behaviour to be respected unconditionally. What proof is there that shows that this is a generally accepted standard?

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- The ratification or accession to the main treaties of IHL, the Geneva Conventions of 1949 and the Additional Protocols of 1977. The obligation to respect the rules contained in these instruments is well known. This alone is sufficient proof of the existence of such an obligation;
- The principles on which the rules are based represent customary rules of IHL, to be respected by all, whether the international instruments have been ratified by certain States or not. This is the unanimous view of those dealing with international law;
- International jurisdiction through the existing international tribunals, the International Court of Justice, the two *ad hoc* tribunals for ex-Yugoslavia and Rwanda, the International Criminal Court, all consider the violations of the principles and main rules of IHL as being punishable, and some of the tribunals have punished those who are responsible for violations;
- The statements of political and military leaders of the countries concerned have often declared that the rules of IHL represent a international standard of behaviour to be respected by all and that their country or organisation, movement, army or armed group, would respect IHL;
- Many resolutions of international intergovernmental organisations, in particular, the United Nations, the European Union, the Organisation of American States, the Organisation of African States or the African Union, explicitly or inexplicitly express their standpoint that IHL principles and rules are to be respected by all those concerned;
- The components of the International Red Cross and Red Crescent Movement, separately or jointly through their international statutory bodies, give full support to the obligation of respecting IHL. The entire Movement is very much concerned with IHL, its reaffirmation, respect and further development. The ICRC is the creator and promoter of this role;
- The doctrine fully supports and defends IHL, analysing it to discover any lacunae, or deficiencies, and developing it in such a way that it can be adapted to modern conditions without infringing upon the basic principles of that law. In this respect, the International Institute of Humanitarian Law, which gathers various profiles of persons all concerned with the promotion and dissemination of IHL, may be considered as an example of this doctrine.

This is sufficient evidence that there is a strong case for the validity of IHL as an irreplaceable standard of behaviour for all actors in armed conflict.

However, it is not sufficient to point out the validity of IHL and the obligation to respect it. It is equally necessary to continually insist on the reasons why this standard has been established. The demand for the respect of these rules should not lie solely on the fact that it is an obligation. All those called upon to implement them must be convinced that this obligation exists for good reasons. These reasons are self-evident. The sufferings which every war brings to people living in the areas caught up in an armed conflict are great; the fear of being hit by the war machine, being killed or seriously injured, separated from their families, having their rights infringed upon through, for example, arrest, detention, mutilation, torture; seeing

the destruction of the goods essential for survival or for a normal life, often being goods acquired through many years of work; seeing the disruption of the services that are essential to life, such as, hospitals and other health institutions. There is no end to the list of suffering inflicted by armed conflicts and violence. In order to eliminate this, international relations has outlawed war, in principle, with certain exceptions. One of the basic ones is the monopoly over the use of armed force by the UN Security Council. However, even the provisions of the UN Charter have not been respected and executed. International armed conflicts still occur.

The main problem is that the resort to armed conflicts in internal relations has not been solved, force has not been prohibited. As a result, wars continue to take place in all parts of the world, many at the same time and with a long duration. The disastrous consequences and effects of wars continue to destroy humans and property on a large scale. The international community did not want to tolerate this and has taken steps to counter these destructive effects, to limit the use of force for humanitarian reasons. The function of IHL is exactly this, to impose obligations which restrict the right to select methods and means of warfare. IHL will continue to be applicable for as long as there are armed conflicts in the world and nobody knows when they will end. The tendency is to limit the use of armed forces. The strengthening of the respect for human rights, and the new developments concerning the rights and duties of States and public authorities, should help to prevent and eliminate the causes of armed conflicts, but IHL will have its importance for as long as this process lasts. In fact, it provides the protection of basic human rights in situations where the consequences of their violations are disastrous and surpass the consequences of any other event. This fundamental function of IHL must always be taken into account and underlined whenever possible.

In order to be efficient, IHL must be adapted to current conditions and relations, but also to the trends of development of the international community. For these reasons, IHL, as a branch of international law, must be as coherent as possible, the lacunae eliminated, new rules and perhaps institutions developed and streamlined, and the parts which are unclear and therefore open to different interpretations, clarified. The relationship of IHL with other branches touching the same questions or situations must be determined. I shall mention some of the points which require improvement so that the application of the legal system and regime of IHL can also be improved.

One of the main features of IHL is the strict division between the rules concerning International Armed Conflicts/IAC, and those of Non-International Armed Conflicts (NIAC). It is evident that the first type of situation calls for rules which are greatly developed, while the second is a smaller field containing only summary rules. Is this great difference between the rules of IAC and NIAC justified? Certainly not. States do not want an international treaty giving for instance the insurgents or rebels the same legal basis as their own. However, in practice, the rules applicable and applied to NIAC are much more developed than they are in main instruments (Art. 3 of the 1949 Geneva Conventions and Protocol II Additional to the Geneva Conventions), the reason being that the victims of war are exposed to sufferings and their property can be destroyed in the same way as in IAC, and thus a broader set of rules was applied or was applicable in

NIAC, officially or implicitly in a pragmatic way. This tendency to develop similar rules of IHL concerning NIAC and IAC is evident. And it should be formalized, as was the case in the Convention on some conventional weapons of 1980, where Art.1 was amended in December 2001. It should be borne in mind that there are hardly any purely non-international armed conflicts. On the contrary, there can be elements of international intervention, which transforms the conflict into "*internationalized non-international armed conflicts"*. The jurisdiction of some international tribunals shows how the rules of IHL for IAC are equally applicable in NIAC situations. This is also visible in practice; many rules, in particular those relating to humanitarian action and to the right to use certain weapons, are considered to be the same in both types of war. In conclusion, the tendency to unite the rules of IHL applicable to NIAC to those applicable to IAC should be strongly supported, and this would already solve some of the humanitarian problems. The problem remains as to how non-state actors, Parties to the armed conflict, can be induced to accept not only the applicability of IHL rules but also their responsibility for the respect as well as for serious violations thereof, and how to introduce them to participate in joint efforts to reaffirm and develop IHL to provide better protection for war victims. This is particularly the case with the appearance of some non-state groups which abstain from supporting generally accepted rules concerning the protection of civilian and military victims who are *hors de combat*. This is, however, more a political than a legal problem.

Another problem which is permanently present is the problem that the declaration of the intention to respect humanitarian standards is not followed in practice; on the contrary, these standards are ignored or seriously violated. Those responsible for conducting war should be reminded that what matters is their action, not only their words. Pressure should be exercised on them, be it of a political or moral nature, or through public opinion and the media, the ICRC or the United Nations, to remove this discrepancy between declaration and actual behaviour. Within this demand, it should be underlined that IHL principles and rules should not only be respected, which means abstaining from violating them, but also implemented by taking active steps to comply with the standards of IHL.

There is also need to clarify many rules which are expressed in general terms but in practice allow for different interpretations. The doctrine includes many suggestions to do that. Good examples can be found in the work of some University centres, NGOs, and the work of the ICRC.

To clarify certain essential rules various methods could be used. Official statements could be made in high forums, such as the UN General Assembly, UN Security Council, ECOSOC, Commission on Human Rights, international tribunals in their verdicts, ICRC, resolutions of International Red Cross and Red Crescent Conferences, some NGOs, such as the International Law Association, Human Rights Watch and the International Institute of Humanitarian Law. A statement could also be made by the experts convened by some of the above-mentioned bodies. The interpretations which are desirable could be exposed in statements and acts, but also as guiding principles. They may include criteria necessary to certain rules.

Where the application of IHL begins and where it ends is one of the fundamental questions determining how far IHL principles and rules are applicable. First, the situation has to be classified as an armed conflict or otherwise. The delimitation between military operations and political operations would be important to regulate, by defining the criteria to be used to classify a situation. The views of the Parties to the conflict alone would not be sufficient, the international community should have the right to make a qualification through its various acts, sometimes it is implied in certain acts. The end of the IHL legal regime would come with the general close of military operations, but again the bodies of the international community should have a say, if necessary. There is the special question as to when a belligerent occupation ends and when the situation passes into other forms of military presence. The experience of the United Nations and its peace operations and missions could inspire the right answer.

The distinction between the military and civilians is certainly one of the key questions of IHL, along with the distinction between objects and objectives open to attack or to be protected. The criteria and conditions of the application of this fundamental issue, should be defined to avoid further questions and dilemmas. This issue must be studied and analysed to determine some of its main elements. There is often a difference of opinion when discussing which military objectives can be lawfully attacked? Objects of dual use cause a difference of opinion. More precision in the application of the concept would be necessary.

The definition of the term "*combatant*" is another key issue, and it is connected to the question of the definition of "*direct participation in hostilities*", which deprive a civilian of his protection. The cases of giving support to a population against the action of the military raises the question as to how far this support could be tolerated to maintain the protection of the civilian, and from which moment could his participation be considered as an act of war. In the doctrine, the question was raised as to whether civilians, who did not fulfil the conditions to be given the status of combatant, could be regarded as a third category of persons, with specific rights and duties, but not regarded as a combatant or non-combatant. Such a construction of a new category seems artificial to me. The existing rules of IHL cover these cases sufficiently.

In the conducting of attacks, the questions to be clarified can raise dilemmas. Such as the obligation of precautionary measures in the preparation of attacks, and the responsibility of persons concerned if such measures have not been undertaken. There is also the question of proportionality in planning an attack -on the basis of which criteria are the expected damages to civilians considered excessive in relation to the military advantage?

Among the important rules of IHL, classical but reaffirmed in Protocol I , is that the weapons and methods causing superfluous injury and unnecessary sufferings are prohibited. The SIRUS project has offered some of the criteria concerning this issue. Has this been widely accepted as standard or is it a subject for further debate?

The widespread appearance of acts of terrorism should be examined in the light of IHL. It is evident that deliberate attacks on civilians are a direct violation of the most fundamental norms of IHL. This interpretation should be included, in an adequate legal form, within the scope of IHL. Terrorist acts which do not fall into the area of armed conflict are a separate and complex question.

Very often war victims suffer from bad treatment when in the hands of the adversary. This is an example of how IHL and Human Rights (HR) overlap. In any case, the obligation to respect the basic human rights of persons whose liberty has been restricted owing to an armed conflict, is clear and it must be affirmed; it effects all Parties to the armed conflict, regardless of its qualification, IAC or NIAC. This is the minimum humanitarian standard, valid in all types of situations, something which is now examined as a separate subject in the United Nations. The firm standpoint is that this issue must be upheld.

Providing humanitarian assistance to war victims is, of course, of vital importance for the victims' survival. While IHL regulates this activity, there are also questions which have not been covered. Recently, the Red Cross and Red Crescent Movement has taken the initiative of defining the so-called "*International Disaster Response Law*" to be applied in peace time. But some of its principles could also be made applicable, if no other rules of IHL exist, in armed conflict situations.

Measures of implementation are a part of IHL, and a very important part. If the material law in armed conflict is regulated to a great extent and in detail, the measures of implementation must also be developed.

- The protecting power system, already well elaborated in the Geneva Conventions and Protocol I, gave good results in the Second World War. Therefore, it was included in the post war international instruments, and developed. However, in practice, almost all the Parties to the conflicts since 1945 have ignored and almost abandoned that system. It is not possible now to examine the reasons for that, but in any case, the disappearance of that system in practice has left a great vacuum in IHL. What are the possible measures of implementation of IHL today? This is a very important part of the humanitarian law system
- ICRC expanded its activity in the period following the end of the Second World War. It developed many tasks performed earlier also by the Protecting Powers. ICRC has generally been accepted as a neutral, impartial humanitarian organisation acting in the interest and protection of the victims, while taking into account the legitimate interest of the Parties to the conflict. In this way, it has given war victims the maximum protection and assistance possible in different and difficult situations of war. It is time to give to the ICRC an even stronger legal basis, and recognise the legal obligation of all the parties to co-operate with it. The ICRC, which has proven in over 160 years of activity to have a irreplaceable role, would remain an institution *sui generis*. This role must be clearly recognised as a mandate of the international community. In addition to the role of the ICRC, there are many other measures which should still continue to be used.

- Diplomatic action of States, individual or groups of States, should remain one of the tools for advancing the respect for IHL. Article 89 of Protocol I foresees, in situations of serious violations of IHL, joint action of the Contracting Parties with the United Nations. In Article 97 of the same Protocol, a meeting of the Contracting Parties is proposed to consider general problems concerning the application of IHL. These two provisions should be used more often as they may advance the respect of IHL, starting with the States and their obligation in conformity with Article 2 of the Geneva Conventions.
- The action of the United Nations organs, particularly the General Assembly, the Security Council, and ECOSOC, have all acted in specific situations and this has contributed to the respect and implementation of basic provisions of IHL. This practice should be generalised, perhaps some guidelines could be adopted as a means of contributing to an improved application of IHL. The practice of many UN peace operation missions contains examples of concrete actions to the evident benefit of the war victims.
- The Fact-Finding Commission of Art. 90 of Protocol I could become a very useful method of advancing the respect for IHL. It has, however, not been used. An analysis may be made to see if there are elements in the functioning of this body, that should be amended, but the Parties should be strongly encouraged to use it.
- International Tribunals have contributed to the implementation of IHL, while the International Criminal Court has already started its work. They should be encouraged to the maximum, especially the newly formed International Criminal Court (ICC), for which universal support from States should be sought. These tribunals should act in conformity with the accepted principles of justice, including equality of all persons before the law; equal protection of the victims from all the Parties to the conflicts; equal responsibility of all the perpetrators of crimes. This is something which should be underlined.
- The media is a powerful tool in war. Action should be taken, at the professional level, to ensure that the media act partially and help the victims entitled to protection. The media should also be warned that any type of information which is advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostilities and/or violence is prohibited by the Covenant on Civil and Political Rights, and that a pro-war propaganda is equally prohibited. Professional ethics of the media should guide them in their work. The media should express public opinion, and encourage the respect for humanitarian values, and assistance to all those who are responsible for the implementation of IHL.
- The Red Cross and Red Crescent Movement should continue to be one of the main bodies in contributing to the respect of IHL. In addition to the very special role and responsibility of the ICRC, in the development and implementation of IHL, other components, according to their statutory functions, can certainly play a constructive role in the implementation of IHL. The resolutions of the International Red Cross and Red Crescent conferences should be an important tool in the whole sphere of IHL, both in its development and its application in specific cases.
- The dissemination activities of IHL should be intensified the world over. It should not only expose the principles and rules of IHL, but also underline at all times the reason for the adoption of the law and the importance of its respect. Education of cadres called upon to implement IHL should be intensified.

The role of the International Institute of Humanitarian Law is very important in this field as, through its courses on international humanitarian law applicable to armed conflict, it reaches the armed forces throughout the world, even bringing together, at times, military from opposing armed forces in conflict. It is one of the models for the universal type of dissemination.

- National IHL commissions, as advisory bodies of the States Parties that help their governments to implement IHL and to participate in its development, are measures whose importance has been recognised by the forums concerned, in particular, by the International Red Cross and Red Crescent Conferences and the UN General Assembly. At present, the network of these bodies is not satisfactory, it should be developed to cover more and more countries, because IHL is a universal law, and its implementation should be the responsibility of all the members of the international community.
- One of the specific services recognised in Protocol I which could provide practical help to reduce the sufferings of war victims, is the civil defence which should be created in all States, possibly under different names. The international protected status of civil defence, established by Protocol I 1977, has not been utilized in most of the wars conducted since 1977. It is in the interest of the victims and potential victims to develop this body and use the special status in order to strengthen the efficiency of its humanitarian action.

There may be other bodies or forms to be listed under the measures of implementation. I have mentioned some which are, in my view, the most important ones. They should act simultaneously if the destiny of victims is to be significantly improved. This is the future of law, based on the law which is in force today, with some possible developments, to adapt it to new conditions and necessities. This adaptation, however, can not be made at the experience of fundamental principles, which should be observed under all circumstances.

IHL has its own field and scope of application, but it may touch other branches, so that they may overlap. One of the branches with which IHL can overlap is Human Rights Law (HRL). In fact, there is an opinion in the doctrine that human rights is a broader term which also includes IHL; according to UNGA resolutions, IHL was termed as "*respect for human rights in armed conflicts*". In any case, the fact that both of these branches may cover and protect the same persons can only improve their position and protection. Therefore, the use of mechanisms and measures of implementation of the human rights system in situations of armed conflict could be in principle recommended. Thus, the victims would be legally protected through the rules of IHL and HRL. It is necessary, however, to establish a kind of guideline for the simultaneous application of the measures of implementation of both legal branches or regimes, in order to avoid any conflict of competencies, with a view to providing better and reinforced protection. Never forget that the persons residing in areas of armed conflicts are exposed to the greatest possible sufferings both from the effects of military operations and from bad treatment in the hands of the adversary, therefore, reinforced

protection is indispensable. The interplay and complementarity of Humanitarian Law, Human Rights and Refugee Law is very present today.

IHL contains the rules of *jus in bellum* which stipulate when the right to use armed force is justified and when it is not. In principle, IHL should not depend on the fact that the party concerned has the right to use force or has no such right. All the persons affected by an armed conflict have the same rights to protection and assistance based on IHL. However, the non-respect of certain basic rules of IHL may deprive them of a specific legal regime giving protection to these war victims. This is particularly the case of the status of combatants, and of those who resort to illegal methods or means of war, such as non-privileged combatants. Those who have the right to use force are, however, limited because the use of force must be restrictive, only to the level indispensable for achieving the purpose of the action. This is more a question of fact than of law.

Today, we are witnessing the initiative of the International Federation of Red Cross and Red Crescent Societies to identify and propose, under the title "*International Disaster Relief Law (IDRL) Project*", the rules relating to disaster response in time of peace, that is, other than those connected with armed conflict. The rules of IDRL relate to humanitarian assistance actions. These actions are also carried out in time of war, and are regulated by IHL. The question may arise as to the relation between IHL and IDRL. Although each of these legal regimes regulate different situations they deal with the same activity, namely providing humanitarian assistance to the victims. Although each of these legal regimes have their own rules, there may be some overlapping. IHL regulates humanitarian assistance with all the restrictions necessary due to the specific situation of war, but it is a minimum. The parties concerned can by mutual agreement go above that minimum, in which case some rules of IDRL may be applicable. There are also broader situations between war and peace, in which the question may arise as to which set of rules is applicable. These and other questions concerning the relation between IHL and IDRL require further study in order to reach proper answers.

We may need to remind ourselves of times that our thinking on the protection of victims of war and violence, as well as refugees and displaced persons, and law generally, basically dates back to the fifties, a time when the world was very different from what it is now. In the last more than fifty years, the world has greatly changed, with quite new opportunities and quite new risks.

Today there is an urgent need for new and creative thinking which takes sufficient account of the pressing demands of international peace and security. At least, the debate on new thinking should take place now. It is unlikely that there can be immediate agreement on the exact nature of the new thinking required, but at least now surely, it is an acceptable time to consider the development – or the reform – of thinking.

The need for change cannot be ignored or wished away, but it can be understood and its positive aspect as well as its problems appreciated.

War is the greatest disaster and danger to normal life and the development of nations and individuals, its consequences being disastrous, long-term and even durable. Therefore, the international community must make all possible efforts to reduce its effects – the function of IHL is exactly this – to reduce the effect of war, to alleviate suffering and damage. Therefore, it should be reaffirmed to help build up the future of the world.

STRIVING TO IMPROVE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

-Keynote address –

Jakob KELLENBERGER

President of the International Committee of the Red Cross

Mr. High Commissioner for Refugees,

Mr. President of the Institute,

Your Excellencies,

Ladies and Gentlemen,

I thank the Institute of International Humanitarian Law for organizing this Round Table and thank all of you for your interest in engaging with us in reflection and debate on this year's topic – that is, *"Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict".*

The protection of human life and dignity is a fundamental objective – one that lies at the very core of international humanitarian law and the other bodies of law we will discuss in the coming days. As affirmed in the Declaration of the 28th International Conference of the Red Cross and Red Crescent in December 2003, *"The inherent dignity of every human being can best be promoted and safeguarded through a complementary application of, in particular, international humanitarian law, human rights law and refugee law[, as appropriate]."*

International humanitarian law, when properly applied, affords vital protection to the lives and dignity of those who are vulnerable in times of conflict. Its provisions are aimed at protecting civilians, people deprived of their liberty, the wounded in war, and those under foreign or military occupation. Parties to an armed conflict have the responsibility to implement and respect these laws and the international community has the responsibility – some speak of obligation – to ensure this respect.

Where international humanitarian law is not respected, however, human suffering becomes all the more severe and the consequences become all the more difficult to overcome. It has, as far as the consequences are concerned, to be reminded that past wars are among the causes of new wars. This is particularly evident for wars which have been waged in total disregard of the rules of international humanitarian law. This is not a particularly encouraging statement with some past and present wars in mind. Political quick fixes will however never heal the wounds of humiliation and other wounds in the near or medium term. It is important to think of this in time. Deliberate targeting of civilians, indiscriminate attacks,

forced displacement of populations, destruction of infrastructure vital to civilian populations, the use of civilians as human shields, rape and other forms of sexual violence, torture, destruction of civilian property and looting – these and other violations of international humanitarian law cause untold suffering in armed conflicts throughout the world. As witnessed most recently in Darfur, for example, we have to recognize that the ability of humanitarian organizations to protect the civilian population in armed conflict is often extremely limited. Indeed, the objective of protecting human dignity through ensuring respect for the law involves staggering practical challenges. This statement is far from new. Some of you may, while following the Darfur tragedy, have thought of the report of the International Commission on Intervention and State Sovereignty entitled "*The responsibility to protect*", published in December 2001, and noted how far we are from a world where all States take this responsibility seriously, even with regard to their own civilian population. I hope the behaviour of the main violators of international humanitarian law will not in the end be honoured by an international community which agrees to safe areas conceived as a plan to re-engineer the social structure of Darfur. We do not oppose safe areas as short term, transitional measures for imperative security reasons, but we firmly oppose them as a disguised way to political re-engineering of the social fabric of the region.

The ICRC, cooperating closely with the Sudanese Red Crescent and other National Red Cross and Red Crescent Societies, is providing non-food assistance to 300,000 internally displaced persons (IDPs) in 30 locations in Darfur. As you know, the ICRC has a special responsibility for IDPs as a consequence of armed conflicts. The ICRC provides also food to more than 50,000 and may go up to 400,000 by the end of 2004. Among the other activities I mention the rehabilitation of four hospitals with 860 beds.

Sudan is at present the largest humanitarian operation of the ICRC. 175 Delegates and almost 1,200 Sudanese ICRC staff are working in Sudan, more than 90 Delegates and 400 Sudanese staff directly for the operation in Darfur. The Institution has the ability to cross the lines and is in contact with all Parties to the conflict.

The struggle to uphold humanitarian law and protect human dignity is further complicated by new or aggravated characteristics of armed conflict – new actors capable of engaging in violence; the fragmented nature of conflicts in weak or failed States; the overlap between political and private aims; an increasingly sophisticated technology employed by those who possess it; asymmetrical warfare; an uncontrolled availability of large quantities and categories of weapons; and an increasing involvement of civilians in armed conflict. These and other characteristics of contemporary armed conflicts have caused some to question the pertinence of current international humanitarian law, making the challenge of ensuring respect for international law all the more difficult.

"The problem of respect for the law is not primarily related to the adequacy of the rules themselves, but is mainly the result of a lack of political will on the part of the Parties to armed conflicts to adhere to the law."

Some of the new characteristics of armed conflicts might contain the potential for clarification of existing law – for example, the notion of direct participation in hostilities and related conduct of hostilities issues, or the concept of occupation. Nevertheless, the ICRC joins with the participants in the 28th International Conference in declaring that we are *"[c]onvinced that the existing provisions of international humanitarian law form an adequate basis to meet challenges raised by modern conflicts*." Its provisions establish a delicate balance between military imperatives, on the one hand, and the requirements of humanity, on the other. The problem of respect for the law is not primarily related to the adequacy of the rules themselves, but is mainly the result of a lack of political will on the part of the Parties to armed conflicts to adhere to the law.

It is for this reason that we are gathered today: to discuss what measures can and should be taken to strengthen respect for international humanitarian law and the provisions of other bodies of law applicable in armed conflict. Each one of us, in our respective capacities and with our distinctive mandates and experiences, brings significant insights to these deliberations. We look forward to hearing your thoughts and contributions in the coming days.

Measures aimed at improving respect for the existing rules of international humanitarian law are central to the mandate of the ICRC. In its daily work in situations of armed conflict, it reminds the parties of their obligations under international humanitarian law, and it tries to protect the lives and dignity of those made vulnerable by the conflict and provide them with assistance. Through these and other activities, the goal of improving respect for international humanitarian law both in peacetime and in time of armed conflict will remain a permanent institutional priority.

Peacetime measures – national implementation, dissemination and repression

Over the years, States, supported by other actors, have devoted considerable effort to devising and implementing peacetime measures, as required in various humanitarian law treaties. Dissemination of international humanitarian law among armed forces and armed groups has been reinforced. International humanitarian law has been increasingly incorporated into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted. Other necessary structures have been put in place to give effect to the rules contained in the relevant treaties.

International humanitarian law is increasingly being considered as part of the political agenda of governments. In many States, specific advisory bodies have been created. For example, National

international humanitarian law Committees – which advise and assist governments in implementing and spreading knowledge of humanitarian law – have been established in 68 countries.

Additionally, by encouraging the national prosecution of war crimes and, more significantly, by establishing international bodies such as the *ad hoc* international criminal tribunals and the International Criminal Court, the international community has concentrated its efforts since the early 1990s on the repression of serious violations of international humanitarian law.

The ICRC has been active in advising and assisting States and other actors in these significant developments. It regularly assists with dissemination activities for armed forces and in efforts to develop within academic circles and civil society an awareness of international humanitarian law. Through its Advisory Service, in particular, the ICRC continues to encourage and give technical advice to States on the ratification and national implementation of international humanitarian law treaties. It has promoted and continues to promote the ratification of the Rome Statute of the International Criminal Court.

Implementation during conflict

"*.... we are here to consider what more can be done – in particular, how better compliance with international humanitarian law can be ensured during armed conflicts, by both State and non-State actors."*

While past and present efforts to improve both the prevention and repression of international humanitarian law violations must continue, we are here to consider *what more can be done* – in particular, how better compliance with international humanitarian law can be ensured *during* armed conflicts, by both State and non-State actors.

This question was the focus of a series of regional expert meetings the ICRC conducted last year on the subject, "*Improving Compliance with International Humanitarian Law"*. Those of you who participated in these expert seminars – in Cairo, Pretoria, Kuala Lumpur, Mexico City, and Bruges – will recall the dynamic and forward-thinking discussions on measures that might be taken to improve respect for the law during armed conflicts. Participants discussed a range of measures, including existing international humanitarian law mechanisms and what new proposals might be considered. Significant emphasis was placed on ensuring better compliance with the law in non-international armed conflicts. The innovative proposals made during the series of seminars have provided a rich source of inspiration for the ICRC as it considers what initiatives might be undertaken in the future.

I highlight some of these seminars' conclusions, in particular those that the ICRC will give priority to its future efforts to create conditions for better respect for humanitarian law.

Existing mechanisms

Any discussion on how to strengthen measures favoring respect for humanitarian law during armed conflicts must begin with a reflection on the obligation contained in Article 1 common to the four Geneva Conventions and Additional Protocol I – that is, the responsibility for States to *"respect and ensure respect"* for these instruments in all circumstances.

In addition to a clear legal obligation on States to "*respect and ensure respect*" for international humanitarian law within their own domestic context, common Article 1 also requires that States neither encourage a Party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations. Furthermore, as recently affirmed in an Advisory Opinion from the International Court of Justice, common Article 1 is generally interpreted as enunciating a responsibility on States not involved in armed conflict to ensure respect for international humanitarian law by the Parties to an armed conflict, by means of positive action. Third States have a responsibility, therefore, to take appropriate steps – unilaterally or collectively – against Parties to a conflict who are violating international humanitarian law, in particular to intervene with States or armed groups over which they might have some influence to stop the violations.

"....how can third States be motivated to intervene with States or armed groups over which they might have some influence to stop the violations, in both international and non-international armed conflicts? " Building on this foundational understanding of common Article 1, it remains to be considered how to put this "*positive*" responsibility into practice. You might consider the following questions in your deliberations in the coming days: How can third States be motivated to take appropriate action to ensure compliance with international humanitarian law by Parties to an armed conflict? In particular, how can third States be motivated to intervene with States or armed groups over which they might have some influence to stop the violations, in both international and non-international armed conflicts? Finally, what strategies for improving compliance with international humanitarian law have third States successfully utilized in the past, and what new strategies can be envisaged?

Cases where States are prepared to take action to secure respect for international humanitarian law in conflicts in which they are not involved are rare. Are they rare because we are not doing enough to spur them on, or are they rare because other interests carry more weight for States? For its part, the ICRC is convinced of the significant role third States can play, and continues to encourage States to consider taking such positive action.

In addition to common Article 1, the Geneva Conventions and Additional Protocol I provide for a number of other implementation mechanisms, which will be discussed in greater detail in Session Two. I

would like to highlight two of these mechanisms that, in the opinion of the ICRC, have particular potential and should be utilized and strengthened.

First, renewed attention should be given to the International Fact-Finding Commission, established pursuant to Article 90 of Additional Protocol I and formally accepted by 67 States. This independent body of international experts stands ready to aid in the efforts to improve compliance with humanitarian law. The Commission offers two potentially valuable services: to enquire into alleged grave breaches or other serious violations of the Geneva Conventions or Additional Protocol I, and to facilitate through its good offices the restoration of an attitude of respect for these treaties. Although its formal competence extends only to situations of international armed conflict, the Commission has expressed a willingness to conduct investigations into non-international armed conflicts.

Despite the Commission's own efforts, and the support of the ICRC and others, no cases have yet been referred to it. This is due, in large part, to a lack of willingness by the Parties to an armed conflict to request or give their consent to an investigation, which is required before the Commission can act. The potential influence of the Commission must not be discarded prematurely, before it has been given the opportunity to show what it can provide. We should continue to strive to improve awareness of the Commission and advocate its use. Third States or others with influence over Parties to an armed conflict should encourage the parties to agree to a Commission investigation. The United Nations could be encouraged to utilize the Commission, perhaps through a Security Council mandate pursuant to Chapter VII of the UN Charter.

Finally, more emphasis should be placed on the second potential role of the Commission – its *"good offices*" function. Through its good offices, the Commission's efforts to restore respect for humanitarian law have the advantage of being "*forward-looking*" and may be welcomed by the Parties to a conflict as less threatening to State sovereignty.

A second potentially valuable measure to be kept in mind are meetings of the High Contracting Parties, provided for in Article 7 of Additional Protocol I. "*The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.*" Although some might consider that a discussion of specific situations of violation would have more potential impact, nonetheless, a discussion of "*general problems*" would provide a significant opportunity to achieve State consensus on interpretations of general issues of international humanitarian law.

New proposals for international humanitarian law mechanisms

The regional seminars resulted in a wealth of proposals for new measures or mechanisms for improving respect for humanitarian law. Proposals included a system of either *ad hoc* or periodic reporting and the institution of an individual complaints mechanism; the creation of a committee of States or of independent international humanitarian law experts to serve as a *"Diplomatic Forum"* for addressing situations of humanitarian law violations; and the establishment of an Office of a High Commissioner for international humanitarian law that could be created as a "*treaty body*" to the Geneva Conventions and their Additional Protocols. Although these and other proposals likely will provide inspiration for future developments, participants nonetheless expressed some concern that the general international atmosphere at present is not conducive to the establishment of new mechanisms.

Improving Compliance in Non-International Armed Conflict

Given that the majority of contemporary armed conflicts are waged within the boundaries of States, the lack of respect for humanitarian law in situations of non-international armed conflict is of particular concern. How we can achieve better compliance in this type of conflict must therefore be a priority. This challenge was the subject of considerable discussion at the ICRC regional expert seminars in 2003, as well as in other fora, such as a joint ICRC-African Union meeting in May 2004 and the recent Informal High-Level Expert Meeting organized by the Government of Switzerland and the Harvard Program on Humanitarian Policy and Conflict Research.

From its own work in non-international armed conflicts, the ICRC has identified a number of important existing mechanisms or tools that can lead to better accountability by States and armed groups with respect to international humanitarian law obligations. First, the Parties to a non-international armed conflict might be encouraged to enter into a special agreement, as provided for in Article 3 common to the four Geneva Conventions. Through such agreements, the parties may make an explicit commitment to comply with a broader range of treaty rules of international humanitarian law, beyond the obligations described in common Article 3 and in other rules applicable in non-international armed conflicts. This will provide the parties with added incentive to comply with the law, based on their mutual consent and express commitment. It must be emphasized that under the plain language of common Article 3, special agreements do not affect the legal status of the Parties.

A second useful strategy in non-international armed conflicts is to encourage armed groups to issue unilateral declarations, stating clearly their commitment to comply with humanitarian law. The aim of such declarations is to provide a self-disciplining effect on the armed groups, in particular where groups are concerned about their public image and reputation. Although there is a risk that unilateral declarations might be made for purely political motives, they might still serve a positive function as an additional tool of leverage to encourage compliance with international humanitarian law.

A similar strategy would be to encourage armed groups to adopt internal codes of conduct on respect for international humanitarian law.

A final tool that, depending on the context, is worth considering is a possible grant of immunity from prosecution for mere participation in hostilities. Given that armed group members are likely to face maximum penalties for their participation in a non-international armed conflict – even if they respect humanitarian law – they have little legal incentive to abide by the norms. A State grant of immunity to armed group members for participating in the hostilities – which of course could never include an amnesty or immunity for alleged war crimes – might provide armed groups with an incentive to comply with humanitarian law. Indeed, Protocol II additional to the Geneva Conventions encourages States to grant the "*broadest possible*" amnesty to persons who have taken part in hostilities at the end of an armed conflict, on the understanding that such amnesties are usually necessary to foster national reconciliation.

The ICRC often uses these and other tools or mechanisms in its attempts to influence armed opposition groups party to non-international armed conflicts to increase respect for international humanitarian law. At the suggestion of participants to last year's regional expert seminars, the ICRC is currently undertaking a study of "*best practices*" of these tools, with the intention of better understanding where they have been most successful and thereby strengthening its work with Parties to non-international armed conflict.

We discussed the issue of incentives which might lead non-State actors involved in armed conflicts to greater respect for international humanitarian law last week with our international advisers who have very different backgrounds and come from different cultures. The main conclusion of the discussion was that the degree of sensitivity shown by armed non-State actors with regard to such incentives depends crucially on the objectives of their armed struggle.

Reaffirmation and Development of International Humanitarian Law

Informed by its operational efforts and analysis of armed conflicts, the ICRC continues to contribute to the interpretation, clarification and, if proved necessary in light of changing realities, the development of international humanitarian law.

"*The ICRC's Project on the Reaffirmation and Development of International Humanitarian Law was established with the aim of providing a framework for internal reflection and external consultations on current and emerging issues of humanitarian law.*" In this regard, the ICRC is undertaking several major initiatives. The ICRC's Project on the Reaffirmation and Development of International Humanitarian Law was established with the aim of providing a framework for internal reflection and external consultations on current and emerging issues of humanitarian law. Through this project, expert meetings have been organized on a variety of topics. In addition to "*Improving compliance with international humanitarian law* ", which I

have mentioned before, other subjects have included *"Direct participation in hostilities", "multinational peace operations"*, and last year's San Remo Round Table, co-organized with the International Institute of Humanitarian Law, on "*International humanitarian law and Other Legal Regimes: Interplay in Situations of Violence"*. Other priorities within the Reaffirmation and Development Project include continued reflection on improving compliance, with a special focus on non-international armed conflicts, issues related to the conduct of hostilities, the concept of occupation, and legal issues arising in the context of the global fight against terrorism.

A number of other subjects are also priorities for the ICRC in the coming years, including initiatives on biotechnology, arms and humanity; and the problem of "*the missing"* – that is, people unaccounted for as a result of armed conflict or internal violence.

Through these and other initiatives, the ICRC continues to strive to support humanitarian action as a whole and to strengthen the protection of war victims.

Independent and neutral humanitarian action

"The preservation of this space also requires that States refrain from giving a humanitarian label to the activities of their armed forces, and from integrating humanitarian action with their political, military or economic response to crises. "

As we are all well aware, a lack of respect for the law often leads to a lack of respect for humanitarian action. Threats and attacks deliberately targeting the ICRC – as well as other humanitarian organizations and their personnel – have raised questions about the ability of these organizations to fulfill their mandate and have generated debate concerning the future of humanitarian action.

The ICRC believes that the security of humanitarian action can best be fostered through increased respect for the rules of international humanitarian law and the rigorous preservation of space for independent and neutral humanitarian action. The preservation of this space also requires that States refrain from giving a humanitarian label to the activities of their armed forces, and from integrating humanitarian action with their political, military or economic response to crises. But in saying so, I am not overlooking the fact that there can be situations where humanitarian organizations are not in a position to carry out their activities, and humanitarian activity by the military might be necessary. But it must be proven – when giving humanitarian tasks to the military – that there are urgent needs requiring humanitarian action that humanitarian organizations are not in a position to meet.

The blurring of lines between military and humanitarian activities clearly adds to the security risks faced by humanitarian organizations. In the future, as now, the ICRC will continue to carry out independent and neutral humanitarian action in order to secure and maintain worldwide access to those adversely affected by armed conflict. Credible independence and neutrality offer the best likelihood of being accepted by all

Parties to a conflict, be it local, regional or global. Sustained dialogue with all actors involved in armed conflicts – however they may be qualified by the international community – is essential to the ICRC's security policy. The ICRC is aware of the fact that it is more important today than it was in the past to project a credible and clear identity in all contexts in which it is working.

Conclusion

Ladies and Gentlemen,

I often ask myself whether the global environment has become more favourable or more hostile to progress, compared to, say, 10 years ago, in terms of respect for international humanitarian law and other bodies of law protecting human life and human dignity and shall conclude my talk by offering some personal thoughts which might be of interest with regard to this issue.

On the one hand, the environment has become more hostile in terms of respect for international humanitarian law because the number of armed groups that simply do not care, about others or about their own members, seems to be on the increase;

- it is more hostile, because of a growing tendency to dehumanise or demonise the adversary. The link with the rise of fundamentalism – not only Islamic fundamentalism – is obvious. Nor am I thinking only of religious fundamentalism. Fundamentalists, as you know, think they are always right. They reduce the richness and complexity of human beings to some very few features – or even to a single one – and they are very good at explaining the world in very simple terms, which is what makes them so successful. Their horror vision is a complex human being who takes on many different identities;
- it is more hostile because some people continue to have serious difficulties in achieving a decent balance between legitimate security concerns and the obligation to respect human dignity;
- it is more hostile, because expectations of reciprocity in terms of respect for international humanitarian law no longer play an important disciplining role. Which measures could compensate for this loss is one of the interesting questions we have to ask ourselves. Among such measures, I would include training and educational programmes, and the determined fight against impunity;
- it is more hostile, because the High Contracting Parties may be less inclined to take the potentially awkward steps of approaching other Parties with a view to securing their respect for the Geneva Conventions, when doing so might result in losing their support in connection with other, mainly security-related issues.

On the other hand, the environment has become more favourable to progress in terms of respect for international humanitarian law

- because international humanitarian law has a visibility and attracts a level of attention one would not have dreamed of ten or fifteen years ago. Debates related to Iraq, Sudan and other places have

contributed to underline the intrinsic value of this body of law. The interest in the ICRC's educational programme for young people aged between 13 and 18 to help them embrace humanitarian principles, to give but one example, is amazing – all the more so when one considers that the States that have introduced the programme belong to different civilizations;

- it is more favourable, because the normative development in the field of international humanitarian law over the last ten years has been quite remarkable, the adoption of the Rome Statute of the International Criminal Court (ICC) standing out as particularly important;
- it is more favourable, because the space for impunity, even if a lot of tenacity and some patience are needed, will gradually narrow, thanks to the ICC, thanks to the *ad hoc* tribunals, thanks to progress being done in the different national legal orders in order to have the basis for prosecuting crimes under the Rome Statute and other legal instruments;
- it is more favourable, because persons whose lives and dignity are under threat can make their voices heard better than in the past;
- it will be more favourable if the commitment contained in the Declaration to the 28th International Conference of the Red Cross and Red Crescent *"to protect human dignity in all circumstances by enhancing respect for the relevant law and reducing the vulnerability of populations to the effects of armed conflicts"* will be taken seriously.

The attitude of States with regard to Article 1 common to the Geneva Conventions remains crucial. To the extent they take this Article seriously there is real hope for improvement. It is useful to point out, particularly at this time, that respect for human life and dignity is also a long-term security investment. Open and hidden forms of humiliation have the opposite effect. States may no longer have the same influence over the behaviour of armed non-State actors that they had during the Cold War and before the latest acceleration in the process of globalisation, but they still hold considerable sway. There are, to be sure, armed actors pursuing goals totally irreconcilable with the rules of international humanitarian law, and incentives to respect the rules of international humanitarian law will have no influence on them. But others may be susceptible to the types of incentives mentioned above, which we therefore have to try, while remaining sufficiently pragmatic in specific situations.

If I remain confident in progress implementing and improving respect for international humanitarian law, it is not primarily because of existing or new mechanisms without underestimating their importance; rather, it is because I have understood better how many people, in the ICRC, National Red Cross and Red Crescent Societies, the UNHCR and in other organizations, are really determined to work in this direction – be they in the field or working in international law, humanitarian diplomacy or in other domains. They will not be diverted by hidden agendas, not ensnared by propaganda and not intimidated by those who respect no human values at all.

My solid hopes rest mainly on them. I thank them for their action, and you for listening.

THE ROLE OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS IN ARMED CONFLICT SITUATIONS

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This paper will briefly outline the developments of the work of the UN Commission on Human Rights (hereafter CHR) as regards countries in armed conflict and its attempts to compile, synthesize or elaborate new standards in the areas where human rights (HR) and international humanitarian law (IHL) are complementary. It will cover the following issues:

1. the evolution of the mandate of the CHR,
2. the role of special procedures of the CHR,
3. the special sessions of the CHR,
4. ongoing efforts to compile synthesize or set new standards on issues where human rights and international humanitarian law converge.
5. conclusions.

1. The evolution of the mandate of the CHR.

The Commission on Human Rights was set up in 1946 by the Economic and Social Council[1], pursuant to article 68 of the United Nations (UN) Charter. Its mandate was to develop standards in the field of human rights[2]. The Sub Commission on Prevention of Discrimination and Protection of Minorities was also established to assist it in this task. In 1947, the Commission adopted a doctrine of no power *vis à vis* countries where HR violations occur[3]. Twenty years later, in 1967, that doctrine was reversed under pressure from the new decolonized independent states, the Soviet Union and their satellite States. ECOSOC resolution 1235 authorized the CHR to deal with specific country situations[4]. The first country to come under the scrutiny of the CHR was South Africa (including South West Africa and Southern Rhodesia). In 1970, the CHR was entrusted with studying the individual communications sent to the United Nations Secretary General (SG) alleging violations of human rights. A confidential procedure -1503- was created to address these complaints[5]. In 1975, the HR situation in Chile was put on the CHR' s agenda, and in 1976 the situation in Cyprus was added[6]. Since 1970 over 84 countries have been scrutinized by CHR. With ECOSOC's authorization to study specific country situations, the CHR's mandate has been enlarged from setting

1 ECOSOC resolution 5(I) 1946
2 ECOSOC resolution 9 (II) 1946
3 ECOSOC resolution 75 (V) 1947
4 CHR resolution 1235 (XLIII) 1967
5 Compilation of communications addressed to the Secretary General was authorized by ECOSOC resolution 728F (XXVIII)1959, see also ECOSOC resolution 1503 (XLVIII)1970, Sub Commission on HR resolution 1(XXIV)1971 on admissibility criteria, the procedure was amended by ECOSOC resolution 2000/3
6 ECOSOC resolution 4 (XXXII) 1976

standards to addressing violations of human rights in a country. A great number of the countries subject to CHR scrutiny have been countries in armed conflict[7], like Afghanistan, Burundi, Colombia, Democratic Republic of Congo, Former Yugoslavia, Guatemala, Liberia, Rwanda and Sierra Leone. As a result one can argue that the current mandate of the CHR not only covers the monitoring of violations of HR but also violations of IHL.

2. The role of the special procedures of the Commission on Human Rights.

Country rapporteurs:

The CHR regularly appoints a country rapporteur to monitor the situation in a specific country on its agenda. The mandate of the rapporteur is regulated in the resolution/decision/chairman's text adopted by the CHR. Most country resolutions state all HR and IHL instruments which the country concerned has ratified and focuses on the implementation of these obligations. Thus the text often deals both with HR and IHL concerns. How this mandate is implemented depends very much on the expert appointed by the chairman of CHR. Most experts have interpreted their mandates to include violations of IHL.

In the majority of these cases, the CHR-text is negotiated with the country concerned, like Colombia or Indonesia, or with the regional group to which the concerned country belongs, for example Democratic Republic of Congo and Sudan. In some instances the text is negotiated between the "*Group of friends*" of a country, like Haiti or Afghanistan. It is very rare that the country concerned ventures into legal arguments regarding the non-applicability of international humanitarian law. A rare example was when CHR attempted to agree by consensus on a text regarding the situation in the Republic of Chechnya of the Russian Federation. The existence of an internal armed conflict was refuted, and thus the applicability of humanitarian law. Russia argued that the events in Chechnya were sporadic acts of violence or isolated clashes[8]. The USA, on its side, has argued that CHR does not have mandate to deal with international humanitarian law and that the prospect of IHL related matters consuming and pushing out the human rights concerns from the agenda is significant[9].

Countries in an armed conflict, like Colombia or Sudan, have made it a *sine qua non* to have the violations of IHL of non-State actors like the FARC/ELN, paramilitaries or SPLA/SPLM reflected in the text. DRC insists that IHL violations committed by the neighboring countries' armed forces on its territory are reflected in the text.

7 CHR resolution 1993/2 established a special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, whose mandate runs until the end of the Israeli occupation.
8 Russian Federation has consistently voted against the draft resolution presented by the EU at the CHR since 2000.
9 US proposal for a sequential approach to human rights law and international humanitarian law in developing the guidelines of 22 January 2004

During the Soviet Union's invasion of Afghanistan, a special rapporteur was appointed to report on both violations of HR and IHL 1984-1989[10]. Also during the war in former Yugoslavia, the country rapporteur was requested to regularly report on violations of HR and IHL, not only to the CHR and General Assembly (GA), but also to the Security Council (SC) in 1992-99. Similarly, the rapporteur on Rwanda was requested to report to the SC in 1994. The special rapporteur on Iraq briefed the SC on the situation in the country in 1994-95.

Thematic rapporteurs:

The genesis of the thematic approach in the CHR in 1979 was the practice of disappearances in Argentina, when the country specific approach could not get the required majority vote[11]. Since then, the CHR has set up thematic rapporteurs/representatives/working groups/independent experts -with a worldwide mandate- to address specific violations of HR and IHL. Currently the CHR has a number of thematic rapporteurs, who have a mandate to cover HR violations, which under certain circumstances also constitute violations of IHL, like torture, enforced disappearances, extrajudicial, summary or arbitrary executions, forceful displacement of civilians/internally displaced, violence against women and children in armed conflict.

Thematic rapporteurs have been requested by the SC to undertake investigations into violations of IHL in a specific country, like the special rapporteur on extrajudicial, summary or arbitrary executions who studied the Kisangani massacre in May 2002 and reported thereon[12]. A more well known practice is the regular reporting of the special representative of the Secretary General on children in armed conflict to the SC[13].

3. The special sessions of the UN Commission on Human Rights

In resolution 1990/48 ECOSOC authorized the CHR to hold special sessions, exceptionally between its ordinary sessions, if there was an urgent and acute human rights situation, provided that a majority of States support it. The procedure was outlined in ECOSOC resolution 1993/286. The Commission has so far held five sessions.

The first two special sessions in 1992 dealt with "*the situation of human rights in the territory of the former Yugoslavia*". They resulted in the country rapporteur reporting also to the SC and its Commission of Experts, which examined and analyzed the information submitted. It also led to a monitoring presence by OHCHR in the region. In 1993 the SC established the International Criminal Tribunal for former Yugoslavia for the prosecution of persons responsible for serious violations of international humanitarian law in the

10 ECOSOC resolution 1984/37
11 CHR resolution 20 (XXXVI) 1980
12 Security Council Statement by the President on 24 May 2002, E/CN.4/2003/3/Add 3
13 The report is submitted by the Secretary General

territory of the former Yugoslavia. The third special session was held in 1994 and covered *"the situation of human rights in Rwanda"* and based its deliberations on reports from the UN High Commissioner for Human Rights (HCHR) and the special rapporteur on summary executions. Again, the appointed country rapporteur was requested to report to the SC and its Commission of Experts. In 1994, the International Criminal Tribunal for Rwanda was established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda and neighboring States in 1994. HCHR also established a field office. The fourth special session based its deliberations on a report from HCHR on "*the situation of human rights in East Timor*" and called for the establishment of an international commission of inquiry, to gather and compile information on possible violations of human rights and acts which may constitute breaches of international humanitarian law since the announcement in January 1999 of the vote and to report to SC, GA and CHR. Several thematic rapporteurs were asked to carry out missions to East Timor and report to CHR and GA.

The fifth special session was held in 2000 and dealt with "*grave and massive violations of human rights of the Palestinian people by Israel"*. The session resulted in a human rights commission of inquiry being established to gather and compile information on violations of human rights and acts which constitute grave breaches of IHL by the Israeli occupying Power of the occupied Palestinian territories. The High Commissioner for Human Rights and several thematic rapporteurs were requested to carry out immediate missions to the region and report to CHR and GA.

4. Ongoing efforts to compile synthesize or set new standards in the area where human rights and international humanitarian law converge.

Children in armed conflict

The Commission finished in 2000 a standard setting exercise on children in armed conflict[14]. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict resulted in raising the age limit for children's direct participation in hostilities and for compulsory recruitment to the armed forces of a country to 18 years. These rules also apply to armed groups, distinct from armed forces. Lengthy debates preceded Article 4, which regulates the non-State actors, since their acts constituted violations of IHL and not HR violations. To monitor the situation of children in armed conflict world wide, a special representative of the Secretary General was established, he reports to CHR, GA and SC. The SC has, since 1999, addressed the protection of children affected by armed conflict[15].

14 CHR resolution 2000/59, GA resolution 54/263

Internally displaced persons

The Special Representative on Internally Displaced Persons was established in 1992[16]. The Vienna declaration 1993 recognized that gross violations of HR, including those in armed conflicts, are among the multiple and complex factors leading to displacement of people. Guiding Principles on Internally Displacement were elaborated in 1998 by the special representative. The guidelines are based on HR, IHL and analogous refugee law and are intended to help governments as well as all other actors in dealing with internally displaced populations. The special representative's mandate was expanded by CHR in 2004.

Fundamental standards of humanity

The need to identify fundamental standards of humanity (FSH) arises from the initial recognition that it is often situations of internal violence that poses the greatest threat to human dignity and freedom. In 1990 the declaration on minimum humanitarian standards was adopted in Turku/Åbo. The issue of securing practical respect for existing HR and IHL standards in all circumstances and by all actors has been on the CHR's agenda since 1994. When the ICRC issues its study on customary rules of international humanitarian law, the CHR will be able to continue its consideration of FSH, based on the recommendations of the Secretary General, hopefully in 2006[17].

The basic principles and guidelines on the right to restitution, compensation and rehabilitation for victims of gross violations of international human rights and serious violations of international humanitarian law.

The now called Sub Commission on Human Rights undertook a study to compile existing obligations as regards the right to restitution, compensation and rehabilitation under human rights and humanitarian law in 1989. The guidelines have been subject to several rounds of comments by States and since 2002 consultative meetings have been held with States by the two experts, who have applied a victim's perspective. At the last meeting in 2003, some countries, in particular the USA, argued that the CHR does not have a mandate to deal with IHL and that the provisions dealing with IHL should be sent to the ICRC for further negotiations. A third consultative meeting will be held in September 2004 in order to finalize the draft.[18]

Working group on a legally binding instrument on enforced or involuntary disappearances.

Since 1980, a special procedure of the CHR, the working group on enforced or involuntary disappearances, has assisted relatives in clarifying the fate of their loved ones. In 1992, a Declaration against involuntary or enforced disappearances was adopted[19]. In 2001, the Commission decided to elaborate a legally binding instrument to criminalize these acts at the national level. The intergovernmental Working

15 S/RES/1261(1999), S/RES/1314 (2000), S/RES/1379 (2001) and S/RES/1460 (2003)
16 CHR resolution 1992/73
17 CHR resolution 2004/118
18 CHR resolution 2004/34
19 GA resolution 47/133

Group has met two times and several overlapping issues between HR and IHL have been identified, such as individual criminal responsibility, statutes of limitations and the "*right to know*". The working group will meet in 2004 and 2005[20].

Counterterrorism

Since 11th September 2001, the CHR has increasingly felt the need to ensure States' compliance with HR and IHL in connection with the "*war against terrorism*". The Commission decided in 2004 to appoint an independent expert to study the efficiency of the current protection system within the UN human rights programme (e.g. special procedures and treaty bodies) to monitor and address the compatibility of national counter-terrorism measures with HR obligations[21].

In this connection, one should mention the two Cuban initiatives to ensure respect for HR and IHL in 2004. The first initiative in CHR dealt with *"the question of arbitrary detentions in the area of US Naval Base in Guantanamo"*[22] and the second one in ECOSOC dealt with "*the question of the protection of human rights and fundamental freedoms in the context of military operations launched to combat terrorism".* The draft resolution was withdrawn after massive political pressure at the last minute from the CHR. The second initiative was voted down by 11-24-17. Both of them were accused of being politically motivated.

Impunity

An independent study on impunity was carried out in 1988. The Sub Commission later elaborated a set of principles for the protection and promotion of human rights through action to combat impunity for violations of human rights and international humanitarian law in 1997. The CHR decided that these should be updated and revised in light of recent legal developments by an independent expert, appointed by the Secretary General[23].

Initiatives in the Sub Commission on Human Rights

The Sub Commission has over the years taken up different aspects of HR and IHL through studies on i.a. state of emergency and humanitarian intervention. A number of its working groups address the issue of HR and IHL from a prevention perspective. This year, the Sub Commission decided that a working paper on the relationship between human rights law and international humanitarian law, their enforcement systems and the scope of the obligations of States to implement international humanitarian law domestically from both a State's perspective and victim's perspective[24] should be done by Francoise Hampson (UK) and Ibrahim Salama (Egypt).

20 CHR resolution 2004/40
21 CHR resolution 2004/87
22 E/CN.4/2004/L.88/Rev2
23 CHR resolution 2004/72
24 E/CN.4/Sub 2/2004/L.35

5. Conclusions:

The CHR has acquired a mandate over IHL violations as regards country situations,

Since 1967 the CHR has expanded its mandate to cover also the monitoring of human rights and international humanitarian law in countries. The monitoring has been done by country or thematic rapporteurs and sometimes by both jointly. In the case of grave violations of IHL, the country rapporteurs have been instrumental in bringing the information to the attention of the CHR, the GA and the SC. Their work has also supplemented the work of Commissions of Experts (Former Yugoslavia/Rwanda), fact-finding missions or commissions of inquiry established pursuant to special sessions or special sittings of the CHR. The work of the special procedures, country specific and thematic, has contributed to the establishment of international criminal tribunals or *ad-hoc* human rights tribunals ensuring individual criminal responsibility for violations of HR and IHL.

Thematic rapporteurs have been asked to carry out investigations on behalf of the CHR and the SC into specific massacres and other instances of grave violations of HR and IHL and to report thereon.

The CHR has a standard setting mandate in areas where HR and IHL overlap or are complementary,

Standard setting exercises in the Commission have covered both branches of law, for example, the involvement of children in armed conflict. Currently there are a number of negotiations ongoing, which clearly shows that there are areas of overlap and complementarity between the two branches like disappearances or right to compensation particularly from a victim's perspective.

The special sessions of CHR have proven to be a useful instrument to ensure respect for IHL

The special sessions of the Commission have proven to be the most effective way of establishing fact-finding missions or commissions of inquiry to secure evidence for future prosecutions of violations of HR and IHL. The onus of convening special sessions currently rests with States, but with the creation of the post of the UN High Commissioner for Human Rights (HCHR) a reform to the convening procedure could be envisaged. HCHR could be entrusted with calling ex-officio for special sessions, when she/he deems it necessary.

The increased role of the Security Council

The Security Council is seized with a number of country situations where violations of HR and IHL figure prominently. The SC has also stated that widespread violations of HR and IHL constitute a threat to peace and security. The SC now regularly studies thematic reports from the Secretary General in the areas of HR and IHL, like protection of civilians in armed conflict[25], IDPs and children affected by armed conflict.

25 S/PRST/1999/6, S/RES /1265 (1999), S/RES/1296 (2000), S/RES/1366 (2001), S/PRST/2002/6, S/PRST/2002/41

One would hope that the briefing and seizing of the SC will become regular practice, in particular when alarming reports are issued by the HCHR or the special procedures.

The newly appointed Special Advisor to the Secretary General on the prevention of genocide, working in close collaboration with the HCHR and the special procedures, could become instrumental in having deficiencies and gaps in the protection of civilians under all circumstances and by all actors addressed[26].

26 S/2004/567, S/RES/1366 (2001) op 10: *"Invites the Secretary General to refer to the Council information and analyses from within the UN system cases of serious violations of international law, including IHL and HR law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development and expresses its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security."*

DEVELOPING NEW WAYS OF STRENGTHENING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

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The use of Space Based Earth Imaging

My commentary will briefly outline the legal issues applicable to the use of space based earth imaging in order to promote the respect and implementation of international humanitarian law (IHL).

Satellite imagery is habitually perceived as being a product highly classified military technology used for intelligence gathering or espionage. Although satellite imagery was developed and initially used as such, the increased commercial development of space technology through the privatization and commercialization of the technology has rendered satellite imagery readily accessible. There are now several commercial ventures specializing in the sales of high quality images of earth taken from privately owned satellites[27]. Various governments have joined the space commercial venture in an effort to leverage the cost of participating in space activities. From a technological perspective, the access to these images is simply contingent upon having an Internet access and a credit card.

The result of this commercial development is twofold. Firstly, there is an increase in the transparency of public action. Secondly there is a de-intermediarization to the access to information. The combination of these two developments is of significant importance to the respect and implementation of international humanitarian law (IHL).

Transparency of public action is a new phenomenon, which certain actors must learn to work with. There is no doubt that international humanitarian law can and must learn to benefit from this increased transparency. Consequently those who are readily involved in the implementation and respect of international humanitarian law must effectively adapt to this new environment. Most military planners have already learned to cope with this new reality. Astute military planners realize that they can and will be imaged from space. With the commercialization of space based earth imaging, non-military actors may now enter the game and utilize effectively satellite imaging to bolster the implementation and respect of IHL in a manner which is independent from military imaging.

Uses of Space Based Imagery to Implement IHL

Implementation of a legal norm implies the performance of the obligations imposed by the norm. In turn, the performance of the obligation is not only contingent upon knowledge of the norm but also upon the knowledge of the conditions within which the norm is to be applied. It is within this second dimension of

implementation that space based imagery finds its usefulness. Space based earth imaging is a unique source of information and knowledge of the physical conditions determining the implementation of IHL.

Advantage of Using Commercial Imagery

Although the cost of using commercial imagery is not negligible it can nonetheless, for several reasons be cost effective[28]. Firstly, the cost of sending a team of experts to access a village, a farm or any other site of importance can easily be greater than obtaining satellite imagery. Depending upon the location to be examined and the tasking of the satellite the purchase of the images might not only be cost effective but also done in a timelier manner.

Secondly satellite images can also be obtained at a lesser risk. The sites to be verified may not only be difficult to access but also present serious dangers to those attempting to access these sites. These sites might easily be within areas where there is continuous fighting. Furthermore, the risks of accessibility are often compounded by the presence of land mines. Satellites are immune from such dangers and risks.

Thirdly, those controlling the area to be verified, be they state actors or private actors, can deny physical access. Satellites image earth from an international space. Satellites are therefore unaffected by the problem of denial of physical access. Space based earth imaging does not violate territorial sovereignty. Furthermore one does not need permission from a State to image the territory of the subject State. In other words a State cannot refuse to be imaged. A State may refuse entry to inspectors but it cannot prevent its imaging.

What can be imaged?

What kind of violations of international humanitarian law can be imaged? Considering that the best commercial satellites have approximately 1 meter imaging capabilities, the present use of this technology is limited to wide scale violations. Mass graves can be imaged from space, the flow of refugees, refugee camps, prison camps, and environmental violations, nuclear power plants and dams are easily and effectively imaged. From the logistics perspective of humanitarian assistance, airport conditions and road conditions can be verified. Damage reports by eyewitnesses or other governments can be confirmed. Villages can also easily be imaged to determine the damage to housing.

How can satellite Imagery be effecively used?

Perhaps one of the most significant uses of overhead imaging occurred on August 9, 1995 at the UN Security Council meeting where pictures were shown of a mass grave and human bodies patiently waiting their burial at two farms near the Bosnian town of Srebrenica, where 7,000 Muslim men were supposedly

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[27] For an excellent review of the various national programs on satellite imagery see *"Commercial Observation Satellites; At the Leading Edge of Global Transparency"*, J. C. BAKER, K. O'CONNELL and R. A. WILLIAMSON (Eds.), RAND Corporation, 2001.

[28] For an excellent analysis of the financial considerations see S. ADAM, "*Financial Considerations in the Acquisition of High Resolution Commercial Satellite Imagery for United Nations Peacekeeping and Humanitarian Operations"* in

missing. Granted these pictures did emanate from military technology, namely a U-2 spy plane. Nonetheless these pictures did cause disturbing feelings and strong concern amongst Security Council members. The result was a strengthening of the resolve of the international community against the perpetrators of these heinous and monstrous acts. For the sake of my argument the U-2 pictures indicated that overhead imagery could be effectively used on a political level to fight against extensive crimes against humanity. Similarly, non-state actors involved in the implementation and respect of international humanitarian law can commercially obtain images to mobilize world public opinion against large-scale violations and learn to use effectively the increased transparency which space technology provides.

Perhaps creativity of use is the key to effectively using commercial space based earth imagery to enforce humanitarian norms. For example those involved on a large scale on the implementation and respect of IHL could find it useful to image themselves. The ICRC could certainly image some of their larger installations, which provide humanitarian assistance and share these images and information with belligerents. Perhaps this technique could have helped prevent the regrettable targeting of ICRC installations in Afghanistan.

International Law Implications

Firstly, it is important to note that the use of civilian imaging satellites is not espionage and is recognized in the corpus of international law as a legitimate activity. The *Magna Carta* of outer space, namely the Outer Space Treaty, states within its Article I that "*the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development and shall be the province of all mankind"*

Outer space is thus available for all to use. The change in paradigms in the use and exploitation of outer space from a purely governmental activity to a commercial activity has increased and facilitated the access and use of this technology by non-governmental actors.

Within the body of international law a State cannot prevent the sensing of its territory from outer space. Furthermore a State does not have any proprietary rights to the data of its territory, which has been collected by a satellite in orbit. The UN principles on remote sensing[29] nonetheless encourage the sharing of satellite imaging data with the sensed State on a non-discriminatory basis and at reasonable costs. These are however principles of international comity and are non enforceable. The development of market structures for such data is proving to be a greater assurance of their availability.

Commercial Satellite Imagery and United Nations Peacekeeping; *"A View from Above"*, J. F. KEELY and R. HUEBERT (eds.) Ashgate Publishing, 2004, pp. 77- 87.

[29] The UN Principles Relating to Remote Sensing of the Earth from Outer Space, (General Assembly Resolution 41/65 adopted without vote on 3 December 1986).

Certain Arms control treaties have legitimized the use of imaging satellites for treaty verification purposes. Although these treaties do not specifically mention satellites they do refer to "*National Technical Means*" which is interpreted to include imaging satellites.[30]

Are private satellites vulnerable to being targeted and attacked?

Regrettably the answer to this question is yes. Granted there are some norms in international law, which protect satellites. It is interesting to note that certain bilateral treaties do protect the imaging satellites from interference during peacetime. Could this protection of imaging satellites be enlarged to include private satellites gathering images for humanitarian purposes? Perhaps yes. However, the problem remains that civilian satellites are dual use assets and have various militaries as major clients. In fact smaller space faring nations have leveraged their space program with commercial satellites where the military could not afford exclusive imaging satellites. Thus privately operated satellites could be considered as legitimate military objectives[31].

Use of Satellite Imagery by UN

Several UN organizations have used satellite imagery in their mandates[32]. Perhaps one of the first such use was the UNHCR environmental assessment in areas close to refugee camps. The UNHCR has a Geographic Information Mapping Unit (GIMU), which applies satellite imagery on an operational basis.

The latest sophisticated satellite images and the global positioning system can help track the movement of refugees, the exact latitudinal and longitudinal locations of refugee camps, buildings or even individual storehouses and the environmental impact on surrounding areas caused by their presence**.**

Lastly it is important to note that satellite imagery can be used in a court of law as evidence in the prosecution of war crimes. Satellite imaging can be used either as scientific evidence or as demonstrative evidence. The brevity of my intervention prevents me from expanding on this interesting issue. Nonetheless, the use of satellite imagery remains a new and challenging issue for Courts of law. Not surprisingly American courts have the most experience in the use of satellite imagery as elements of proof[33].

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[30] On this issue see N. JASENTULIYANA, *"International Space Law and the United Nations"*, Kluwer Law International, The Hague, 1999.

[31] On this point see M. BOURBONNIERE, *"Law of Armed Conflict (LOAC) and the Neutralization of Satellites or Ius in Bello Satellitis"*, in Journal of Conflict and Security Law, Vol. 9 Number 1 Spring 2004, p. 43.

[32] See Einar BJORGO, *"Space Aid; Current and Potential Uses of Satellite Imagery in UN Humanitarian Organizations"*, available at **www.usip.org/virtualdiplomacy/publications/reports/12.html**

[33] On this point for an excellent review of the legality of using satellite imaging in a court of law see A.J. KROUSE, M. M. FERRY and R. CROWSEY, *"Satellite Imagery: The Space Odyssey Arrives in the Courtroom"*, available at www.crowsey.com;p; H. GINZKY, *"Satellite Images as Evidence in Legal Proceedings Relating to the Environment – A US Perspective*", Air & Space Law (2000) XXV, p. 114; S. H. HODGE "*Satellite Data and Environmental Law: Technology Ripe for Litigation Application"*, 14 Pace Environmental Law Review, pp. 691-718, 1997.

THE ROLE OF NGOS

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The role of Non-Governmental Organizations (NGOs) in this area is as multifarious as are the NGOs themselves. In this presentation, I will only touch on four areas where I believe that there is a specific role for NGOs or NGO perspective:

1. The traditional human rights NGO role and its development
2. The credibility gap in particular in relation to International Humanitarian Law (IHL)
3. Alternative stories and heroes
4. Possible IHL specific developments

1. Traditional NGO roles:

First the obvious things: traditionally, human rights NGOs do monitoring, fact-finding and exposure (denunciation) of violations. These are as important as they have ever been. It is precisely at times when public opinion and government pressure are against maintaining the standards that the consistent monitoring, fact-finding and exposure of violations and problem areas by NGOs are even more critical than usual. In the area of IHL, the public exposure by NGOs is an important counterbalance to the less public role of the ICRC. In doing this, NGOs are not only dealing with the individual violations, but are playing a broader education and advocacy role in reminding(?) people (at all levels) about the fundamentals which apply in ALL circumstances, such as non-discrimination, prohibition on torture, the importance of due process guarantees, and so on.

Secondly, NGOs are important in making the linkages between IHL, human rights law and refugee law and making the connections between them in terms of the impact on people. This is not to say that the "*institutional guardians*" of each of these bodies of law is not aware of these things, but inevitably their role and focus is primarily on their own body of law.

Thirdly, the role of NGOs in both developing and maintaining pressure for accountability mechanisms, including the International Criminal Court and domestic prosecutions, and against impunity, remains crucial. (See below in relation to "*the credibility gap*")

Humanitarian NGOs are facing a particular challenge at this time – over the last few years they have increasingly believed that they had a role and a 'mandate'/justification for providing assistance and relief in conflict areas and not only in man-made disasters/emergencies, or post-conflict. [Complicated by the confusion of when does post-conflict begin …] Faced by perceptions that either these NGOs are biased/part of the conflict and not separate from it and/or of their value as hostages or targets, they are having to re-think, including for example the recent announcement by Oxfam that they would stop taking Government funding. I do not intend to go into this in more depth as others are better placed to do so than I.

2. The credibility gap:

However, there is a more fundamental issue which needs to be addressed. It is whether we accept the principles underpinning human rights and humanitarian law (and refugee law) or whether we do not. [And who is *"we"*?] A superficial review of the *"state of the worl"*' in this respect might lead to a sense that we do not. This is not a view that I share: and the seemingly universal revulsion at what was revealed by the photographs from Abu Ghraib lends some support to my position.

However, there is a major problem: why should people put their faith in IHL when what they see around them is widespread disregard for it (or acting deliberately counter to it) with impunity? This is where "*dissemination*" falls down: you can teach me the principle of distinction in IHL, but if my observation is that it is ignored or deliberately flouted, why should I, as a civilian, put my faith in it? Let me give you an example.

The widespread rape and sexual abuse of women and girls in the various conflicts in the DRC have been notorious. What do we say then to the girls who see the reality of what is happening and decide they are better off by becoming armed combatants themselves?

> *Because if you have weapons you can defend yourself; if you don't have any, you are beaten, one kills you, and one rapes you, even the boys.* (Christine)

What do we say to those girls who having done so, tried to stop the men and boys from committing rape and when persuasion or threats failed, used more forceful means?

> *We tried to prevent them, but if they are doped it's difficult, so sometimes you must kill them. If you can't kill them at this time, well you kill them when you are on the front line.* (Vanessa)[34]

[34] Interviews with former girl soldiers from DRC as part of the joint Quaker UN Office/ILO Voices of Young Soldiers Research Project, the results of which are published as R. BRETT & I. SPECHT, "*Young Soldiers: Why They Choose to Fight"*, ILO/Lynne, Rienner, 2004.

As long as this remains the reality for too many "*civilians*", IHL will have a credibility problem. This is not only a problem of training soldiers (and potential soldiers) though the importance of this should not be underestimated (I will come back to it in a minute), but of real accountability mechanisms. On the other hand, we also have cases where children were taught the minimum age of recruitment in situations where previously it had never occurred to them that age might be a significant factor, and started standing up to potential recruiters on the grounds that they were too young to be recruited. Such knowledge and understanding cannot solve all the problems, of course, in particular where the abuse is deliberate rather than inadvertent or merely thoughtless, but without such knowledge the kids themselves did not have any basis for opposing their recruitment.

3. Alternative stories and heroes:

One problem is the relentless pressure on reporting bad news – this also is one of the effects of the human rights NGO focus on "*violations*" of IHL, HR law, etc. In the Quaker UN Office's research on child soldiers, we have come across many testimonies of those (both forced and volunteer young soldiers) who maintained a sense of values in the most seemingly unlikely circumstances. Two examples:

In Sierra Leone, one young volunteer, who had been with the AFRC for two and a half years and was 17 years old at the time of interview, was nicknamed "*Stop the War*":

> *they call me stop the war because as I am doing my own job as a fighter there are some certain aspects that they normally do which I do not favour so I always stop them that's why they call me stop the war.*
>
> *... the name was given to me by my commander who was with me. The main reason for giving me this name was my hatred of forceful behaviour on people. That was the main reason for giving me that name.*

In Afghanistan, Ali (20 at the time of interview):

When I was about 7 or 8 years old ... I was living in a Mojahedin war zone. I was a good schoolboy and my literacy was so good. When I was going to school I simultaneously worked in a medical clinic belonging to MSF. Our school time was 8 to 12 in the morning, and in the afternoon we were free, so I went to the medical clinic of the French doctors. There I began to learn first aid such as injection, dressing of a wound, and so on, and I became a first aid helper with the Mojahedin; I always worked to support the Mojahedin. That time I did support and worked as a medical helper behind the strongholds. I gradually learned some advanced medical skills. ...

When I was 10 years old a war began [...]. We were fighting all the time, and 560 people of the Mojahedin and about 1,700 of the state forces were killed and injured. I was among Esmail Khan's forces. I

became familiar with different war weapons and guns such as the Kalashnikov. After 5 or 6 months fighting, I had to return to the hospital. I was just a 10-year-old boy but the only one who was familiar with medicine in the area. When the area became a war zone for some reason, all the doctors and nurses left the place … I ran the clinic, because there was no doctor and nurse, there was no one to help the injured soldiers.

Later, when we were fighting the Taliban, sometimes our forces captured an injured enemy soldier. I treated the injured soldier of the Taliban group in the same way that I treated our own soldiers. I didn't discriminate between him and our soldiers. He appreciated me. Later, when the Taliban was in power, I was captured and imprisoned by the Taliban again. When I was in prison, the injured Taliban soldier who I treated saw me by accident. He was a commander and released me.[35]

What these stories illustrate is that inculcating the values underlying human rights and humanitarian law actually works, and that we should not underestimate the achievements just because there are so many failures. In particular, training (dissemination) must of course include armed forces but must also reach out to the population more generally – through schools, youth organisations, religious institutions, etc etc.

Secondly, by collecting and publicising these alternative stories and heroes, we can help to counter the sense that the only values which matter are around the use of violence: these examples come from those who were participants in the armed conflicts. However, there are others too.

In the South Kivu area of DRC there are local peace committees in action, working to mitigate the effects of the years of fighting on individuals and families, across divides (ethnic, regional, socio-economic, religious, gender, etc) and raising awareness around the crucial questions of peace-building, human rights and democratisation in the DRC. Supporting those systems/structures within society that can enable people to live together and solve problems without violence (local capacities for peace) is one of the most effective ways of breaking into the systems that keep war and injustice going. A recent video of one such project shows footage of young Mai Mai militia describing their contact with the South Kivu peace committees[36] and training programmes and how they were persuaded to put their guns down and come out of the forest. In the video, they ask, "*Why should I fight when I can sit around a table and find a solution?*" On the day of the

[35] Ali had further training, *"When I was 12 and 13, I attended in surgical operation room and I did work as a surgical assistant. When my knowledge developed and after a few months MSF had some medical courses to teach medicine helping, surgery, and general medicine, and I took part. So now I am familiar with many medical and surgical skills. For instance, I know orthopaedics and I can bone-set whenever needed."* Unfortunately the story does not have a happy ending, Ali goes on: *"Because my average of exams was very high I was allowed to attend the university entrance examination in Afghanistan. And I did. I successfully passed the exam and was accepted to study medicine. I studied some medical courses, but due to having a very bad war experience I no longer like medicine. I saw too many injured people and I don't like to deal with patients and wounded people. I haven't got a diploma. I was injured several times as well. Now I have difficulties with my eyes. I suffer from cataracts and pearl-white. Before attending in the war I was hale and hearty. Because I dealt with injured soldiers, now I have some blood diseases as well. I have hepatitis and my blood is polluted with hepatitis."*

[36] This is part of the Quaker Service Norway Change Agents for Peace Programme in the Great Lakes region of Central Africa

fall of Bukavu to rebel leader Laurent Nkunda's troops in June, there was a football match between Mai Mai ex-rebels and the civilian youth of Fizi: a remarkable community-building event. Again, it is not just the story that is important (although it is!) but the need to help and support the local individuals and institutions which are working to speak up for the non-violent elements of the population and who too often not only go unreported, but are also ignored or excluded from consideration by internal and external "*authorities*".

Linked to these issues about the bias of reporting and inclusion in peace/war discussions, is the broader point about our societies and their values. The stories and histories we teach our children are too often linked to war and heroism in battle (and often include what we would now recognise as atrocities/war crimes) and at least in "*mainstream*" education, literature, and culture it is short on heroes and role models who support and encourage the kind of attitudes and behaviours which we espouse and which underlie human rights and humanitarian law. If boys don't want to be like "*Rambo*" who can they follow? As NGOs, we know the power of "*stories*" – this is why NGO reports are full of the telling vignette or quote – these are what make people sit up and listen, what has impact, what they remember, what makes the violation come to life and not be just another dreary report of death and torture, or more statistics about poverty and child labour. We need the stories that will model, challenge and inspire the attitudes and behaviour that we would like to see.

4. Possible IHL specific developments

NGOs have considerable experience with the human rights Treaty Body system and its strengths and weaknesses. Based on that experience and analysis, I would, therefore, like to comment on the interesting proposal in Yves Sandoz' paper about a possible IHL *"reporting system"* and to propose an alternative or variation on the theme, with a view to addressing the particular needs in relation to IHL that he identifies rather than either directly mirroring the human rights procedures or actually seeking to bring IHL into them more directly.

In general terms the reporting system works well for reviewing legislation. Its strength is precisely its slow, systematic, (near) universal, non-political, low-key, consistent and persistent questioning and bringing in expertise from different legal traditions and viewpoints from around the world, as well as NGO information to act as a counterbalance to that provided by the Government. However, reporting procedures as such even with respect to these perceived strengths have the weaknesses of States' failure to report, reluctance of States to take on further reporting obligations, the slow and cumbersome nature of the process and the fact that it can too easily become a paper exercise between a few government officials and a small group of international experts meeting theoretically in public but in practice in front of an 'audience' of a few interns.

IHL needs in this respect identified by Yves Sandoz seem to fall into the areas of reviewing national law in relation to IHL and its implementation, and ensuring effective training and education in IHL. For these purposes rather than starting with the idea of a reporting procedure, it might be better to take the key components and then design a specific process. For example, it seems to me that the need is for an "*international expert legislation and implementation review committee*" to review the national law and its implementation in relation to the international humanitarian law obligations of each State, to advise and assist (directly or for example through the ICRC Advisory Services), on the basis of an expert assessment, and to review and assist/encourage dissemination both in the form of training for military and future or potential military personnel but also in the broader education through schools, colleges, youth groups, religious and other institutions. In order to do this, the Committee could ask for a report, or simply ask for or itself access the relevant legislation directly, and/or it could undertake a country visit. In order to be most effective (as well as providing the least additional bureaucratic work for the Government) it would need to be able to call on someone with the language of the country concerned so that legislation could be read in the original. This could be done, for example, by having a procedure for appointing an *ad hoc* committee member from that country if no-one with the relevant skills was already a member of the committee, or having the possibility of calling on consultants or some other way of accessing the necessary expertise. Country visits should also be an opportunity for public meetings to generate interest and public opinion by discussing IHL, a Parliamentary debate, schools competitions (*à la* model UN), or other ways of drawing attention and engendering public interest and debate. But the committee should also have a mandate for regional (or sub-regional) reviews. For example, with the developments in West Africa there could be real benefits in having a regional meeting to both consider national legislation and implementation in each/all the countries in the region but also the question of training of forces both nationally and those who could be serving under an ECOWAS mandate. The benefits of harmonisation in this respect are obvious, but it could also have a confidence-building role.[37] By allowing the committee flexibility in how it undertook its role, it could cover all States but adapting its precise mode of doing so to best fit the circumstances rather than being bound by a rigid procedure or timetable. The members of such a committee might be nominated by Governments or National Societies and elected at the quadrennial International Conference of the Red Cross and Red Crescent Movement, and could report back to the Conference on its activities.

Conclusion:

The challenges to the effective implementation of IHL self-evidently exist. What is needed is to continue with the tried and tested activities, such as training of military personnel, with renewed vigour; to continue with the newer developments, such as more effective accountability mechanisms in terms of both domestic and international legal procedures; and to initiate more creative and imaginative approaches that

[37] An example of such an approach is a current NGO initiative to consider the question of conscientious objection to military service in South-East Europe with a view to both developing unified standards but also mutual understanding.

challenge the individual and societal attitudes which enable and encourage the erosion of the fundamental standards.

RECOGNIZING AND FURTHERING THE ROLE OF NGOS IN IHL

Dinah POKEMPNER
Human Rights Watch

While there is a wide variety of civil society organizations that have a role in the development and implementation of IHL, my introduction will focus on two functions: humanitarian assistance and rights or law monitoring.

Humanitarian assistance to civilian populations is an integral aspect of IHL, and its facilitation a legal obligation. The role of NGOs in this regard is long-established and recognized, and yet facing deep challenges.

NGOs engaged in this work rely on principles of neutrality and humanitarianism to keep their mission separate from the political conflict and the political affiliation of populations in need, and such separation serves to protect both the humanitarians and the civilian populations they serve.

Yet just what these principles entail has engendered continuous debate. One of the first questions was whether humanitarian aid can be genuinely neutral when it is subject to diversion by military forces, particularly in circumstances where the military forces are grossly abusive of human rights and IHL, as for example the Khmer Rouge camps in Thailand, the Hutu camps in then-Zaire, or even North Korea, where there have been persistant difficulties in ensuring that aid is not diverted to the military and political elite.

Another challenge has arisen when some portion of a civilian population is made the object of armed conflict and abuse by their own government, raising the question whether their right to humanitarian assistance (i.e. their right to food, shelter, health, etc.) should be secured by the international community, if necessary, through military intervention. The siege of Sarajevo and the slaughter of Srebrenica set the stage for some NGOs to endorse military intervention in Kosovo as a humanitarian imperative.

The most recent challenge is the arrogation of humanitarian functions by Parties to armed conflict as part of a "*hearts and minds*" strategy, as in Afghanistan and Iraq. This may entail the military taking a direct role in the provision of assistance in such a way as to confuse perceptions of a distinction between military and humanitarian personnel, or the blurring that results when one side to the conflict coordinates and controls access, activities and funding of private humanitarian efforts. The increased peril that humanitarian workers and the civilians with whom they associate face is due in part to the compromised understanding of neutrality.

The rights function of NGOs with respect to armed conflict is more recent and less well understood, but an extremely important development. Until recently, monitoring IHL compliance was the exclusive province of the war correspondent - an inexpert but very public endeavor - and the ICRC - a very expert but confidential one. This has changed dramatically.

Human Rights Watch has one of the longest record of in-depth monitoring of IHL compliance, at least two decades, but many other organizations, including Amnesty International and MSF, have made enormous contributions to expert and public reporting, analysis and advocacy.

Monitoring and documenting both violations and compliance has become increasingly sophisticated and "*real time*" since the 1980s. The initial methodology was a classic human rights investigation, culling anecdotal accounts from refugee or displaced populations. While this is still a mainstay of investigation, NGOs now use technology such as satellite imagery and GPS, and sophisticated analytic techniques, such as statistical regression, to understand the actual conduct of war. Patrick Ball, a visionary statistician, for example, took data collected by human rights investigators on refugee movements and time and place of murders in Kosovo, and transformed this into convincing testimony at the Milosevic trial that killings and flight correlated to each other, and to the actions of the Yugoslav army, rather than to NATO airstrikes or KLA movements.

When NGOs can convey their concerns, directly or through the media, contemporaneously with battle they have had an immediate impact on the conduct of warring parties. An example was the outcry over the use of cluster bombs by U.S. forces in Kosovo, which contributed to their discontinued use in that conflict (although, unhappily, not in subsequent ones such as Iraq).

Post hoc analysis generally produces more comprehensive documentation and more insightful analysis. As the understanding of the effects on civilians of means and methods of war grows, it becomes increasingly difficult for military powers to claim ignorance or mistake, as, for example, the foreseeable effects of cluster bombs in urban areas, or the effect of destroying the electrical grid in urban areas in Iraq.

There has been considerable cross-fertilization of expertise among NGOs, with many having experts in both humanitarian issues and rights issues on their staff. This has allowed a fuller picture of conflict, illuminating the interrelation between discrimination, incitement, atrocity, war crimes, flight, forced displacement, starvation and disease.

But an equally important development has been the growing exchange between these groups and professional military analysts and theorists, both in terms of dialogue between these communities and the integration of military experts into the staff of NGOs. With the help of such military professionals, Human

Rights Watch has produced sophisticated and influential bomb damage assessments of the Gulf War, Kosovo and the current war in Iraq that cast light on contested IHL standards such as proportionality, foresee ability, unnecessary suffering, etc. For example, our most recent analysis on the Iraq war, *Off Target,* is being used as a training tool by U.S. Army JAGs to teach military lawyers they must probe the intelligence reports that are used to justify targeting, after we revealed that urban strikes aimed at Saddam Hussein and the leadership were based on GPS readings from telephones, a method that produced an unacceptably high margin of error.

Another example of sophisticated military analysis would be our recent investigation of Israeli house demolitions in Rafah that have rendered homeless some 18,000 Palestinians on the rationale that these were necessary to halt weapons smuggling through underground tunnels. Our soon-to-be released findings rely on satellite imagery analysis of the extent of damage, and expert technical input on the various options for locating and disabling tunnels, and clearing access routes of interactive explosive devices.

The assumption by NGOs of these sorts of analytic tasks has had two effects. One is the exponential increase in public interest in and understanding of IHL matters. IHL has been made accessible to the media as never before, through the publication of reports, glossaries and guides. My organization hosts media training sessions, media guidance pages on our website, and our phones ring off the hooks with inquiries from journalists. Where ten years ago IHL was a subject taught only at military academies and specialized institutions such as this one, a casual survey of this year's curriculum at a dozen top U.S. law schools showed every one is now offering the subject.

The second effect is less welcome; a sense among States that they have been relieved of some responsibility for public explanation and documentation. It is lamentable, for example, that internal as well as public accounting of civilian deaths is a task that has all but been abdicated by States. Yves Sandoz has raised the issue of meaningful IHL reporting by States as an important means of control, and it would be helpful to conceive of reporting and assessment as an integral part of State Party compliance with existing law, regardless of whether it is required by outside expert bodies or not.

This raises the enormous impact NGOs have had on standard setting and accountability. The role of NGOs is well-known in the campaign to ban landmines and blinding lasers; new efforts are being made in respect to the control of small arms. The civil society demand for accountability contributed to the creation of the *ad hoc* Tribunals for former Yugoslavia and Rwanda, and ultimately to the creation of the ICC. Even where NGOs produce no independent fact-finding, they have a role in accountability, as when they put commanders and parties on notice of violations that is their responsibility to suppress.

The new visibility, expertise and impact of NGOs has predictably engendered a backlash. Just who are these new players at the table (or more accurately, in the corridors) - whom do they represent? This is a

popular complaint taken up by States, despite the fact that many NGOs do not put themselves forward as representative. Most are expert organizations, whose influence derives from popular support for their work. Their perspective, coming from the street, the battlefield, and the academy, is important to the implementation and creation of IHL. So too is the perspective of military scholars and the ICRC, whose expertise and mandate have nothing to do with being democratic or representative.

The reluctance to acknowledge the legitimacy of "*civil society*" organizations in having influence on legal norms was recently on display at a high-level experts meeting at Harvard sponsored by the Swiss government. The conference, which included experts from the ICRC and the academy, discussed many of the most contentious IHL questions of our day, and yet expert NGOs were barred even as silent observers. We have to understand this regrettable action as indicative of the profound influence that NGOs have had in the last decade in standard setting. A more constructive response is engagement, and one that enriches social acceptance and commitment to the norms and choices that IHL presents.

In this time when many of the most basic principles of IHL are under question, how can we preserve the valuable functions NGOs play, relieving suffering where Parties to conflict cannot or will not, informing public opinion, spurring accountability and compliance, developing and offering new angles on the interpretation of standards? How can the principles of neutrality and impartiality be reasserted, and how can NGOs maintain a function as articulators of "*principles of humanity and the dictates of public conscience*"? And at the same time, how can we encourage Parties to armed conflict not to shirk their fundamental responsibilities, to analyze their own actions, minimize civilian damage, foresee and avert unnecessary harm?

One of the greatest challenges to the protective function of IHL (and to the issue of perceived neutrality of NGOs) is engaging non-state actors as willing participants in the rules of armed conflict. As Sandoz has mentioned, the asymmetric nature of much recent warfare has encouraged weaker forces to attack civilians, and stronger ones to ignore legal constraints with little expectation of reciprocity. This is an area for NGOs to explore, given the unlikely engagement of States in this sort of endeavor.

Finally, with reference to the much-anticipated ICRC study on customary international law, it would be useful for NGOs to make more systematic efforts to log positive as well as negative practices, a point Rachel Brett has made. An immediate issue would be the efforts of States Parties in suppressing grave breaches, such as state practices of accountability for violations such as torture and inhuman treatment.

SOME THOUGHTS ON GOVERNMENTAL ATTITUDES

Ove BRING
Stockholm University

So far during this Round Table, we have looked at existing mechanisms and bodies to see how they could improve respect for international humanitarian law, and we have also spoken about the role of NGOs in this context. I would like to address the role of governments and government bodies, or, to put it another way, the issue of governmental attitudes. My theme will be the need for a revival of governmental interest and idealism in IHL and human rights law. This has been lost in recent times. We need it for dissemination, education and penetration of values to members of our societies.

It is not enough that NGOs have an idealistic agenda – governments need to have it too – so they can do a better job with regard to implementation and training. At the same time, governments also have to be realists when assessing capacities and goals. There is a need for a constructive blend of idealism and realism to get good results.

The implementation of IHL has recently shown signs of being in crisis. During the UN Peace Operations in Somalia some ten years ago, it was shocking to learn that peacekeepers from "*western democracies*" had been involved in acts of torture against young Somali boys suspected of trying to steal food from the camps. More recently, we have learned about the cases of torture against prisoners in Iraq, and again the individual perpetrators come from countries where one would expect IHL education to be more effective.

The news media have reported about Iraq – and also about Guantanamo – and have sensed the moral and legal scandals involved. In fact, journalists and reporters have shown a greater normative awareness than some politicians, political advisers and security officials. In some cases, a political culture has emerged where one aspect is the downgrading of IHL and human rights norms, with priority being given to security interests.

In connection with the debate on the legal status of the prisoners at Guantanamo, President George W. Bush said at some point that the global war against terrorism has brought "*a new paradigm*" and that terrorist attacks require "*a new thinking in the law of war*". Most international lawyers would not agree and Professor Jordan Paust of Houston University has responded with an article called "*There is no Need to Revise the Law of War*". Rather, with regard to Guantanamo, we have experienced a problem of implementation of existing law.

The IHL situation in Iraq has been reviewed by the ICRC. In its Report on treatment of protected persons of February this year, a number of violations of the law have been noted, including brutality against prisoners during initial custody and physical and psychological coercion during interrogation to secure information. The ICRC– throughout 2003 – has regularly brought its findings and concerns to the Coalition Forces, including at the highest level in August 2003. In spite of some improvements in the conditions of internment, allegations of mistreatment have not ceased, thus suggesting – in the words of the Report – "*a practice tolerated by the Coalition Forces*". The ICRC supervision (or control) was important and necessary, but it was not sufficient to rectify the situation.

So the problem seems to be linked to governmental attitudes and security perceptions where IHL has not been a matter of high priority. We can compare this with the Washington Report on interrogation policies in *"the global war against terrorism"* of March 2003. Here, a Working Group of Pentagon lawyers interpreted, inter alia, the 8th Amendment to the US Constitution in relation to the UN Convention against Torture. The point was made that the Amendment was only "*designed to protect those convicted of crimes*". As a consequence, other detainees, for example those under arrest or those waiting for trial, would be unprotected against torture. Although this conclusion was not officially confirmed as valid on either the national or international level, the Report probably mirrored what its authors thought that the political decision-makers wanted to hear at the time.

As to political decision-makers, things were different after World War II when statesmen used lawyers in what has been called a revival of natural law. At any rate, this was a time when governmental attitudes included a fair amount of legal idealism. President Harry S. Truman, himself present in San Francisco in June 1945, welcomed the adoption of the UN Charter and said, among other things, that the Charter "*is dedicated to the achievement and observance of human rights and fundamental freedoms*" and unless nations could attain those objectives on a universal basis "*we cannot have permanent peace and security in the world.*"

In August 1945 the Nuremberg Charter was adopted and later implemented through the inspired work of a former US Minister of Justice, Robert Jackson, and others. In 1948, when the Universal Declaration of Human Rights was adopted, Eleanor Roosevelt, as the driving personality behind it, pointed out with a blend of idealism and realism about human nature, that the members of the UN, conscious of their own shortcomings and imperfections, now had to join their efforts in good faith to live up to the high standard of the Declaration. In the same year, 1948, the Genocide Convention was adopted, although that was – and still is – a document of good intentions rather then of legal efficacy. But this was a time when statesmen and government officials were actively steering human rights law, international criminal law and international humanitarian law in the right direction. One could also mention the 1948 Red Cross Conference

in Stockholm, which prepared the Geneva Conventions. It was at this occasion, that the British government, through its legal adviser Sir Gerald Fitzmaurice, introduced the idealistic notion of universal jurisdiction.

Today, we do not need a revival of natural law in any philosophical sense, but we need a revival of *normative interest and sincerity* on the part of governments. We have been reminded repeatedly during this Round Table that dissemination and knowledge of the law is not enough. A corresponding *political will* has to be present as well. The problem lies in the Realpolitik of governmental decision-making centres. In order to achieve compliance with the law these centres have to be influenced. Public opinion is essential in this context, as are the news media, the relevant UN bodies, NGOs, the ICRC, the Federation and our Institute. We all have to convey our normative awareness and idealism to the outer world and its political circles – in a realistic fashion. This is our task and this is our challenge.

But to end on a more immediate note, let me add that the Sanremo Institute has to embark on a very practical discussion with regard to its future direction in order to find its place in this international networking. As a member of the Executive Council of the Institute, I can assure you that its future is on the agenda. As another member of our Council, Ambassador Zahran, said yesterday, there is a need for cooperation and coordination between the different actors on the humanitarian scene.

Thank you for your attention.

THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN STRENGTHENING THE RESPECT OF INTERNATIONAL HUMANITARIAN LAW

Arne Willy DAHL
Judge Advocate General for the Norwegian Armed Forces,
Public Prosecutor at the Office of the Director of Public Prosecutions,
Chairman of the IIHL Military Commission

Ladies and Gentlemen,

Implementation of International Humanitarian Law and other rules protecting human dignity in armed conflict is the responsibility of the Parties to the conflict. States Parties to the Geneva Conventions and other relevant instruments have undertaken to disseminate and enforce the rules within their own armed forces. Non-state actors in armed conflicts are also bound by the same basic norms and should take them seriously, especially if they have aspirations towards becoming a member of the international community of States.

The activities of Non-Governmental Organizations in this field are not motivated in legal responsibilities, but in the moral responsibility each person has to fight against suffering and injustice. Each of the various NGOs has its own specialized field of work, which may be directly or indirectly related to protection of human dignity in armed conflict. Some are focusing on legal issues such as Human Rights, some on humanitarian relief work, some on special exposed groups such as refugees or children.

With regard to the implementation of international humanitarian law, NGOs have a subsidiary role in showing those who bear the primary responsibility what their responsibilities entail, and providing them with various forms of assistance.

1 Watchdogs

Non-Governmental Organisations are usually present in conflict areas, and have transnational networks enabling them to bring forward information to the international public scene about what is going on. They have a capacity for calling situations to the attention of mass media and politicians, which in some cases may lead to political or in some cases physical intervention by the international community or parts of it, and even the establishment of tribunals to bring those most responsible for atrocities, to justice.

It is unpleasant for a government to have its failures with respect to the implementation of international duties exposed to the public. The watchdog function of NGOs is therefore very important, also in situations, which do not lead to concrete international measures against the culprit.

2 Training

Failure to implement International Humanitarian Law is not necessarily a result of bad will in the government, but can have its cause in ignorance in and insufficient training of the armed forces. I suppose the activities of the International Institute of Humanitarian Law in this field is known to the audience, but let me say a few words about the military courses, which many will regard as the "*flagship*" of the institute. More than one hundred of such courses have been held over the years, bringing together thousands of officers and other concerned personnel from all corners of the world to study and discuss how International Humanitarian Law should be implemented. In these courses practitioners train practitioners in practical solutions of practical problems, the main method of work being discussion of practical cases in small groups, mixing nationalities and professions.

The capacity of our Institute is limited, and the cost of moving participants from one part of the world to another is high. On the other hand, the need for training is immense. There should, therefore, be ample opportunities for others to undertake similar activities on a national or regional basis, supplementing the training activities of the Red Cross and the armed forces.

The activities of our Institute are not limited to practical training, but do also include academic work, such as the preparation of the Sanremo Manual for Naval Warfare. Academic work includes training on an academic level, but there is also need for academic research and development. Universities and academic institutions have their obvious role here, but there is also room for organisations such as the International Society for Military Law and the Law of War, having in some situations a better access to the military than a purely civilian institution might have.

3 Influencing the military

The various civilian NGOs have capacities in influencing politicians and public opinion, but are in many cases viewed with distrust by the military. There are, however, also various organisations with affiliations to the military, who take interest in the protection of human dignity in armed conflict.

We have the veterans' organisations, with members who have personal experience from armed conflict, and in some cases from being prisoners of war. We have the reserve officers' organisations, who have members with one foot in the military and the other in the civilian society. There are religious organisations such as the Military Christian Fellowship, which has a strong interest in military ethics. I will

also mention the military orders, such as the Sovereign Military Order of The Temple of Jerusalem, which, as a NGO with a humanitarian purpose, is in a position to influence the military with regard to military ethics and decent warfare.

Such NGOs have a unique opportunity to promote knowledge and humanitarian values among colleagues in their home countries and internationally, speaking the language of the officer and having his attention to a far greater extent than someone who is trying to influence the officer from the "*outside*".

4 Cooperation in war crimes investigations

In my present work as a public prosecutor working with matters related to investigation and prosecution of war crimes and other international crimes, I have experienced a surprising openness among NGOs with regard to cooperation with the police and prosecutors. In many cases there has to be limitations, having regard to confidentiality requirements, the personal security of local employees or the possibility to carry out the primary mission of the relevant NGO. Most NGOs that I have met, would, however, be happy to provide all forms of background information about the country and the conflict in question, in order to facilitate investigation and prosecution of a war criminal who has fled to another country.

5 Conclusion

The struggle for strengthening the respect and implementation of International Humanitarian Law and other rules protecting human dignity in armed conflict is a struggle for Civilization against Barbary. It is a matter of communication and enforcement of values, in which civilized States and civilized individuals as citizens of the world, have a shared interest.

In this context, the NGOs represent the civilized individuals. The role of NGOs is still developing. The challenge is great and the opportunities many.

Thank you for your attention.

POSSIBLE NEW MECHANISMS ENHANCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

Marco SASSÒLI
Professor of International Law at the University of Geneva

The main shortcoming of international humanitarian law (IHL) is the lack of its respect by States, armed groups and individuals involved in armed conflicts. Regional meetings organized by the ICRC around the world on how to enhance compliance with IHL came unanimously to the conclusion that the main problem are not deficiencies in the existing legal mechanisms to ensure compliance with IHL, but lack of political will, by belligerents and by third States. How to create political will is a question that challenges less the expertise of lawyers than that of political scientists, sociologists, historians, anthropologists, psychologists and perhaps we even need psychiatrists. Legal mechanisms may however contribute to generating political will. When one honestly searches for such legal mechanisms in the field of IHL, one is confronted with the problem that those we could imagine either already exist, or they are unrealistic (because they presuppose a world governed by the rule of law which, if it existed, would anyway have no need for IHL), or they are even dangerous (because they could weaken existing mechanisms and serve as an alibi allowing States to mask their lack of political will). Worse, some mechanisms may even fall under two or three of those criteria. This difficulty to find new mechanisms is not astonishing, but rather stems from the fact that the existing law cristallizes the experience of the international community of what can work and what is acceptable for States.

The foregoing word of caution should however not make us surrender and leave the war victims in the intolerable situation of non respect which characterizes current conflicts. I have the illusion that the following proposals could contribute towards creating political will and that it is not entirely unrealistic.[38]

The most traditional and less intrusive mechanism to monitor the respect of international obligations, consists of requiring States Parties to report periodically to an international monitoring body on their respect and implementation. This creates political will, because States want to avoid the embarrassment either to be obliged to report violations or to be subject to questions by the monitoring body. Such reporting obligations were sometimes envisaged for IHL, *e.g.* concerning national measures of implementation, but States never accepted them. Contemporary experience in the field of human rights also shows a great reluctance of States towards new reporting obligations. Voluntary reporting may be more acceptable and the will to report could be enhanced if others, e.g. intergovernmental organizations, the ICRC (when it chooses to abandon its

[38] For a more detailed analysis see M. SASSÒLI, (Armed Groups Project), "*Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law*", available at http://www.armedgroups.org/_media/Sassoli%20Armed%20Groups%20paper.doc.

confidential approach because such would be in the interest of the victims of the conflict and confidential bilateral steps have not shown sufficient results), NGOs and even armed groups were also allowed to report about a State's compliance. Its own report would be an occasion for a State to put the record straight. Armed groups might only be admitted to report about a State's behaviour if they also report about their own compliance. Such reports might either be due periodically or on complaints by other actors. The mere responsibility for writing such reports and to collect the necessary data will increase the sensibility of some segments of the apparatus of a State or an armed group for IHL and add to their sense of ownership.

The ICRC would probably not want to be the addressee of such reports, as it is an institution focused on its fieldwork, which it might not be willing to put into jeopardy by dealing with reports it has to comment upon. Furthermore, the ICRC normally works confidentially while an important part of the impact of any reporting system is due to the publicity given to the reports received and comments by the supervisory body. We therefore need a new, separate body to receive such reports and to comment upon them. The existence of a distinct body providing comments with regard to the IHL performance of a State or an armed group and publishing their allegations about their performance may facilitate confidential ICRC representations in the field to narrow the gap between such reports and comments, on the one hand, and the reality in the field, on the other hand. Such a distinct, independent, expert body receiving reports by armed groups and commenting thereupon might be established by a periodical meeting of the High Contracting Parties to the Geneva Conventions, the first of which has been convened by Switzerland, the depositary of the Conventions, in 1998.

Based on all information it receives and possibly complemented by information it finds itself, such an expert body could write periodically a report about the respect of IHL in the world. In particular if created by a periodical meeting of the High Contracting Parties, such an expert body could submit its report to this meeting. This would leave the decision about the general measures to be taken to increase the respect of IHL or the specific measure taken under the obligation to ensure respect for IHL to the deliberation of States, but make sure that their deliberations are based upon a sound, impartial and non-selective factual basis. In addition, the simple existence of an official report on violations provides victims some relief and may constitute a basis for future reconciliation.

ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Beatrice DE HOZ
Minister at the Permanent Mission of Argentina to the UN in Geneva

In order to analyse the role of the High Commissioner for Refugees from a State point of view, it is important to remember that the legal framework that supports the international refugee protection regime was built by States.

The 1951 "*Convention Relating to the Status of Refugees*" is the cornerstone document of refugee protection. In the Preamble of the 1951 Convention it is indicated that the object and purpose of the instrument is to ensure the protection of the specific rights of refugees, to encourage international co-operation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between States. Refugees need protection and also durable solutions.

Signatory States agree to apply international human rights standards and agreements towards refugees and confer other specific rights which reflect the fact that refugees have lost the protection of their home Governments.

It is not necessary to enter into details of the wide list of rights included in the Convention, for example: the right not to be forcibly returned, or *refoulé*, to a country in which the refugee has reason to fear persecution; the right not to be expelled, except under certain strictly defined conditions; exemption from penalties for illegal entry into the territory of a contracting State ; the right to work; the right to housing; the right to education; the right to public relief and assistance; the right to freedom of religions and free access to courts; freedom of movement within the territory; the right to be issued identity and travel documents.

The Statute of the Office of the UN High Commissioner for Refugees extends its mandate to protect refugees as defines in similar, but not identical terms, the Refugee Convention. Over the years, the General Assembly has expanded UNHCR`s mandate concerning issues of statelessness and other "*persons of concern*" to UNHCR.

The Cartagena Declaration on Refugees adopted by a colloquium of experts for the Americas, in November 1984, enlarges the definition of refugees. It includes "[...] *persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".*

This category is not world-widely recognised, but the provisions of Cartagena Declaration are respected in Central America and have been incorporated into some national laws.

There is a close relationship between conflict and persecution. During armed conflicts individuals may be targeted for persecution. Some of them may be for reasons reflected in the Refugee Convention definition.

Refugee emergencies almost always occur in the context of armed conflicts and, in a sense, can be seen as an emergency within a larger catastrophe. The role of UNHCR is to provide protection and to ensure that assistance reaches people in due time.

In these situations of refugee emergencies, UNHCR is usually in charge of the co-ordination of the response of the UN System and the implementing actors.

States that are Members of the Executive Committee of UNHCR have the task to approve the High Commissioner's assistance programs, advise him in the exercise of his statutory functions, notably international protection, and scrutinise all financial and administrative aspects of the agency.

The Convention relating to the status of refugees of 1951 refers in Article 35 to the relationship between the HCR and the States. It indicates that *"the States undertake to co-operate with the Office of United Nations High Commissioner for Refugees* [...] *in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention"*. In that way the responsibility is shared.

Protecting refugees is the primary responsibility of States. Countries that have signed the 1951 Convention are obliged to protect refugees on their territory and treat them according to internationally recognised standards.

Even in the case of armed conflicts, UNHCR´s role complements that of States and it contributes to protecting refugees by:

- ensuring that refugees are treated in accordance with internationally recognised standards of law
- ensuring that refugees are granted asylum and are not forcibly returned to the countries from which they fled
- promoting appropriate procedures to determine whether or not a person is a refugee
- seeking durable solutions to the phenomenon of refugees.

UNHCR belong to the UN family and in case of complex emergencies has to co-ordinate its activity with other agencies of United Nations.

The subject of security is one of the crucial points to be taken into consideration in order to organise an assistance mission.

Humanitarian assistance should be in principle granted with the consent of and in co-operation with all the Parties involved in the conflict.

In resolution 46/182 of December 19th 1991, the General Assembly entrusted the Secretary General with certain functions in order to facilitate access by obtaining the consent of all the Parties concerned.

In this sense, OCHA (Office for the Co-ordination of Humanitarian Affairs) was created to deal with emergency situations.

The number of complex operations is growing and the "*Rules of Engagement*" require better prepared men to ensure adequate human rights capability and expertise.

The phenomenon of large-scale influx of refugees creates new challenges to States. When refugees are crossing the border in large scale, it is practically impossible to examine individual asylum requests, even when there may be doubt that they should be recognised as refugees. Violent elements can be mixed with real refugees, jeopardising the security of the whole group.

UNHCR´s Executive Committee has recommended minimum standards of treatment for refugees arriving in large numbers. Temporary protection is the formula used to respond to an emergency when there are clear protection needs, but it is not possible to determine such needs quickly on an individual base.

Countries of asylum shoulder the heaviest burden during a refugee crisis, since it often means disruption in the areas in which refugees arrive. Other countries, both in the region and beyond, must share the responsibility by providing support, both financial and material, to maintain and protect refugees.

It has been said that ICRC is the "*custody of the international humanitarian law and the Geneva Conventions*". We can say UNHCR serves as the "*guardian* " of the 1951 Convention of Refugees and its Protocol. UNHCR also supervises the application of the Refugee Convention.

CONCLUSION:

The events of September 11, 2001 had a fairly negligible impact on movements of people world-wide. Flows and stocks of aliens are fuelling debate revolving around internal and external security issues. In the wake of the terrorist attacks, most States have tightened their legislation to control their borders.

In this complex environment, the role of States is to adopt national refugee legislation that conforms to international law and standards and oversee their implementation.

UNHCR work alongside refugees in some of the most dangerous and remote places on earth. The August 19th, 2003 events in Iraq demonstrate the risks for the UN personnel in the field. That is why States have to co-operate closely and in the measure of their capacities, to help UNHCR to accomplish its humanitarian and social mandate.

ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS IN ARMED CONFLICT SITUATIONS

Loubna FREIH
Human Rights Watch, Geneva Director

Coming from the human rights sphere, it seems evident that the human rights monitoring and supervisory models, including the function of the High Commissioner for Human Rights and of the agency he/she governs, the treaty bodies system, the Commission on Human Rights and its 40 or so human rights investigators, offer opportunities for those looking to strengthen measures for the respect and implementation of intenational humanitarian law (IHL) and other norms protecting human dignity.

In actual fact, these two bodies of law are undeniably converging both in terms of interpretation of and approach to the law as attitudes have changed in the last few years to allow a deeper analysis of a potential relationship between the human rights system and IHL.

Initially, to put it simply, dissenters argued strongly that human rights law governed in times of peace and IHL in times of war. Today, there is more general understanding that IHL does not necessarily supersede or displace human rights law in situations of conflict. In fact as the Human Rights Committee developed in its General Recommendation 29 on States of Emergencies, there is a litany of rights that are non derogable, even in situations of conflict. These often mirror and complement core IHL provisions. In addition, it is now understood by most that IHL regimes are informed by human rights law, as for example *habeas corpus* in IHL detentions regimes for civilians. This complementarity and simultaneous application are especially important in situations that fall outside the paradigm of inter-state conflict.

At the same time, the human rights system has also taken up issues of IHL as a matter of course when addressing human rights violations in conflict situations. The Commission on Human Rights has increasingly developed standard setting norms that relate to IHL issues as well as a number of country resolutions that deal directly with violations of IHL. Special Rapporteurs, independent experts and other mechanisms of the Commission do tend to cover IHL in their monitoring and reporting, even the treaty bodies though formally mandated to cover only government violations will do so whenever feasible.

Most importantly, both previous High Commissioner for Human Rights, Mary Robinson and the late Sergio Vieira de Mello, stressed the importance of IHL as well as human rights norms in the so called ‘war on terror’ following September 11, as have other parts of the UN system including the Secretary General, Kofi Annan.

Louise Arbour, the Fourth High Commissioner for Human Rights and the former Chief Prosecutor of the UN war crimes tribunals for Rwanda and FYO, is particularly well placed to ensure that the promotion and protection of human rights and international humanitarian law in conflict situations be one of the most important functions of the job.

At a time when stakeholders in IHL themselves are involved in discussions as to what constitutes the best measures to ensure the respect of and implementation of IHL, with far ranging proposals including that of a High Commissioner for IHL, it may be opportune as Yves Sandoz mentioned to look at existing mechanisms with a view of strengthening them. Better still to build complementary partnerships within existing frameworks from within the UN system and from civil society.

Roles and Functions of the High Commissioner for Human Rights in Conflict Situations

I would like to explore some of the ways in which the key functions of the High Commissioner for Human Rights can help to ensure respect of and the implementation of IHL notably in internal conflict with you today. These include Public and Private Advocacy, Monitoring, Reporting, Accountability and Transitional Justice, and Institution Building.

I. Advocacy

It is undeniable that there is a role for a more public reporting and advocating role on IHL by the High Commissioner for Human Rights to work in unison or in a complementary way with the ICRC.

In the 1980s human rights NGOs such as Human Rights Watch (HRW) pioneered the work of analyzing and condemning conflict-related abuses by armed opposition groups as well as by governments. We proceeded to publicly 'name and shame' offenders of IHL in any conflict, thereby complementing ICRC's work. Today up to 30% of our work is in conflict areas. The OHCHR should take a much more prominent role in publicly reporting, and when appropriate, condemning parties who commit IHL violations. The Office of High Commissioner for Human Rights (OHCHR) is particularly well placed to influence and feed into the Security Council, General Assembly and Commission on Human Rights deliberations and, hopefully, trigger a response by the international community. Undoubtedly, one of the High Commissioner's most difficult yet vital work is the advocating of human rights and IHL in the UN emergency interagency process. In order to do this effectively, the High Commissioner will need to develop and integrate IHL expertise at field level and at Headquarters, as well as work more closely with the ICRC.

The High Commissioner can systematically call on all parties to respect IHL in a conflict and ask them to make clear publicly their determination to respect IHL, as well as report publicly on IHL violations. This is a daunting and difficult function for any High Commissioner. For example, it is largely believed that Mary Robinson may have lost key support when she publicly condemned the US, Russia and China in the manner in which they fight against terrorism. While Sergio Vieira de Mello made a public appeal in front of

the Commission on Human Rights to all the parties to respect their obligations under the IHL the United States and its allies attacked Iraq in March 2003.

II. Monitoring

Effective advocacy needs to be backed by clear and comprehensive monitoring. Monitoring is one of the most important functions of the OHCHR. In conflict situations it is characterized by monitoring through emergency missions, as human rights component of Department of Peace Keeping Operations (DPKO) missions, stand-alone presences, or through the monitoring and on site missions of investigative mechanisms of the Commission on Human Rights.

One of the High Commissioners's key preventive and investigative tools is the dispatching of emergency missions in cases of grave and massive human rights and IHL violations, either mandated by the Security Council as the OHCHR mission to Ivory Coast in December 2003, by the Commission on Human Rights, as the mission by the High Commissioner to the Occupied Territories in 2001, or as an initiative of the High Commissioner.

The Acting High Commissioner, Bertrand Ramcharan, dispatched an emergency mission to Chad and Darfur in the midst of the Commission of Human Rights in April 2004. This mission established grave patterns of human rights and IHL abuses by government forces and forces aligned with it such as the Janjaweed that have led to the humanitarian catastrophe we know today. The mission also developed a set of recommendations including that an international commission of enquiry be established to investigate war crimes and crimes against humanity committed by all parties, including rebel groups. This specific human rights monitoring from the OHCHR (from two emergency missions and from human rights monitors who are now dispatched in the region) informed two briefings to the Security Council as well as the report of the Special Representative of the Secretary General to Sudan, Ian Pronk. In actual fact, in May the acting High Commissioner was asked to brief directly the Security Council.

On-the-ground presence is key to offering protection to victims, to monitoring ongoing human rights and IHL violations. One of the most comprehensive field mission by the OHCHR is the office in Colombia and regional offices. The Office came about as a result of intense pressure at the Commission on Human Rights where the Colombians agreed to the establishment of a field presence to stave off a UN resolution. This office actively monitors human rights and humanitarian law violations, takes up individual cases, makes recommendations and appeals to the Government, including with regards to IHL violations and violations of armed groups (notably the FARC – Revolutionary Armed Forces of Colombia), and reports back to the Office and to the Commission.

Since the tragic play of events in the Great Lakes Region and in the Balkans, the Security Council has acknowledged that severe human rights abuses often play a critical part in fueling armed conflict and aggravating humanitarian crises. As a result it has been more willing to include a human rights component to peacekeeping missions. One of the best examples of a sophisticated SC-mandated human rights mission is in El Salvador, in the early 1990s, which predates the later crises in the Great Lakes and in the Balkans. The mission was mandated to monitor the human rights situation, to investigate specific cases, to make recommendations and to report to the Secretary General, SC and GA. The SMLN in making the concession to put down their arms were comforted in that government forces would be monitored.

Today, the UNHCHR has some 40 field presences either as part of peacekeeping missions or as stand alone presences. The increasing number of UN field operations in conflict areas has led to an increasing role for the OHCHR but often in very murky conditions. For example, too often it depends largely on the goodwill of the Security Council and whether it establishes a human rights component in a mission it deploys, as for example was the case in Liberia and the Ivory Coast.

Even in cases where there is a mandate for the OHCHR, these activities have been given a low priority by the officials who oversee UN field operations for political convenience or perceived political gains. In fact, I would go as far as to say the more acute the fighting the more resistance there is for the High Commissioner to be monitoring the situation.

Monitoring through mechanisms established through the Commission on Human Rights.

Many thematic and country rapporteurs do report regularly on both human rights and IHL violations through their regular reporting requirements to the Commission on Human Rights and to the General Assembly, by undertaking in-country visits, or through the issuance of urgent appeals.

In the case of the situation in Darfur, both the Representative of the Secretary General on IDPs (Internally Dispersed Persons) and the Special Rapporteur on summary, extra-judicial executions, and the independent expert on Sudan mandated by the Commission on Human Rights have visited Darfur. Some of them have already made their findings public thereby putting pressure on the Security Council to act.

One of the undeniable advantages of these rapporteurs are that their independence ensures them a certain degree of freedom that many parts of the UN find difficult to shake off. Those special procedures have repeatedly made individual and collective calls on how the fight against terrorism was being waged and its impact on the enjoyment of human rights as well as violations of IHL. In June 25, four of these special procedures made a joint public request to visit all places of detention for persons held on grounds of alleged terrorism in Guantanamo, Iraq, Afghanistan and elsewhere.

In addition, conceptually an increasing number of thematic and country independent monitors are mandated to cover IHL violations. The Independent Expert on IDPs actually has incorporated the monitoring of non-state Parties to a conflict in the Guiding Principles. Two new mechanisms will be of particular interest to persons and bodies concerned with IHL, the special advisor on Genocide who is mandated to report directly to the Security Council, and the new independent expert on counter terrorism who as you all know is an expert on IHL, Bob Goldman.

III. Reporting

Reporting the information back to the Security Council, through the Secretary General and directly, as regularly as possible is an essential role for the High Commissioner (HC). Step by step, the High Commissioner has become a presence on the Council's radar screen – from the first Security Council briefing by the High Commissioner in September 1999, through the establishment of monthly meetings with the SC Presidency by the High Commissioner or the OHCHR New York representative, through the joint participation of SC ambassadors and the High Commissioner in a 2001 Security Council retreat on human rights peacekeeping, to several briefings for the SC on specific countries and the results of human rights investigations, including the most recent one on Darfur in May 2004.

This direct link with the Security Council is vital for the High Commissioner, so as to be able to alert and inform the SC with regards to grave human rights and IHL violations. Too often, there is a temptation by the UN Country Team or SRSG to suppress the truth to pave the way for political negotiations. There is a need to protect the integrity of human rights reporting and this can only be achieved if the HC is able to independently monitor and be able to alert the international community by reporting directly to the SG and to the SC. So whether human rights and IHL information is considered by the international community or taken into account in UN reporting largely depends on the representative of the SG in any given conflict—as we have seen in many conflicts including Afghanistan. To avoid this, increasingly human rights NGOs and the OHCHR have called for a senior human rights person to be placed in the leadership of the mission with direct political impact, a sort of Human Rights Commissar—as was the case in Kosovo.

IV. Accountability and Transitional Justice

As Mr Kellenberger highlighted the environment for the respect and implementation of IHL is more favorable today thanks to mechanisms to address impunity, such as the International Criminal Court (ICC), and the creation of the *ad hoc* Tribunals. Once again the work of the OHCHR and of the Commission's mechanisms in the collecting of information to prosecute against war crimes and establish individual responsibility is particularly vital.

Louise Arbour's own expertise will strengthen this aspect of the High Commissioner's mandate. For example, in the case of Afghanistan, the OHCHR has been key in developing and supervising a mapping

exercise to identify the main offenders of past abuses despite lack of political will on behalf of the international community.

The role of OHCHR is key in UN-sponsored peace agreements as well—as the example of the failed Lomé peace accords makes clear. Issues of accountability and impunity need to be addressed so as to allow for a society to be able to rebuild itself. These rights cannot be mitigated in the peace process. The Lomé peace accord signed in 1999 granted an amnesty to the worst violators of human rights and the issue of impunity was largely ignored by the Security Council. It took the re-ignition of the conflict, many lives lost or destroyed, and a nearly total collapse of the peace process, for the Council to start addressing the most pressing human rights and IHL issues through the establishment of a special court and the strengthening of the human rights monitoring component of United Nations Mission in Sierra Leone (UNAMSIL).

V. Institution building

To lay the foundations for a new society and peace to take roots, institutions need to be reconstructed and built, such as the development of civil society including human rights institutions in Cambodia or the setting up of the ombudsperson in El Salvador and Guatemala.

Possible limitations to a complementary partnership with the human rights system

Role of Commission on Human Rights (CHR)

As the Security Council is the United Nations' most important response mechanism used in times of emergencies and crises, it is imperative that the High Commissioner be able to feed into the Security Council's deliberations as often and regularly as possible. Yet there is an important role, both as a preventive organ in relation to its standard setting role and as a monitor of crises situations, that the Commission on Human Rights (CHR) be able to regularly take up and consider human rights and IHL violations in conflict situations both as part of its regular, or by calling on special sessions as it has done in the midst of conflicts in the Balkans, in East Timor, and in the Occupied Territories.

Most importantly, the work and findings of human rights special rapporteurs and other procedures of CHR, as well as members of treaty bodies, and other human rights institutions, should be better considered by the Commission as well as more regularly addressed to the Security Council by way of 'Arria briefings'.

Several key governments and NGOs are currently supporting a proposal for such rapporteurs to hold more regular public briefings for the International Community on key human rights development and crisis situations, including when they return from mission. This would take place under the auspices of the High Commissioner and ensure that timely discussion of Special Rapporteurs' reports are part of the Office's early warning system and permit immediate discussion of possible responses. The High Commissioner could also

call for special sessions of the Commission on Human Rights when human rights crises arise either as to trigger action by the Security Council or when it has failed to act. And she can appoint *ad hoc* investigative mechanisms in cases of grave crises.

Possible limitations to a complementary partnership with the human rights system

I would like to briefly address possible limitations to such a strategic partnership.

- Lack of political will from Security Council: through regular reporting to the Security Council, and a more assertive positioning within the UN interagency process, the High Commissioner is the leading voice on human rights and IHL within the UN system. In many instances, the High Commissioner has been key in both undertaking monitoring of situations that include IHL violations when other parts of the UN system have failed to do so or when there is no political will within the international community. I have mentioned the mapping of war crimes in Afghanistan, and the early deployment of an emergency mission to Darfur. Another example is the recent report on Iraq developed by the OHCHR at a time when the European Union under pressure from the United States failed to introduce a resolution on the situations in Iraq and to renew the mandate of the Special Rapporteur Commission on Human Rights. Thus, the High Commissioner is key in addressing responsibility of Parties to a conflict, particular in cases of internal conflicts, and has done so several times against permanent members of the Security Council including by invoking their international responsibility. Naturally, in order to remain a credible and strong voice, the High Commissioner will need to pick and chose her battles carefully. More still needs to be done to make sure that every crisis response on behalf of the Council addresses human rights and IHL in an appropriate manner and that the Council's significant protection potential expressed in various resolutions on the protection of civilians and children in armed conflict is fully realized.

- Politicization of IHL in debates at the Commission on Human Rights and at the Security Council: as Yves Sandoz and as speakers on this panel have demonstrated, the increased awareness and presence of IHL at the Commission on Human Rights is characterized by partial examination of certain situations, or lack of review of situations that deserve attention. However, by 'singing in unison' the ICRC and High Commissioner can bring weight and highlight some of these problems. Greater unity would also help to counter some of the misappropriation of IHL in Security Council debates and resolutions.

- Lack of resources: a larger systemic problem is the lack of resources attributed to human rights within the UN system.

In concluding, it is undeniable that the human rights system, though far from perfect, offers synergies and mechanisms that the IHL framework so far has not developed or not activated. These include synergies between the international community (Security Council, The General Assembly, the Commission on Human Rights), the UN (the OHCHR, independent investigative mechanisms such as the special rapporteurs and the monitoring treaty body system), as well as with civil society.

PRIORITIES AND OPEN CHALLENGES TO IMPROVE IMPLEMENTATION AND ENFORCEMENT OF HUMANITARIAN PROTECTION

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Severe gaps and deficiencies in implementing international humanitarian law call for a continuous review of existing and prospective legal mechanisms. A multitude of human suffering and vital challenges for the rule of law in current conflicts require urgent action, to be taken by governments and civil society at both international and national levels. The Introductory Report has posed important questions in terms of prevention, control and suppression. The responsibility of States, international organisations and the ICRC has been scrutinised (Session II). A proactive role of the ICRC and the Red Cross movement (Sessions III and IV), of UNHCR (Session V), UNHCHR (Session VI), and of NGOs (Session VII) have been explained and encouraged in this context. For successful efforts in this field much depends on the effectiveness of cooperation and exchange. In view of the nature and size of the problem, all available remedies to improve implementation and ensure enforcement of humanitarian protection must be implemented with the same high priority.

Fact finding is essential for both implementation and enforcement of the law. It needs to be improved by institutional and other means. In this respect no undue difference as to the availability of established fact finding procedures and their institutional implementation should be made[39]. Parties to the conflict should use existing fact-finding mechanisms in order to enquire into any facts or alleged violations of rules of international humanitarian law. Non-governmental organisations can contribute to securing and promoting compliance with the rules of international humanitarian law. They may provide good offices and assist in monitoring, mediating and providing other assistance in this respect. Human rights bodies, although confined by mandate and tradition to control compliance with human rights obligations[40], can provide appropriate means for investigating violations of international humanitarian law. Human rights bodies have, indeed, set already convincing examples for their participation in the application of humanitarian law and its progressive

[39] See the *San Remo Manual on the Protection of Victims of Non-international Armed Conflicts*, Tentative Text (June 2003), para.s. 332 and 333.

[40] *E.g.* Human Rights Commission and its Sub-Commission on the Promotion and Protection of Human Rights, working groups and network of individual experts, representatives and special rapporteurs, reporting procedure under Art. 40 ICCPR, inter-state complaints under Art. 41-43 ICCPR, individual communications under the first Optional Protocol, Commission on the Prevention of Racial Discrimination and the Protection of Minorities; European Court on Human Rights; Inter-American Court of Human Rights; Inter-American Commission on Human Rights (IACHR). See P. ALSTON, *"The United Nations and Human Rights"*, Oxford 1992; L. MOIR, *"The Law of Internal Armed Conflict"*, pp. 252-263 and 271-273.

interpretation[41]. The International Humanitarian Fact Finding Commission, established under Art. 90 AP I for investigating breaches of humanitarian law in international armed conflicts at the request of all Parties concerned, should be used also in internal wars. The ICRC, as the guardian of international humanitarian law, may assist in fact finding within the principle of impartiality and existing ICRC practice[42]. Fact finding is also highly relevant for post-conflict peace building. Its importance for truth commissions cannot be limited to aspects of reparation[43].

The application of the law and its progressive development are subject to a test of effective remedies to ensure compliance. While serious violations may paradoxically have the effect of extending rather than limiting existing obligations under international humanitarian law (as in *Tadić*[44]), new and forceful efforts remain necessary to ensure confidence in the law in this field. The fundamental character of humanitarian standards as obligations *erga omnes* underlines that all States can be held to have a legal interest in their protection, and to confirm their responsibility for taking appropriate steps to ensure respect, even if they are not directly involved in an armed conflict[45].

a) Preventive means such as education and training, co-operation in fact-finding and special arrangements designed to confirming compliance and supplementing existing rules would enhance compliance with the law and support understanding for reciprocal and long-term interests of the parties. An innovative look into third State roles and responsibilities and efforts to develop strategies for influencing Parties to non-international armed conflicts[46] deserve forceful endeavours and they require international support at regional and global scale. The civil society's role is essential not only for the success of educational programmes but also for the conclusion of special agreements under Common Article 3 of the Geneva Conventions and the granting of amnesties to members of armed groups as incentive for compliance with international humanitarian law.

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[41] See IACHR, *Tablada case*, report No. 55/97, case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38 (October 30, 1997), see L. ZEGVELD, *"The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada case"*, IRRC No. 324 (September 1998) pp. 505-11; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, www.cidh.org/Terrorism/Eng.

[42] See the *Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, February 2004.

[43] See *Guatemala Memoria des Silencio (Informe de la Comisión para el Esclarecimiento Histórico*, 1999 (12 volumes); L. FERNANDEZ, "*Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa"*, in: Albrecht Randelzhofer and Christian Tomuschat (eds.), State Responsibility and the Individual: Reparation in instances of Grave Violations of Human Rights, 1999, pp. 173-87.

[44] ICTY case No. IT-94-1-A: *The Prosecutor v. Tadić*, Appeal on Jurisdiction, 2 October 1995, Appeals Chamber Judgment, 15 July 1999, www.un.org/icty/judgement.htm, extracted in M. SASSOLI & A. A. BOUVIER (ed.), *"How does Law Protect in War?"*, ICRC, 1999, p. 1159-1225.

[45] Under Art. 1 common to the Geneva Conventions there is even a legal obligation to ensure respect for international humanitarian law. See B. KESSLER, "*The Duty to ‚Ensure Respect' Under Common Art. 1 of the Geneva Conventions: Its Implication in International and Non-International Armed Conflicts"*, in GYIL 44 (2001) 498-516; B. KESSLER, *"Die Durchsetzung der Genfer Abkommen von 1949"*, in Nicht-Internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1., Berlin, 2001.

[46] See ICRC, *Improving Compliance with International Humanitarian Law*, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Löaw, Cambridge, Mass., June 25-27, 2004, http://www.ihlresearch.org.

b) Repressive means include political, economic and military measures. They depend on competent authorities, fully aware of their responsibilities and ready to act. Confidential negotiations, together with appropriate forms of diplomatic pressure and coercive measures are required. External scrutiny and public support remains helpful and sometimes necessary in the process of decision-making. The measures taken may be highly controversial. Once being ordered, they require coherent strategies for ensuring implementation.

c) Appropriate remedies are not confined to humanitarian law itself. The law of non-international armed conflict, as part of international humanitarian law, can not be considered as a "self-contained system" which in the words of the International Court of Justice enumerates a limited number of possible reactions to violations, in the context of the law of diplomatic relations[47]. Abandoning this concept even for the law of diplomatic relations, the International Law Commission has limited it to the rule that a "State taking countermeasures is not relieved from fulfilling its obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents[48]. International humanitarian law is to be implemented not only by using mechanisms it expressly provides for. State responsibility and the individual responsibility of fighters in armed conflicts are based on a much broader concept.[49]

Means to Strengthen Individual Accountability are essential elements for good governance.

a) Litigation as an enforcement devise has become more prominent in recent years, due to the establishment of ad *hoc* tribunals and the International Criminal Court. The international justice system, however, is still primitive and selective and the level of expertise in military matters of those prosecuting, defending and adjudicating cases is often rather limited. It should also be borne in mind that the requirements of fair trial and the duration of criminal procedure both at national and international courts generally exclude the possibility of using prosecution as a tool for enforcing compliance. But effective criminal jurisdiction can be used for dissuading from the performance of crimes in future conflicts.

b) The right to individual reparation mainly rests within municipal legal orders and, except for *ad hoc* solutions after certain armed conflicts, there are hardly any compensation procedures under international law today. An international legal regime of individual reparations would strengthen democratic developments. It could have deterrent effects for some perpetrators. Art. 75 of the ICC Statute requires the Court to establish principles '*relating to reparations to, or in respect of, victims'*. Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition[50]. While full reparation will be impossible in almost every case, honest efforts to provide reparations are essential for an

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[47] *"[...] diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."*, *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 3, at p. 38 (para. 83) and p. 40 (para. 86).

[48] United Nations, International Law Commission, *Report on the Work of its Fifty-third Session* (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), http://www.un.org/law/ilc/reports/2001/2001report.htm, Draft Article 50 (2) (b).

[49] M. SASSÒLI, *"State responsibility for violations of international humanitarian law"*, in IRRC June 2002, Vol. 84 N° 846, pp. 401-34 [403-4].

[50] Cf. UN Commission on Human Rights, *The right to Restitution, Compensation and Rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni*, E/CN.4/2000/62, 18 January 2000, pp. 5 et *seq*.

effective peace process and immaterial measures including recognition of facts and responsibilities are not less important than payments and restitution[51].

c) An individual complaints procedure for violations of international humanitarian law should be encouraged. It might be developed either as a new mechanism[52] or using existing human rights procedures. International organisations may be denied access in certain States. Yet an opportunity for individual victims to apply to such organisations is essential for ensuring monitoring and providing remedies against violations.

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[51] The International Law association has established a new Committee on **Compensation for Victims of War** (chair: Dr Luke T Lee, American Branch, rapporteur: Professor Rainer Hofmann, German Branch. The Mandate is as follows: "Innocent civilians are often casualties during armed conflicts, whether or not intentionally targeted. Deprived of effective protection, they are often left without any remedy if they are killed or wounded, or suffer property or other losses. It is time to systematically review the law of war and human rights with a view to focussing on the rights of victims of war to compensation – both to serve the end of justice and to inhibit wanton attack on civilian population by the military, whether or not under superior order. The proposed project would have as its goal the preparation and adoption of a Draft Declaration of International Law Principles on Compensation to Victims of War, as a logical sequel to three ILA declarations already adopted: namely, on *Mass Expulsion (Seoul 1986)*, *Compensation to Refugees (Cairo 1992)*, and *Internally Displaced Persons (London 2000)*. Underlying all these declarations is the principle that compensation must, under international law, be paid to victims of human rights abuses."

[52] See *Hague Appeal for Peace*, Draft Additional Protocol to the Geneva Conventions Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law [http://www.haguepeace.org]; J. KLEFFNER, *"Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*", in: 3 Yearbook of International Humanitarian Law (2000), 384-401; J. KLEFFNER, *"Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure"*, in 15 Leiden Journal of International Law, 2002, pp. 237-250.

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LES MOYENS DE MISE EN ŒUVRE DU DROIT INTERNATIONAL HUMANITAIRE: RÔLE DES ORGANISATIONS NON GOUVERNEMENTALES

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La mise en œuvre du Droit International Humanitaire (DIH) pose, tout naturellement, le problème de son effectivité qui est celle du droit international en général et du rôle que celui-ci joue dans la société internationale. En effet, le DIH est loin d'avoir le monopole des problèmes et des insuffisances dans la mise en œuvre de ce corpus juridique. Tout le droit international est imprégné de cette caractéristique essentielle qu'il constitue un droit dont les sujets sont des États qui se considèrent comme des États souverains et qui même lorsqu'ils s'engagent dans des normes conventionnelles, les appliquent à leur manière, c'est-à-dire en fonction de leurs intérêts et non pas forcément en fonction des intérêts de la société internationale. Ce qui tend, dores et déjà, à limiter l'effectivité du droit international.

Au surplus, contre ces Etats, la sanction ne joue encore qu'un rôle marginal dans l'application du droit international, soit par le Conseil de sécurité (chapitre VII de la Charte des Nations Unies) soit par le juge (Tribunaux pénaux *ad hoc* ou Cour pénale internationale).

Cependant, si les insuffisances et les lacunes que l'on constate, de plus en plus, dans la mise en œuvre du DIH créent beaucoup d'émoi et d'indignation, c'est parce que nous sommes ici dans un domaine très sensible, puisqu'il s'agit du droit des conflits armés, c'est-à-dire d'un droit tragique qui a pour ambition de tempérer ces conflits et de protéger les victimes, dans un contexte difficile où les belligérants ont tendance à privilégier la dialectique des armes, par rapport à celle du droit.

La première difficulté que l'on rencontre lorsqu'on réfléchit sur cette question des moyens de mise en œuvre du DIH, c'est lorsque l'État n'applique plus le DIH, parce qu'il a l'impression que cette application le met dans une situation de rapport de forces défavorable et que la mauvaise volonté mise dans l'application du DIH constitue, en quelque sorte, pour l'État, une mesure de sécurité ou d'autoprotection, pendant le conflit.

La seconde difficulté vient du fait que si le corpus du DIH se développe et s'enrichit, les conflits se transforment aussi et imposent au DIH de s'adapter, sans cesse, à de nouvelles formes de conflits où l'État se désintègre et où, parfois, la société même se désintègre, laissant place à des factions ethniques ou religieuses ou tribales (Ex-Yougoslavie, Somalie, Afghanistan, Irak, etc...).

D'où l'intérêt de réfléchir sur les moyens d'améliorer la mise en œuvre du DIH dans une perspective qui intègre la société civile, à travers les associations nationales et les organisations internationales non gouvernementales, pour en faire un instrument qui supplée aux défaillances de l'État.

Certes, partout, les Sociétés nationales de Croix-Rouge et de Croissant-Rouge constituent, déjà, en principe, des auxiliaires de l'État, intervenant non seulement en période de conflit armé, mais même en temps de paix, pour le secours aux victimes de toutes sortes. Mais le rôle effectif joué par ces sociétés nationales est très différent selon les pays. Si, dans les pays riches, ces sociétés disposent, en général, de supports humains et financiers importants et même de ressources propres pour financer des programmes d'action énormes, dans les pays en développement, ces sociétés ont des ressources très limitées et sans commune mesure avec les besoins humanitaires de la population, déjà en temps de paix, malgré les efforts méritoires accomplis par la Fédération Internationale des Sociétés nationales de Croix-Rouge et de Croissant-Rouge, pour lancer des opérations de partenariat entre les sociétés riches et les sociétés pauvres. Compte tenu de ces besoins humanitaires urgents de la population, on a toujours mauvaise conscience à affecter une partie des ressources des sociétés nationales à la formation et à la diffusion du droit humanitaire.

Dans cette perspective, il serait nécessaire de relayer et d'étoffer l'action des sociétés nationales par l'action des ONG et de toute la société civile. Et cela à plusieurs niveaux:

- au niveau de la prévention
- au niveau du contrôle
- au niveau de la répression

I – Rôle de la société civile dans la prévention:

Il serait indispensable que toute la société civile soit associée et impliquée dans les actions de prévention, et notamment au niveau de la formation et de la diffusion des normes du DIH. L'objectif est de parvenir à une situation dans laquelle les militaires, de leur côté, et la population civile de son côté, sachent bien quels sont les droits et les devoirs de chacun dans un conflit armé. Certes, ce sont les États qui se sont engagés à respecter et à faire respecter les règles des Conventions de Genève (Article 1er commun aux quatre Conventions). Mais, à l'expérience, cela ne suffit pas. Il faudrait que la société civile s'engage aussi à respecter et à faire respecter le DIH, en revendiquant sa responsabilité dans la mise en œuvre du DIH. Et, parmi les moyens susceptibles d'améliorer cette mise en œuvre il faut que la société civile se sente responsable, à côté de l'État, et joue son rôle dans la formation et la diffusion du DIH.

Dans cet esprit, il est important de considérer que l'armée n'est pas la seule institution concernée par la mise en œuvre du DIH et donc par la formation qu'il faut dispenser aux militaires en cette matière. Il faudrait qu'à tous les niveaux de l'enseignement et de la formation, dans tous les domaines, généraliser l'initiation à l'ethique du DIH et la vulgarisation des principes essentiels des Conventions de Genève et des Protocoles additionnels. Là où sont dispensés des cours d'éducation civique, il faudrait que cette initiation au

DIH soit intégrée à ces cours, de façon à bien montrer qu'il s'agit d'une formation qui vise à intégrer les principes de base du DIH dans l'éducation et la culture de base des citoyens et à en faire de bons citoyens autant que de bons soldats, aptes à saisir le message du DIH et à veiller, spontanément, à sa mise en œuvre, au cours des conflits armés. A cet égard, des expériences intéressantes se déroulent dans les écoles des pays du Maghreb, grâce à une collaboration étroite entre la Délégation régionale du CICR et les Ministères de l'Éducation nationale relative à un programme dénommé *"Explorons le droit humanitaire*". [53]

Au surplus, il serait nécessaire que les *"mass media"* participent activement à l'œuvre de diffusion du DIH, de telle façon que la formation de base dispensée aux citoyens à l'école, au lycée et à l'université soit entretenue, constamment, par une espèce de formation permanente, dispensée par les medias.

Par ailleurs, il serait très utile que cette œuvre de formation et de diffusion du DIH soit surveillée et coordonnée, dans chaque pays, par une commission nationale consultative, placée à côté du Premier ministre ou du Président de la République et représentant la société civile, à l'instar de ce qui existe dans le domaine des droits de l'homme. Comme dans ce dernier domaine, toutes les institutions nationales consultatives créées dans le domaine du droit humanitaire pourraient former un Comité international de coordination qui serait rattaché à la Commission des droits de l'homme, ou au Conseil économique et social, ou à l'Assemblée générale des Nations Unies.

II – Rôle de la société civile dans le contrôle:

Il serait certainement utile de s'inspirer de l'expérience des droits de l'homme pour mettre en place, grâce à un protocole additionnel aux Conventions de Genève, un système de contrôle de la mise en œuvre par les États de leurs engagements conventionnels. Il y a , à l'heure actuelle, huit systèmes de contrôle par des comités d'experts qui fonctionnent dans le cadre des Nations Unies et qui ont pour objectif d'obliger les États parties à rendre des comptes, quant à la mise en œuvre de leurs engagements, contractés dans le cadre des conventions relatives à la protection des droits de l'homme: les deux Pactes relatifs aux droits civils et politiques (CCPR) et aux droits économiques, sociaux et culturels (CESCR), la Convention relative à l'élimination de toutes les formes de discrimination raciale (CERD), la Convention sur l'élimination et la répression des crimes d'apartheid (APAR), la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW), la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (CAT), la Convention relative aux droits des enfants (CRC) et enfin la Convention sur la protection des droits de tous les travailleurs migrants et de leur famille.

Certes, ces Comités d'experts n'ont aucun pouvoir contraignant, mais agissent par le dialogue avec les États et par leur pouvoir de persuasion. Ils n'ont également aucun pouvoir de sanction, mais peuvent

[53] Voir la Délégation régionale du CICR pour le Maghreb, *L' Humanitaire Maghreb*, N° 7, juin 2004 , pp. 20-25

seulement adresser aux États des constatations ou des observations ou des recommandations. Toutefois, celles-ci sont reprises dans les rapports adressés chaque année par les Comités à l'Assemblée générale des Nations Unies et qui deviennent des documents publics, dès lors qu'ils sont communiqués aux États membres. Il y a là un moyen de pression indirect qui peut finir par obliger les États à effectuer des avancées au niveau du respect et de la mise en œuvre des dispositions conventionnelles.

Un tel système de contrôle pourrait servir comme source d'inspiration dans le domaine de la mise en œuvre du DIH. En effet, la mise en place d'un système de contrôle analogue sur la mise en œuvre du DIH par les États serait un complément indispensable au rôle joué actuellement par le CICR dont la règle de conduite est généralement la discrétion et la confidentialité. Le contrôle serait exercé par un Comité d'experts indépendants, élus par les États parties et ce Comité aurait un double rôle:

- Recevoir des États parties, périodiquement, des rapports relatifs à la mise en œuvre de leurs obligations relatives au DIH
- Permettre aux États parties, aux victimes et aux ONG de saisir le Comité de communications relatives aux violations des normes du DIH

Mais, ce qui est le plus important, c'est d'associer les ONG au fonctionnement du système, non seulement en leur permettant de faire parvenir au Comité des communications ou requêtes relatives aux violations des normes du DIH par les États, mais surtout, en leur permettant de prendre part à la présentation des rapports périodiques, de façon à ce que cette présentation des rapports obéisse à une procédure contradictoire, grâce aux rapports et documents d'information réunis et présentés au Comité, non seulement par les représentants officiels de l'État, jouant le rôle de la défense, mais aussi par les ONG qui ont tendance à jouer un rôle accusatoire, en toute impartialité.

On a adressé à ce système beaucoup de reproches, quant à son efficience, en particulier en raison des retards énormes accumulés par les États dans la présentation de leurs rapports périodiques. Mais, apprécié sur le long terme, le système de pression maintenu sur les États, grâce à ce double rôle du Comité et des ONG finit par produire des résultats positifs, puisque souvent l'État finit par céder et par adopter une attitude positive, quant au respect et à la mise en œuvre des normes conventionnelles constitutives d'obligations pour cet État.

III – Rôle de la société civile dans la répression:

Dans le cadre de ce volet relatif à la répression, il est évident, tout d'abord, de considérer que la mise en place et le fonctionnement des tribunaux *ad hoc*, en particulier les tribunaux pour l'ex-Yougoslavie et le Rwanda, mais surtout l'entrée en fonction de la Cour pénale internationale constituent des avancées considérables de la société internationale vers l'instauration d'un système répressif efficace et généralisé qui doit sanctionner les violations, par des individus, des normes essentielles du DIH et du droit des droits de

l'homme. Certes, le système actuel reste encore très diminué, aussi bien sur le plan des engagements des États que sur celui des incriminations instituées pour la mise en jeu de la responsabilité pénale individuelle. Nous savons que ces insuffisances sont dûes aux réticences de beaucoup d'États, surtout en dehors de l'Europe. Il faut bien dire que le grand obstacle reste, pour le moment, l'attitude résolument hostile des États-Unis qui exploitent les réserves de plusieurs États africains, arabes et asiatiques. Mais, la situation peut changer, après la fin de la peur terroriste.

En tout cas, sur ce point également, la société civile peut jouer un rôle très positif dans l'évolution de la situation. L'on sait le rôle extrêmement actif et très positif joué par les ONG, au cours des travaux de la Conférence de Rome et dans l'adoption du Statut de la Cour pénale internationale, le 17 juillet 1998. Cette action des ONG et de la société civile, doit continuer à s'exercer aussi bien sur le plan interne que sur le plan international, et à faire pression sur les États. Elle finira par produire, progressivement, des résultats positifs, quant à la sanction des normes essentielles du DIH et du droit des droits de l'homme.

Après la découverte de la situation choquante des prisonniers de Guantanamo et de la prison d'Abou Ghraïeb, l'opinion publique internationale a été émue de constater à quel point les conflits armés et le terrorisme constituent encore des prétextes pour justifier la violation des règles les plus essentielles du droit humanitaire et des valeurs qu'elles représentent, même pour les États démocratiques qui parlent de *"dommages collatéraux"* ou de *"résultats inévitables d'actions sécuritaires"*. Le Président du CICR, M. Jakob Kellenberger s'est insurgé contre certains commentateurs qui *"semblent penser que la menace que constitue le terrorisme justifie un affaiblissement du droit international"* et que *"le droit devrait avant tout servir les besoins de sécurité des États et la protection juridique des personnes contre les atteintes à leur dignité doit être amoindrie si l'on veut ettre un terme aux actes terroristes*", avant de conclure que «*la lutte contre le terrorisme ne peut être légitime u'aussi longtemps qu'elle ne porte pas atteinte aux valeurs fondamentales partagées par l'humanité"* et que *"le droit à la vie et à la protection contre le meurtre, la torture et les traitements dégradants doi être au cœur des actions de tous ceux qui participent à cette lutte"*.[54]

Il est évident que dans ce "*combat sans fin*" évoqué par le Président Kellenberger, toute la société civile doit se mobiliser, pour jouer le rôle qui est le sien, à côté du CICR et, non seulement faire évoluer le droit humanitaire, mais aussi – et c'est tout aussi important – faire progresser le respect et la mise en œuvre de ce droit. Il est certain aussi qu'à la faveur de certains évènements tragiques et émotionnels, il devient plus facile de mobiliser l'opinion publique pour faire pression sur les gouvernements et les obliger à céder sur le terrain de leur souveraineté ou de leur sécurité. Et c'est le rôle des ONG de travailler la société civile en profondeur, pour aboutir à un tel résultat. La création de la Cour pénale internationale, en suspens depuis l'adoption de la Convention pour la prévention et la répression du crime de Génocide, adoptée le 9 décembre

[54] Voir *"Le combat sans fin du CICR"* , in Le Monde du 21 mai 2004.

1948[55] n'aurait pas été possible sans les évènements dramatiques qui se sont déroulés en ex-Yougoslavie et au Rwanda. Comme le dit le proverbe: à quelque chose malheur est bon! Il faut espérer que l'émotion soulevée par les évènements de Guantanamo et d'Abou Ghraïeb en particulier aux États-Unis, aura des conséquences positives sur la mise en œuvre du DIH, au niveau de la répression des responsables, y compris les responsables politiques.

Il reste aussi un autre espoir. C'est que le Conseil de sécurité retrouve son consensualisme des années 1990 – 1998, pour que les cinq grandes puissances, détentrices d'un condominium en matière de sécurité collective, puissent agir collectivement, dans le cadre du chapitre VII de la Charte et au nom de l'intérêt commun de la société internationale, pour imposer des sanctions contraignantes aux États qui posent des problèmes sérieux de respect et de mise en œuvre du droit humanitaire. Ce qui pose, du même coup, le grave problème de l'usage du droit de veto, prévu par la Charte, mais est-ce pour préserver les intérêts de chacune des grandes puissances, ou bien pour préserver les intérêts supérieurs de l'ordre international?

[55] Voir l'Article VI qui dispose que *"les personnes accusées de génocide ou de l'un quelconque des autres actes énumérés à l'article III seront, traduits devant les tribunaux compétents de l'État sur le territoire duquel l'acte a été commis, ou devant la cour criminelle internationale qui sera compétente à l'égard de celles des parties contractantes qui en auront reconnu la juridiction"*.

IMPLEMENTATION MECHANISMS REGULATING THE POSSESSION, USE AND TRANSFER OF WEAPONS

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I. Introduction

I would like to start by thanking Yves Sandoz and Delphine Pratlong for their excellent report, *"Measures for Implementing International Humanitarian Law".* The report takes a comprehensive approach, and that is brave and welcomed!

The report lists a number of questions relating to weapons, such as:

- Should a permanent process be aimed for to evaluate the conformity of new weapons with norms of international humanitarian law?
- Could more flexible and swifter processes be adopted to determine the conformity of new weapons with the norms of international humanitarian law?
- Can objective criteria be developed and implemented to clarify the legality or illegality of a new weapon?
- How should restrictions in the transfer of weapons be addressed?

II. Comments on the thoughts presented in the report

1. Should a *permanent process* be aimed for to evaluate the conformity of new weapons with norms of international humanitarian law?

The mere thought of such an international process is likely to make some States and governments shiver. Yet, and perhaps for that very reason, the idea merits a sincere discussion.

Even if it is not possible to establish an international process, it might be possible to continue the discussions on the implementation of the obligation in Article 36 of the Additional Protocol, namely that:

"In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all

circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

Also non-parties to the First Additional Protocol could be invited to participate in the process given the general principle of international humanitarian law that:

"The right of belligerents to adopt means of injuring the enemy is not unlimited." [56]

More and more States are establishing national mechanisms in order to implement Article 36 of the First Additional Protocol. Their interest in how other States have implemented Article 36 is great. The workshops and informal exchanges of information during the two last International Red Cross and Red Crescent Conferences bear witness to this, as does the request for information from States such as Sweden and the US that have implementation procedures.

Such a meeting could be convened by the Depositary of the Protocol under Article 7 of the Additional Protocol. [57]

Such a process, or rather "*an exchange of information of practice*", would also take care of some of the thoughts expressed in another proposal by the authors of the report, namely "*Could more flexible and swifter processes be adopted to determine the conformity of new weapons with the norms of international humanitarian law?"*

The third issue raised is linked to the so-called SIrUS project that was initiated under the auspices of the ICRC. The authors of the report raise the important question: *"Can objective criteria be developed and implemented to clarify the legality or illegality of a new weapon?"*

Sandoz and Pratlong answer the question affirmatively.

The SIrUS project was an important exercise but there was no agreement on "*objective criteria*" among the experts that attended the meeting. I have some doubts that it is possible to develop "*objective*" criteria relating to suffering and I have doubts that it is helps the aim. It might even be counterproductive. It is sometimes better to rely on a general prohibitive norm than to have exact criteria, as a general norm can give the flexibility needed to adjust the content of the rule to modern military, medical and technological standards.

[56] See *e.g.* Article 22 of the IV Hague Convention.
[57] Article 7 reads: *"The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon, the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol."*

It should be recalled that there is still no agreement on the rationale for prohibiting blinding laser weapons. For some countries they were and should be prohibited because of the proliferation risk. For other countries, they should be prohibited because they run counter to the prohibition on unnecessary suffering. Despite these differences in views, States could agree to ban them.

This shows the linkage between restrictions and prohibitions on the use of weapons under humanitarian law and under disarmament law.

This raises the crucial question of whether it matters on what ground a weapon is restricted or prohibited?

4. Restrictions in the transfer of weapons

The report correctly notes that "*a good portion of trade escapes States' control*" and continues to suggest that the Round Table should discuss issues such as marking of weapons and their destruction when they are renewed, an international register or the adoption of ethnic criteria concerning the transfer of weapons.

These issues are important and need to be discussed at upcoming Round Tables. They are complex and, as the Report correctly notes, also have implications beyond international humanitarian law.

Some might argue that such a topic would be far too sensitive and thus difficult to discuss. This might have been true a decade ago, but illegal and criminal proliferation of weapons is a growing security threat and destabilizing factor.

This is why the issue of proliferation and transfer is addressed in various fora.

This is why the UN Security Council has adopted Resolution 1540 on the proliferation of WMD.
This is the reason why the UN has a register on conventional arms, the EU has adopted guidelines on the transfer of weapons and some States are trying to evaluate whether or not it is possible to adopt national legislation that brings in the humanitarian law and human rights records of the recipient State as criteria to take into consideration in their legislation on arms transfer. The Swedish Government made such a pledge at the last International Red Cross and Red Crescent meeting in 2003. The pledge was a joint pledge with the Swedish Red Cross.

III. Concluding remarks

I have chosen to address the weapons issue partly because I was asked to, partly because I believe this is one of the most important issues for the future.

The weapons issue needs a holistic approach but also a primary concern for disarmament law, humanitarian law and human rights law.

Disarmament law and IHL regulations are two sides of the same coin. Its value lies in minimizing the suffering of the individual (combatants and civilians) and stabilizing international relations.

Human rights norms regulating the use of weapons and firearms are not the same as international humanitarian law norms.

There is also a credibility (normative) problem relating to the fact that certain weapons and ammunition might be prohibited in situations of armed conflicts, i.e., between combatants but are allowed in riot control situations.

I hope that the next Round Table will focus on the weapons issue from a humanitarian law angle, an arms control/disarmament angle and a human rights angle in order to examine where the areas intersect.

Thank you for your attention.

THE ROLE OF THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW IN THE TEACHING OF INTERNATIONAL HUMANITARIAN LAW

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"The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains." (G I, art. 47; G II, art. 48; G III, art. 127; G IV, art. 144)

The 191 High Contracting Parties, who have ratified these four Geneva Conventions have undertaken, in time of peace as in time of war, to train their armed forces to respect and apply the provisions of these Conventions in their military activities. Even the civilian population, if possible, should be made aware of the relevant provisions of these Conventions.

Protocol I Additional to the Geneva Conventions of 12 August 1949 adds to the text above the following:[58]

"Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof." (GP I, art. 83, para. 2)

The 161 High Contracting Parties, who have ratified this Additional Protocol are entitled to even enlarge the sphere of training of these Conventions and Protocol.

Also Protocol II Additional to the Geneva Conventions of 12 August 1949 refers to wide teaching requirements by saying:

"This protocol shall be disseminated as widely as possible." (GP I, art. 19)

[58] The author would like to thank Mrs. Shirley Morren for assistance.

1. Observations on implementation within the armed forces

Even if the obligations to include relevant law of armed conflict provisions into military training at all levels and at all times is clearly spelled out in these instruments the situation from country to country varies very much. In broad terms the situation is certainly getting better. In a number of armed forces special courses and training events take place regularly. Law of armed conflict training has been integrated into the military programmes and this training is duly acknowledged. Military lawyers are assigned to missions where they focus on operational law of armed conflict issues and teaching. They are also engaged in operational matters advising law of armed conflict aspects in military activities. Adequate training to military lawyers and all members of the armed forces is provided.

Many countries, perhaps the majority, acknowledge the requirements enshrined in the Geneva Conventions to include their study in the military training but their implementation gets no special attention and efforts. Members of the armed forces are aware of the Conventions and their main contents but the real practical training and implementation of these principles may be neglected.

Observations and discussions with participants of international military courses at the International Institute of Humanitarian Law (IIHL) show that there are armed forces who have not observed the training requirements dictated in the Conventions even if their countries have ratified them. Even higher ranking officers confess that they have not got any training in the law of armed conflict and to their knowledge this training is not included in their military training.

However, in a number of cases participants from this type of country have been sent to the courses organised by the IIHL in order to get basic knowledge about the law of armed conflict and to get ideas as to how this training should be arranged within their armed forces. Also attending a military course at the Institute has been considered as a good opportunity to meet participants from other countries, get ideas and information together with further contacts that may be useful in preparing and integrating law of armed conflict training in their armed forces. It is considered that the courses can contribute to law of armed conflict training and preparing instructors at the national level.

As international peace operations started to considerably increase and become more demanding in many respects so has the need to offer training in international humanitarian law by the Institute for these types of operations increased. The Institute has also received more requests and suggestions to arrange law of armed conflict training for more specialised categories of military personnel, e.g. to naval and air force personnel, focusing on the special law of armed conflict needs these services may have.

The general situation in the study of the law of armed conflict and its integration into the programmes of military instruction was no better in 1970, when the Institute was founded, than it is today. The far-reaching decision to found the International Institute of Humanitarian Law in 1970 and to define its objectives in its Statutes a) to promote dissemination and develop humanitarian law at national and international levels and b) to operate at all levels for its implementation have proved to be correct.

2. The Institute's method of training military personnel

In the early 1970s the Institute arranged some meetings for a small group of military law of armed conflict experts. As a result of these meetings they suggested the launching of the International Military Course on the Law of Armed Conflict.

In 1976 the Institute organised its first International Military Course on the Law of Armed Conflict. There were 17 participants from six countries representing three continents on this one-week course. Participants came from Belgium, Congo, Iran, Italy, Switzerland and Zaire.

Then, like today, the role of the Institute in organising international courses on the law of armed conflict primarily for military personnel is to help governments to come to terms with their obligation of ensuring respect for the law of armed conflict within their armed forces. In order to promote this general objective certain guiding principles and methods have been established.

The Institute is a private and independent organisation and not attached to any armed forces. Its sole purpose is to concentrate on teaching international humanitarian law to participants coming from all round the world. The Institute does not promote any political views but wants to stay outside partisan politics or national political aspirations of any single country.

It is not the aim of the courses to indoctrinate the participants. Neither does the Institute dictate or advise participants of any country to implement certain factors within their armed forces. The sole purpose of training carried out by the Institute is to assist governments in their obligation of ensuring respect for the law of armed conflict. This means, for instance, that in the case studies, maps and countries shown are fictional and not showing or referring to any real country.

Following this general principle the main objective of all military courses is to teach the relevant contents of international humanitarian law. No particular focus is made on the fact that some countries may not have ratified a certain instrument or that they may have made reservations to certain instruments and their articles. It is up to the participants to keep in mind these possible national restrictions. Participants have

always accepted this approach without difficulties. On the other hand, the fictional countries that are used in all exercises have, according to the exercise information, ratified all Conventions. No references to real world countries are made, unless participants want to raise these types of issues and then normally referring to cases in their own countries.

A unique and much appreciated feature is the adoption of a military approach as the principal didactical method used at all military courses organised by the Institute. It means that a simulated real life problem or task is the starting point and then the solution or preferred way of action is studied making references to the relevant international humanitarian law provisions. This problem-oriented teaching method has always been appreciated among military personnel. It also generates lively discussions in the classes.

The second key feature of this didactical approach is the organisation of work in classes so that the normal military headquarters organisation with various staff sections is established and followed. This allows each participant to study and analyse law of armed conflict issues from a practical and a staff section's point of view. The third feature normally followed is that each staff section is nominated so that there are at least two participants in each of them and the team members make a good mix between military officers and lawyers. This arrangement enhances possibilities of practical and fruitful interplay between participants having different academic backgrounds. In addition, the working teams are always nominated so that the team members do not come from the same country.

A common feature in the international military operations of today is that besides the military component there are also other actors with whom the military contingents must work, co-operate and co-ordinate activities. This has led to the realisation that at those courses where this type of issues are dealt with there should also be participants from those other professional groups and organisations. Particularly persons representing ministries for foreign affairs, security and police organisations and international organisations are invited and welcomed to attend these courses to bring them closer to real life situations, to increase co-operation and co-ordination and to provide opportunities to learn and understand each others better.

3. The International Military Course on the Law of Armed Conflict

The first International Military Course on the Law of Armed conflict was organised in 1976. This course lasted for one week. It was in English. The 17 participants from six countries representing three continents made this course already in its inception a really international one. Since then this course has become the flagship course of the Institute.

Very soon, in 1980, it was extended to last for ten working days. This was the result of the experiences gained up till then. It was felt that more time was needed to cover additional important issues and have more time for practical exercises and discussions. The teaching method was then changed from a series of lectures and a number of exercises to simulating the normal work in a military headquarters and focusing on more relevant practical issues increasing the number of practical case studies and exercises and at the same time diminishing the number of lectures.

Since then the basic course concept, the ten working days and the practical teaching method have been the cornerstones of this course. Course after course the participants have in their course evaluations indicated that these teaching methods are valid, effective and very much appreciated.

The general aim of the course is to enable and encourage participants to act within their spheres of responsibility in accordance with the principles and rules of the law of armed conflict. At the end of the course the participants should:

- Have a basic knowledge of international treaties related to armed conflict;
- Know the necessary routine to find relevant provisions;
- Be able to reach practical military solutions in harmony with the general principles of training in the law of armed conflict;
- Have accepted the law of armed conflict as a guideline for conduct of combat and behaviour in action; and
- Have accepted the necessity of training on the law of armed conflict in the armed forces and play an active part in it.

This course is particularly meant for officers who are involved in the field of operational planning, have a general responsibility for training or are in charge of training policies and programmes or are instructors in military academies and colleges. The course is also a training phase for future instructors at the national level. The other major group of participants are military lawyers. The ideal composition of the course is to have equal numbers of officers and military lawyers.

A slowly growing number of participants are persons who have a direct professional interest or obligation related to the application of the law of armed conflict but who do not represent armed forces. These participants come from various international organisations. On almost each course there is also at least one participant from the ICRC.

The initial ten-day programme included ten subjects, focusing on the law of armed conflict aspects, as follows:

Preparatory exercises

- Basic notions
- Strategic situations
- Responsibility

Command and staff exercises

- Operations planning
- Conduct of operations
- Behaviour in action, evacuation
- Rear areas
- Operations under specific circumstances
- Law of armed conflict training
- General exercise

In addition there were a few general lectures covering, for instance, the ICRC and its activities, the role of the United Nations in the peaceful settlement of disputes, etc.

The expansion of United Nations peace-keeping operations in the early 1990s created more and more requests to add a new topic on the course programme covering the legal aspects of UN peace-keeping operations. Some other amendments to the earlier programme were also made during the 1990s and more recently.

Today the course programme covers the following topics, again focusing on the law of armed conflict aspects:

Preparatory exercises

- Basic notions
- Strategic situations
- Responsibility

Command and staff exercises

- Operations planning
- Conduct of operations

- Behaviour in action
- Rear areas
- Peace support operations
- Operations to restore public order
- ICRC
- Repression of war crimes
- Law of armed conflict training
- General exercise

The following general lectures are among those included in the course programme: Introduction to International Humanitarian Law, Treatment of Refugees, Rules of Engagement, International Jurisdiction and the International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia.

The feedback from the participants and the teaching staff have shown that the general aim, the course programme, the basic concept, and the teaching methods of the course are good and no major changes have ever been suggested. Many minor improvements have been proposed and many smaller updates have taken place during the years.

A proof of the usefulness of the course are the numbers of participants who have attended. From the first till the 107th course arranged in May 2004 there have been 3752 participants from 159 countries. The general trend shows that the number of participants is increasing all the time. In 2003 there were 264 participants which is the second highest annual figure. The 108th International Military Course on the Law of Armed Conflict takes place in September 2004.

In the 1980s there were three courses per year. Then the number grew to five and in the latter part of the decade to six courses per year. Also the course languages have increased from English and French to include Spanish, Arabic and Russian, as well.

4. Course for Training Programme Managers

Although the International Military Course on the Law of Armed Conflict is relatively long and covers many relevant topics there are issues that would need more time and focus than time allows during the basic course. One topic needed was how to prepare law of armed conflict training for various personnel groups in the armed forces and how this training should be integrated into normal military education. There have also been requests to deepen knowledge on pedagogical aspects.

The first Managers of Training Programmes Course was organised in 1997. Since then there have been altogether 11 courses. The courses have been offered in English and French.

The general aim of the course is as follows:

- Help governments to come to terms with their obligation of ensuring respect for the law of armed conflict within their armed forces;
- Enable officers in charge of the planning of the teaching of the law of armed conflict to analyse the needs of teaching, define the objectives and develop the teaching programmes; and
- Enable officers in charge of the actual teaching of the law of armed conflict to apply the set programmes in the best way possible.

The course programme consists of five parts and the main emphasis is on the introduction and application of the Integrated Teaching Method in the practical work during the course. These five parts are as follows:

- General aspects, including an introduction, duty and need regarding dissemination and a discussion on the Integrated Teaching Method;
- How to develop a law of armed conflict training programme using the Integrated Training Method;
- A discussion of the different teaching methods, teaching aids and the development of progress-monitoring methods and tests;
- The organisation of training;
- Practical exercise.

The Ex-Cathedra method of instruction is followed by practical individual or group exercises after each teaching point. During the course the instructor uses various types of training aids and approaches in order to serve as examples of the course contents regarding means and methods of training. Exercises during the course are done and presented by participants individually as well as by groups.

During the practical exercise the participants develop a course syllabus for a law of armed conflict course on a pre-decided level in their respective defence forces, where they also have to develop a complete lesson plan on one of the subjects to be taught.

The feedback from the participants has been very positive and constructive. The participants regard the course very relevant to their respective countries and defence forces. Even experienced senior instructors who have attended the course have invariably said that the course has provided them with invaluable information that has assisted them in their tasks.

The value of the Course for Programme Managers lies specifically in the methodical step-by-step process of the Integrated Teaching Method which provides even the most advanced and experienced instructors with a logical system that enables them to develop comprehensive training programmes and material.

Up till now 87 participants from 34 countries representing four continents have attended.

In updating the course programme more focus will be placed on the further development of the Integrated Teaching Method and less emphasis will be placed on teaching methods and training aids. A point to be considered is how after course tutoring and follow-up could be arranged in order to really assist the participants to finalise the work started during the course.

5. The Specialised (Advanced) Military Course on the Law of Armed Conflict

Military and academic experts, the ICRC and a number of participants, particularly at the International Military Course on the Law of Armed Conflict have asked for and recommended a follow-up course where some topical law of armed conflict issues could be studied more thoroughly. After some consideration and deliberation the Institute introduced a new three-week training event called The Advanced Course on the Law of Armed Conflict. The first Advanced Course took place in Venice from 4 to 27 October 1999. There were 18 participants from 11 countries.

So far there have been four Advanced Courses and each of them has had a slightly different aim and programme. The general aim of the 3rd Advanced Course on the Law of Armed conflict was as follows:

- To enable participants to develop a thorough knowledge and understanding of the principles of public international law, particularly those related to armed conflict and peace support operations;
- To study in detail the principles and rules applicable in non-international armed conflict situations.

The Advanced Course programme covered two and a half weeks and it was followed by a separate seminar on a topical issue. Some but not all participants of the Advanced Course followed the seminar. Also there were persons who only came to attend the seminar on the current issue, such as "*Targeting & International Humanitarian Law"* or *"International Humanitarian Law and Future Wars".*

Participants of the Advanced Course had also to write a study paper on an international humanitarian law topic. These papers were prepared in small teams of 2 – 3 participants. These papers had to be handed in after the first two weeks of the course. In the course programme considerable time was devoted to the preparation of these study papers.

On the first four Advanced Courses there have been 97 participants from 47 countries and representing all the six continents. The next course, now called The Specialised Military Course on the Law of Armed Conflict, will be in October 2004.

The general aim of this updated course with an adapted profile is to sharpen the participants' knowledge and understanding of international humanitarian law, by focusing on its applicability in contemporary armed conflicts and the consequent challenges it may arise.

The course is meant for military officers, military lawyers, diplomats, law enforcement officials, representatives of international organisations and non-governmental organisations. Before attending, the course participants should have a good basic knowledge of international humanitarian law. This means, for example, that the participant has attended the International Military Course on the Law of Armed Conflict.

The course consists of five modules, each of which has one or more lectures, as follows:

International Humanitarian Law today

- Contemporary international law, its applicability in armed conflicts and by the United Nations
- International humanitarian law today
- Human rights law, its applicability in armed conflicts
- Law of armed conflict – Human rights law – Refugee law: interaction between them

Armed Conflicts and International Humanitarian Law

- High intensity armed conflicts and international humanitarian law
- Internal security operations and international law for security forces
- Non-international armed conflicts and international humanitarian law
- Targeting and international humanitarian law
- Rules of Engagement and international humanitarian law

Protection and fundamental guarantees of victims

- Protection of civilian population

- New challenges concerning occupation, responsibilities of occupying power
- Treatment of detainees, prisoners of war and non-privileged combatants in military operations and after hostilities
- Protection of refugees and internally displaced persons in armed conflicts

Respect, training and implementation of international humanitarian law

- Within the armed forces and law enforcement organisations
- In general to the civilian population

Responsibilities and accountability

- Law enforcement and international humanitarian law
- Accountability and commanders' responsibility
- International Criminal Court

Some additional topics may be added to this curriculum.

The concept of this course also follows the same basic principles that have been described before. Besides the lecture each participant gets pre-lecture reading which contains a short article or text on each topic. After the lecture time is allocated to a question and answer session and then a practical seminar work, group work or case study takes place as prepared and instructed by the lecturer.

Based on the experiences and course evaluations made by participants and lecturers the course will be modified so that it better meets the needs of participants but still maintaining the basic curriculum, structure and teaching method. It may be added that the study paper requirement has been deleted and no seminar on a special topic is attached to the Specialised Course.

6. Course for Planners, Executors and Controllers of Air Operations on the Law of Armed Conflict

The International Military Course on the Law of Armed Conflict concentrates mainly on the law of armed conflict issues in land warfare. Very little time is devoted to special features of air warfare. There have been recurring requests to cover law of armed conflict aspects related to air warfare and to its effects on military operations on land. It is impossible to allocate the necessary amount of time for this topic on the

International Military Course on the Law of Armed Conflict. Other difficulties might also be faced. Based on these considerations a new course focusing on air warfare and the law of armed conflict was prepared and the first course was held in 2001.

The general aim of the course is to provide air force personnel, involved in the planning, execution and/or controllers of air operations, with a comprehensive theoretical and practical knowledge of the law of armed conflict, thus enabling them to apply air power within their legal obligations.

The course design and method of instruction is such that no prior knowledge of the law of armed conflict is required. However, the better this knowledge the easier it is to follow and benefit from the course. Also the time needed to focus on the introductory law of armed conflict principles can be reduced and more time spent on topics of the specialised air operations if all participants have a sound basic knowledge of the law of armed conflict.

The participants should have a good working knowledge of military aircraft, aircraft systems, weapons, in particular missiles, and self-protection systems they carry. They should also have an understanding of the technical jargon, associated with the environment, in the working language of the course. In conclusion, this course is primarily meant for air force personnel.

The course programme starts with a lecture on "*Application of Air Power within the Context of International Humanitarian Law"* taking the first day of the course. It will be followed by 22 case studies on topics, such as:

- Command responsibility / communicating command decisions to subordinates / non-international armed conflict / non-defended areas and locations;
- Gathering military information;
- Reprisals;
- Precautions during attacks;
- Military necessity / targeting responsibility / combat against civilians;
- Targeting;
- Downed aircrew in enemy territory;
- Deception and perfidy;
- Breaches of the law of armed conflict.

The course runs at the same time as the Course for Planners and Controllers of Naval Operations on the Law of Armed Conflict. The two courses culminate in a joint exercise to plan an air / naval campaign

where the purpose is to illustrate how to apply the law of armed conflict when deciding on the appropriate action to be taken in an air / naval campaign. This final exercise lasts for one working day.

Based on the course evaluations the course contents and concept have proved to be good. As the person who prepared the course material has also been available as course director on all the three courses, continuity and consistent updating of the course has been possible. Possibilities of holding this course in other languages, preferably in French, are under scrutiny.

7. Course for Planners and Executors of Naval Operations on the Law of Armed Conflict

Even if naval warfare and the law of armed conflict are to some extent dealt with during the International Military Course on the Law of Armed Conflict it cannot be considered enough. To meet the needs of naval officers and military lawyers concentrating on the law of sea and naval warfare, a special course was developed simultaneously with the course on air operations and the law of armed conflict. Both courses are offered in English.

The general aim of the course is to provide planners and executors of naval operations, with a comprehensive, theoretical and practical knowledge of the law of armed conflict which will enable them to apply naval power in respect of the law of armed conflict in times of armed conflict, whether international or non-international in nature. The course also considers some of the legal principles and obligations involved in the application of naval power in operations that are not subject to the law of armed conflict.

This course is primarily for navy officers of any specialisation. Military lawyers, legal advisers and civilian defence officials who have an interest in the topic would also benefit. Like the Course for Planners, Executors and Controllers of Air Operations on the Law of Armed Conflict, this course design and method of instruction is such that no prior knowledge of the law of armed conflict is required. However, the better the basic knowledge of the law of armed conflict is the easier it is to follow and benefit from the course. As this course is offered in English, participants should have a good working knowledge of the naval jargon in the course language.

The course programme includes lectures, case studies and the final exercise together with the Course for Planners, Executors and Controllers of Air Operations on the Law of Armed Conflict. The lectures cover the following topics:

- Introduction to the law of armed conflict, including, for example, command responsibility, conduct of operations, behaviour in action, neutrality, operations to restore public order and the law of armed conflict in peace support operations;
- Law of the sea;
- Law of naval warfare;
- Submarine warfare and international humanitarian law;
- Rules of engagement;
- Grave breaches and command responsibility.

The programme includes nine case studies on topics, such as: exercise of command, support for civil agencies, reprisals, targeting, protected persons and vessels, perfidy / deception and rules of war.

As already mentioned in the previous chapter, this course runs at the same time as the Course for Planners, Operators and Controllers of Air Operations on the Law of Armed Conflict. The two courses culminate in a joint exercise to plan an air / naval campaign where the purpose is to illustrate how to apply the law of armed conflict when deciding on the appropriate action to be taken in an air / naval campaign. This final exercise lasts one working day.

The feedback from the participants of this course has been good. The course content has been considered appropriate. Also the practical approach with many case studies and discussions after practical exercise presentations have been considered very useful. Even if the basic outline of this course has remained the same, some minor enhancements have been made to the course content to take into account significant activities that have affected naval operations since the previous course. Possibilities of having this course in other languages are under consideration, as well.

1. The Course for Planners, Executors and Controllers of Air Operations on the Law of Armed Conflict and the Course for Planners and Executors of Naval Operations on the Law of Armed Conflict, which both began in 2001, have been attended by 78 participants from 25 countries.

8. Course on Human Rights for Armed, Security and Police Forces in Peace Operations

It has become evident that the time allocated to peace support operations in the programme of the International Military Course on the Law of Armed Conflict is not adequate. This together with the fact that mandates, with considerable tasks referring to obligations in international humanitarian law, human rights and refugee law, are given to the military components in contemporary peace operations has led to

the development of a course where the main focus is on peace operations and the applicability of international legal instruments.

Initially the course focused less on scenarios in peace operations. Instead, its aim was to comprehend the influence of contemporary human rights law on the domestic and operational roles and tasks of armed and security forces of a nation State. The first five-day course was in Spring 2002.

The course programme consisted of lectures and six case studies. The lectures were as follows:

- The nature and concept of human rights;
- Mechanisms for protection of human rights;
- International human rights law and international humanitarian law: implementation of human rights obligations in military operations;
- Operational human rights law standards affecting the armed forces in internal security operations;
- Operational human rights law affecting paramilitary and police forces;
- Protection of the vulnerable;
- Operational human rights law, "low-intensity conflict" and terrorism;
- Problems of enforcement: international criminal justice as a remedy for human rights violations;
- Jurisdiction and human rights: extraterritorial application of human rights instruments.

The course was specifically designed for military personnel occupying staff or operational positions, legal advisors, security officers and civilians with a marked interest in international human rights law. The course contents was designed so that the participants did not necessarily need to have legal training or any prior legal experience.

Now this course is undergoing an update to focus more on the international humanitarian law issues in peace operations covering activities of the armed forces, and the role of security and police forces. The course aim is to give the participants knowledge of relevant international humanitarian law, analyse its applicability and obligations to armed, security and police forces and study how to implement it in international peace operations.

Besides lectures, practical work, for example case studies, are included in the course programme. The case studies also focus on the co-operation between the armed forces, security forces and civilian police.

This adapted one-week course in English will take place in December 2004.

9. Competition on the Law of Armed Conflict for Military Academies

Most of the participants on the courses described above are mid-career or senior officers, military lawyers, etc. They have completed extensive studies and already have professional experiences covering many years when they attend the course at the Institute. There are many good reasons why countries prefer to send this type of experienced and more senior person to attend the courses. It is expected that this calibre of persons will have real influence on law of armed conflict matters in their respective countries and armed forces after the course.

In order to offer young officers or officer cadets an international law of armed conflict training event the Competition on the Law of Armed Conflict for Military Academies was developed. The initiative and preparations were made by some collaborators of the Institute and this idea has proved to be very successful. The first competition was organised in 2002. It is a five-day training event.

The general aim of this international competition is to offer the participating officer cadets enhanced training in the law of armed conflict, demonstrate some options as to how to cover law of armed conflict topics and train and test decision making skills combined with law of armed conflict knowledge in international officer cadet teams.

The competition is divided in two parts. During the first two days, lectures are presented by experts on the law of armed conflict. The second part lasting the remaining three days of the competition is a simulation of a combined UN Joint Operations Centre (JOC) with mixed teams representing fictitious countries. During this phase the teams are given tens of practical law of armed conflict related cases and the teams are requested to recommend the correct conduct of operations or behavior in these situations and present the reasons and law of armed conflict references supporting their recommendations. The issues covered range from pre-conflict, initiation of hostilities, naval combat, air warfare, targeting, cyber operations, prisoner of war, refugee, and occupation law. The performance of each team is assessed by the evaluation commission.

There have been three competitions so far and preparations for the next one are underway. Eleven teams participated in the first competition and in 2004 there were already sixteen teams. The total number of participating cadets is 109. Each team has also a team-leader who is an officer from the respective military academy. Some of the team leaders also give lectures during the first phase of this event. The language of the competition is English. Some lectures have been offered in a different language but translated into English.

The feedback has been very good. Repeatedly the officer cadets have said that the competition has been a positive learning experience and it has offered many valuable training lessons. The training received would assist the leaders of tomorrow in learning how to deal with real world situations of today. The international atmosphere and the possibility to work together with colleagues from other countries, even from other continents, have been very much appreciated.

The feedback given by the cadet who won the first prize in 2004 describes in an eloquent way the attitudes that the competition promotes:

"30 years ago my father was flying missions against the fathers of the young men that I now call great friends. While our fathers fought, we now embrace. It is wonderful to think that competitions like this can bring so many of us together around the world and teach us the importance of peace, justice, and humility. I trust I will be a better Marine, American, and citizen of the world because of that week in San Remo."

10.The teaching staff

Throughout the years the Institute has had its own policy of recruiting the teaching staff for its courses. Particularly for the International Military Course on the Law of Armed Conflict the procedures are well formulated and functioning. For the other courses similar types of principles are applied to the extent possible.

The principal method of choosing new members of the teaching staff is by making the initial selection during the courses from among suitable participants. The initial selection and proposal for a new member is made by the teaching staff to the Director of the Military Department.

When choosing a new person for the teaching staff the following principles are considered:

- The composition of the teaching staff should have a good balance between continents and countries. The geographical spread of various course languages give additional aspects to these considerations;
- A sound balance between military officers and military lawyers should be maintained as a whole and in each language group;
- A balanced mix of different ages, military ranks and experience in the training activities of the Institute should be observed and maintained;
- The number of female members of the teaching staff should be increased to the extent possible and feasible in each language group;

- All members of the teaching staff must have an adequate command of the course language. However, this language requirement does not lead to choose members of the teaching staff only from countries where the / one official language is the same as the course language;
- All members of the teaching staff should keep in mind the Institute's position as an independent and non-partial organisation in their teaching assignments with the Institute.

The Institute has always been fortunate to have a great number of persons ready to work and collaborate, if needed. Today the teaching staff consists of over 60 persons. They represent all continents. Among them there are also some female military lawyers. To keep and maintain a good and qualified teaching staff available for the courses is even more important as to a great extent the teaching staff represents the institutional memory of the course activities.

Besides the recruitment method described above the Institute has been able to maile some special arrangements with certain military academies in order to get instructors and lecturers for the military courses. At present there is a Memorandum of Understanding between the Institute and the United States Naval War College. It provides the Institute with a number of qualified and experienced persons to be class leaders and / or lecturers at the military courses. Similar types of arrangements have been effective or are still existing with some other military defence colleges. Some offers to provide class leaders, lecturers and / or other types of contribution based on an agreed manner for a longer period of time to the Institute are being considered.

Besides the members of the teaching staff a number of lecturers representing various organisations give lectures on certain topics on the courses. Standard arrangements exist with the International Committee of the Red Cross, the United Nations High Commissioner for Refugees and the International Criminal Tribunal for the former Yugoslavia.

For the other courses organised by the Military Department the same principles are followed. However, due to the nature of these courses and the expertise needed the teaching staff of these courses may consist of more visiting lecturers who are experts on certain relevant topics of these courses. It is in the interest of the Institute to keep these persons and have them on the lecturer list for a longer time.

Members of the teaching staff are volunteers who in most cases are in active service. It is normal that there are situations when qualified experts, even if they would like to continue collaboration with the Institute, due to their service requirements and posting, have to refuse the offers of the Institute. This is the main reason why new members are continually required to replace outgoing members of the teaching staff. Another reason for new experts is to find persons who have new and recent personal experiences in

the new types of military operations that are included in the course programmes of the Military Department.

A continuous challenge to the Military Department is to keep the qualified experts on the teaching staff, have competent lecturers available as needed and be able to find good and suitable new members to the teaching staff to replace the outgoing members and to bring new expertise to the courses. Attempts to improve mutual co-operation and exchange of information between the Military Department and the members of the teaching staff are under way.

A competent and effective teaching staff is of vital importance to the Institute's activities in its Military Department. It has a direct impact on the work, results and reputation of the activities. With an active and effective teaching staff the continuous development of the courses is possible. When members of the teaching staff accept the objectives and working methods of the Institute and all matters of the teaching staff are handled in an approved, open and consistent manner the teaching staff can play an important role in promoting the activities of the Institute.

11.Way ahead

The International Institute of Humanitarian Law has a remarkable record in teaching international humanitarian law to military personnel from all round the world. This activity has not reached its turning point but the trend in all aspects is to the better. The expanded activities require more efforts and active work to meet the new challenges.

A high level acknowledgement of the work the Institute has been doing is the reference on the General Assembly resolution 50 / 44 of 11 December 1995, entitled "*United Nations Decade of International Law".* In the Annex to this resolution titled "*Promotion of the Acceptance of and Respect for the Principles of International Law"*, in paragraph 5 of Section IV, the Institute is invited to continue cooperating with States as regards the organization of special training in international law for legal professionals, including judges and personnel of ministries of foreign affairs and other relevant ministries as well as military personnel. The same has been repeated on other General Assembly resolutions in other years, as well.

Only by offering interesting, well prepared and relevant training can the Institute get enough participants to its courses. The continuous update process of course materials is a primary task in the Military Department. Right now this work has increased. Some new courses may be offered in the near future.

The course evaluations made by the participants are very positive and prove that the courses are good and only minor improvements or changes are recommended. An increasing number of participants are, however, suggesting that more time should be allocated to contemporary military operations and their specific law of armed conflict features. Law of armed conflict in the traditional international armed conflict situation between two states is losing some interest as a study issue. To some extent new teaching is offered, e.g. by updating the Human Rights Course for Armed, Security and Police Forces in Peace Operations. To some extent the requests of participants go beyond international humanitarian law as they would like to tackle with purely operational issues they may encounter in these types of operations. On the other hand international humanitarian law may not offer clear guidance or this type of instrument does not exist yet.

The participants are also asking for teaching based on their field experiences, particularly in the international military operations, which cross the strict boundaries of the law of armed conflict, human rights law, international or national best practices type of instruction mixed with military code of conduct and discipline inputs. How can these requests be satisfied.

With the development of warfare, weapons technology and new types of military engagements clearer internationally accepted instructions and authoritative guidelines on the correct means and methods of warfare are also needed. This includes, for example, law enforcement type operations and the contemporary international peace operations and the roles of armed, security and police forces.

A feature always recognised during these military courses is the excellent working attitude and openness in the classrooms and the plenary. The Chatham House Rule[59], even if not explicitly referred to during the course, seems to be accepted and followed as an encouragement to frankness in all discussions. Another observation is that the basically similar type of military training and the military *esprit de corps* among military personnel vastly help in all training during the courses.

One teaching objective is to motivate the participants to accept the law of armed conflict as a guideline for conduct of combat and behaviour in action. The purpose is to make them realise the necessity of training on the law of armed conflict in the armed forces and play and active part in it. These objectives are unanimously accepted among the participants during the course. Perhaps it might be worth having a follow-up on what happens to the attitudes and aspirations of the participants in the years after the course.

[59] The *Chatham House Rule* reads as follows: *"When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed"*. The benefits of using the Rule are:it allows people so speak as individuals, and to express views that may not be those of their organizations, and therefore it encourages free discussion.

Turning this positive attitude into reality is a continuous challenge. The major concerns are, how to convince the military commanders and decision-makers to fully accept these provisions as guidelines to be followed and to underline the responsibility and duties of commanders in implementing law of armed conflict requirements. Another issue that deserves more efforts in all training is how to accept law of armed conflict tenets to be fully integrated in all military activities and operations. These are among those issues where the Institute should also offer its services.

The general trend round the world is to cut down the strength of armed forces and build smaller armed forces of professional, effective and skilled soldiers with no or considerably smaller conscript components. This should also underline the need to be well trained to observe and implement the dictates of the law of armed conflict.

In order to develop and systematise the teaching at the courses and to further the integration of law of armed conflict training and application in military operations, the production of pragmatic manuals for all those types of armed engagements the Institute covers in its course programme, are under preliminary consideration. This would be continuation to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, the Manual on Protection of Victims of Non-International Armed Conflicts, and the Manual on Air Operations for the Institute's Military Courses.

THE ROLE OF THE ICRC: A MILITARY PERSPECTIVE

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Introduction

1. Warfare and the suffering associated therewith are harsh realities confronting soldiers and civilians alike on a daily basis. In the 20th century alone more than 100 million people have lost their lives in both international and non-international armed conflicts. Another stark reality is that a significant part of these statistics comprises of civilian casualties.

2. Because of these realities of warfare, most armed forces in the world agree, albeit to a greater or lesser extent, to the importance and necessity of rules governing armed conflict.

3. It is against this backdrop that independent and neutral national and international humanitarian volunteer organisations, such as the ICRC, operate to bring relief to and alleviate the suffering of those who are caught up in armed conflict without being able to defend themselves, whether civilians or combatants who are *hors de combat* due to wounds, sickness or having been taken prisoners of war. The important role played by these organisations, of which the ICRC is certainly the most significant, should never be underestimated. Even the armed forces realise and respect their importance and support the laudable role of such organisations.

4. In my personal experience the ICRC provides sterling support to armed forces, for example:

   a. Assistance with external assessments on the implementation of the Laws of Armed Conflict (LOAC) in the armed forces.

   b. Hosting of seminars on the importance of LOAC to top management and command structures of defence departments.

   c. Encouraging the issue of Ministerial Directives regarding the implementation of LOAC in defence departments.

   d. Providing expert LOAC advice and training material to armed forces.

e. Providing invaluable assistance with mission training prior to operational deployments.

Proviso

5. Before continuing, I deem it expedient to highlight that vast diverging perceptions exist in the different armed forces regarding the role and value of the ICRC, and that it is impossible to present anything else than broad generalisations. These opinions, nonetheless, are based on inputs received from numerous military officers in various defence forces originating from their personal experiences.

6. The criticism of the ICRC contained in this paper, although candid and in many instances controversial, should be regarded as an honest attempt by the military to enhance the already invaluable role of the ICRC and the relations between the ICRC and armed forces.

Necessity for the ICRC

7. The ICRC, to a large degree, executes the mandate given to it by the international community in close proximity to the armed forces of the world that may include regular as well as guerrilla forces. As such, the ICRC is intensely involved in the dissemination of LOAC within the armed forces as well as in assisting the victims on the receiving end of the application of armed force.

8. I do not think that there is a government or an armed force in this world that does not realise the important role that the ICRC plays in time of peace and in time of armed conflict. The positive role of the ICRC is the topic of other presentations and I do not intend to go deeper into this subject, save to acknowledge the importance and value of the ICRC taking a huge load off the hands of combating forces with, for example, the handling of prisoners of war, civilians, refugees, internees and seriously wounded persons. A military commander who does not realise and employ this assistance is, in my view, unwise and should be relieved of his or her command.

9. Realisation of the importance of the ICRC should also be transformed into action by the armed forces. How many armed forces provide for;

a. an appropriate standing nodal point for interaction and communication with the ICRC and other humanitarian structures; or

b. structure and prepare for appropriate interfaces with them for times when armed forces are to be used?

Diverging ideals

10. Without derogating from the importance of the protection of the victims of armed conflict, the reality remains that the combating forces remain the principal actors in the theatre of armed conflict.

11. Irrespective of the justification of the armed conflict, the primary aim of war is to neutralise the opposing force as quickly as possible with the expenditure of the least resources. The pursuit of this practical aim inevitably comes into direct conflict with the humanitarian aims of LOAC and the functions of organisations such as the ICRC.

12. The recognition of the principle of military necessity, tempered by the principles of proportionality and no undue suffering provided for in LOAC, is praiseworthy in principle and indicates that the law is not only idealistic, but that it also strives to be realistic and to provide sensible solutions to practical soldiers faced with difficult and often challenging tactical and operational problems.

13. In spite of the aforementioned provision and recognition of the practicalities of warfare, the most fundamental difference between the aspirations of humanitarian organisations and the military is found in the interpretation of "military necessity" and the, often subjective, value judgements with regard to what is "proportional" and "undue suffering".

Interaction between the Armed forces and the ICRC

14. The interaction between the Armed Forces and the ICRC differs significantly in the world, depending on a range of variants, such as the history or legal culture of a nation. In some instances the ICRC enjoys open and free cooperation with armed forces, whilst in other instances the military regards the ICRC with apprehension and distrust and perceives them to be an impediment to military operations.

15. Although it is unfortunate that some armed forces or some members of armed forces may have the above-mentioned perspective, discussions with members of various armed forces have indicated that the ICRC may actually have contributed to these perceptions and to strained relations in their dealings with the armed forces.

16. Access to information and opposing forces by the ICRC is perceived by the military to be an opportunity for espionage. There is therefore a tremendous obligation on the ICRC to ensure that this access is not abused or perceived to be abused.

17. One distinguishing characteristic of the military culture, which is found all over the world amongst all armed forces, especially regular forces, but to some degree also amongst guerrilla forces, is the clinical and practical approach towards the attainment of military objectives. Although the protection of the victims of warfare is usually an integral part of the military appreciation and planning processes, the aforementioned characteristic leaves no or very little room for philosophical reflection or emotional considerations. A further characteristic of the military is an innate scepticism regarding the civilian way of doing things and especially civilians attempting to prescribe to the military.

18. Many military personnel perceive members of the ICRC with whom they come into contact, as persons with no military and especially no combat experience. They are perceived to be out of touch with the realities and necessities of warfare, especially the application of armed force and the military approach. This perception manifests, for example, during the training of military members in LOAC and the reports of the ICRC on military action taken by armed forces. It is often the case that military personnel perceive the ICRC representative conducting the training or writing the report to have no military background and experience, and this perception causes soldiers to close ranks and become unreceptive and prejudiced.

19. I will concede that it may be unfair for armed forces to react in this way and I will also acknowledge that once military personnel really get to understand the principles of LOAC, they usually have a total change of heart and become devoted disciples thereof. The ICRC is, however, not totally blameless in contributing towards prejudice within armed forces.

20. In addition, the ICRC has postures on certain issues that are not necessarily acceptable to the military, for example that Rome Statute cases in national forums only be dealt with by civilian courts. This can also breed distrust when juxtaposed to military command responsibilities. Command structures and military courts should lead the way regarding the prosecution of military members and should not be excluded.

21. It is understood that the ICRC has a balancing role to play to ensure that international law keeps a tight rein on the military and the application of armed force. The military would perhaps always be more permissive in its appreciation of a situation and its interpretation of the law, thereby compelling the ICRC to take a more restrictive approach. The military, nevertheless, often experiences the ICRC to be dogmatic and rigid in its interpretation of the LOAC, insisting on a singular interpretation where the matter at hand could

be argued differently. The ICRC is often perceived to evaluate actions and to judge from an armchair approach whilst things looked totally different in the heat of battle or from a military strategic point of view.

22. An example of the approach of the ICRC (and LOAC) being perceived to be impractically restrictive in contrast with military realities is the absolute ban on and condemnation of torture in the pursuit of vital military intelligence that may save the lives of thousands of people. This dogmatic approach may not be rational in view of the fundamentalist nature of modern warfare and of terrorist activities. It may even lead to the military being condemned for dereliction of duties, if many innocent civilian lives are lost due to the failure to do everything possible to gain information on planned attacks from captured members of an opposing force.

23. A sound relationship of mutual trust and understanding and of open communication between the ICRC and armed forces will go a long way in alleviating this problem.

24. Another perception that exists within the military, which often results in suspicion regarding the motives of the ICRC, is the belief that the ICRC is by nature a very closed organisation, almost as if it is some secret fraternity only accessible to a select few. The ICRC requires from armed forces to provide full cooperation and transparency, yet as an organisation, the ICRC appears to remain detached. The military functions as a cohesive group and places a high value on aspects such as *esprit de corps*, teamwork, cooperation and mutual trust. It is appreciated that the ICRC treasures its impartiality. The ICRC should, nevertheless, moderate its stance to allow for more open communication and interaction with the military in order to build a relationship of mutual trust. Perhaps the time is ripe for the ICRC to regard the military, especially professional armed forces, not only as organisations to be monitored, but also as partners in the fight against human rights abuses.

25. The perceived detachment of the ICRC is seemingly exacerbated by an observation that the establishment and maintenance of good working relations with the military is often the result of the personal skills of individual Regional Delegates and the personal drive and motivation of the individual Heads of Delegation, instead of the execution of a concerted ICRC policy on cooperation and liaison with the military. Not all Delegates and Heads of Delegation are equally keen in advocating the position of the ICRC and to be thoroughly in touch with the armed forces in their region. Often a particular Delegate will establish the most excellent working relations with the military, only to be replaced a short while later by another Delegate who is less keen to maintain this relationship. The retention of more conducive Delegates for longer periods in certain areas could, to some degree, alleviate this problem.

26. Another factor that contributes to strained or poor relations between the ICRC and military forces in a region is the fact that the appointed Delegates are in most of the cases from outside the region. Such

Delegates often have little initial knowledge of the nature and challenges of a specific region and the armed forces therein and precious time and resources are often spent on getting to know the region and determining the right approach rather than establishing and maintaining good relationships with the armed forces in that region. Again, although the endeavour towards absolute impartiality is appreciated, it is submitted that the appointment of former members of the armed forces of a region as Delegates, especially in peacetime, could solve this problem. Such Delegates, if correctly identified and selected, will not only know the region, but also the right people and places to approach to achieve maximum results with regard to establishing a good working relationship with the armed forces, the dissemination of the ideals of the ICRC and respect for LOAC. Should an armed conflict situation threaten or develop, the independence of the ICRC will become more important than, for example, relationships with the armed forces in question, in which case the ICRC can easily replace the Delegates with more independent Delegates.

27. Apart from the abovementioned need for good and trusting relationships between the armed forces and the ICRC, many armed forces also require assistance regarding the development of training material and LOAC publications. The irony is that most military forces do not provide for such material and publications in their budgets until, at least at senior level, they fully understand and respect the principles of LOAC. Much training and sensitising is, however, necessary to get to that level. Experience has shown that the assistance of the ICRC is indispensable until the required level of training is achieved.

Role of the International Institute of Humanitarian Law (IIHL)

28. Whereas the ICRC provides assistance in time of war and information and knowledge regarding LOAC in peacetime, the IIHL has a major role to play in the sensitising of military members, academics and even members of the ICRC with regard to the practical application of LOAC. In my opinion, the IIHL is ideally positioned to enhance theoretical LOAC training by means of more practical training and discussions.

29. The Basic LOAC Course of the IIHL is important, but the development of courses where operational and tactical LOAC scenarios are solved and current incidents are discussed from a practical perspective is imperative. The establishment of the LOAC Courses for Planners of Air and Naval Operations are excellent examples thereof. There is, nonetheless, a great need for the development of a practical course for army members, and even for joint operations, where no theory is taught but where various operational and tactical questions are posed and where operational plans are drafted and evaluated with regard to the addressing of LOAC challenges.

30. The International Course for Managers of Training Programmes in LOAC presented by the IIHL will also go a long way in assisting armed forces and states to transforming LOAC theory into a practical,

workable package that can direct the knowledge, attitudes and skills of members of the armed forces to respect for and compliance with LOAC.

31. The establishment of a research capability to analyse current incidents from a LOAC perspective and to comment thereon in a newsletter would also go a long way in providing practical perspectives and insight on the application of LOAC. Part time lecturing staff of the IIHL and members from armed forces and the ICRC should also be approached and encouraged via this research capability to write and publish such analyses in an IIHL newsletter.

Conclusion

32. The ICRC has the intrinsic ability and capability to assist and influence the armed forces in a number of ways during the preparation for and in the application of military force.

33. The invaluable role of the ICRC in the dissemination of LOAC and in assisting armed forces in realising their responsibilities in this regard is recognised and honoured.

34. Armed forces are, nonetheless, the main actors in the theatres of war and experience the realities of armed conflicts directly.

35. Even though the ICRC and LOAC attempt to reconcile the pressures of warfare experienced by armed forces with the welfare and needs of society, the ICRC will not be able to achieve this objective if they do not establish good and trusting relationships and open communication with armed forces.

36. In order achieve this, the armed forces should be able to relate to ICRC members and *vice versa*. Mutual understanding between the ICRC and armed forces is crucial in the establishment of these relationships. When this condition is achieved, the ICRC would not only find it much easier to achieve its worthy mandate, but also find most professional armed forces to be precious allies in this enterprise.

37. Instead of regarding professional armed forces as delinquent organisations to be monitored and castigated, the ICRC should accept them as partners in the fight against human rights abuses.

38. The IIHL has an invaluable role to play in providing opportunities for applied LOAC training to the military, academics and the ICRC.

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40. I also wish to give recognition to all the officers all over the world with whom I discussed the practical problems regarding LOAC and the ICRC during all the courses and social interaction at the IIHL and elsewhere. Your valuable contributions made it possible for me to be able to speak freely about this matter.

THE MILITARY LAWYER: NUISANCE OR NECESSITY?

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Introduction

Two decades after the conclusion of the American Civil War, General William Tecumseh Sherman sought to capture the key military lessons of the war for posterity. In the midst of his astute observations regarding, *inter alia*, the best composition of regiments, the effects of good officership, and the support and supply of great armies, he expressed a decidedly acerbic view of the lawyers' role during operations. As the commander of a disciplined fighting force, General Sherman's observation that excessive *"court-martials in any command are evidence of poor discipline and inefficient officers"* rings as true today as it did in 1885.[60] Though General Sherman conceded that "*there are statutory offenses which demand a general courts-martiale, and these must be ordered by the division or brigade commander,"* he added his opinion that *"the presence of one of our regular civilian judge advocates in an army in the field would be a first class nuisance, for technical courts always work mischief."*[61]

Though this sentiment might be ignored as the quaint remnant of an archaic era when law was an afterthought and the developed corpus of developed international law of war yet glimmered on the horizon, those of us who have trained soldiers know that its echoes remain in the sub-conscious attitudes of many military members around the world. General Sherman recognized the enduring truth that any good commander must direct every operation towards a defined, decisive, and attainable objective. The principle of "Objective" derives from the basic principles of war recognized across the globe, and this principle is refined for the purposes of military operations into the "mission statement."[62] General Sherman's perception

[60] W. T. SHERMAN, *"Memoirs of General W. T. Sherman: Written by Himself* " 1875, New York, Library of America, 1990.
[61] *Id.*
[62] The Principles of War crystallized as military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity, see *"The Oxford Companion to American Military History"*, John Whiteclay Chambers III ed., 1999. In unilateral operations, the mission statement reflects a relatively linear process of decision-making from the civilian command authorities through military command channels to the tactical force in the field. In multilateral operations, however, achieving consensus on an agreed and refined mission statement is much more difficult and complex. Reflecting this reality, U.S. Army doctrine warns that

> [c]ommanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation's motivation tends to change during the situation. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually

regarding the utility of legal expertise reflected a shortsighted, superficial assessment that the lawyers intermingled with a deployed force would distract from the overall operational objectives. In truth, the success or failure of the mission provides the yardstick for measuring the commander's success. Combat readiness can thus be achieved only by melding individuals from disparate backgrounds into a disciplined unit with a fine-edged warrior ethos focused on overcoming any obstacle in order to accomplish the mission. Even in light of the non negotiable necessity for accomplishing the mission and the culture that correspondingly prizes the selfless pursuit of duty, lawyers have a vital role that supports rather than impedes the effort to create and sustain combat ready forces.

Lawyers as a Military Necessity

Military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise. The necessity for military lawyers grew from the requirements of commanders across the world for guidance. The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence. Far from the nuisance that General Sherman postulated, commanders have relied on sound legal advice precisely because of their need to accomplish the mission rather than as an unfortunate impediment. Military lawyers and good commanders develop a very special relationship of trust precisely because the lawyer provides necessary technical advice that the commander relies upon in solving some of the most complex problems posed by the military mission itself.

For example, even during General Sherman's war, the tactical uncertainty faced by Union forces in waging a campaign against the rebel forces thrust lawyers into the spotlight. The first comprehensive effort to describe the law of war in a written code (the Lieber Code) began as a request from the General-in-Chief of the Union Armies, based on his confusion over the distinction between lawful and unlawful combatants. General Henry Wager Halleck recognized that the law of armed conflict never accorded combatant immunity to every person who conducted hostilities, but could provide no pragmatic command response to the changing tactics of war. On August 6, 1862, General Halleck wrote to Dr. Francis Lieber, a highly regarded law professor at the then Columbia College in New York, to request his assistance in defining guerrilla warfare.[63] This request, which can justly be described as the catalyst that precipitated more than one hundred years of legal effort resulting in the modern web of international agreements regulating the conduct of hostilities, read as follows:

> *"My Dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war,*

attainable objectives. Department of Army, Field Manual 100-8, The Army in Multinational Operations 1-2 (24 Nov. 1997).

[63] Letter of General Halleck to Francis Lieber, Aug. 6, 1862, in Series III, ii, *"The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies"* 301, (Government Printing Agency, 1899), reprinted in R. S. HARTIGAN, Lieber's Code and the Law of War 2 (1983).

I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners of war in their possession. I particularly request your views on these questions."

Based on the stimulus of Confederate conduct, the Union Army issued a disciplinary code governing the conduct of hostilities (known worldwide as the Lieber Code) as "*General Orders 100: Instructions for the Government of the Armies of the United States in the Field"* in April 1863.[64] This was the first comprehensive military code of discipline that sought to define the precise parameters of permissible conduct during conflict. The principle endures in the law today that persons who do not enjoy lawful combatant status are not entitled to the benefits of legal protections derived from the laws of war (including prisoner of war status)[65] and are subject to punishment for their warlike acts. The law of war is therefore integral to the very notion of military professionalism because it defines the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity.[66]

As an aside, Lieber's description of unlawful combatancy is notable in light of the current legal context and the operational debates that have played such a central role in the global war on terror. Though this language is dated, it describes the tactics of Al Qaeda in evocative terms:

"*Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional*

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[64] *"Instructions for the Government of the Armies of the United States in the Field"*, Government Printing Office 1898, (1863), reprinted in *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents*, pp. 3-23, D. SCHINDLER & J. TOMAN eds., 1988, [hereinafter *Lieber Code*]. For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see G. R. DOTY, *"The United States and the Development of the Laws of Land Warfare"*, Military Law Review 224, 1998, and G. B. DAVIS, *"Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, American Journal of International Law, 13, 1907.

[65] This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. See Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, art. 3, *"the armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war"*, entered into force Jan. 26, 1910, reprinted in *Documents on the Laws of War*, p. 73, 3rd ed., A. ROBERTS & R. GUELFF eds. 2000, [hereinafter *1907 Hague Regulations*].

[66] See generally L. C. GREEN, *"What is – Why is There – The Law of War"*, in Essays on the Modern Law of War 1, 2d. ed., 1999.

assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[67]

Though the detailed prescriptions of the law of armed conflict evolved in response to the demands of military pragmatism and the impetus of changing technology, lawyers were also a necessary ingredient in developing the norms that have come to define the very essence of professionalism. Commanders must balance the need to accomplish the mission against an internalized awareness of the larger legal and ethical context for their actions. As a consequence, military professionals developed legal codes in order to increase military efficiency by defining appropriate bounds that served to facilitate the accomplishment of the mission. Gustavus Adolphus' Articles of War, for example, mandated that *"no Colonel or Captain shall command his soldiers to do any unlawful thing; which so does, shall be punished according to the discretion of the Judge."*[68] Any unit that is ripped apart by allegations of illegality and indiscipline cannot be combat effective simply because its members are focused on the details of sworn statements, self preservation, and self interest rather than the overall accomplishment of operational goals. Lawyers who are enforcing the law through comprehensive investigations and appropriate prosecutions will likely affect the unit's mission posture, but the underlying indiscipline can be justly blamed for undercutting the mission-first focus of a good, cohesive military organization.

Furthermore, as the backbone of military professionalism, the implementation of legal norms in an operational setting became an indispensable aspect of military legitimacy. International humanitarian law is not a beast that is kept chained and fed with words and conference and good intentions. Quite the contrary, though humanitarian law is grounded in the principles of necessity, humanity, reciprocity, those ideals are all achieved in the context of facilitating the accomplishment of the military mission. In fact, the modern law of armed conflict is really nothing more than a web of interlocking protections and specific legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. In short, the law serves as the firebreak between being a hero in the service of your nation and a criminal who brings disgrace to your nation, dishonor to the unit, and disruption to the military mission.

In the wake of the Lieber Code, other states issued similar manuals: Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904;

[67] *Lieber Code* art. 82, *supra* note 6.
[68] G. ADOLPHUS, *"Articles of War to be Observed in the Wars*", in M. C. BASSIOUNI, *"Crimes Against Humanity in International Criminal Law"*, 2nd ed., 1999. The 150 Articles regulating military conduct were a groundbreaking attempt to establish a professional code grounded in legal formulations and were promulgated as Swedish forces moved toward battle with Russian forces.

and Spain, 1893.[69] Over time, military codes and the more thorough military manuals that followed served to communicate the *"gravity and importance"* of behavioral norms to commanders and soldiers.[70] Legal norms continue to form the rallying point of moral and professional clarity that guides soldiers in the midst of incredibly nuanced missions, no matter how tired they are, or how much adrenaline is flowing in the impetus of the moment.

Indeed, the increased complexity of the law and the need to ensure its effective implementation within the military structure led to a specific obligation for the High Contracting Parties to the 1907 Hague Regulations to "*issue instructions to their armed land forces [...] in conformity with the Regulations respecting the laws and customs of war on land."*[71] This incremental development from the baseline of foundational principles prompted one of the Nuremberg prosecutors to muse that "*the law of war owes more to Darwin than to Newton.*"[72] Because military lawyers played an indispensable role in the effort to instill professional discipline by defining the boundaries of acceptable conduct, they helped safeguard the legitimacy of the military force in the eyes of the nation and the ranks of military colleagues around the world.

The Law of Lawyers

As the law became more complex, and its implementation on the battlefield more problematic, it is unsurprising and perhaps inevitable that the role for lawyers became embedded in the law itself. Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over. The law of armed conflict provides the standards that separate trained professionals from a lawless rabble. International humanitarian law balances its laudable goals with the perfectly legitimate need to accomplish the mission.[73] To that end, the lawyer serves a vital purpose within the command by helping to ensure that the obligations of the law are not seen as a hindrance, but as an essential component of a professional military balancing the legitimate use of power against the terror and pain that conflict causes. These principles form the practical foundation which warrants the textual mandate of Protocol I, Article 82:

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[69] See DOTY, *supra* note 6.
[70] W. M. REISMAN & W. K. LIETZAU, *"Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict"*, in The Law of Naval Operations, 64 Naval War Colllege International Law Studies, 1, 5-6, Horace B. Robertson, Jr. ed., 1991.
[71] *1907 Hague Regulations* art. 1, *supra* note 7.
[72] T. F. LAMBERT, *Recalling the War Crimes Trials of World War II*, 149 Military Law Review 15, 23 (1995).
[73] The law explicitly embeds the latitude for military commanders and lawyers to balance the requirements of the mission against the humanitarian imperative of the law itself. Thus, legal duties are predicated in many instances by such words as *"to the fullest extent practicable"* 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 23, art. 10(2) [hereinafter *Protocol I*], *"unjustified act or omission" Id*., art. 11, *"unless circumstances do not permit". Id*., art. 57(2)(c).

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisors are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[74]

For those States party to the Protocol, Article 82 imposes an affirmative obligation to provide legal advisors to military forces. From my perspective, the concept of legal advisor for military forces should be largely synonymous with the concept of military lawyer. Who better to understand and represent both professional military obligations with the requirements of the law than a professional soldier? The professionalism of the military lawyer is also an extremely important component in gaining the credibility and respect of both commanders and soldiers that is necessary to properly implement the constraints of the law. One eminent commentator referred to the soldier/lawyer who is equipped to fill such a vital operational niche as the "*lawyer-in-uniform*."[75]

Within Article 82, the caveat "*when necessary*" does permit flexibility and sovereign choices in the conditions for the use, allocation, and location within the military structure of those legal advisors. The unstated but necessary corollary to this legal duty is that the Parties to the Protocol have an obligation to ensure that the selected legal advisors "get the appropriate training."[76] In addition, the creation of an office or section exclusively devoted to international law applicable in armed conflict is an "*apparently essential prerequisite for the implementation of Article 82*."[77]

The Additional Protocol expanded on earlier provisions of the law with regard to concrete obligations for its training and dissemination.[78] Article 83 included more sweeping provisions focused on closing the gap between the textual provisions of law and their realization in practice:

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military

[74] *Protocol I*, art. 82, *supra* note 14.
[75] G. BEST, *"War & Law Since 1945"*, 1994.
[76] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 3344, at 949 Y. SANDOZ, C. SWINARSKI, & B. ZIMMERMANN eds., 1987, [hereinafter *ICRC Commentary on Protocol I*] .
[77] *Id.*, 3348, at 950.
[78] See, *e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, art. 47 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, art. 48 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316, art. 127 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, art. 144.

instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Taken together, these provisions are intended to effect a comprehensive mechanism for training military professionals in the obligations inherent in the law of armed conflict as well as a systematic and authoritative implementation of those principles.

Back to the Future: The Continued Necessity for Military Lawyers

– *The Lawyer as Trainer*. Recent events in Iraq serve as a stark reminder that the efforts of commanders and lawyers to achieve a well-trained and disciplined force can never be taken for granted. Unfortunately, this is not a new lesson. Lieutenant General William R. Peers reported that one of the contributing factors to the crimes committed at My Lai was that *"[n]either units nor individual members of Task Forcer Barker and the 11th Brigade received the proper training in the Law of War (Hague and Geneva conventions), the safeguarding of non combatants, or the Rules of Engagement."*[79] Proper training in the legal requirements that inhere in the conduct of hostilities and the interactions of military with non-combatants should be seen merely as the necessary foundational step for the accomplishment of those obligations. Thus, United States military doctrine requires that military lawyers are always available to assist commanders in applying international humanitarian law "*at all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations."*[80]

In order to actualize this commitment to implementing legal obligations, U.S. military doctrine further specifies that advice on law of war compliance should *"address not only legal constraints on operations but also legal rights to employ force."*[81] This formal doctrine is entirely appropriate in light of the need for lawyers to successfully facilitate the transfer of the intellectual knowledge gained in the classroom into the reality of the military operation.

In practice, the lawyer must have a hand in the drafting, training, dissemination, inspection, and enforcement of the Rules of Engagement and command policies that provide the linkage from the classroom to the field. This, in turn, requires that lawyers work closely with commanders and staff to

[79] W. PEERS, *"The My Lai Inquiry*", New York, 1979.
[80] Joint Chiefs of Staff Memorandum, MJCS 5810.01B, Subject: Implementation of DOD Law of War Program, para. 4a. (March 25, 2002), available at http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf.
[81] *Id*., para. 4b.

ensure proper targeting in the deliberate process. The Rules of Engagement must be disseminated to every corner of the command; equally important, the lawyer must be constantly on the move to reinforce the legal component of the Rules of Engagement, answer questions, and help fill the gaps in soldiers' minds regarding the interface of law and tactics.

Some soldiers from the Vietnam era reported that a lackadaisical approach to legal training caused them to take the otherwise sound command guidance they received on pocket cards and put the cards into their pockets unread and hence ignored.[82] The United States Army continues to develop and disseminate such cards, as do many of our allies. The card is not an end in itself, but serves as the commander's tool to help instill compliance with legal norms, which is in turn reinforced by the active role of military lawyers.

In contrast to simply preparing a card for distribution to soldiers, lawyers with the Third Infantry Division during Operation Iraqi Freedom developed a matrix that was disseminated and used at command levels down to the smallest tactical force. The matrix (*see Figure 1 below*) gave commanders and soldiers a quick and ready reference with which to consider and implement the obligations of international humanitarian law. Anecdotal evidence shows that the Third Infantry Division filled out these cards and kept records of their efforts to comply with the law as long as it was physically possible given the demands of the battle.

[82] See PEERS, *supra* note 21, p. 230.

Commanders are responsible for assessing proportionality before authorizing indirect fire into a populated area or protected place (NFA/RFA). Refer to ROE; seek legal advice; copy SJA, G5 and FSE.

POPULATED AREA TARGETING RECORD
(Military Necessity – Collateral Damage – Proportionality Assessment)

I. MILITARY NECESSITY – What are we shooting at and why?

1. **DTG of mission: _____**
2. **Location – Grid Coordinates: _____**
3. **Enemy Target (WMD, CHEM, SCUD, ARTY, ARMOR, C2, LOG)**
   a. **Type and Unit: _____**
   b. **Importance to Mission:_____**
4. **Target Intel:**
   a. **How Observed: UAV, FIST, SOF, other: _____**
   b. **Unobserved: Q36, Q37, ELINT, other: _____**
   c. **Last Known DTG of Observation or Detection:_____**
5. **Other Concerns as applicable:**
   a. **US Casualties: Number: _____ Location:_____**
   b. **Receiving Enemy Fire: Unit: _____ Location**

II. COLLATERAL DAMAGE – Who or what is there now?

6. **City: _____ Original Population:_____**
7. **Estimated Population Now in Target Area (if known):_____**
8. **Cultural, Economic, or Other Significance and Effects:**
   _____

III. MUNITIONS SELECTION – Mitigate civilian casualties and civilian property destruction

9. **Available Delivery Systems Within Range:**
   155, MLRS, ATACMS, AH64, CAS, other:_____
10. **Munitions: DPICM, Precision-Guided Munitions (PGM),**
    other:_____

IV. COMMANDER'S AUTHORIZATION TO FIRE – Proportionality analysis

11. **Legal Advisor's Rank and Name: _____**
12. **Civil Affairs/G5 Advisor: _____**
13. **Is the anticipated loss of life and damage to civilian property acceptable in relation to the military advantage expected to be gained? Yes/No**
14. **Commander or Representative's Rank, Name, and Position:**
    _____
15. **Optional Comments:_____**
16. **DTG of Decision: _____**
17. **TARGET NUMBER: _____**

Figure 1

– *The Lawyer as Negotiator*. Military lawyers must continue to play a central role in the negotiation of new legal norms. The Official ICRC Commentary on Protocol I notes with some understatement, *" a good military legal advisor should have some knowledge of military problems."*[83] In a similar

[83] *ICRC Commentary on Protocol I, supra* note 18, p. 951.

vein, the law cannot be allowed to drift into an atrophied state in which its objectives are seen as romanticized and unattainable in the operational context. If humanitarian law becomes separated from the everyday experience and practice of professional military forces around the world, it is in danger of being relegated to the remote pursuit of ethereal goals. As the Third Infantry Division matrix illustrates so well, the law takes form and shape in the practice of soldiers and the thinking of commanders on the ground rather than in the textbooks and scholarly opinions.

Military lawyers need to be involved in the negotiation and discussion of emerging legal norms precisely because it is so vital to maintain ownership in the field of humanitarian law. Continued ownership of the legal regime by military professionals in turn sustains the core professional identity system of military forces. Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict. This trend could result in principles and documents that would become increasingly divorced from military practice and therefore increasingly irrelevant to the actual conduct of operations.

For example, Article 23 of the 1899 Hague II Convention stated that it was forbidden "[*t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war*." This same language showed up in Article 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court. Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a totally subjective threshold by which to second-guess military operations. They proposed a verbal formula for the Elements that any seizure of civilian property would be valid only if based on imperative military necessity.[84]

Such an element would have been contrary to the entire history of the law of armed conflict. The concept of military necessity is ingrained into the law of armed conflict already; introducing such a gradation would have built a doubly high wall that would have had a paralyzing effect on military action that would have been perfectly permissible under existing law prior to the 1998 Rome Statute. Moreover, a double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law. Of course, any responsible commander and lawyer recognizes that because the corpus of humanitarian law enshrines the principle of military necessity in appropriate areas, the rules governing the conduct of hostilities cannot be violated based on an *ad hoc* rationalization of a perpetrator who argues military necessity where the law does not permit it. Such a subjective and unworkable formulation would have exposed military commanders to after-the-fact personal criminal

[84] Knut Dörmann, Elements of War Crimes Under The Rome Statute of the International Criminal Court 249 (2002).

liability for their good faith judgments based only on after-the-fact subjective assessments. The ultimate formulation translated the 1899 phrase into the simple modern formulation "*military necessity*" that every commander and military attorney understands. The military lawyers among the delegates were among the most vocal in defeating the suggestion to change the law precisely because the elements for such a crime would have been unworkable in practice. The military officers participating in the Elements discussions were focused on maintaining the law of armed conflict as a functional body of law practicable in the field by well-intentioned and well-trained forces. The importance of this role will not diminish in the foreseeable future.

– *The Lawyer as Enforcer*. The importance of enforcing the substantive body of norms through criminal investigations and prosecutions when appropriate cannot be overstated. As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."[85] Military lawyers are at the forefront of such efforts precisely because they are in the best position to evaluate the culpability of commanders in light of the "reasonable commander" standard that is built into the law of armed conflict.[86] Moreover, the same experts who advise commanders on the proper implementation of the law should find a great deal of professional satisfaction in helping to ensure that the law retains its influence and credibility. Their expertise forms the basis of effective prosecutions that are legally sound, but fair and credible from the perspective of soldiers in the field.

The events at Abu Ghraib have served to remind military professionals of the visceral linkage between their actions and the achievement of the mission. Abu Ghraib represents a sharp departure from American ideals precisely because some soldiers forgot about their overarching mission to defend justice and human dignity. At the same time, it is worth recalling that the crimes were made public because one young soldier, Specialist Joseph Darby, alerted appropriate authorities when he became aware of the activities inside Abu Ghraib. The investigation and administration of appropriate discipline against culpable individuals serves an important deterrent purpose in the legal regime by helping to strengthen the resolve of the next Joseph Darby who may be forced to choose between loyalty to his comrade-in-arms and the principles of law and professionalism.

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[85] J. B. MOORE, "*A Digest of International Law*" p. 5-6 (1906).

[86] The ICTY Report concluded that criminal investigations were not warranted by the actions of NATO during the bombing campaign during which only an estimated 500 civilian deaths resulted from 38,400 sorties that released 23,614 air munitions. See *International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign*, para. 50, reprinted in 39 I.L.M. 1257, 1272 (2000), available at http://www.un.org/icty/pressreal/nato061300.htm (The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military

Legal advisors play another, more subtle, role in successful enforcement of the law of armed conflict. In one case from Iraq, an officer of the 101st Airborne Division was prosecuted for lying about the conduct of his soldiers after they stole a vehicle from an Iraqi man. Testimony at trial showed that although the soldiers had a right to take the vehicle based on military necessity,[87] they failed to provide a receipt as mandated by the Division policy that was crafted to comply with the law. The legal advisor had trained the unit on the appropriate legal procedures, but had also ensured that the receipts needed to comply with the law were printed and distributed. It is only appropriate that those soldiers who knowingly disregarded their professional and legal obligations be prosecuted by the same attorney who had gone to such lengths to train and equip them for compliance. Similarly, many of the prosecutions of those who strayed so far from accepted professional norms in Iraq are based on the principle of dereliction of duty. Reflecting a concept of military law recognized around the world, Article 92 of the Uniform Code of Military Justice makes it a crime to fail to perform a known duty, either willfully or through neglect.[88] The necessary base of knowledge that supports subsequent enforcement efforts was built by the military lawyers who taught the units, rehearsed them, and integrated legal considerations into the operational flow.

– *The Lawyer as Reporter*. Lawyers who advise commanders on the proper application of humanitarian law have a vested interest in helping to ensure that those norms are respected and implemented in the future. In order to achieve that fundamental objective, legal advisors must be engaged at all levels to bring the light of truth and proper legal analysis to allegations of war crimes. Humanitarian law belongs to the armed forces of the world; it is not a media tool to be manipulated and sensationalized. The passivity of trained lawyers in the face of misleading media reports could permit humanitarian law to be seen as nothing more than a mass of indeterminate subjectivity that can be used as another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones and most compliant accomplices in the media.

Lawyers must be proactive in responding to allegations that humanitarian norms have been violated by collecting the relevant facts and eyewitness accounts, and analyzing them in light of their particular expertise in the law. There is a very real danger that the media can be manipulated and used to mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. Failure to articulate the correct state of the law in turn feeds into an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This in turn can lead to a cycle of cynicism and second guessing that could weaken the commitment of some military forces to actually follow the law.

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histories would always agree in close cases. It is suggested that the determination of relative values must be that of the *"reasonable military commander"*).

[87] See *1907 Hague Regulations* art. 23(g), *supra* note 7.

[88] 10 U.S.C. §892 (2000).

For example, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.[89] In the era of mass communications, the media often creates a perception that the normative content of the law is meaningless by conveying an automatic presumption that any instance of collateral damage is based on illegal conduct by military commanders. This perception is, of course, completely without foundation in humanitarian law. Left unchecked by the light of the law and the facts, however, it can erode the acceptance of the law in the minds of military professionals who may begin to feel that their good faith efforts to comply with the complex provisions of the law are meaningless and counterproductive in terms of gaining legitimacy and public trust. Indeed, nothing would erode compliance with humanitarian law faster than false reports of what the other side has done, or distorted allegations that permissible conduct in fact represents willful defiance of international norms.

Secondly, lawyers should never accept a moral or legal equivalence between an enemy that deliberately and repeatedly violates the basic norms of international law, and a professional military that is required to *"comply with the principles and spirit of the law of war"* at all times.[90] Accurate and timely documentation of illegal conduct on the part of non-state actors may represent the most effective way to enforce the law on a reciprocal basis. Professional soldiers are often confronted with circumstances in which the enemy forces disregard applicable legal principles by deliberately endangering civilians and waging war with no regard for the norms of humanity. In contrast, American soldiers in Iraq have risked their lives on many occasions and constrained themselves because of their own professional obligations and discipline even when it made their mission more difficult or made the loss of American lives more likely.

In sharp contrast to those who exult in the intentional murder of unarmed civilians, professional soldiers who are guided by the norms of humanitarian law are immediately concerned with ameliorating the suffering of the civilian population and providing assistance for the innocent victims of conflict when they are caught in the vortex of combat. The kindness of individual American soldiers towards those civilians unfortunate enough to be caught in the vortex of combat has been one of the truest measures of their training and humanity. If the exposure of illegal acts on the part of the adversary helps sway social and political opinion away from supporting lawless thugs, they may in turn recognize that their unlawful actions are a barrier to achieving their ends. Some NGOs and IGOs have been able to use media outlets as an effective tool for buttressing humanitarian norms. The legal advisor plays a critical role in getting

[89] *Protocol I*, *supra* note 15, art. 48.

[90] See, *e.g.*, Department Of Defense, Directive 5100.77, DOD Law of War Program, para. E(1)(a)(10 July 1979) [hereinafter DOD. Dir. 5100.77], requiring that United States Armed Forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized", available at http://www.dtic.mil/whs/directives/corres/html2/d510077x.htm .

to the scene quickly at the behest of the commander and ensuring that the facts are accurate so that the legal analysis is correct and timely.

Conclusion

Lawyers who serve the interests of the law as honest brokers have a critical role in the difficult task of implementing humanitarian law. The only guarantee is that the task is difficult and the progress slow, but their role is nonetheless essential. The creator of the Hague Peace Conference, Czar Nicholas cautioned that *"[o]ne must wait longer when planting an oak than when planting a flower."*[91] The balance between the mandates of the mission and the obligations of the law make the services of the lawyer an operational necessity.

[91] J. B. SCOTT, *"The Hague Peace Conferences of 1899 and 1907"*, xiv 1915.

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN THE REPUBLIC OF MACEDONIA

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Summarizing the current situation regarding implementation of international humanitarian law (IHL) in the Republic of Macedonia, it can be said that it has become an integral part of the Macedonian legal system. Some parts of IHL, in legislation and practice, are very well implemented, while regarding some others, however, there are shortcomings. Implementation of international humanitarian law in Macedonia would be more effective if a National Inter-ministerial Committee on IHL was established. There is a Proposal from Macedonian Red Cross, made on December 10, 2003, and Letter of support from ICRC, written on February 11, 2004, submitted to the Government of the Republic of Macedonia to establish this National Committee. The Macedonian Government is expected to adopt a special regulation to establish such Committee, stipulating its aim of activities, functions and composition. As a body for implementation and dissemination of IHL, this Committee will examine thoroughly all its aspects and keep on the agenda problematic issues. It can initiate improvement in areas where things are not properly set and prepare recommendations to submit to the Government on the necessary activities and measures to be adopted.

The Republic of Macedonia is Party to the Geneva Conventions and Additional Protocols, as well as to the large majority of other IHL treaties. Yet, Macedonia should ratify the following treaties of IHL: a) Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976; b) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention); and c) Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995.

Translation of texts of some IHL treaties, including Geneva Conventions and Protocols, that are published in Macedonia, but are not yet official, should be verified by governmental bodies and become official. There is need for the translation of those IHL treaties which are not yet translated, probably by the appropriate Unit for translation in the Government's Sector for European Integration. Their texts should be published in the Official Gazette, and sent to the depositary and other States Parties. These issues should be regulated as one segment of the expected Law on Foreign Affairs.

In general, serious efforts have been taken in Macedonia to teach and disseminate international humanitarian law, being enabled by the unofficial translation of the four Geneva Conventions and their Additional Protocols in Macedonian. IHL education is part of military training in the Army of the Republic of Macedonia, for officers and lower officers, as well as for soldiers serving their military duty and reserve soldiers. IHL is taught in several faculties at two universities, as well as at Military and Police Academy, in the framework of Public International Law and as a facultative subject International Humanitarian Law.

Macedonian Red Cross, with full support from the ICRC, is very active organizing a number of seminars and courses in the field of dissemination and promotion of IHL.

However, the state should systematically put the teaching of IHL in school programs on lower levels. The obligation of the state to educate the professional personnel such as volunteers, medical personnel, lawyers, etc., as well as to provide legal advisors of IHL to the Army, should be followed by the state's increasing involvement and bigger financial share.

In general, the grave breaches of the Geneva Conventions and Additional Protocol I are adequately covered by the Criminal Code of the Republic of Macedonia, with the exception of the act of apartheid. War crimes in the Criminal Code are punished if they were committed in war or armed conflict, meaning during both international and non-international conflict.

Some adjustment to the legislation of the Republic of Macedonia is necessary after the Statute of the International Criminal Court entered into force. Namely, crimes against humanity, when committed in war or armed conflict, can be prosecuted in Macedonia just under provisions incriminating war crimes, while others can only be prosecuted under provision incriminating murder or other crimes against life and limb, crimes against sexual integrity, etc. The adjustment of the Criminal Code in respect of the war crimes and crimes against humanity can be done in two ways: a) by putting a new article for crimes against humanity in time of peace in Chapter 34 of the Criminal Code, and amending the articles in this Chapter (Articles 404 to 407), by adding to the relevant articles acts not yet included in the Criminal Code; b) by changing Chapter 34 of the Criminal Code replacing present articles with two new articles incriminating, similarly to the Statute of the International Criminal Court, war crimes and crimes against humanity. One should take into consideration also the presently binding provisions of international law.

Regarding the principle of non-retroactivity of criminal law, a possible solution is for the relevant articles of Macedonian Constitution and Criminal Code to be amended – with a text whereby no one should be punished for an act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.

The issue of mutual assistance in criminal matters in the Republic of Macedonia is adequately covered with the Law on Criminal Procedure. However, issues of Macedonian cooperation with the International Criminal Court (ICC) and *ad-hoc* Tribunals, and especially of extradition or handing over of the suspects, should be covered by adoption of expected Special Laws on cooperation between the Republic of Macedonia and both ICC and International Tribunals for Former Yugoslavia and Rwanda.

Incrimination of the criminal act of abuse of the emblem of the Red Cross in Macedonian laws seems satisfactory. Yet, it should be evaluated if it is necessary for a separate law on the protection of the Red Cross and Red Crescent Emblem to be adopted. Also, it should be examined whether more precise rules on the use of the emblem and the name of the Red Cross, as well as on the issuing of special identity cards, are sufficient to put an end to the cases of emblem abuse.

Although the relevant laws and regulations contain regular provisions regarding basic judicial guarantees, including detailed provisions for a fair procedure in the arrest, there are no special provisions in

Macedonia ensuring due process of law during an armed conflict. The Criminal Code of the Republic of Macedonia covers crimes against prisoners of war, but it should be amended among others (and/or other relevant defense regulations should be adopted), as follows: a) definition of a prisoner of war (taking into account requirements of Article 5 of the Third Geneva Convention and Article 45 paragraph 2 of Additional Protocol I); b) sanctions against willful deprivation of prisoners of war the right to fair and regular trial (according to Article 130 of the Third Geneva Convention and Article 85 paragraph 4(e) of Additional Protocol I); c) sanctions against willfully causing of great suffering or serious injury to body or health of prisoners of war; d) provisions on detention of prisoners of war, defining conditions of detention (interrogation, work, etc.), procedures of release and repatriation of prisoners of war; etc.

Military courts have not existed in Macedonia since 1991. Regarding Article 84 of the Third Geneva Convention which provides that a prisoner of war shall be tried only by a military court, possible solution should be proposed, by Ministry of Defense and Ministry of Justice. These two ministries should put into regulations so far not included elements regarding the treatment of war prisoners, disciplinary proceedings against them, etc. and should be responsible for their implementation. It is necessary to take care also concerning the appointment and training of personnel responsible for the treatment of prisoners of war, as well as editing *"manuals"* to be used by the military personnel.

The Criminal Code of the Republic of Macedonia adequately incriminates war crimes against civilians, including internees. However, there is need to include all the details of treatment of the civilian internees into other relevant legislation, including measures that need to be taken with respect to the internees in case of armed conflict. These measures should include some steps already in peacetime: identification of localities suitable for the internment, preparation of mobile infrastructure for the establishment of camps for internees, supplying of civilian internees with food and clothing and offering them hygiene and medical attention, defining repatriation procedure and training specialized personnel, etc.

Regarding issues of special protection of women and children in time of armed conflict, special measures, like preparation of the appropriate locations and infrastructure for their residence and protection etc., should be taken. They should be put into the Law on Defense and/or into relevant regulations. Laws should be amended also with relevant provisions of the Statute of the International Criminal Court.

Part of measures of identification and protection of medical and religious activities, including marking of medical institutions, medical property and transports, hospital ships and medical aircraft, preparation of the identification documents, making updated lists of personnel in hospitals, etc., should be done by the national authorities. Measures of identification and protection of religious activities should be included in Macedonian legislation.

The issue of identification in the Army of the Republic of Macedonia is solved with identity cards and identity discs. However, according to the provisions of the Geneva Conventions and their Additional Protocols, more data have to be included. In case of armed conflict the state authorities (not only the Association of Journalists as an NGO) should design and issue the appropriate cards for journalists doing their work on the territory of armed conflicts.

Criminal legislation incriminating attacks on works and installations containing dangerous forces is appropriately solved in the Republic of Macedonia. However, other measures, like collecting detailed information about these objects and ensuring their appropriate designation, should be taken by the Ministry of Defense in cooperation with other competent authorities.

Macedonian legislation, in principle, provides for adequate and detailed provisions concerning protection of cultural objects, as well as envisages criminal responsibility for acts against cultural objects during armed conflict. However, the system of protection of cultural heritage (conducting a National Register on Cultural Heritage, approval of a List of cultural objects of state importance, adoption of detailed regulations concerning the marking of cultural objects, etc.) will be completed after the enforcement of the Law on the Protection of Cultural Heritage (on January 1, 2005).

It is also recommended that measures should be taken for the dissemination of the provisions of the Hague Convention among civil population, spreading the knowledge on the protection of cultural heritage among the public, mostly in primary and secondary schools. Members of the armed forces should be provided with adequate information concerning the protection of cultural property, also during armed conflicts, with the preparation of special manuals. The establishment and training in peacetime of a special service or specialist personnel within the army, whose task is the safeguarding of the cultural heritage in cooperation with the civilian authorities, should also be done.

The legal and organizational framework to perform civil defense in Macedonia is set and works well. Civilian protection personnel should be provided with identity cards as required by Article 66 para.3 of the Additional Protocol I. Macedonian legislation should regulate the functioning of civil protection in occupied territories or in non-international conflicts, as well as the cooperation with international organizations providing aid to Parties in conflict, initiating adoption and implementation of such regulations.

It is recommended to evaluate whether the Tracing Service in the framework of the Macedonian Red Cross is prepared to be transformed into National Information Bureau, for activities of a larger scale which might be needed during possible armed conflicts. Evaluation should be made on the need for new persons, necessary premises and equipment (computers, software, etc.) in the Bureau, in order to realize provisions on storing and retrieving all the information, as well as its responsibility for collecting personal valuables of persons concerned. It is also recommended that the Government define its formal and financial relation with the Macedonian Red Cross which fulfills the obligation of the State in this regard.

Although majority steps regarding the establishment of hospital and safety zones and localities, neutralized zones, non-defended localities and demilitarized zones, should follow after the outbreak of hostilities, some of them are to be done in times of peace. It is recommended that national authorities consider the possibility of preparing such zones and localities for cases of armed conflicts. Draft agreements relating to these zones should be prepared, using Annex I to the Fourth Geneva Convention as an example in this respect.

It is recommended that regulations and measures for implementation of the provisions regarding Graves Registration Service be prepared. Some steps in the implementation of these regulations, like

allocation of necessary equipment and training of personnel, should be taken already in peacetime. Collecting and recording data on dead members of the armed forces, already provided for by the Macedonian Red Cross Tracing Service, should be supported.

It is recommended that the Republic of Macedonia prepare the provided measures for the protection of the environment, as well as the analysis of compliance with other relevant international acts.

Obligations concerning military planning contained in Additional Protocol I have been partly met in the Law on Defense. Questions of preparation and designation of the protected objects, zones and goods, of methods and means of fighting, are dealt with in the appropriate sectors of the Ministry of Defense and in the Army. The Republic of Macedonia, as a member of the Partnership for Peace and aspirant to NATO membership, is working hard and intensively to comply with NATO standards, including the supervision of the development of new weapons and making them in accordance with international standards.

RENFORCER LES MESURES POUR LE RESPECT ET LA MISE EN ŒUVRE DU DROIT INTERNATIONAL HUMANITAIRE: LE RÔLE DES ONG

LE POINT DE VUE D'UNE ONG D'ACTION HUMANITAIRE SUR LA MISE EN ŒUVRE DU DROIT INTERNATIONAL HUMANITAIRE

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Médecins sans Frontières (MSF) n'est pas une organisation de juristes ni une Organisation Non Gouvernamentale (ONG) de défense du droit international ou des droits de l'homme. C'est une ONG active dans l'action d'urgence: particulièrement le secours médical aux victimes des conflits. MSF s'est même crée dans les années 70 en opposition à une interprétation jugée trop légaliste, du droit humanitaire notamment au regard de l'accès aux victimes d'un conflit armé interne. Lors de la guerre de sécession du Biafra les secours devaient être approuvés par le gouvernement du Nigeria. MSF estimait que si le droit humanitaire pouvait être utilisé pour interdire ou justifier l'interdiction du secours aux victimes, il valait mieux que les organisations humanitaires se passent du droit humanitaire.

Les protocoles additionnels de 1977 sont venus corriger certains paradoxes de ce droit humanitaire en remettant les victimes des conflits au cœur des préoccupations et en précisant les règles d'interprétations de ce droit.

Ceci s'est concrétisé dans les textes par:

- Une association étroite entre le droit à l'assistance et à la protection pour les victimes d'une part et la limitation des moyens de combat par les belligérants d'autre part.
- Des règles d'interprétation précisant que le droit humanitaire ne pouvait pas être utilisé pour priver les personnes protégées des droits à l'assistance et à la protection qui leur était accordé.

L'intérêt d'MSF pour le droit humanitaire est apparu progressivement à partir de plusieurs constatations sur les limites de l'action humanitaire et ses multiples détournements par les belligérants au service de politiques criminelles ou de politiques de contrôle des populations.

Le choc fut sans aucun doute de constater que l'aide alimentaire fournie par la communauté internationale à l'Éthiopie était utilisé pour organiser des déplacements massifs et forcés de population par le gouvernement et l'armée. MSF dénonça publiquement cette réalité et fut expulsé par le gouvernement éthiopien en décembre1985. Le fait que l'action humanitaire puisse contribuer ou faciliter certains crimes obligeait à s'interroger sur les responsabilités, droits et obligations confiées par le droit humanitaire aux organisations humanitaires.

Le droit humanitaire semblait avoir balisé la plupart de ces dilemmes vieux comme le monde, pour tenter de ne pas dissoudre la responsabilité des uns dans la générosité des autres, pour éviter de camoufler le crime sous les habits de la générosité.

MSF a découvert que le droit humanitaire donnait des droits mais imposait également des responsabilités et des obligations précises et rigoureuses aux acteurs de secours pour assurer l'efficacité de ces secours tant en matière d'assistance que de protection des victimes.

Si les militaires se plaignent parfois que le droit humanitaire pose des restrictions à l'emploi de la force, les humanitaires pourraient aussi protester qu'il est plus facile de faire des actions de secours sans respecter le droit humanitaire !

Au Darfour aujourd'hui l'assistance humanitaire ne peut pas être confiée directement aux autorités gouvernementales en raison de la persistance d'une situation de conflit. La responsabilité première des autorités est de faire cesser les violences contre les populations et de rétablir l'ordre. En attendant, les populations restent sous la sauvegarde du statut de victimes civiles d'un conflit armé et doivent pouvoir bénéficier de la présence et de l'assistance d'organisations humanitaires impartiales, (le temps que l'autorité du gouvernement soit rétablie dans les zones concernées et que les populations puissent de nouveau bénéficier des garanties attachées à leur statut de ressortissant national).

Le droit humanitaire n'est pas contraignant que pour les forces armées. Il l'est aussi pour les organisations de secours, le CICR et les autres. Mais cette contrainte à pour but de faire exister un espace pour l'intérêt des victimes. Cela est extrêmement pragmatique. Les membres des organisations humanitaires, le CICR et les autres comme MSF ont une connaissance directe du champ de bataille et ont quotidiennement les yeux et les mains dans les réalités humaines les plus violentes, les plus sordides. S'ils ne sont pas à même d'évaluer les nécessités militaires, ils sont parfaitement placés pour évaluer la réalité et le poids des souffrances générées par les diverses techniques, tactiques utilisés lors des opérations militaires.

De façon ultime le droit humanitaire définit également les conditions et les limites de validité de l'action de secours. Ainsi les situations de violations graves sont des situations dans lesquelles la poursuite de l'action humanitaire doit être mise en balance avec la révélation et la dénonciation des crimes commis.

Le génocide constitue le cas ultime dans lesquelles l'action de secours doit pouvoir céder le pas à l'intervention pour faire cesser le crime. Ces situations sont pour nous les limites au principe de confidentialité. Car le droit d'accès ne se monnaie pas contre le silence sur des actes d'extermination.

Les organisations de secours ont un intérêt vital à l'application et au respect du droit international humanitaire. Cet intérêt est fondé sur des considérations plus opérationnelles que juridique. L'expérience pratique de l'application ou de l'inapplication du droit humanitaire dans les situations concrètes permet à un acteur humanitaire comme MSF d'identifier certaines difficultés d'application et de respect de ces normes.

I. Les entraves concernant la mise en œuvre du droit international humanitaire

La mise en œuvre bute le plus souvent sur deux éléments très différents, la méconnaissance du droit d'une part et la question de la qualification des situations et les problèmes liés au refus de reconnaissance d'une situation de conflit d'autre part.

La méconnaissance du droit humanitaire.

Il s'agit d'une méconnaissance juridique mais également politique et philosophique.

La méconnaissance juridique est liée au fait que le droit humanitaire est complexe et qu'il doit être appliqué sur le terrain par des non-juristes : militaires ou organisations de secours.

La méconnaissance philosophique et politique découle du fait que ce droit est applicable aux situations de conflit et de tension. Or force est de constater que dans ces périodes de danger, les réflexes sécuritaires qui veulent que la fin justifie les moyens, s'imposent comme des évidences et font table rase de toute la connaissance sur la nécessité de limiter les mécanismes de destructivité humaine. La réapparition et les formes du débat sur la torture illustre amplement ce phénomène de simplification mensongère.

Cette méconnaissance du droit humanitaire n'est pas une fatalité. Il existe aujourd'hui un véritable intérêt pour ce droit, sans doute lié au développement de l'action de secours humanitaire et au fait que 90% des victimes de ces conflits sont des civils. Il ne faut pas réduire le droit humanitaire aux crimes de guerre, crimes contre l'humanité et génocide. Sa première fonction est d'établir les responsabilités opérationnelles directes des différents acteurs présents dans les situations de conflit, avec pour objectif de faire survivre les victimes.

Ce sont ces règles qu'MSF a voulu rendre accessibles au plus grand nombre, en rédigeant par exemple le dictionnaire pratique du droit humanitaire.

L'objectif était de :

- rendre la complexité du droit accessible au plus grand nombre, dans ses éléments techniques mais aussi dans ses principes organisateurs et sa philosophie.
- permettre la responsabilisation des différents acteurs de terrain dans les situations de conflit.

La complexité du droit humanitaire peut être éclairée par la compréhension d'un principe simple : le principe de responsabilité. Le droit humanitaire organise la protection des victimes des conflits en organisant un système de responsabilités multiples. Ainsi la responsabilité des combattants est garantie par une chaîne d'autres systèmes de responsabilité politiques, diplomatiques, humanitaires, judiciaires. C'est l'ensemble de ces systèmes qu'il faut mettre en mouvement pour renforcer la responsabilité des combattants.

Il est également important d'alimenter le débat philosophique sur la limitation des moyens auprès des opinions publiques. Dans le cas de la torture par exemple, il est important de questionner cette pseudo

morale de la nécessité en lui opposant le prix de la destruction humaine et sociale que les ONG constatent sur le terrain et qui n'est jamais pris en compte dans le calcul de la prétendue efficacité de cette pratique.

Les querelles de qualification concernant l'applicabilité du droit humanitaire

Contrairement aux droit de l'homme, en droit humanitaire, la qualification des situations et des personnes décide du droit applicable. Ce qui est gagné en qualité de protection par la précision des règles applicables peut être perdu en efficacité. La disqualification de l'adversaire et la déqualification des conflits armés est un outil majeur pour entraver l'application du droit humanitaire.

Notamment dans les conflits internes, le refus de reconnaître une situation de conflit est une tentation fréquente pour les États qui ne veulent pas offrir de reconnaissance politique ni juridique à leurs adversaires. C'est le cas notamment de la guerre en Tchétchénie.

Mais on peut aussi constater le refus de reconnaître la qualité de combattant et de prisonniers de guerre à des gens qui participent aux combats.

Cette tendance naturelle est accentuée par les nouveaux concepts stratégiques de guerre contre le terrorisme qui érigent la sécurité en objectif de guerre, et par l'impossibilité de la confrontation militaire directe qui place en conséquence l'affrontement au cœur de l'espace civil.

Il faudrait revenir à ce sujet à une règle simple qui consiste à interpréter le droit humanitaire de bonne foi et dans le respect de l'esprit de ces textes. Concernant les détenus par exemple :

La contestation d'un statut de protection ne peut pas aboutir à priver une personne de tout statut et de toute protection. On ne peut contester un statut et une protection que si on en propose un autre. Il n'est pas possible qu'on refuse à un individu les droits des civils et les droits des combattants. Concernant le terrorisme utilisé par des acteurs non étatiques. Il est important de reconnaître que ce phénomène n'échappe pas totalement aux Conventions de Genève et à leurs protocoles. Ces conventions et protocoles prennent en compte les belligérants non étatiques. Le terrorisme est également une méthode de guerre décrite et interdite par les Conventions de Genève dans le cadre des conflits armés.

Ainsi donc à toute situation nouvelle il ne faut pas avoir peur d'appliquer par analogie du droit ancien. Sur un autre plan que le terrorisme, la nature du droit applicable aux compagnies privées de sécurité, ainsi que les mécanismes dit de *"maintien de l'ordre"*, largement utilisés dans les conflits armés constituent un potentiel considérable d'évasion par rapport aux obligations du droit humanitaire.

II Le respect du droit humanitaire à l'heure de sa sanction judiciaire

La question est avant tout celle de l'irrespect et de l'attitude face aux violations.

On ne peut pas occulter le soulagement de voir enfin apparaître de façon embryonnaire la possibilité de répression des crimes de droit international. Pendant des années, l'impunité des crimes de guerre a été le garant de la paix. Le monde s'est mis à tourner à rebours de cette vérité depuis quelques années seulement.

- l'action avant la sanction

L'évolution qui a conduit à une prise en compte actuelle de la possibilité de réprimer les violations ne doit pas totalement occulter les autres aspects du droit humanitaire. L'objectif premier du droit humanitaire n'est pas la justice *post mortem* mais le respect de la vie.

Le rôle des juristes n'est pas de se replier derrière les tribunaux, mais de négocier, justifier et défendre sur le terrain des actions de secours qui permettent de préserver la vie et limiter les souffrances.

- Justice, dissuasion judiciaire et interventions armées internationales

Le cas du Darfour est exemplaire dans le sens ou le débat sur la qualification criminelle a précédé le déploiement des secours pourtant nécessaires et urgents pour la survie des populations. La question de savoir si les évènements du Darfour pouvaient ou non être qualifiés de génocide était influencé par la possibilité de faire pression sur les autorités y compris en les menaçant de déclencher une intervention armée internationale dans cette région.

La dénonciation des crimes et particulièrement la dénonciation du génocide est aujourd'hui devenue une arme diplomatique très puissante puisqu'elle peut justifier des interventions armées internationales.

Il faut que les organisations humanitaires fassent attention de ne pas être utilisées contre leur gré pour justifier l'appel et le déclenchement d'interventions armées internationales dont les règles d'interventions et les résultats ne sont pas encore convaincants en matière de protection des populations.

- du règne de la norme à celui de la jurisprudence

Jusqu'à présent le droit humanitaire se limitait à des normes écrites dans les conventions pour lesquelles on l'a vu, il y avait déjà des problèmes d'interprétation. L'avenir va rajouter de multiples interprétations jurisprudentielles de ces textes. Il faudra veiller à ce que ce surcroît de complexité juridique ne détourne pas définitivement les non-juristes de l'application du droit humanitaire.

Il y a un nécessaire travail d'accessibilité et de mise en cohérence qui doit se poursuivre pour que le droit humanitaire reste compréhensible et applicable par les acteurs armés et les organisations de secours sur les terrains de conflit.

III Concernant le rôle spécifique des ONG

Les ONG sont plus libres que les institutions de faire évoluer leur mandat, leurs activités. Par définition elles se développent pour répondre à des besoins nouveaux ou pour répondre autrement à des besoins existants. Par nature elles sont liées à la société civile plutôt qu'aux États. En outre, contrairement au CICR et au HCR, les ONG ne sont pas prisonnières d'une double mission parfois incompatible : la

mission opérationnelle sur le terrain et le mandat de surveillance du respect des conventions dont elles ont la charge.

Le rôle des ONG humanitaires peut donc consister à équilibrer l'interprétation du droit humanitaire dans un sens qui soit plus favorable aux victimes civiles des conflits.

Paradoxalement il faut que les ONG se professionnalisent pour que leurs actions de secours se libèrent du contrôle des gouvernements et se conforment au droit humanitaire.

Ce sont des organisations d'action, elles doivent être actives dans la négociation et la mise en œuvre du droit humanitaire sur le terrain et ne doivent pas se contenter d'attendre l'étape de la sanction judiciaire.

Leur rôle est également de mettre en évidence les souffrances, le prix humain et social des différentes méthodes de guerre utilisées pour permettre de questionner de façon efficace la proportionnalité des méthodes de guerre. Elles peuvent dans ce domaine limiter le phénomène de concurrence entre les victimes, bien décrit par un certain nombre d'études dont celle de M. Bouvier, qui conduit l'agresseur à se présenter lui-même comme une victime lui-même, niant ainsi leur statut et leur existence à ses propres victimes.

La participation à la révélation des crimes et à leur sanction reste une activité très importante pour les organisations de terrain mais très délicate qui ne doit pas compromettre la mission centrale de secours aux victimes ni exposer les victimes à de nouveaux dangers. Cette question doit être examinée séparément.

ROLE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN ARMED CONFLICT SITUATIONS

A CONTRIBUTION

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The primary role of the High Commissioner for Human Rights in armed conflict situations is monitoring and reporting human rights observance or violation in a very public way. The High Commissioner is in a unique position. She alone has the three attributes necessary to do this effectively:

- the mandate to monitor
- the power to report publicly and
- the independence to do both credibly.

States, with their diplomats and their intelligence agencies, often watch closely what occurs in armed conflict situations but they are rarely independent observers and their reports are often, quite rightly, dismissed as politically motivated. Non-government organisations are well placed to monitor and report but they do so without the authority of the High Commissioner's high office. The International Committee of the Red Cross has clear responsibilities and discharges them effectively but secrecy is essential to its effectiveness. The media play important roles in bringing situations of human rights violation to public notice but they report what others allege or what their representatives witness and they too can be subject to criticism as to the reliability of their information and the motivation behind the report. Only the High Commissioner has the authority to monitor and report publicly and credibly.

The High Commissioner's active involvement in monitoring and reporting can have two purposes. First, it can reduce impunity by increasing the chances of gross violations of human rights during armed conflict being exposed and so subjected to legal accounting. Second, it can be preventive. Knowing that the High Commissioner is monitoring a situation may contribute to a greater sense of responsibility and accountability on the part of combatants.

But whose actions should the High Commissioner monitor?

Of course the High Commissioner should monitor the combatants, the two or three or more sides to the conflict. They are the instigators of or respondents to the conflict, the ones who have the most to win or

lose and so the ones most committed to it, with the biggest stake in it. Whether state or non-state actors they have clear obligations under international law, both treaty law and customary law, and so their observance of these obligations needs to be monitored.

In addition, however, the High Commissioner has a responsibility to monitor and report on the actions of international actors in relation to the armed conflict – the United Nations and its organs, including the Security Council, UN peacemaking and peacekeeping forces, other military forces deployed under UN mandates and the legions of international civil servants, experts and specialists who follow in the rearguard of the military. Here the international legal obligations might still be clear but the mechanisms for their application and enforcement are far murkier and the processes for accountability far less certain.

The United Nations system is said to be subject to human rights obligations but, as usually understood and applied, international law does not permit the UN as an entity or any other intergovernmental organisation, such as the World Bank or the International Monetary Fund, to be a party to a human rights treaty and to be subject to the obligation to report to treaty monitoring bodies and have their performance examined by them. Basically the UN and other intergovernmental organisations are human rights free zones, accountable to no one but their members and so subject not to the rule of international law but the politics of international relations. The High Commissioner for Human Rights is one of the few international institutions with the potential to require some measure of human rights transparency and accountability of these international actors.

Is it really necessary to monitor the peacebringers? Repeated experiences over the last decade or so cry out for it. We know that wearers of the blue beret have been responsible for murder, torture, rape and arbitrary detention for which they have enjoyed impunity unless their own national governments have been prepared to prosecute them in domestic courts. Now the International Criminal Court has a role too but it is a residual role that arises only where national courts fail. Anyone can bring an allegation of violation to the attention of the ICC but the High Commissioner can play a most significant role in early warning, investigation and reporting authoritatively on events. Monitoring the actions of UN soldiers in the field and of soldiers acting under UN mandates will enhance the respect for UN interveners by ensuring a higher standard of conduct than has often been the case in the past and re-assuring people affected by the intervention that they are truly being helped and not further victimised.

However, watching the soldiers themselves and monitoring their actions is not enough. Responsibility for human rights violations that result from UN action and inaction in armed conflict situations lies far higher up the chain of command. Monitoring and reporting on that level of participant is also important. Again experiences of action and inaction in the last decade point to its necessity. UN Security Council decisions imposing sanctions have resulted in gross human rights violations for civilian populations.

Other decisions that prevent UN forces intervening in events occurring in their presence have cost the lives of thousands of civilians. The High Commissioner should be monitoring and reporting publicly on the human rights consequences of these kinds of decisions.

Finally the High Commissioner for Human Rights has a similar role in the immediate post conflict environment. UN forces are accompanied by civilian officials, international civil servants and experts. Their presence, military and civilian, has been found to lead directly to an upsurge in prostitution, sexual exploitation of children, drug trading and the organised criminal activity necessary to support prostitution and drug industries. They also affect local economies, especially price structures, with their relative wealth and ready access to US dollars in deeply impoverished societies. Directly and indirectly their presence has serious consequences for the observance of human rights, positively and negatively. It needs to be monitored and the consequences reported.

Human rights violations by UN military and civilian personnel over the past decade have come to light only through media exposure, usually as a result of investigative reporting or revelations of former officials. Those that have seen the light of day have been very serious. No doubt there are many many more, of at least equal seriousness, that have never been exposed. It is simply not good enough for exposure of serious violations to be so arbitrary and indeed so unlikely. It encourages further offending and does nothing to bring justice to victims. The High Commissioner for Human Rights has a clear role to play in these armed conflict situations.

DEVELOPING NEW WAYS OF STRENGTHENING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

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I'd like to thank Judge Koroma, the San Remo Institute and the ICRC for this opportunity to provide remarks on this topic. I know Ed Cummings, who was scheduled to participate on this panel, regrets missing it and would have been here but for the press of business in Washington. I'd like to focus on two points today.

First, as Yves Sandoz has pointed out in his excellent preparatory paper for this Round Table, the measures we have been discussing to strengthen respect for IHL are mutually reinforcing. He states very correctly, for example, that measures dealing with repression have an undeniable effect on prevention. An appreciation of the importance of this point about the synergistic effect of these measures offers, I believe, an important approach to improving respect for IHL.

Indeed, recent events in the U.S. have demonstrated the importance of a broad based approach to these measures - of an approach that emphasizes preventative measures and stresses the importance of national capacities - particularly in terms of domestic law and investigative processes.

Prevention, when it comes to IHL, means, in particular, training of military forces. We know that training military forces in proper humanitarian behavior is crucial to lay the groundwork for disciplined leadership and action during conflict that can prevent wars from descending into barbarism.

One of the pledges the United States undertook on the occasion of the 50th Anniversary of the Geneva Conventions was to redouble our efforts to provide training in IHL principles. We understand how such training contributes to the rule of law and enhancement of a democratic society generally. It's one of the reasons we support the work of institutions like this one that shares our commitment to humanitarian training.

But, no prevention program is perfect. No situation, no society is immune from problems. Let me speak about some of our own problems, starting with what happened at Abu Ghraib prison.

President Bush expressed the view of the American people when he called the events at Abu Ghraib "*deplorable*." As Secretary Powell has recently stated, what the world will now see is how America treats this kind of a problem. We do so with open inquiries, with rigorous investigations (like the Taguba and

Schlesinger reports), with the Congress overseeing the actions of the Executive branch, with free media looking into it constantly, and with accountability through due process under law. We believe that it is through such democratic capacities that such problems should be addressed.

Thus, where there are problems or violations of the law of armed conflict, or when questions of implementation arise, as they will - notwithstanding efforts to prevent them through training and other measures - the importance of having processes already in place to deal with them can't be overstated. It is essential that states have credible, pre-existing domestic mechanisms to handle such situations in an open, just and fair way that ensures both accountability and due process.

The importance of this point is also illustrated by the U.S. Supreme Court decisions dealing with the question of persons detained in connection with the war on terror, as well as by the Administration response to those decisions.

The Supreme Court made important decisions affecting the war on terrorism and civil liberties. And, in turn, the Executive branch has put together a process that responds to the Court's decisions that the detainees at Guantanamo are able to file petitions for *habeas corpus* and seek review in U.S. courts.

In sum, when it comes to the question before us, of new measures, we do not see the need for novelty. We do see, however, validation of the point that the range of measures most commonly discussed, particularly training and national mechanisms, need to be understood as working best when they are both working together robustly.

The second point I'd make today is this. Another reason to focus on national capacities is because of the difficulties in getting agreement in an international framework on capacities such as international fact-finding regimes.

For the last ten years I've had the privilege of participating in many negotiations of IHL treaties. Most recently I've been the deputy head of the U.S. delegation to the negotiations involving the Convention on Conventional Weapons or CCW. Recent events within that framework demonstrate how difficult it is to get agreement on international investigatory mechanisms of any sort.

During the 1995-1996 CCW review conference the US and others proposed that the Amended Mines Protocol include provisions for monitoring and enforcing its provisions. Some of these ideas were adopted (such as a requirement that penal sanctions be imposed against those who willfully kill or seriously injure civilians through violation of the protocol).

However, one feature of the U.S. proposal was not adopted: a regular procedure for international fact-finding regarding allegations of non-compliance. A significant number of delegations refused to consider such procedures, which they saw as intrusions into their sovereignty, particularly in the context of internal armed conflicts that were now to be covered by the protocol.

In fact, the compliance mechanism proposed in 1995 for the Amended Mines Protocol had protections to address these concerns and was, moreover, optional. Still, many governments refused to consider it.

It is true that a formula based on that proposal became part of the Ottawa Convention. But what is now known as Article 8 of the Ottawa Convention, which provides for fact-finding into alleged non-compliance, has, as far as I know, not been employed.

In 2001, the United States tried again. We put forward the substance of our proposal for a fact-finding mechanism in the context of the current CCW effort to agree on a new protocol on anti-vehicle mines. But again it failed to draw support.

As recently as this July, CCW member states were presented with the idea that the Article 90 International Fact-Finding Commission might be somehow utilized by them. But there appears to be little enthusiasm among CCW parties for even this idea.

Finally, I should mention an interesting footnote about the spate of work over the last ten years on CCW. This extended negotiating process has not only produced important developments, it has had benefits in terms normally thought of as preventative. That is to say, the continued engagement in CCW negotiations of representatives from some 90 countries, including the world's major military establishments, and the involvement of leading humanitarian organizations has resulted in substantially increased understanding of the Convention's rules and the principles that underlie them. In other words, the process of reviewing regimes such as CCW can work not only to improve them, but to disseminate and explain them as well.

So while it remains difficult to forge consensus on fact-finding mechanisms for the CCW, we have found great success in dealing with new conventional weapons issues, such as the problems of explosive remnants of war, where we concluded a new protocol last year. We hope also to conclude in the near future a new protocol dealing with the problem of anti-vehicle mines. The fact that this progress has also increased the CCW's adherence and promoted it, is icing on the cake.

Thank you very much.

RED CROSS AND RED CRESCENT NATIONAL SOCIETIES – EXPERIENCE IN RECENT AND ON-GOING ARMED CONFLICTS

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I. Introduction

Due to the title of session IV and its focus on *"National Societies' Experience"*, the focus of the present contribution will up to a certain degree focus on the German Red Cross and its experience with regard to measures for respect and implementation of international law. Nevertheless, references to the German context will be by way of example and will be taken as a basis for reflections of a more general scope.

National Red Cross or Red Crescent Societies form the basic units of the RC/RC Movement[92] and embody its work and principles in 181 countries today. They carry out their humanitarian activities in conformity with their own statutes, under their domestic legislation and in accordance with the Fundamental Principles. Within their own countries, National Societies are autonomous national organizations; they cooperate with the public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering; and they organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts and the victims of natural disasters and other emergencies.[93] National Societies are not restricted to domestic activities. Internationally, they give assistance for victims of armed conflicts, as provided for by international humanitarian law, and for victims of natural disasters and other emergencies.[94]

It is the National Societies which embody most evidently the unique relationship the components of the movememnt have with Governments: they do not only *"co-operate"*[95] with the public authorities in the areas of national preventive health programs and emergency relief operations, but as a voluntary aid society according to the national legislation of their home Governments they are *"auxiliary to the public authorities in the humanitarian field"*[96.]

[92] Article 3 para. 1 Statutes of the Movement.
[93] Article 3 para. 2 subpara.s 1 and 2 Statutes of the Movement.
[94] Article 3 para. 3 subpara. 1 Statutes of the Movement.
[95] Article 3 para. 2 subpara. 1 and 2 Statutes of the Movement.
[96] Article 4 para. 3 Statutes of the Movement.

This auxiliary[97] status[98] dates back to the origin of the RC / RC Movement.[99] It is even a condition for recognition of a society as a National Society of the Red Cross or the Red Crescent – and as such is a precondition for the authorization to use the distinctive emblem of the Red Cross or the Red Crescent[100.]

In times of armed conflict, this auxiliary status becomes even more apparent: According to Article 26 para. 2 GC I National Societies may be authorized[101] to render assistance to the regular medical service of the armed forces of a High Contracting Party of the Geneva Conventions, under the responsibility of this Party.[102]

On the basis of this legal and conceptual framework the question is how – successfully – National Societies have been able to benefit from their specific mandate and to use this unique relationship with Governments in order to strengthen respect for and implementation of the rules protecting human dignity in armed conflict. To admit it from the very beginning, the record of the German Red Cross in this respect is

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[97] The term *"auxiliary to the public authorities in the humanitarian field"* is not defined neither in international humanitarian law nor in the Statutes of the RC / RC Movement. The role of auxiliary to the public authorities in the humanitarian field is characterized by a specific legal status, based on international humanitarian law, the rules established by the movement and the national legislation of each State. The recent study of the auxiliary status of National Societies presented to the 2003 Council of Delegates confirms an evolution in the concept of auxiliary status from the original concept of *"auxiliary to the medical services of the armed forces" to the wider concept of "auxiliary in the humanitarian services of [their] governments"*; in *"National Red Cross and Red Crescent Societies as auxiliaries to the public authorities in the humanitarian field"*, Geneva 2003, pp. 23 and 2.

[98] Yet, the study reveals that there is no common understanding of the concept and that the expectations of different actors vary considerably. The study's concluding characteristics of guidance for States and National Societies in developing their relations almost consequently remain rather general and vague:

- underline the importance of partnership, dialogue and respect for each other and outline the scope of cooperation in the partnership;
- stress the importance of respect for the Fundamental Principles as the guide for the work of the National Societies in the partnership;
- highlight specific points related to the partnership in times of armed conflicts;
- suggest points to develop an enabling environment for the work of the National Society and provide guidance for action in case the integrity of the National Society is in jeopardy;

"National Red Cross and Red Crescent Societies as auxiliaries to the public authorities in the humanitarian field", Geneva 2003, pp. 23-26. The 2003 Council of Delegates mandated the International Federation to continue the study and to elaborate on this guidance; http://www.ifrc.org.

[99] From the very beginnings of National Societies in the second half of the 19th century, the vision of the role of National Societies included not only assistance to victims of conflicts. As early as 1862, Henry Dunant wrote "these Societies could also render great services, by their permanent existence, in times of epidemics, or of disasters such as floods, fires or other natural catastrophes."; *"National Red Cross and Red Crescent Societies as auxiliaries to the public authorities in the humanitarian field"*, Geneva 2003, p. 4.

[100] Article 44 para. 3 GC I.

[101] For example the German Red Cross has been recognized as being authorized to render assistance to the regular medical service of the Bundeswehr (German Armed Forces) by decree of the Chancellor of the Federal Republic of Germany of 27 Sept. 1956, confirmed by decree of 06 March 1991 (with regard to the recognition of the German Red Cross on the territory of the reunified Germany). Yet, some governments and armed forces have asked their National Societies to accompany the armed forces on crisis-response operations abroad, especially in Asia and the Pacific; cf. the VIth Regional Conference for National Societies of the Asian and Pacific Region in 2003. Up to date, such integration of German Red Cross staff into the medical service of the Bundeswehr has never been requested. It is the position of the German Red Cross that it would not be legally obliged to respond to such a request in the positive. It retains the option to reject a request in particular for reasons of incompatibility with its legal obligations, especially the Fundamental Principles or the safety of its personnel; cf. Policy paper of the German Red Cross on Civil-Military Co-operation, adopted by the Presidential Committee on 03 July 2003, under C. II. 1.; http://www.drk.de.

[102] In case of an (international) armed conflict the staff of National RC / RC Societies would not become part and members of the armed forces. It rather would temporarily be incorporated in the medical service. A literal "subjection" of RC / RC staff to military laws and regulations is even the precondition for RC / RC staff to enjoy the same respect and protection as the personnel of the armed forces; Article 26 para. 1 and Article 24 GC I.

not only a success story. Not in all situations it has been possible to overcome the obstacles being presented to an effective use of the specific mandate of National Societies.

The following reflections will focus on the issue of dissemination and several complementing implementation and enforcement activities of the German Red Cross and will conclude with some observations on National Societies' operational activities as measures for respect and implementation of rules protecting human dignity in armed conflict.

II. Dissemination Activities By National Societies

According to the Geneva Conventions[103], the Additional Protocols[104] and customary law, it is a legal obligation of Parties to an armed conflict to undertake, already in time of peace as in time of armed conflict, to disseminate international humanitarian law as widely as possible. The object of such dissemination has to be to make humanitarian law known to the armed forces and to the civilian population. Such dissemination and instruction is undertaken both by the military itself and by civilian actors, primarily by the ICRC and by National Societies[105].

1. Dissemination System of the German Red Cross

Not withstanding other dissemination systems, namely in particular dissemination provided by and within the German armed forces, the German Red Cross has a long-standing expertise in disseminating International Humanitarian Law and the Fundamental Principles of the International Red Cross and Red Crescent Movement. Indeed, such dissemination constitutes the first statutory task of the German Red Cross.

System and expertise of the German Red Cross are characterized by a unique system of voluntary dissemination officers, dissemination activities[106], both on its own behalf and joint activities with other actors as especially universities and the armed forces, as well as periodicals and publications[107]. The federal structure of the German Red Cross is mirrored in the system of voluntary dissemination officers on all three federal levels, *i.e.* a Federal Dissemination Officer[108,] 19 Regional Dissemination Officers[109] on the level of

[103] Article 144 GC I.
[104] Articles 83 AP I and 19 AP II.
[105] Dissemination of international humanitarian law and the Fundamental Principles and ideals fo the International RC/RC Movement for example is the first task mentioned in Article 2 of the Statutes of the German Red Cross (bullet point 1).
[106] Cf. www.drk.de/voelkerrecht/index.html.
[107] Cf. www.drk.de/voelkerrecht/index.html.
[108] The Federal Dissemination Officer has to be a high-ranking international lawyer, who provides legal advice to the German Red Cross Headquarters and the Federal Government. He co-ordinates and supports the activities of the Regional Officers and promotes the advocacy for positions of the German Red Cross with regard to IHL issues on the national and the international level. The present Federal Dissemination Officer is Prof. Dr. Horst Fischer, Professor at the Universities of Bochum (Germany) and Leiden (The Netherlands); see www.horstfischer.info.
[109] Regional Dissemination Officers are lawyers or of an equal qualification. They give advice to the regional branches of the German Red Cross. They co-ordinate and support the district IHL officers, provide backing for regional staff and volunteers in IHL matters and disseminate Red Cross positions on the regional level.

the German *"Länder"* and about 300 District Dissemination Officers[110]. Specific target groups being served by German Red Cross dissemination activities are young lawyers, the armed forces as well as children and youngsters.

2. Confinement of Activities

Major limitations of dissemination activities of a National Society result from the fact that dissemination is usually – but not necessarily and by nature – pursued during peacetime and that this is done also usually – but not by nature – on a National Society's own territory. The addressee is usually a Society's *"proper"* audience, *i.e.* in particular its own specific and general public as well as its own branches and personnel.

German territory has not been the place of an armed conflict since World War II and Germany has been a party to an armed conflict in the Kosovo conflict for the first time since World War II. Until to date the German Red Cross has not extended its dissemination activities abroad – neither to conflict areas nor to non-conflict areas, neither dissemination programs or activities nor personnel / dissemination officers.

3. Problems

One of the major problems with regard to dissemination activities of the German Red Cross is the activation and formation of dissemination officers. Specific strategies have been developed to cope with this problem as well as with the challenge to constantly recruit new and young officers and to institute them properly within the different branches and levels. Yet, the implementation of these strategies within the Society is far from being satisfying. A further challenge is the identification and development of adequate and attractive dissemination tools for target audiences. In this regard the media have turned out to be one of the most difficult audiences in the German context. Whereas during the Kosovo conflict the German Red Cross was faced with an increasing demand for dissemination programs[111] which lasted until about six months after the end of the conflict, the question of how to attract media interest on a more general, constant and sustainable basis is still unanswered and unresolved. Remarkably, a similar phenomenon is to be noticed with regard to the attention of executive levels within the German Red Cross to dissemination issues. Due to strong economic pressure on the majority of branches and units, dissemination of International Humanitarian Law and the Fundamental Principles is far from being on top of the agenda of executives, despite its distinctive quality.

[110] Two thirds out of approximately 540 German Red Cross districts have appointed a District Dissemination Officer. They advise district and local branches on IHL matters and secure formation on IHL and Fundamental Principles on district and local level.

[111] A similar, though less long-lasting effect was experienced after the publication of mistreatments of Iraqi prisoners in May 2004.

III. Complementary Implementation and Enforcement Activities

Complementary implementation and enforcement activities of the German Red Cross focus on the German International Humanitarian Law (IHL) Commission and the contribution of the German Red Cross to ICRC initiatives and projects.

Being established in order to implement Resolution XXVIII of the 20th International Red Cross and Red Crescent Conference with a view to support the ICRC regarding the further development of IHL and being installed in 1968/1973, the German IHL Commission is the second oldest Commission of its type. Its mandate is to accompany and support the IHL legislative process in Germany, to provide a forum for academic discussion between academia and practice in the area of IHL, to give policy advice to both the German Red Cross governance and leadership and to the German Government as well as to disseminate International Humanitarian Law.

Membership in the Commission comprises the leading IHL experts in Germany, representatives of the relevant Government ministries – Foreign Office, Defence, Justice, Interior –, and representatives of the German Red Cross. One of the particularities of the German IHL Commission is that it is hosted by the German Red Cross which also provides the Commission's secretariat. The chairperson is nominated by the Presidential Committee of the German Red Cross and traditionally chosen among the group of IHL experts[112].

The Commission's working method is characterized by a discussion of the development and the implementation of international humanitarian law both on the international and on the domestic level. The members of the Commission look jointly into possible solutions, and the Commission contributes to the formulation of Governmental positions.

In the past, the Commission's activities focused on issues of humanitarian action, Antipersonnel Landmines, small arms and light weapons, children in armed conflict, protection of the Red Cross / Red Crescent emblem and the protection of cultural property. One of the climaxes was its sustainable advocacy on the ratification of the two Additional Protocols to the Geneva Conventions, culminating in the ratification of 1991. Current and recent main activities of the Commission are strongly characterized by its contributions to the preparation of the German Code of Crimes Against International Law and its efforts with regard to the establishment of an information exchange system in international humanitarian law.

Approach, design and the main features of the German Code of Crimes Against International Law have been discussed and agreed on through deliberations in the Commission and a number of Commission members have been members of the Working Group preparing the Draft Code. In February 2003 the Chairman of the Commission addressed an open letter to all chairpersons of National IHL Commissions on bilateral agreements with regard to the extradition of US nationals to the ICC.

The idea of instituting a reporting system in international humanitarian law was revitalized in the context of the 27th Interantional RC/RC Conference 1999, with a view to initiating a system of exchanging information on respect for and implementation of IHL. In 2002, the German IHL Commission presented a

[112] The present chairman is Prof. Dr. Michael Bothe; see www.jura.uni-frankfurt.de/l_Personal/em_profs/bothe/Pers/index.html.

pilot report on implementation and enforcement of international humanitarian law in Germany which was updated in 2004. This report constitutes a joint effort of all Commission members, comprising Government representatives, IHL experts and representatives of the German Red Cross. Given the general reluctance of Governments to join this initiative to establish a voluntary system of exchange of information experienced since the very beginning of the idea of a reporting system, this initiative has so far not – possibly yet – been a success story.

As future projects the Commission has identified in particular the relationship between international humanitarian law and human rights law, the application of international humanitarian law in the fight against terrorism, the question of direct participation of civilians in hostilities, occupation regime and problems of non-international armed conflicts as well as the protection of the emblem.

IV. Operational Activities by National Societies

Since there has not been an armed conflict on the German territory for nearly 60 years, the focus is on international operations of the German Red Cross regarding its experiences in recent and ongoing armed conflicts.

1. International Operations

Mentioning armed conflicts and activities of National Societies in one sentence automatically touches upon the concept of the so-called Seville Agreement of 1997[113], which has been the operational and political legal basis for international humanitarian action of Red Cross / Red Crescent components since then. In the Seville Agreement the three components of the Red Cross and Red Crescent Movement (i. e. ICRC, International Federation and National Societies) agreed on a division of roles and tasks in their international activities.

Key element of the Seville Agreement is the concept of *"lead role"* and *"lead agency".* The concept of the *"lead role"* bases on the Geneva Conventions and the Statutes of the Movement which assign specific competencies to each component. These specific competencies determine the lead role of the respective components.

Roughly, in armed conflicts the *"lead role"* concept implies the lead role of the ICRC[114,] conferring on it the authority of *"general direction and coordination"* of international operational activities[115] in such situations. Within this concept, National Societies delivering humanitarian assistance – traditionally having

[113] Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement – Seville Agreement, Council of Delegates, Seville, 25 – 27 November 1997; www.icrc.org/Web/Eng/.

[114] The ICRC is assigned the role of the lead agency in situations of international and non-international armed conflicts, internal strife and their direct results beyond the cessation of hostilities where victims of a conflict remain in need of relief until a general restoration of peace has been achieved, as well as in complex disasters when armed violence and natural and / or technological disasters coincide (Article 5 para. 5.3.1).

[115] Article 4 para. 4.3 Seville Agreement.

been referred to as *"Participating National Societies"* (PNSs) – may act as implementing agencies. For various reasons, several National Societies have insisted on their statutory mandate[116] to give assistance to victims of armed conflicts bilaterally and with the consent of the operating sister Society – notwithstanding or complementary to the regulation contained in the Seville Agreement.

The nearly seven years of application of the Seville Agreement have revealed the need for evaluation of the Agreement, and a certain necessity to clarify and possibly adapt it to the international environment of today. On the occasion of the Council of Delegates in December 2003[117] delegations from both operating and participating National Societies as well as from ICRC and International Federation listed several weaknesses and open questions. The most urgent questions centered around the authority to qualify a situation as a *"situation requiring a lead agency"*[118], the geographical scope of the qualification of *a "situation of armed conflict"*[119], the fact that National Societies from the very beginning have retained the authority to conduct bilateral operations with the consent of the operating sister Society, and, last but not least, the authority to direct, coordinate and maintain the relationship with the military in the context of operations. The 2003 Council of Delegates decided to request the Standing Commission to establish a Working Group on practical experiences in the application of the Seville Agreement, explicitly not excluding potential amendments to the existing text of the Agreement.[120]

In the area of measures for respect and implementation of rules protecting human dignity in armed conflict, operational activities in the form of delivering assistance and providing protection constitute essential tool for National Societies. National Red Cross / Red Crescent Societies do have both a domestic and an international mandate.[121] Yet, within the present legal and conceptual framework, a certain trend to reduce own humanitarian activities of National Societies has been emerging. Without judging this development as negative or positive, as inevitable or desirable, increasing co-operation, concerted action and co-ordination bears at least the danger of a loss of self-managed humanitarian activities of National Societies – the reason why there is an undeniable truth of the saying that *"everybody cries for co-ordination, but nobody wants to be co-ordinated"*.

Within the International RC / RC Movement, existing procedures and agreements of co-operation tend to endanger immediate action in general, in particular those carried out by National Societies. The more Movement components insist on formal procedures to include their tasks, roles, mandates and interests in assistance and protection operations, the more the urgency of the needs of the most vulnerable are likely to be neglected. We have to be aware that these self-made weaknesses and deficiencies within the Movement are being realized by actors of the international community. It is a fact that these humanitarian actors take

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[116] Article 3 para. 3 subpara. 1 Statutes of the Movement and provided for by international humanitarian law.
[117] Council of Delegates of the International Red Cross and Red Crescent Movement, 1 – 2 December 2003; see http://www.icrc.org/Web/eng/siteeng0.nsf/html/section_council_of_delegates_2003 .
[118] Article 5 para. 5.1 Seville Agreement.
[119] According to Article 5 para. 5.1 A) a) the term *"situation of armed conflict"*, within the meaning of the Geneva Conventions and of this [i. e. the Seville Agreement], covers the entire territory of the Parties to a conflict as far as the protection and assistance of the victims of that conflict are concerned." [emphasis by the author].
[120] Resolution 8; http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UDEPB/$File/anglais-CD-2003-resolutions.pdf.
[121] Article 3 para.s 2 and 3 of the Statutes of the International Red Cross and Red Crescent Movement.

advantage of the Movement components' weaknesses in the competition, both on the domestic as well as on the international level – one of the consequences often being that National Societies react counterproductively, often striving for visibility, funds and recognition. This inevitably leads to a general danger of lack of relevance of the RC/RC Movement.

In this situation, neither to give up striving for a better co-ordinated and more effective assistance and protection for the sake of enhanced respect for human dignity, nor to disclaim interests and potential of Movement components provide a solution to current operative problems. A mutual balance at best effectiveness of each parameter might be the only way out to protect human dignity in armed conflict – simple and tempting as a concept, and yet a maybe desperate attempt in practice. And yet, getting out of this vicious circle, even this vicious spiral, is probably the most urgent challenge today – not only to the components of the Movement in general, but also to National Societies in particular.

2. Civil-Military Relationships

One of the recently most vividly discussed areas of strengthening measures for respect for *"other"* rules protecting human dignity in armed conflict is the area of humanitarian-military relationships. Without entering into a detailed discussion[122] of aspects of civil-military co-operation, co-ordination or any similar relationship, it deserves being mentioned in this context that any discussion of common and differing approaches to humanitarian-military relationships among the different actors of the humanitarian community as well as among Movement components focuses on the respect for and the protection of the Fundamental RC/RC Principles – principles not constituting a dogma for its own sake, but principles constituting rules of crucial importance for the protection of human dignity in armed conflict.

It is not a secret that the German Red Cross is among those National Societies recognizing the fact that there might not only be a conceptual difference between the ICRC approach to civil-military relationships and an approach taken by National Societies, but also that there is a legal difference which must become manifest in certain situations. Unlike the ICRC, National Societies are by their nature and their statutory preconditions *"auxiliary to the public authorities"* in the humanitarian field – and in this respect are legally obliged to be much closer to Governments and their armed forces than other humanitarian actors and also than the ICRC. This being a simple fact, the real question and challenge is what to conclude from this and how to position a National Society with regard to civil-military relationships for the sake of preserving and strengthening the Fundamental Principles in order to protect human dignity in armed conflict. Despite or even due to the different positions being taken by National Societies, we have to do our utmost to balance the auxiliary status of National Societies with the Principles of Humanity[123,] Impartiality[124,]

[122] Cf. f. ex. Workshop on *"National Societies in Civil-Military Co-operation – Questions Challenges, Opportunities and Prospects"* as part of the 28th International Conference of the Red Cross and Red Crescent 2003.

[123] **Humanity.** The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavors, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

Neutrality[125] and Independence[126] – for the benefit of human dignity. In this regard the German Red Cross takes the approach that the legitimacy of assistance provided by the military to victims of armed conflict as such is not questioned with a view to Article 70 Additional Protocol I and respective customary law. However, the *"if"* and the *"how"* of a co-operation between armed forces and the German Red Cross are to be decided on a case-by-case basis. In any case the following two basic preconditions have to be met in each individual case: The absolute primacy of the Fundamental Principles as well as the widest-possible reluctance with regard to a co-operation with Parties to an armed conflict.

V. Concluding Remarks

In conclusion, the German Red Cross experience in recent and on-going armed conflicts is to be summarized as follows:

Dissemination activities by the German Red Cross have generally been limited to the German territory and to German audiences. The main internal challenge is to maintain the attention of executive levels, and the main external one to build-up and to maintain the general, constant and sustainable interest of the public.

The German IHL Commission has proved to be an indispensable instrument for strengthening respect for and implementation of international humanitarian law in order to protect human dignity in armed conflict. Regardless of whether a National IHL Commission is hosted by the National Red Cross/Red Crescent Society or the National Society is participating in an inter-parliamentary National Commission, the National Society has a crucial role to play in pursuing and maintaining the activity and relevance of a National IHL Commission.

The process of working on solutions for the present challenges to international operations of the Red Cross/Red Crescent Movement has to prevent other humanitarian actors from benefiting from too many opportunities to take advantage of the Movement's specificities. There is a clear decrease of relevance of the Movement in the humanitarian environment; components of the Movement sometimes seem to do their utmost to further diminish its own relevance. The priority in all our efforts has to be to make effective use of our unique relationship with Governments for the benefit of protecting human dignity in armed conflicts.

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[124] **Impartiality.** It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavors to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

[125] **Neutrality.** In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

[126] **Independence.** The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

DISSEMINATION IN SERBIA AND MONTENEGRO RED CROSS SOCIETY
- ONE EXPERIENCE -

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Dissemination is surely one of the more important methods of implementation of international humanitarian law. Furthermore, it is a prerequisite for the operational implementation of international humanitarian law under specific real circumstances, in cases of armed conflict and other forms of violence.

Of course, the dissemination of international humanitarian law is primarily the responsibility of the State, because the State is obliged to implement and secure the implementation of international humanitarian law.

However, it is hard to imagine that any State could fulfill this obligation using only its own capacity. It is especially difficult for the State to secure dissemination for all target groups that need and should be targets of dissemination. In such circumstances the role of the National Society of the Red Cross or Red Crescent should become prominent, as the auxiliary governing organ in the humanitarian field. The National Society can, using its capacities and its network of volunteers, which usually covers the whole territory of a State, organize and carry out dissemination towards those target groups where the State is not able to.

Besides, according to the statutory documents of the International Movement of the Red Cross and Red Crescent, the integral parts of the International Movement, especially the National Societies of the Red Cross and Red Crescent have a clear obligation to carry out dissemination of international humanitarian law as well. For National Societies, dissemination is not only a legal obligation, but an opportunity to introduce themselves and their ideas through dissemination and to contribute to minimizing human suffering in possible armed conflicts and other cases of violence, which is the basis of the mission of National Societies. That is a chance for the Red Cross to reiterate in the best way its position as an auxiliary organ of governing authorities in the humanitarian field.

In its long history the Serbia and Montenegro Red Cross Society, especially in the period after the Second World War, has traditionally been dedicated to the dissemination of international humanitarian law and Fundamental Principles of the International Red Cross/Red Crescent Movement in various ways: organizing seminars for different target groups, participating in dissemination activities of government institutions, organizing conferences and round tables that dealt with dissemination. The big contribution to dissemination that the National Society carried out was given by the Commission for International Humanitarian Law founded in 1970. This Commission had a special importance bearing in mind that there existed no state commission. It can be said that the Commission of the National Society practically

functioned as a national commission since it frequently had been the place of discussion of the most important issues of international humanitarian law in the former SFRY, respectively Serbia and Montenegro.

The Commission for International Humanitarian Law discussed plans and programs for dissemination, decided on priorities of those activities and target groups that at a given time were actual. Furthermore, the Commission analyzed work on dissemination programs, suggested and decided on its harmonization and other measures that it found indispensable.

Of course, in all those activities, the most important were particular dissemination activities for specific target groups. Numerous volunteers of the National Society that were previously trained to plan and execute dissemination programs were involved in them.

Through years of experience in the field, a conclusion was reached in the National Society that, regardless of great efforts, dissemination programs cannot cover all intended and possible target groups due to various reasons.

First of all, dissemination was planned and carried out from one center, from the level of the National Society headquarters. Regardless of their number, there were never enough educated disseminators that could answer to all requests and needs.

Secondly, that kind of dissemination brought with it pretty serious expenses. Travel expenses, accommodation, food, etc. had to be secured for participants who gathered at a place that was not their home.

In addition, the greatest problem has to be kept in mind. Participants of those kinds of programs voluntarily respond to invitations and their free time has to be respected. Often it is hard to coordinate dissemination time with their free time, especially if they are traveling to a distant place and stay there for a prolonged period required, separating them from their regular obligations and consuming a significant amount of their time.

Bearing in mind all those experiences, the Red Cross Society has started with designing a new approach towards dissemination since 1997, which should eliminate the perceived problems and make dissemination more effective and rational. Since then, along with exceptional help from the International Committee of the Red Cross – Delegation in Belgrade, a new concept of dissemination has been created that we wish to share with all interested parties, because we think it deserves attention. Meanwhile, we are ready to accept all comments and suggestions that would contribute to the advancement of this concept.

On the territory of the then Federal Republic of Yugoslavia, today Serbia and Montenegro, the National Society formed five dissemination centers. At the moment we have 127 disseminators. All the centers were formed in cities that have universities: Belgrade, Podgorica, Novi Sad, Nis and Kragujevac. At the beginning of this year, 2004, three new centers were formed in cities with universities as well: Kraljevo, Uzice and Zajecar, which means that today eight dissemination centers operate in the National Society. The choice that the centers be created in cities with universities is logical because there is the possibility of recruiting disseminators and dissemination students at these universities[127].

[127] In the attachment there is a map with the area of activity of dissemination centers

For each of the centers a specified number of disseminators are assigned, according to the number of local organizations of the Red Cross that the center covers. Generally, each center organizes, plans and carries out dissemination for 15 to 20 local organizations of the Red Cross. It is intended that every local organization from the area of the dissemination center has at least one trained disseminator. We haven't completely achieved that goal, because there is still a number of local organizations that do not have trained disseminators in their ranks, but we are on the way to securing that in 2004.

Every center has a center coordinator who is a Red Cross volunteer and who is in direct communication with headquarters and with the disseminators who are active in his/her center. Besides the knowledge with which the disseminators are equipped, center coordinators are additionally trained in the fields of planning, organizing and carrying out dissemination activities. In order to secure the best possible coordination and common approach to dissemination, at least three annual meetings of coordinators from all centers are held. These meetings are a chance to share experiences about current dissemination issues for center coordinators, for harmonizing the common approach and solving specific problems that occur in the work. Every center is equipped with indispensable, technically up to date dissemination supplies: multimedia projector, computer, graph scope etc. Furthermore, every center is equipped with the necessary literature indispensable for preparing and organizing dissemination: collection of the sources of international humanitarian law, textbooks and books, monographs and similar material. Every center is supplied with some support material: transparencies for material that is discussed in dissemination programs, CD presentations of those topics, etc. Each coordinator has a special manual for dissemination containing methodology instructions, possible target groups, different ways for organizing events (lectures, workshops, etc.) and articles for 6 basic dissemination topics, including international humanitarian law.

It is important to emphasize that the centers have some freedom in the preparation of annual dissemination plans according to the local circumstances. Namely, there is a minimum of the common program that every center has to carry out during the year and that is planned at the headquarters of the National Society. That minimum common program is determined depending on the priorities of the National Society, in accordance with the current decisions of the International Movement, depending on the present problems in development and adoption of rules of international humanitarian law, etc. In everything else, dissemination centers are encouraged to adapt dissemination programs to the situation in the community in which they operate. That means their obligation to define priority target groups and to adapt the contents of dissemination to the need of those target groups.

It should be pointed out, because of its specificity, especially because of capacity and possibility of realizing cooperation with international organizations, before all the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies and authorized government organs, some activities kept exclusively for the dissemination center in Belgrade, which is in the headquarters of the National Society. Those are, before all, training of new disseminators, programs that are carried out for the Serbia and Montenegro Armed Forces, police forces. That doesn't mean that only the center in Belgrade can anticipate and organize those activities. On the contrary, all centers can create those

activities, but their planning, organizing and executing must include the dissemination center in Belgrade, with the dissemination group from the National Society headquarters. We think that this is necessary in the case of those specific target groups, because expert disseminator knowledge which disseminators who are involved in the Belgrade dissemination center process is indispensable.

It should be pointed out that the unique monitoring and coordination of the work of all centers is secured in the headquarters of the national society, where there is a group of authorized groups for dissemination issues including the high advisor for international humanitarian law of the National Society and his assistant. This group secures communication with the International Committee of the Red Cross which, through its delegation in Belgrade, has been giving an excellent contribution to dissemination programs for some time now.

The task of the group is to follow the work of all centers, to assist them in the preparation of plans and projects for their activities, to give suggestions for perfecting the work of the center and to, when it is possible and necessary, help in finding donators for those programs. Besides this, the group prepares material for dissemination along with center coordinators, which are discussed in the Commission for International Humanitarian Law, it prepares the mentioned minimum of mutual programs, and helps center coordinators in solving current issues and problems that arise while carrying out dissemination programs.

There is an obligation of all dissemination centers to provide their monthly plans to the dissemination group before they are put into effect. The centers have the obligation to provide realization reports, with their comments, noticed weaknesses, suggestions for the future after every single project, as well.

A nearly seven-year experience of this type of organization and dissemination execution lets us draw some conclusions about achieved results:

Unlike the previous period, dissemination of international humanitarian law has become part of the regular program of nearly all local organizations of the National Society. Most of the local organizations have understood that it is an activity that is useful to the community as a whole, that it contributes to the adoption and the development of humanitarian values and that it contributes to the realization of other goals of the activity of local organizations. More than 800 people participated in some of the organized activities.

Dissemination has, according to the number of activities and covered target groups, increased a lot. For example, in the first six months of 2004, till June 30th, 41 different activities and happenings were organized in the National Society in all centers. On average, each center organized five of those activities.

It is of particular importance that a much larger number of different target groups were covered by dissemination compared to the previous period:

- Members of the Army
- Police force
- Health workers
- Teachers
- Members of the Red Cross

- Students of different universities
- Students of secondary schools

We think that one of the most important target groups approached with dissemination is young people. It turned out that it is the target group most open to new knowledge especially of a humanitarian character, and ready to accept values to which the Red Cross is committed and to support them.

Dissemination has become closer to target groups where its activities are carried out. Participants are either from the places where the activities are held or from ones near by. In that way better attendance is achieved because much less voluntarily committed free time is required from them for acquiring new knowledge.

With that, dissemination has become more economical and rational. Dissemination expenses have become drastically lower, which clearly shows that organizing a greater number of activities with equal or less expenses is possible. Or, more importantly, it is possible to cover a significantly greater number of target groups with dissemination.

It is also important that, through this concept, it was possible to make dissemination more attractive for the participants. The equipping of dissemination centers with contemporary technical equipment made it possible to spread knowledge in a modern manner, with presentations that are considerably more attractive than ordinary lectures, *ex catedra*. The equipment is at the disposal of every disseminator and each one is able to prepare his own presentation and to include personal creativity in it.

By creating a network of dissemination centers, it has been possible to accept and carry out some new programs that are not dissemination in its exact form, but complementary to dissemination and contributing to the creation of a favorable atmosphere for dissemination activities e.g. program of exploring humanitarian law, which the International Committee of the Red Cross created for high school students.

Dissemination programs that are carried out in the described manner are becoming more common, to a greater extent, in the local community as programs that contribute to the building of the so called "*civil society*" and are accepted as a contribution of the Red Cross to those efforts.

As a whole, it seems that we can conclude that this concept of dissemination contributes to accepting rules and criteria that are part of international humanitarian law and contributes to a change of attitude and behavior of individuals and groups towards obligations that arise from those rules to a greater extent.

Results achieved do not mean that this concept is perfect and that there are no problems that need solving. It is a concept that requires constant maintenance and effort in the perfection of it. In that view we would like to indicate some of our observations.

The support that the local organization of the Red Cross gives to the concept and each disseminator individually is essential and especially the local organization in the headquarters of which the dissemination center is situated. The management of the local organization must be convinced that dissemination is a program from which they benefit directly. The benefits are many, but basically they can come down to the better positioning of the local organization in the community where it operates, strengthening of the reputation of the organization itself, because they are engaged in generally beneficial activities.

In order to achieve that, in other words, in order to explain to the management in what ways they can use dissemination programs to achieve the mentioned goals, we organized special seminars for them that dealt with communication skills, public relations and marketing. First class professionals in the field were recruited as lecturers at those seminars. A large majority of members of the management who participated accepted the seminars especially well and thought that the seminars contributed to their attitudes regarding the values that dissemination deals with. In fact, we plan to repeat those seminars for members of the management of local organizations who were not included in the previous seminars, at their own request.

One of the key preconditions for the success of this concept is the correct choice of candidates for disseminators and their preparation for training and for the work that they will perform. Disseminators, first of all, must be personally convinced in the value of the contents that they pass on. They have to be ready to put their capacities to work on their own decision and to be aware that their improvement is always ongoing and is not completed only with the initial training. Consequently, they should be individuals that consciously place their free time at the disposal of activities for which they are training.

Naturally, for a disseminator some other prerequisites are required. They should be people who are by their nature and orientation, communicative, tolerant, and ready for dialogue; to dispose with solid general education and vocabulary that allows them to, without great effort transfer acquired knowledge to others. Most importantly, they should be responsible towards their work and respectful of the audience they address.

It is not easy to "create" that kind of disseminator. That requires personal efforts from the candidates as well as serious efforts from every one who plans and organizes their training. Besides all that effort, one should keep in mind that education itself is not enough for any individual to become a complete and all-round disseminator after the initial training. Because of that, the process of disseminator training can not be considered complete after that basic training. All of their individual practical work should be followed; they should be assisted in their first steps of knowledge spreading, with practical advice, preparation of material, conceptualizing activities, in evaluation of what they have done. That is the task of the coordinator of dissemination centers, more experienced disseminators in cooperation with coordinators, dissemination groups in the National Society headquarters. All that is a process that requires time, but it is the only way in which competent disseminators can be formed, who will, with a high degree of certainty, fulfill the goals of dissemination in the expected and required manner.

In addition to all this one should keep in mind that our disseminator volunteers to use his free time for accomplishing activities that he feels worthy and desirable. That means that sadly, in time some disseminators are lost due to personal or some other reasons. In order to reduce those losses as much as possible, a high respect for disseminators is necessary. That means that they must not be overwhelmed with work. Their participation must be reduced to rational dimensions in order to evade their being forced to choose between working on dissemination and dealing with their personal preoccupations.

It is hard to generally define what the tolerable bounds of a disseminator's engagement are, but our experience tells us that they should not be involved in that work more than three to four days a month.

Despite all the measures taken and the engagement plans, it must be anticipated that some of the trained disseminators will cease performing their work. That means that new disseminators should always be recruited and their training should be planned and carried out. In other words, the concept that has been implemented in our case should regularly and in a planned manner be adapted and kept functional in order to provide required results.

MAKING REFUGEE LAW WORK

Erika FELLER
Director, Department of International Protection

Introduction

Sergio Vieira de Mello, then UN Under Secretary-General and Emergency Relief Coordinator, noted in a 1999 presentation, that '*in most contemporary conflicts, international humanitarian law, human rights and refugee law are unknown, ignored or willfully disrespected. The gulf between existing international norms and respect for them on the ground has probably never been so wide. Our greatest challenge is to bridge this gap through the realization of international laws and fundamental principles in practice'.* The cost of failure was horribly underlined in Sergio's death at the hands of terrorists in August 2003, as the Iraq conflict continued to grind on, marked by startling acts of, to use Sergio's words, willful disregard of even basic standards of human decency.

The Sierra Leone conflict saw limbs of opponents regularly hacked off. Rape as a weapon of war was a characteristic of the conflict in Bosnia and Kosovo. Failure to respect the civilian and humanitarian character of the institution of asylum manifests itself frequently from Burundi to Northern Uganda to Ingushetia in militarization of camps and attacks on refugee camps and settlements. The murder of over 150 refugees a week or so ago in Gatumba Camp, Burundi, is a chilling recent reminder. Children are forcibly recruited into armed forces in many parts of the world. Displacement which takes the form of ethnic cleansing, ethnic engineering, is a prevalent feature of modern conflict, of which Darfur is but one recent example. Borders are closed to asylum seekers fleeing conflict, in many parts of the world . The reasons are various: the people have been brought by smugglers; others are responsible to receive them; the conflict is not a recognized one; security of people and the State takes precedence. Whatever the reason, the right to seek and enjoy asylum from persecution, the right to flee for your life, to protect the security and dignity of your person, takes poor second place.

This list could go on and on, unfortunately, and is in itself argument enough for reinforcing implementation of instruments bearing on refugee protection, which have as their purpose to bring back the standards of human decency and make them relevant to the pursuit of whatever may be the goals of any conflict. There are other arguments, though, in favour of a concerted effort to make international refugee law work, besides the fact that non-implementation violates the legitimate interests of refugees as well as their rights and guarantees provided for by international law. [128]

[128] For a detailed elaboration of the arguments (some of which follow) see in particular W. KALIN *"Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond"* in Feller, Turk, Nicholson (eds.), Refugee Protection in International Law.

1. Prolonged toleration of non-implementation by one State violates the rights of the other State Parties to the Convention and other relevant instruments for the protection of refugees. Non-implementation is detrimental to the material interests of those State Parties that scrupulously observe their obligations. Disregard for international refugee law may create secondary movement of refugees and asylum-seekers who have to look for a country where their rights are respected. It forces States that would be ready to treat refugees fully in accordance with international obligations to adopt a more restrictive policy in order to avoid a greater influx of refugees attracted by the higher degree of protection available on their territory. At a regional level, divergent interpretations of the refugee definition or non-compliance may complicate co-operation in the determination of the country responsible for examining an asylum request. Then there is the fact that the *"implementation level",* at a given time, of the provisions of the 1951 Convention by State Parties may affect the quality of refugee legislation adopted by newly acceding State Parties.

2. Non-implementation is a serious obstacle for UNHCR in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations.

3. Prolonged toleration of non-implementation seriously undermines the system of international protection as it was established fifty years ago and threatens a regime that has often been able adequately and flexibly to address and solve instances of flight for Convention reasons. Non-implementation is thus detrimental to the proper management of current and future refugee crisis at the global level and thus hurts the interests of State Parties to the refugee instruments, notably 1951 Convention and 1967 Protocol, and even the *international community* as a whole.

Without wanting to simplify the problem, I would suggest the foregoing are among the more compelling arguments for better implementation. I should add that I come at this issue from the perspective of UNHCR. Non implementation of the refugee instruments has its consequences across the spectrum of flight, at the stage where conflict is forcing displacement internally, then externally, when war refugees are arriving in countries of first asylum seeking emergency sanctuary, as well as when they are able to move further afield. So for us the issue of implementation is not one confined, if you like, to the zone of conflict, but extends to the broader field of flight. I am accordingly now going to take the liberty of looking a little more generally at the dilemmas of non implementation of the standards we would like to see. In so doing I want to resurrect, to some extent, what has been actually a rather long standing discussion in our fora about implementation in particular of the 1951 Convention and what measure we might all collectively consider which could strengthen the Convention regime here.

For UNHCR, the agency mandated to provide international protection to refugees and work with States to find solutions to their problems, these rules, the framework of norms and principles which we work with, are essentially those in the 1951 Convention related to the Status of Refugees, its 1967 Protocol, several very

important regional instruments, notably the 1969 OAU Convention for African refugees and the 1984 Cartagena Declaration, together with a range of human rights instruments bearing on refugee dilemmas. These latter instruments include the so-called Bill of Rights, the Convention on the Rights of the Child, the Torture Convention and a number of regional human rights instruments. International Humanitarian Law, the 1949 Geneva Conventions and their Protocols, are also of fundamental importance.

Strengthened implementation of these instruments has been a goal of UNHCR for quite some years now. The promotion of this is a responsibility inherent in our mandate, spelled out quite specifically in our Statute. Article 35 of the 1951 Convention requires States to cooperate with UNHCR in the exercise of its functions, and in particular to facilitate its duty of supervising the implementation of the provisions of the Convention. This formulation is important in that it imposes a duty, not a discretion, to cooperate. In addition Article 35 is a twofold requirement, relating both to specific responsibilities for the Convention but also to all of the office's other functions. In other words, it establishes a duty to cooperate with UNHCR across the spectrum of its statutory responsibilities, which are much broader than monitoring the implementation of the Convention. It is also, as a consequence, an evolutive duty. In other words, as UNHCR's functions evolve, so does this duty, commensurately. Other instruments which confer on UNHCR a monitoring and implementation responsibility include Article VIII of the OAU Convention and Recommendation II© of the Cartagena Declaration.

The fact of UNHCR`s creation and its specific role in relation to the Refugee Convention and others besides, was an effort by the international community to create a strengthened implementation capacity. UNHCR was one of the first treaty implementation bodies to be set up. It was, some would say, a rather cautious effort. Subsequent international instruments, such as the human rights texts, not only put in place oversight bodies, but also processes of compliance with the oversight function which are absent as far as UNHCR is concerned. There is for example no compulsory reporting mechanism, no required process by which States Parties are held to account publicly for their performance or their failures. This has, over the years, led to calls from many quarters for improved implementation structures. I would like to use the remainder of my time today to examine this concern. Is UNHCR an imperfect implementation mechanism? What more, if anything, is required?

How does UNHCR fulfill its Article 35 responsibility?

International protection on behalf of refugees is UNHCR's core function. It has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection in their country of origin into a broader concept that includes protection not only of rights provided for by the 1951 Convention and the 1967 Protocol, but also of refugees' human rights in general. UNHCR's protection

activities are listed in some detail in paragraph 8 of its Statute. The focus in the Statute is on enhancing the legal framework for refugee protection, promoting measures which improve the situation of refugees and reduce the numbers requiring protection and working with States to achieve admission, the grant of asylum on acceptable terms and the realization of solutions. The Executive Committee of UNHCR has continually encouraged the office to focus on promoting and realizing physical security and basic standards of treatment, notably of the particularly vulnerable, more efficient processes to receive refugees, determine their status and identify their needs, and ensuring the necessary infrastructure is in place for good if not optimal management of the problems. Particularly important components of the office's protection work include:

- Negotiating access to asylum-seekers and refugees;
- Intervening with the authorities;
- Ensuring physical safety;
- Protecting women, children and the elderly;
- Promoting national legislation and asylum procedures; Participating in national RSD procedures;
- Undertaking determination of refugee status;
- Providing advice and developing jurisprudence;
- Staff development.

In all of this, the 1951 Convention serves as the starting point, the broad frame, and indeed regularly the principle foundation. The degree to which it is respected and implemented may well critically determine the success or failure of these efforts.

In past discussions within the Executive Committee, UNHCR identified three categories of obstacles to the implementation of the 1951 Convention and 1967 Protocol[129]: socio-economic, legal and policy, and practical.

1) Socio-economic obstacles: tensions between international obligations and national responsibilities, especially in States facing large-scale influx of asylum-seekers and refugees, but who are suffering their own severe economic problems, high unemployment, etc.

2) Legal obstacles: inconsistencies between existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementation legislation; or implementing legislation which defines not the rights of the individual but rather the powers vested in refugee officials; where the judiciary has an important role in protecting refugee

rights, restrictive interpretation can also be an impediment; maintenance of the geographical limitation by some countries.

3) Practical obstacles: bureaucratic obstacles, including lack of resources and/or poorly trained refugee/migration officials; also, there may be a problem of perception of governmental level, where the grant of asylum is perceived as a political statement and can affect inter-state relations.

The limits of UNHCR's supervisory functions

It is often said that violations which receive wide attention are more difficult to commit than those that remain unknown. The "*Achilles heel*" of UNHCR in this regard is that it is an operational organization that is not only providing humanitarian assistance but also carrying out protection work on the ground on a daily basis. In this role, UNHCR is an advisor to and an (often critical) partner of governments, as well as a supporter or advocate of refugees. It is necessary to distinguish between two distinctive features of UNHCR's protection role: its *"operationality"* and its *"supervisory"* functions. Both may complement each other, but they may also come into conflict, for instance a strong critique of non-compliance would endanger operations on the ground. UNHCR's daily protection partnership with governments on the ground can of course facilitate supervision, in that staff are present and witness not just the theory but the practice of asylum and international obligations. However, the fact that UNHCR has to rely on a functioning partnership for the carrying out of its operations is a limiting factor. There is also a tension between following up on monitoring through representations and advocacy on the one hand and, on the other, the office's dependence on voluntary contributions. In short operations and supervision follow a different logic.

These sorts of considerations have led many to recommend complementary models for supervision of implementation which would leave UNHCR as a key factor here, but not alone. Third party supervision of various sorts has been recommended in addition. The idea here is to put some distance between international critique and the operations. There is an increasingly strong body of opinion that believes that it is essential to separate the role of providing international protection and the process of supervising State Parties on the basis of Article 35 of the 1951 Convention from the highly visible task of third party monitoring of State behavior.

Many of you will have heard of UNHCR's two year process of Global Consultations on International Protection, which the office ran through 2001 and 2002. One of the purposes of that process was to reinforce the commitment of States to implement their international protection responsibilities more concertedly and thoroughly. Full and inclusive implementation of the 1951 Convention was one of the goals and the process

[129] Excom, Sub-Committee of the Whole on International Protection, *"Implementation of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees – Some Basic Questions"*, UN doc.EC/1992/SCP/CRP.10, 15 June 1992, para.9.

led to a number of suggestions in this regard which found their place in the Agenda for Protection which the process put in place. Apart from the Agenda, another important product of the process was the greater clarity given to the meaning and current application of specific articles of the 1951 Convention. I mention this because one such article was Article 35, and the focus of attention here was on how to complement, without diminishing or undermining, UNHCR's supervisory role, all in the interests of strengthening implementation. A number of possible approaches were put forward for further reflection. They included:

- giving the Executive Committee a special role to review problems of implementation, and enabling this through the {re}creation of the a sub committee on protection;

- instituting a process of periodic meetings of States Parties, along the lines of those organized by the ICRC;

- providing for forms of peer review and *ad hoc* mechanisms to allow for a more positive focus on best practices and collective discussion of shared problems which impede implementation, with trade policy review mechanisms as one model;

- more active resort to judicial forums of various sorts, both informal [IARLJ] and more formal [ICJ advisory opinions];

- nomination of expert advisors, Special Rapporteurs, even fact finding missions; UNHCR was, for example, recommended to put in place a process of independent expert reporting – a sort of Special Rapporteur mechanism, if you like - which would enable the High Commissioner to commission reports on any issue within the ambit of his concern which could then be submitted, either by the High Commissioner or directly, for international discussion in the Excom, or indeed other UN bodies as appropriate.

Participants in the process all recognized that their discussions were only the beginning. Any new possibilities should only be explored in tandem with strengthening UNHCR's role, for example by increasing significantly the number of protection staff, by improving cooperation with regional bodies and by UNHCR strengthening its capacity to provide technical, legal and practical advice to governments. There was recognition that supervision is not simply about ascertaining violations, but, perhaps more importantly, it is also about constructive engagement, dialogue and coordination. NGOs need to have a proper role in the process of supervision; information collection, research and analysis must be improved; and throughout there is a need to ensure complementarity with human rights treaty based monitoring systems and to avoid competing interpretations.

All in all participants felt that this process of reflection should continue, expanding to include other participants – as it was held at the expert level – and taking in other perspectives. This Round Table offers me a fine forum to put some of the thinking back on the table, open up the discussion again, and take back from this very interesting audience your recommendations on whereto from here.

A FISTFUL OF DUTIES: MANAGING THE DIFFERENT ASPECTS OF A NATIONAL SOCIETY'S ROLE

THE EXPERIENCE OF THE BRITISH RED CROSS SOCIETY

IN RECENT AND ON-GOING ARMED CONFLICTS

Michael MEYERS

Head of International Law, British Red Cross

A National Red Cross or a National Red Crescent Society is a special organisation with a number of different responsibilities. It is neither a non-governmental organisation (NGO) nor a government agency: it is a private body with certain recognised public functions. A National Society is an auxiliary to the public authorities in the humanitarian field[130], in particular, where a country has armed forces, to the military medical services. It can also take its own humanitarian initiatives[131].Additionally, as a member of the International Red Cross and Red Crescent Movement, a National Society must respect the Movement's Fundamental Principles[132], including neutrality and independence, and as far as possible, support the activities of other members of the Movement, including the International Committee of the Red Cross (ICRC)[133]. National Societies face a constant challenge to be able to fulfil these varied roles and to meet the related obligations.

Each National Society works in its own specific circumstances. Thus, the experience of a National Society in recent and on-going armed conflicts will depend upon whether its country is involved in the particular armed conflict, for example, as a party to an international armed conflict, and/or as the host country for persons fleeing from an armed conflict, or of course, if there is a non-international armed conflict going on within the national borders.

This paper addresses selected aspects of the experiences of the British Red Cross in recent and on-going armed conflicts. Its focus is on providing illustrations from actual events, rather than on the statutory or legal bases for our actions[134].

[130] This is a condition for recognition as a National Red Cross or National Red Crescent Society (Statutes of the International Red Cross and Red Crescent Movement 1986, Article 4(3)).
[131] *e.g.* see Statutes of the Movement, Art.s 3(1) and 3(2).
[132] *e.g.* see Statutes of the Movement, Art.s 1(2), 3(1) and 4(10).
[133] *e.g.* see Statutes of the Movement, Art.s 3(3), 3(5), 4(9) and 7(1).
[134] Some references to the statutory or legal bases are set out in the footnotes.

(1) Special auxiliary role

The British Red Cross Society, in its auxiliary role to the public authorities, has a special responsibility to co-operate with the British government and armed forces in the field of international humanitarian law (IHL)[135]. With respect to the recent armed conflicts in Afghanistan in 2001 and in Iraq in 2003, and continuing to date, the British Red Cross has had close contacts with the British Ministry of Defence and the Foreign & Commonwealth Office on IHL issues. Before the armed conflicts started, there were discussions on IHL matters, primarily of a practical humanitarian nature. There was a clear commitment on the part of government legal advisers to take action to help ensure that the United Kingdom conducted its operations entirely in accordance with the Geneva Conventions 1949 and as appropriate, their Additional Protocol I 1977, and any other relevant laws. Specific matters discussed included the use of the emblem on medical aircraft, and the establishment of National Information Bureaux.

During the course of the armed conflicts, there were consultations on important issues, such as prisoners of war.

The British Red Cross also provided an informal channel of communication between the British authorities and the ICRC on missing persons, the possible appointment of Protecting Powers or of substitutes, and issues of a sensitive nature. This helped to avoid misunderstanding. The National Society was also able to facilitate contacts between the UK Prisoner of War Information Bureau and the ICRC's Protection Division/Central Tracing Agency.

Like many National Societies, the British Red Cross's original role as an auxiliary to the medical services of the British Armed Forces[136] has become less necessary in recent decades. However, the British Red Cross was involved with the planning for reception arrangements for military patients who might have been airlifted to the UK from the theatre of operations. If this had happened, the National Society would have had a support role providing transport and welfare services.

A National Society must always be very careful to safeguard its neutrality. An issue involving neutrality which arose during the Iraq conflict in 2003 was whether the British Red Cross would be compromised by accepting funds from the British Department for International Development for humanitarian work in and near Iraq. Many British NGOs felt unable to accept such funding, feeling that it somehow implied agreement with the decision to initiate the armed conflict and with the UK's participation as a belligerent. On the other hand, the British Red Cross felt that, because of its neutral auxiliary role and the humanitarian needs, there

[135] Statutes of the Movement, Art. 3(2); British Red Cross Society Royal Charter of Incorporation 1997 (revised 2003), Art. 3, and Arts. 5.1-5.3.
[136] This is reflected in Geneva Convention I 1949, Art. 26, and in the British Red Cross' Royal Charter of Incorporation, Art. 3.

was no difficulty in accepting British government funding for Red Cross/Crescent operations in the region, provided that, in the normal way, the funding was able to be spent according to the Movement's Fundamental Principles and procedures. We also recognised that the British government, as a party to the conflict, was carrying out its responsibilities under IHL to provide humanitarian assistance to the affected population.

Our long-standing relations with colleagues at the Ministry of Defence, with the legal advisers of the armed forces and the Foreign & Commonwealth Office permit full and frank discussions. We certainly raise concerns with government and Service colleagues when necessary. An example is when, in the early days of the Iraq conflict in 2003, individual Iraqi prisoners of war were filmed in ways which made them identifiable, thus, in our view, exposing them to public curiosity contrary to Article 13 of the Third Geneva Convention of 1949. We quickly raised the matter, and the relevant authorities equally quickly took the necessary measures to prevent such incidents from recurring in future.

It is important to note that such contacts are always discreet and confidential in nature. It is not the wish of the British Red Cross to embarrass publicly the government or any other organisation or individual. Our aim is to work co-operatively with others in promoting observance of IHL, and we have learned over the years that this is best achieved through mutual trust, respect and open dialogue[137].

(2) Communications

A National Society has a special role in raising awareness and understanding of IHL, in peacetime as well as during armed conflicts[138]. IHL issues are more in the public mind during an on-going armed conflict. It is important for a National Society to understand the limits when considering commenting publicly upon live issues. For example, after the release of the photographs showing prisoner abuse at Abu Ghraib prison in Iraq, the British Red Cross felt that it was not its role to criticise any authority involved, but rather, to explain the relevant law and to support the ICRC and the importance of the confidentiality of its reports.

We are also pro-active in helping to ensure respect for IHL. As an illustration, during both the Afghanistan and the Iraq conflicts, we were in contact with media outlets to try to ensure that they did not expose prisoners of war to public curiosity. Most British television companies and newspapers took steps to ensure that the identity of such individuals was not revealed. This was done by pixolating the faces of individual prisoners of war or by showing images of them from behind or at a distance.

[137] Indeed, the relationship of mutual support between States and the components of the Movement is prescribed and defined in the Statutes of the Movement e.g. in Art. 2.
[138] *e.g.* Statutes of the Movement, Art. 3(2).

Our representations were not always successful, however. After the capture of Saddam Hussein in December 2003, we engaged in protracted correspondence with a well-known British news service regarding use of several unauthorised photographs on their website which, we felt, showed Mr. Hussein in a humiliating and/or degrading situation. We understand that the capture of Mr. Hussein was a major news story, and that there may have been justification to show a photograph of him upon his initial capture *e.g.* to demonstrate that he was in custody. However, we did not feel that there was justification for further photographs, and we believed that he was entitled to the normal protections given to prisoners of war. The news service concerned did not share our view, however, feeling that it was editorially justified to use the images, in part because they had appeared on other sites and in newspapers. We have had to accept a difference of view on this issue with the news service concerned. However, we intend to continue to be in contact with this British media outlet, and others, on the general issue of the protection of prisoners of war against public curiosity, with a view to agreeing on a modern, practical interpretation of the prohibition in Article 13 of the Third Geneva Convention. In addition, we hope to offer suitable training or information to journalists on relevant provisions of international humanitarian law.

At the beginning of the Afghanistan conflict, we arranged a briefing on the IHL issues for representatives of British aid agencies. During the Iraq conflict, the British Red Cross might have done more to help explain the relevant IHL rules to UK aid agencies when the latter were critical of the humanitarian assistance delivered by the British forces in and around Basra. We might have helped facilitate communications between the Ministry of Defence and certain British aid agencies on this issue and in a more general way.

Although the situation in Northern Ireland was never categorised as an armed conflict by the majority of commentators, the British Red Cross cross-border and cross-community dissemination project, with the support of the ICRC and the Irish Red Cross Society, sought to promote some common humanitarian ground between different sections of the population.

(3) Support to the Red Cross and Red Crescent Movement

The British Red Cross is often in the fortunate position to be able to support ICRC and International Federation operations related to armed conflict[139]. We seek to respect and support Movement policies such as the Seville Agreement[140] which, among other matters, seeks to harmonise the co-ordination of roles and responsibilities in international relief operations. We understand that each National Society has its own

[139] Examples of British Red Cross contributions to ICRC operations include the provision of tracing expertise in the Middle East region in the run-up to the hostilities in Iraq in 2003, and technical support to the Urban Voucher Programme undertaken in the occupied Palestinian territories, also in 2003. During the Iraq conflict in 2003, the British National Society also assisted the Syrian Red Crescent, through the International Federation, in responding to the refugee flow from Iraq.

requirements to be seen as a relevant humanitarian organisation within its own country. Nevertheless, the need for such visibility domestically should not override the primary purpose of Red Cross and Red Crescent protection and assistance which is to help the victims in an efficient and effective fashion, and in ways which do not detract from other Movement humanitarian operations related to the same armed conflict.

The diverse nature of the British population sometimes gives rise to unexpected issues. For example, in December 2003, during the occupation by Coalition forces in Iraq, supporters of the People's Mujahadeen of Iran (PMOI) started to stage regular demonstrations outside the British Red Cross national headquarters. The PMOI is an Iranian opposition group, and their supporters were concerned that PMOI members in Ashraf camp in Iraq would be forcibly repatriated to Iran. We had to learn quickly about the issue and deal with their concerns. Consultation with the ICRC, which had the lead role in dealing with the matter within the Movement, was very helpful[141]. We learned that other National Societies in Western Europe had had similar contacts with PMOI supporters in their countries. In fact, there was very little that the British Red Cross or other National Societies could do, and even though the ICRC did its best, in the end, the decision was one for the governments of the Coalition, rather than for the Movement. This experience also illustrates a general misconception that the Red Cross and Red Crescent is a unitary organisation, and is able to resolve nearly all difficulties.

More generally, a National Society is frequently the public face of the Movement in its country, and is often asked to justify or explain actions undertaken by other components over which it has little or no control. This can sometimes be tricky when a Society wishes to appear supportive of a component of the Movement but may itself have doubts about the advisability of its pronouncements or actions.

As an example, one sister National Society made a rather intemperate public statement following the allegations of prisoner abuse in Iraq. The British Red Cross, although understanding very well the humanitarian concerns, did not agree with the mode of expression, which raised questions in the UK and which, potentially, could have a negative impact on the perception of the Movement's neutrality.

(4) Maintaining neutrality

One of the themes underlying many of the preceding situations is the importance of maintaining the Movement's neutrality. It is not only the way in which a National Society is perceived in its own country which is important to consider, but also, the effects of the National Society's actions on the work of the ICRC and other components of the Movement.

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[140] Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, adopted by the Council of Delegates of the Movement, Seville, November 1997.

[141] The ICRC has a recognised role under IHL to provide protection and assistance to protected persons in occupied territory *e.g.* see Arts. 10, 30 and 143 of the Fourth Geneva Convention 1949. In the case of the PMOI mentioned in the text, the ICRC was in direct contact with all the Red Cross and Red Crescent organisations and State actors concerned.

Following the allegations of prisoner abuse at Abu Ghraib, the British Red Cross decided not to re-engage a supplier whose parent company is reported to have supplied personnel to the detaining authorities. Even though the renewal of such a commercial relationship by the British Red Cross would not in itself compromise its neutrality, nevertheless, it was felt that there could be a perceived conflict between, on the one hand, the British Red Cross's association with the company, and, on the other, the ICRC's role in visiting Abu Ghraib and other prisons in Iraq.

The efficacy of a National Society's work during armed conflict depends upon its integrity and activities at all times. If a National Society does not respect the Fundamental Principles during peacetime, it will be more difficult for them suddenly to adopt a neutral role during an armed conflict. Thus, preparedness to fulfil a National Society's special role as an auxiliary and in support of other components of the Movement is a continuing task.

(5) Concluding remarks

This overview of the experience of one National Society, the British Red Cross, in recent and on-going armed conflicts shows the differing roles of a Society and the need to strike a correct balance between them. A National Red Cross or Red Crescent Society, with its special status and commitments nationally and internationally, often occupies a middle ground, and a support function. This can provide unique opportunities for humanitarian service. But it can also be a challenge, and this underlines the importance of staying close to our guiding Fundamental Principles, which keep us focused on the correct path and enable us to carry out our special responsibilities and varying roles appropriately and effectively.

The experience of the British Red Cross also illustrates that our ability to contribute constructively in the dissemination and implementation of IHL has enhanced our capacity to act as a useful auxiliary to our public authorities and armed forces, and to serve as an impartial reference source respected by others. All National Societies have a special, internationally recognised role in the field of IHL[142], as well as a unique auxiliary status to their governments. One way to strengthen measures of respect for IHL is to strengthen the capacity of National Societies in that field, which will also help to increase their ability to act as a valued partner to the government and armed forces of their country. The National Society's profile and utility among sections of civil society may also increase.

With respect to the auxiliary role of National Societies, the study the International Federation of Red Cross and Red Crescent Societies is continuing to carry out on that subject, as requested by the 28th

[142] See M.A. MEYER, *"The role of a National Society in the implementation of international humanitarian law – taking up the challenge!"*, International Review of the Red Cross, No. 317, 1997, pp. 203-207.

International Conference of the Red Cross and Red Crescent[143], is very important. It can help to reinvigorate or restate the auxiliary role of National Societies, and define its continuing relevance in Movement actions and for governments.

[143] 28th International Conference of the Red Cross and Red Crescent (Geneva, 2003), Resolution 1, operative paragraph 13. As the resolution notes, more in-depth consultations are needed with States, as well as with National Societies.

SUMMARY SPEECH

Jovica PATRNOGIC
President IIHL

1. The problem of strengthening respect for IHL lies at the root of our activities. This Institute has existed for 34 years and not a single year has gone by without our having to address the issue.

2. The reason for this is simple: even if the law were perfectly clear, and universally disseminated, there would always be circumstances in which at least one Party to an armed conflict – sometimes both Parties – would choose to stray from the accepted norm, pleading one excuse or another. Since IHL is not always perfectly clear, and it is not universally disseminated, its implementation leaves a lot to be desired.

3. But we must bear in mind that implementation, however important, is not the only issue. The proliferation of armed conflicts, and the huge experience accumulated, lead to the inevitable conclusion that some modern problems have not yet been fully addressed.

4. I shall give only three or four examples:

a. In the "*war on terrorism*" there are a number of unresolved questions, not least the legal mechanism of handling the threat of suicide "human bombs". Of course, torture in all its ugly manifestations must be ruled out. But it is not enough to say what measures must not be used by law enforcement agencies. We must also be in a position to tell them what legal means and methods are available in an effective way.

b. What about the right of humanitarian assistance, in wartime as well as in peacetime (international disaster response law)? There is much talk but little hard law guaranteeing the successful granting of such assistance by the international community, irrespective of the wishes of the central government which may be indifferent to the fate of a minority starving to death.

c. In this context, what are the guidelines for offering assistance? There are many new players in the field, and not all of them believe that the traditional principles which have guided the Red Cross Movement should be observed. Do we not need a code of behaviour that will be binding on all the segments of the civil society active in this arena?

d. Again in the same context – but also in others – should we not pay more attention to what the UN Security Council is doing in the framework of IHL, and should we not try to cooperate more closely with the Security Council (as well as coordinate activities with it)?

5. All these examples, and I could give you many others, raise serious issues that require (a) serious thinking and study; (b) discussion with all the parties concerned – on the governmental levels – in order to offer solutions or at least options.

6. The Sanremo Institute has always been at the forefront of this cycle of studies/position, papers/discussion and proposed solutions. As we enter our 35th year, I am confident that our role in the development and affirmation of IHL has not diminished: if anything, the challenge has grown. We intend to prove, with your help, that we are up to that challenge.

ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

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- In every armed conflict, thousands or even millions of people are forced to flee their homes. As refugees, internally displaced persons (IDP) or externally displaced persons who do not meet the 1951 Refugee Convention (RC) definition they are in need of international protection and humanitarian assistance. Representing the Swiss Federal Office for Refugees, it is my task here today to ask from a Swiss perspective / a Government's perspective what the role of UNHCR, as a major international humanitarian actor, should be in a forced migration emergency situation. In sharing my thoughts and ideas I will draw in particular on the experiences UNHCR made during the Kosovo conflict.

- The recent conflicts in Bosnia-Herzegovina and Kosovo produced the two largest refugee crises in Europe since the Second World War. During the Bosnian war over half the population of some 4.3 million was uprooted. In Kosovo, after a few weeks' time, the refugee movement consisted of over 850,000 people, of which more than 55,000 found refuge in Switzerland. In both conflicts the UN Secretary General assigned UNHCR lead agency responsibility for refugees and IDPs. Switzerland supported the Secretary General's decision, since co-ordination and cooperation among the many humanitarian actors, in accordance with their respective mandates and capacities, is key in safeguarding and protecting the lives of thousands. However, UNHCR's broad mandate revealed weaknesses of the agency's emergency response capacity and presented unique challenges to its protection work. Due to the fact that NATO was both a Party to the armed conflict and a central actor in providing humanitarian assistance to refugees and IDPs, UNHCR's cooperation with this organization during the Kosovo conflict raised in particular questions with regard to its independence and impartiality and the civilian and humanitarian character of its mandate. It also showed the agency's dependence on the willingness of the other (humanitarian) actors involved in the conflict to be coordinated. What lessons can be learned from these past experiences?

- The Kosovo crisis with its sudden and massive exodus of refugees into neighbouring countries reminded us all in a most dramatic way of the fact that the primary responsibility to protect refugees and other persons in need of international protection lies within States. Living up to their international obligations also entails a duty of States to actively cooperate and collaborate with UNHCR in carrying out its protection mandate.

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- As to the question of what UNHCR's role should be in strengthening the respect and the implementation of rules protecting human dignity in armed conflict, the Kosovo crisis showed us that UNHCR has to set the right priorities. In our view the following are the most important:
    - (1) In armed conflicts – as in any other refugee situation - UNHCR's actions must be guided by the core aspect of its mandate, which is the worldwide protection of refugees and the search for long term solutions to their problem. Thereby, the mandate requires it to work in *"an entirely non-political"* way (UNHCR Statute, para. 2). Switzerland has repeatedly stressed that in all circumstances the fundamental humanitarian principles of impartiality, neutrality and independence apply.

      Switzerland has always strongly supported UNHCR's efforts to strengthen the respect for human rights and humanitarian law and, in particular, refugee law. Respecting these laws and ensuring that they are respected involves their promotion and dissemination, informing the different actors, raising their awareness and making them responsible. The actors concerned are States, in particular their armed forces and police, but also armed non-state actors. Here, I may add, that Switzerland, in a very practical way, has been active in helping to build a functioning asylum and refugee protection system in States Parties to the Refugee Convention, especially in Central Asia and the Balkans, through our training courses offered to these countries.

      The important role UNHCR plays in securing the rights and safety of refugees and enhancing the understanding of refugee protection has been stressed in numerous ExCom Conclusions. I may name, for instance, ExCom Conclusion No. 22 (Protection of Asylum-Seekers in Situations of Large-Scale Influx), 48 (Military or Armed Attacks on Refugee Camps and Settlements), 51 (Promotion and Dissemination of Refugee Law), or 72 (Personal Security of Refugees).

      In this regard, UNHCR has to be commended for defending principles of refugee protection in a highly politicized environment during the Kosovo crisis where it was facing contradictory demands by important donor States.

On the other hand, due to a lack of preparedness, a limited emergency capacity and the heavy involvement of the NATO in providing humanitarian assistance, the agency played only a relatively limited role in providing humanitarian assistance.

- (2) In view of the often complex nature and the rapid onset of emergencies, UNHCR should therefore continue its efforts to develop and implement early warning, preparedness and response mechanisms to react rapidly in refugee emergencies. An important step in this direction has been made with the creation of an "Emergency Response Service", which reports directly to the High Commissioner.
- (3) Additionally, in order to ensure the effectiveness of the humanitarian operation, UNHCR should build strong partnerships and aim at strengthening coordination, cooperation and collaboration with other UN (including OCHA) and non-UN humanitarian actors.

- Therefore, Switzerland has supported the recommendations made by UNHCR's Evaluation and Policy Analysis Unit with regard to the agency's emergency preparedness and response in the Kosovo refugee crisis and has positively taken note of the progress that has been made in implementing the Plan of Action[144] to increase UNHCR's effectiveness in emergencies.

- In carrying out its protection work in armed conflicts, however, it is our view, that UNHCR should respect and duly take into consideration the following principles and boundaries:
  - (1) UNHCR does not have a general mandate for the protection of IDPs. Though it might seem to be a "*natural*" outcome of its humanitarian mandate on behalf of persons displaced by persecution, conflict or massive violations of human rights, UNHCR's assistance of IDPs, as has taken place in various conflict situations from at least the 1970s, has to meet certain requirements. According to established practice there has to be "*a request or authorisation from the Secretary General or a competent principal organ of the UN; consent of the State concerned, and where applicable, other entities in a conflict*".[145] I would like to stress, however, that in armed conflicts, it is the ICRC that is entrusted with the protection of the civilian population, which IDPs are part of. As High Contracting Party and the Depositary of the Geneva Conventions and their Additional Protocols it is Switzerland's special duty to call upon all international actors, be they States or international organizations, to respect ICRC's unique role and mandate with regard to the assistance and protection of all victims of armed conflicts and to comply with the principles set forth in the Geneva Conventions. What is needed, however, is a close coordination and cooperation between UNHCR and ICRC in their relief and protection efforts, thereby taking into account their respective mandates.
  - (2) We recognize that in order to carry out humanitarian operations more effectively UNHCR may collaborate with the military, as has been the case in the Kosovo and other conflicts. Indeed, the military can provide a secure environment for humanitarian organizations, give support in terms of logistics, transport and communication. However, there must be clear limits to the involvement of the military in the work of UNHCR (and the other humanitarian actors), with the military – contrary to NATO's heavy involvement in the Kosovo crisis - playing only a subsidiary role. UNHCR's impartiality and neutrality has to be preserved, which means there has to be a separation between military and humanitarian activity. Otherwise, humanitarian agencies' actions may no longer be perceived as impartial and their workers may easily become targets of violence, as has sadly been the case most recently in Afghanistan and Iraq. And as we have seen in the Bosnian conflict, even the cooperation with a UN peacekeeping force can be a mixed blessing. In Bosnia, UNPROFOR had the responsibility to assist in "*creating conditions*

[144] EC/51/SC/CRP.4.

[145] The other requirements are: access to the affected population; adequate security for staff of UNHCR and implementing partners; clear lines of responsibility and accountability with the ability to intervene directly on protection matters; and adequate resources and capacity (UNHCR position paper, March 2000).

for the effective delivery of humanitarian aid" and protecting six internationally created safe zones.[146] While UNPROFOR did a lot to improve the security of humanitarian workers, the presence of UNPROFOR escorts sometimes had the effect of drawing fire onto UNHCR convoy teams, especially after UNPROFOR's call for punitive NATO air-strikes against the Bosnian Serbs.[147] This example illustrates the intricate situations in which humanitarian organizations like UNHCR find themselves in today's conflict zones. Therefore, every decision to work with a military/peacekeeping force must be based on a careful assessment of the risks and benefits involved for the humanitarian workers themselves and for those who are in dire need of protection and humanitarian assistance.

- (3) Addressing negative perceptions of bias and partiality also requires that UNHCR undertakes to draw the attention of donor States to conflict-driven refugee emergencies, especially in Africa, that are too often ignored by the international community.

- As a final remark I would like to highlight the importance of being innovative and flexible in finding ways to enhance the protection of refugees in armed conflicts. UNHCR has led the way to such new solutions when it promoted the concept of temporary protection during the war in Bosnia in the mid 90s. Not only did this new policy address the reluctance of Switzerland and other European States to provide a permanent protection status to such a high number of persons in need of protection, with the temporary protection scheme, which included a clear return perspective, UNHCR also ensured that the policies of receiving countries did not contribute to further ethnic cleansing.
- The challenges posed by complex refugee emergencies may also call for exceptional measures in order to alleviate the burden of those States that are most affected by a refugee influx. As one such example I may mention the Humanitarian Evacuation Program (HEP) during the Kosovo crisis, when UNHCR transferred refugees out of the region (Macedonia) to third countries. While the idea was good, the HEP was marred by inconsistency by States and UNHCR. Although Switzerland was heavily burdened by spontaneous movements and hosted more than 55,000 Kosovo refugees, this fact has not been taken into account by UNHCR when it assessed the responsiveness of States in accepting Kosovo refugees under the HEP. If we want a real burden-sharing mechanism, UNHCR will therefore have to further develop the concept of a HEP, together with States concerned and international organizations (EU).

- In conclusion, I would like to stress once more the importance of UNHCR's role in protecting human dignity and alleviating human suffering during armed conflict situations. For UNHCR to be able to carry out its humanitarian mandate, it is our obligation as States (Parties to the RC and the Geneva Conventions) to respect the independence and neutrality of UNHCR (and all the other humanitarian

[146] S. F. MARTIN, *"Forced migration and the evolving humanitarian regime"*, New Issues in Refugee Research, Working Paper No. 20: Geneva, Switzerland: UNHCR, July 2000, p. 23.
[147] M. CUTTS, *"The Humanitarian Operation in Bosnia: 1992-95: the Dilemmas of Negotiating Humanitarian Access"*, New Issues in Refugee Research, Working Paper No. 8,: Geneva, Switzerland: UNHCR, May 1999, p. 10.

actors) and to fully adhere to the principles of international humanitarian law, human rights and refugee protection.

STRENGTHENING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW TRAINING – ROTE OR ETHOS?

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Prior to his election in 1997, the British Prime Minister, Tony Blair, when asked what were his priorities for office said, "*Education, Education, Education*".[148] That should be the motto of all interested in upholding the law of armed conflict as well. In recent years, the emphasis of many international NGOs and others has been on the enforcement of the law of armed conflict.[149] This has been no bad thing. Enforcement mechanisms have been badly lacking and the world has watched whilst atrocities were committed with apparent impunity. Finally, patience snapped and we saw the emergence of the International Criminal Tribunal for the Former Yugoslavia[150] and the International Criminal Tribunal for Rwanda[151] together with the Special Courts for Sierra Leone,[152] East Timor[153] and Cambodia.[154] In the midst of all this we had the ICC Statute[155] and now we wait with bated breath to see the fate of Saddam Hussein before the Iraqi Special Tribunal.[156]

However, my purpose is to look at the other end of the spectrum from enforcement – training. This seems to have fallen off the radar slightly though I would argue that it is at least, if not more, important. After all, prevention should always be more important than cure. A number of other contributors to the Round Table have already referred to the need for dissemination and, indeed, where too more appropriate to discuss training in the law of armed conflict than here in San Remo, where courses have been run for decades bringing together military and civilian defence employees and introducing them to the law of armed conflict as a practical set of rules.

I take as my starting point here, Article 127 of the Third Geneva Convention:

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[148] See speech by Tony BLAIR MP to Ruskin College Oxford on 16 December 1996, quoting from his earlier speech to the Labour Party Conference, accessed at http://www.leeds.ac.uk/educol/documents/000000084.htm

[149] See the achievements of the NGO Coalition for an International Criminal Court as outlined in W. PACE and M. THIEROFF, *"Participation of Non-Governmental Organizations, in The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results"*, Roy Lee, Ed., Kluwer Law International, 1999 at p.391.

[150] Established by UN Security Council Resolution 827 of 25 May 1993. The Statute can be found at UN doc. S/25704, 32 ILM at p.1192.

[151] Established by UN Security Council Resolution 955 of 8 November 1994. The Statute can be found at UN doc. SC/5974, 33 ILM at p.1598.

[152] Established on 16 January 2002 by agreement between the United Nations and Sierra Leone, following UN Security Council Resolution 1315 of 14 August 2000. The website of the Court is at http://www.sierra-leone.org

[153] Special Panels of the Dili District Court, established by the United Nations Transitional Administration in East Timor (UNTAET) under UNTAET Regulation 2000/11 of 6 March 2000.

[154] See the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, adopted by the National Assembly of Cambodia on 2 January 2001, accessed at http://www.genocidewatch.org/CambodianTribunalLaw.htm.

[155] The Rome Statute of the International Criminal Court of 17 July 1998, 37 ILM (1998) at p.999.

"*The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.*"[157]

Similar provisions are to be found in the other three Conventions.[158]

I want to take three points here and stress them.

The first point is the word *"principles"*. That word is important here because it implies more than rote learning, more than manuals. The Geneva Conventions alone contain 429 detailed articles. One cannot expect the average soldier (if there is such a thing) to "*read, mark, learn and inwardly digest*" all of that. However, he or she does need to know those parts that are of direct relevance to the task allocated, and the principles that lie behind them. The word "*principles*" implies an ethos, a philosophical outlook, and it is here that training comes into its own.

It is no good here imparting head knowledge only. The soldier must believe in what he is doing. Sometimes we are told that our soldiers know "*what is right*". But the history of war shows us that that is not correct. At My Lai, US forces certainly did not do "*what is right*".[159] In Somalia, Canadian and other NATO countries ran into problems.[160] In Iraq today, we see in Abu Ghraib and other examples, the failure of the policy of relying on the inherent fair-mindedness of the soldier. All these examples illustrate, in my opinion, a failure of training.[161] Of course there were other reasons too but the fundamental issue is that the soldiers did not understand the parameters of what they could and couldn't do – and broke those parameters. War is a dirty business and unless parameters are clearly marked and the soldier understands them, the danger of excessive and wrongful actions will remain. It was as a result of My Lai and Somalia that the US and Canada

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[156] See *The Statute of the Iraqi Special Tribunal*, of 10 December 2003, accessed at http://www.cpa-iraq.org/human_rights/Statute.htm

[157] Art.127, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), printed in *"Documents on the Law of War"*, A. ROBERTS & R. GUELFF (Eds.) (Hereafter *"Roberts & Guelff"*), 3rd Ed.,2000, Oxford University Press at p.295.

[158] See Art.47, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Art.48, Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Art.144, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), all of 12 August 1949, Roberts & Guelff, *op. cit.*, footnote 10, at pp.214, 237 and 351 respectively.

[159] For a commentary on the events at My Lai on 16 March 1968, see Jeffrey Addicott, The Lessons of My Lai, Military Law and Law of War Review, Vol.XXXI (1992) at p.73.

[160] Some of the Canadian and Belgian cases arising out of the UN operations in Somalia are abstracted in How Does Law Protect in War? (Marco Sassoli and Antoine Bouvier Eds.), ICRC, 1999, at pp.1062ff.

[161] In the Executive Summary of his Report into Abu Ghraib, Lieutenant General A. JONES commented that *"abuses would not have occurred had doctrine been followed and mission training conducted"*. See para.1.d (6), Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade by LTG Anthony R Jones (Jones Report), accessed at http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf

introduced their excellent law of armed conflict training packages.[162] One of the questions that the inquiries into Abu Ghraib will no doubt be asking is what training did the participants receive and whether it was adequate. Initial reports seem to indicate that there was a conflict between some of the instructions being given on the ground and some of the Army Field Manuals which were being referred to as out of date.[163] A soldier requires clarity. If he has conflicting instructions, the danger is that he – or she - will ignore all.

To this end training has to be effective. Too much of law of armed conflict training is not. In many countries, law of armed conflict is taught as a stand-alone subject. The poor instructor is usually given the worst time for the class--when students are tired, distracted, or otherwise disinterested. The very word "law" is an instant turn off for most soldiers.

This brings me to my second point. The Geneva Conventions require High Contracting Parties:

"to include the study [of the law of armed conflict] in their programmes of military and, if possible, civil instruction"[164]

Note what is not required – separate programmes. If we want to develop an ethos, I would suggest that the aim should be to make acting by the rules instinctive. For this to happen, the law of armed conflict needs to be seen not as an overlay on other training, but as an essential underpinning element. It needs to become an integral part of ordinary military training, not some adjunct. It is not difficult because most of the law of armed conflict is military common sense. If there is no military advantage in destroying an object, why waste time and resources in attacking it? You do not need to be told that it is unlawful to attack it, even though it will be.[165] Medical personnel are taught to treat all wounded and sick on the basis of medical priority. That is medical ethics--and also reflects the law of armed conflict.[166]

There is a further danger in not integrating law of armed conflict training: false ideas will develop. It is surprising how line officers continually think that the law restricts their operations when often that belief is wholly incorrect. This can also work the other way where the operational staff genuinely believe something to be a legitimate target though a lawyer would (or should) know that it is not. In many countries, military lawyers are thin on the ground--or even nonexistent--and it is therefore rare for them to be included in

[162] See H. PARKS, *"The United States Military and the Law of War: Inculcating an Ethos – International Justice, War Crimes and Terrorism: The US Record"*, Social Research, Vol 69, No.4, Winter 2002, at pp. 981-1015.
[163] LTG JONES referred to FM 34-52, Intelligence Interrogation, being *"currently under revision"*. He continued that *"there was confusing and sometimes conflicting guidance resulting from the number of policy memos and the specific areas of operation the various policies were intended to cover."*, see para.7.b(1) of the *JONES Report*, *op. cit.*, footnote 161.
[164] See footnote 157
[165] See Art.52(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Additional Protocol I), *Roberts & Guelff, op. cit.*, footnote 157, at p.450.
[166] See Art.12, First Geneva Convention, Roberts & Guelff, *op. cit.*, footnote 157, at p.201.

exercise planning or exercise play. This leads either to a failure to exercize legal points at all or, still worse, false assumptions becoming engrained into operational thinking.

This brings me back to the idea of an ethos. The lawyer is merely an adjunct in the task of creating such an ethos. The prime responsibility rests with the commanders. A good commander wants a disciplined force; anything else is not an army: it is a mob, a rabble and as dangerous to its own side as it is to the enemy. A disciplined force will follow its leader; a rabble is as likely to shoot him in the back! Discipline and leadership are tested to the utmost in the crucible of conflict. History shows that leaders can be good or bad. If we want to instill in our soldiers an ethos of doing what is right, of moral integrity and obedience to the law, then it is to the commanders that we must look. Unless the commander is prepared to take his or her responsibilities in this field seriously, there is little chance of anyone else doing so.

The need for an ethos is also reflected in the changing nature of conflict. The days of conflicts taking place between regular professional armed forces as in the Falklands/Malvinas conflict have almost gone. Today, we are generally dealing with militias and irregular forces, if they are forces at all. Furthermore, those regular forces who are involved have often not received up-to-date training. This difference is reflected in the importance given to respect for the law of armed conflict.

In the crucible of conflict, particularly a conflict based on ethnicity rather than any political factor, head knowledge gives way to emotion. Hatred takes over. What price training then? Unless head knowledge is taken further and converted into an ethos, a belief in the rightness of a course of conduct, that head knowledge will not prove strong enough to stand against other pressures. You may know what you are doing is wrong but you begin to justify it by other means. If the other side does not play by the rules, it is hard to do so yourself--unless you have a firm belief in those rules not just as rules but as a right course of conduct.

Asymmetric warfare, as it is now called, places its own stresses on personal conduct. Where one side is so powerful that it cannot be engaged by conventional means, the response is unconventional. Our response to unconventional warfare is often emotional and there is a danger that in such response we will throw the baby out with the bathwater. We may all nod sagely when somebody says that those who adopt unconventional methods have no right to the benefits extended to those who remain conventional. To an extent that is right. Criminal acts remain criminal. However, we have moved on from the days when persons were declared "outlaws" and were deprived of all rights. Even criminals have rights--some would say too many--but if we seek to remove those rights where it does not suit us, we demean ourselves. If we wish to uphold the law, we cannot pick and choose which bits suit us.

This brings me to my third point. The purpose of dissemination is:

"..so that the principles thereof may become known to all their armed forces and to the entire population."[167]

We have already seen the reference to *"civilian"* instruction. This is perhaps the most ignored provision of all. But why is it necessary? First, so that people know their rights. But, in my view, there is a more fundamental reason. Most professional armies are now kept at peace time levels. They expand in time of war, made up of reservists, conscripts, militias and other groups – some official, some unofficial. We are now also seeing the increasing phenomenon of Private Military Companies. Few if any of these participants will have had any law of armed conflict training – or even heard of it. It is far too late to start training then. You do not take out fire insurance when the house is already ablaze! Unless there is a thorough imbuing of the principles of the law of armed conflict into the civilian population in peacetime, it will be impossible to impart that ethos to which I have referred when *"civilians"* become *"military"*. It is interesting that many of the cases arising out of Abu Ghraib appear to involve reservists – not regular personnel.[168] In the UK, although nominally our reservists receive the same training in the law of armed conflict as regulars, in practice it is not so and I know that the British Red Cross for one have been concerned about this for years. If this is so with reservists, who at least have some link with the military, how much more will it be true of those press ganged into military service direct from civilian life in order to fight for the survival of their country.

Michael Meyer, in his presentation at the San Remo Round Table, touched briefly on the education programme undertaken by the Red Cross amongst the schools of Northern Ireland.[169] This is an admirable initiative and needs to be built upon. More Universities now in the UK offer the law of armed conflict as a module though the teaching often remains academic. However, whilst to students, this may be for the most part, an academic exercize, to the soldier, sailor and airman at the front line, it is a matter of life and death, literally.

And so, I return to the three points which I wanted to emphasise. First: *"principles"* – the need to impart an ethos. Heart knowledge is required as well as head knowledge. Second: the inclusion of law of armed conflict training in programmes of military instruction. It should not be a stand alone subject but built in to the ordinary curriculum so that it is seen to be based in practical military reality. Third: the widening of dissemination relating to the law of armed conflict to the civilian community. It is too late when those civilians begin to don uniform.

Acceptance of these three principles and moves towards implementing them would, I suggest, be a sound way of "*Strengthening Respect for International Humanitarian Law*."

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[167] See footnote 157
[168] The 800th MP Brigade is a Reserve Unit and the 205th MI Brigade consists of both active and reserve components.
[169] A description of the project can be found at http://www.ibe.unesco.org/International/ICE/bridge/English/NewTechnologies/Practices/North%20Ireland6a.htm

THE IMPORTANCE OF NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

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1. International humanitarian law

International humanitarian law has always had ambitious goals: to protect the victims of armed conflicts, and to limit the means and methods of warfare. It comes into play at precisely that point when rules and structures are breaking down; when countries and communities are struggling for their very existence; when humanitarian standards are in jeopardy.

And yet, by many of the criteria of international standard-setting, humanitarian law has been a remarkable success story. Its rules are enshrined in numerous treaties and conventions; spread over hundreds of pages and treaty articles, they are among the most detailed and extensive in international law. Moreover, humanitarian law may truly claim to be a universal body of law. There are now 192 States party to its principal instruments, the Geneva Conventions of 1949 – more than to the United Nations Charter, more indeed than to any other treaty.

The 1949 Geneva Conventions are supplemented by several treaties that apply in armed conflict situations. The 1977 Protocols additional to the Geneva Conventions are applicable in international (Protocol I) and non-international (Protocol II) armed conflicts. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols protect monuments of architectural, artistic and historical significance and other cultural property. The 1998 Rome Statute of the International Criminal Court establishes a permanent international criminal court with jurisdiction for the crime of genocide, war crimes and crimes against humanity, and for the crime of aggression once defined. Other treaties regulate the use of specific weapons during armed conflict situations. The most relevant are the 1972 Convention banning the use of biological weapons, the 1980 Conventional Weapons Convention and the 1997 Ottawa Treaty banning the use of anti-personnel landmines. All these treaties have also been widely ratified.

But the rules of international humanitarian law are not intended to be a mere theoretical exercise in standard-setting. For the other side of the picture, suffice it to read a newspaper, turn on the television or the radio, or listen to the harrowing firsthand accounts of refugees escaping from areas of conflict. Torture, rape, the targeting of civilians: serious violations of humanitarian law are committed on a daily basis in the dozens of conflicts now taking place around the world.

This should not lead us to conclude that humanitarian law has had no impact on the ground or that there are more violations now than before. Such statements are difficult, if not impossible, to prove and quantify. While attention quite properly focuses on the law's failures and on violations, it is possible to identify areas and conflicts where it has *generally* been respected. Violations nevertheless do occur, and will continue to do so until an end is put to impunity.

The biggest challenge facing humanitarian law today is thus implementation – compliance – rather than the need to develop new rules and standards. The importance of implementation is underlined at every International Conference of the Red Cross and Red Crescent, with many States pledging to enhance implementation of the law by formally undertaking to ratify specific humanitarian law treaties to which they are not party and to adapt their national legislation accordingly.

2. Enhancing the implementation of international humanitarian law

What can be done? How can the law be made to work more effectively to protect the victims of armed conflict?

The answer is to be found in the 1949 Geneva Conventions for the protection of victims of war and their Additional Protocols I and II applicable in international and non-international armed conflicts respectively. These instruments, as well as the other humanitarian law treaties, prescribe a range of mechanisms to promote compliance with the rules. They make it clear that the States themselves are bound not only to respect, but also to ensure respect for the rules, that they must act internationally, at both the bilateral and the multilateral levels, to suppress violations of the law. They also establish a role for independent third parties and, in the field of compliance specifically, for an international fact-finding commission.[170]

Under the treaties of international humanitarian law, a number of measures must be adopted in time of peace to ensure compliance with the law in time of war. Article 80 of Additional Protocol I, entitled "Measures for execution", emphasizes this point and indicates to the States how they are to fulfil their obligations. It is supplemented by a number of obligatory means of implementation, namely:

- *translation into national languages and adoption of laws and regulations to ensure application*[171]

[170] Protocol I, Art. 90.
[171] Geneva Conventions, common Art. 48/49/128/145, and Protocol I, Art.s 80 and 84.

The laws and regulations mentioned refer in the main to the adoption of penal legislation for the punishment of war crimes, to the adoption of legislation punishing misuse of the protective emblem, and to a whole series of other measures which the States should adopt in peacetime in order to be in a position to apply international humanitarian law during armed conflicts.

- *dissemination and instruction to the armed forces*[172]

Humanitarian law can be implemented only if its content is known. Instruction in humanitarian law must be made an integral part of regular combat training and a basic and essential component of military training. The provisions, rules and orders relative to the instruction of troops are of vital importance. The texts of the treaties must therefore be translated in such a way as to be understandable to those troops.

- *material preparations*[173]

The measures to be taken for ensuring respect for and protection of persons and objects are stipulated in a series of provisions. One measure is the marking of hospitals and ambulances with the red cross or red crescent. Hospital ships must be identified by means of the protective emblem and emit the radio signals described in the treaties. It is also important to keep military objectives separate from densely populated areas.

There is no means of monitoring the adoption of national measures of implementation since the humanitarian law treaties make no provision for a system of international supervision. Responsibility for this task thus lies chiefly with the States.

The key challenge in implementing humanitarian law is to ensure that it reaches beyond the central organs of the State. The law must apply not only to governments but also to individuals: soldiers, rebel fighters, civilians. States therefore have a clear obligation to disseminate the rules of humanitarian law as widely as possible to members of the armed forces and the public. Many would argue that this is the most important, and effective, means of promoting compliance.

3. How successful have implementing mechanisms been?

[172] Geneva Conventions, common Art. 47/48/127/144; Protocol I, Art. 83, and Protocol II, Art. 19; see also Protocol I, Art.s 6 "Qualified persons", 82 "Legal advisers in armed forces", and 87 "Duty of commanders".
[173] See *inter alia* First Convention, Art.s 23, 26, 44 and 53, Second Convention, Art.s 39 and 45, and Protocol I, Art.s 12 and 31.

At one end of the scale there is the International Fact-Finding Commission which, notwithstanding its great potential and the quality of its membership, has never been called upon to exercise its responsibilities since it was established in 1991.

It is difficult to evaluate the role of discreet diplomacy in relation to the duty to ensure respect. It is certainly true that bilateral contacts continue to have a role to play in exerting pressure on offending States. At the multilateral level, regional and international organizations have shown an increasing interest in the implementation of humanitarian law. Resolutions on this issue have been adopted, for example, by the Organization of American States, the Organization of African Unity (African Union), the Council of Europe and the League of Arab States. The United Nations, which tended to be wary of humanitarian law in its early years, has also shown increasing concern for the issue as reflected in resolutions adopted by the General Assembly and the Security Council.

When it comes to spreading knowledge of the law, education and training continue to be a matter of major concern to the entire International Red Cross and Red Crescent Movement. The International Committee of the Red Cross has devoted growing resources to this activity in the past twenty years. It has recruited specialists and used a range of media, from folksongs and puppet-shows to academic seminars, to bring the rules of humanitarian law to schoolchildren, soldiers, irregular fighters, officials and politicians. Governments are also encouraged, and provided with assistance, to discharge their dissemination responsibilities.

4. The repression of war crimes

Humanitarian law also seeks to ensure that individuals, whatever their position, are held to account for their actions. Serious violations are to be considered as criminal acts, as "war crimes", and States are obliged to punish grave breaches of humanitarian law regardless of the place of the offence or the nationality of the offender. The now familiar notions of individual liability and universal jurisdiction represented major innovations when introduced into humanitarian law.

States party to international humanitarian law treaties undertake to adopt the necessary legislative measures to suppress any grave breaches of the treaties.[174]

Grave breaches comprise some of the most flagrant violations of international humanitarian law. They are listed in the Geneva Conventions and Additional Protocol I, and include wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, attacks on the

[174] *"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention [...]"*, Geneva Conventions, common Art.s 49/50/129/146.

civilian population and indiscriminate attacks, attacks on works and installations containing dangerous forces and non-defended localities, perfidious use of the protected emblems, unlawful population transfers, unjustified delay in repatriation of prisoners of war or protected civilians, attacks on historic monuments or places of worship, and denial of judicial guarantees.[175] Grave breaches such as these are regarded as war crimes. [176]

The notion of war crimes is broader than that of grave breaches because it covers, in addition to the acts enumerated above, other serious violations of the customary or treaty-based rules of international humanitarian law, regardless of whether such violations are committed in situations of international or non-international armed conflict.

National criminal legislation adopted to sanction violations of international humanitarian law should as a minimum:

- establish, in respect of each grave breach covered, the nature and extent of the punishment, with due regard for the principle of proportionality between the penalty imposed and the gravity of the breach committed;
- recognize the individual criminal responsibility not only of the persons who committed any of the said breaches, but also of those who ordered the commission thereof, and recognize the individual criminal responsibility of superiors;
- provide, in particular, for the repression of grave breaches which are the result of an omission, where the omission in question is not already punishable under ordinary national law;
- specify that interests and imperatives of a political or military nature, national interests and requirements, and orders issued by superiors do not justify the commission of grave breaches and are not grounds for exemption from punishment;
- have a substantive and personal scope permitting application of the law to any perpetrator of a grave breach, irrespective of his or her nationality or the place where the act was committed;
- give any person prosecuted for committing such a breach the right to a fair trial by an impartial and regularly constituted court and to regular judicial proceedings affording the generally recognized judicial guarantees;
- comply with the obligation to facilitate cooperation with other States in terms of judicial assistance in criminal matters and matters involving extradition.

[175] Geneva Conventions, common Art.s 50/51/129/147, and Protocol I, Art. 85.
[176] Protocol I, Art. 85.

Moreover, this legislation must be tailored to meet the specific requirements of the legal system of the country in question so as to resolve any problem that arises in connection with the repression of war crimes at the national level.

The most important developments in recent years relate to the punishment of war crimes. From 1949 onwards the provisions of the Geneva Conventions on penal sanctions largely remained a dead letter. While implemented in the national laws of some countries, they were not frequently invoked to prosecute individual offenders.

The establishment of the International Tribunals for the former Yugoslavia in 1993 and for Rwanda in 1994, followed by the establishment of the International Criminal Court, was therefore a critical development. Not only were these the first international criminal tribunals since Nuremberg, but they also appeared to reflect renewed determination on the part of the international community to prosecute war crimes.

In addition to doing their own work, the tribunals have provided an important catalyst for action. At the national level, criminal cases and related civil actions for war crimes committed in the former Yugoslavia and Rwanda have been brought in Denmark, France, Germany and Switzerland. At the international level, the establishment of the tribunals for the former Yugoslavia and Rwanda appears to have been largely responsible for reviving negotiations for a permanent international criminal court, negotiations which resulted in the adoption of the Rome Statute on the International Criminal Court in 1998.

5. The International Criminal Court

The jurisdiction of the recently established International Criminal Court (ICC) has the following characteristics: it is *complimentary*, *limited*, *non-retroactive*, *automatic* and *not time-barred*.

The first of these characteristics, *complimentarity*, means that the ICC will only exercise jurisdiction when the State that would normally have jurisdiction is either unable or unwilling to exercise it. Thus, States are and remain primarily responsible for prosecuting and punishing crimes over which the ICC also has jurisdiction, to the extent required by the other international rules by which they are bound, i.e. those set forth in the 1949 Geneva Conventions and in customary international law.

The jurisdiction of the ICC is *limited* to genocide, crimes against humanity and war crimes.[177] It will be extended to crimes of aggression, once they have been defined.

[177] Rome Statute, Art.s 6-8.

The Court's jurisdiction covers crimes committed after July 2002, the date on which the Rome Statute entered into force for the States Parties. For those States that become party to the Statute after its entry into force, the ICC will have jurisdiction only once the State has ratified or acceded to the Statute, confirming the *non-retroactive* character of its rules.

The jurisdiction is *automatic* and does not need any declaration or other act and, finally, the crimes under the ICC's jurisdiction are *not time-barred.*

The success of the ICC is directly contingent on complete and prompt State cooperation. The States Parties need to render assistance to the ICC in many ways enumerated in the provisions of the Rome Statute.

In order to be in a position to benefit from the principle of complimentarity, States Parties should bring their national legislation in line with international law and give their domestic courts jurisdiction over the crimes under the jurisdiction of the ICC.

Since the capacity of the ICC is limited, its importance is likely to lie not only in its work but also in the example that it sets to governments.

6. National committees for the implementation of international humanitarian law

The obligation to implement humanitarian law falls primarily on the States. It is they who must act to ensure full compliance with the law.

To date, 69 national committees for the implementation of international humanitarian law have been created worldwide. They have been assigned specific functions to promote humanitarian law and prepare measures for its implementation, with the general objective of providing governments with support on matters relating to the law. They take the form of interministerial working groups or advisory committees set up by the States to facilitate the process of national implementation.

How the national committee is organized and its objectives are determined at the time of its formation. The committee should, however, be able to evaluate domestic law in the light of international obligations, be in a position to make recommendations and monitor application of the law, and promote activities to spread knowledge of the law. It thus requires a wide range of expertise, and must therefore include representatives of the government ministries concerned with the implementation of humanitarian law. Precisely which ministries are relevant will depend on the committee's mandate, but they are likely to include defence, foreign affairs, justice, finance, education and culture. It may also be useful to have

representatives of parliamentary committees, members of the judiciary, personnel from the armed forces general staff, and representatives of the National Red Cross or Red Crescent Society.

The implementation of humanitarian law is an ongoing process in which the adoption of laws and regulations is but one step. Comprehensive implementation involves monitoring the application and promotion of the law, as well as keeping abreast of and contributing to its development. It is therefore recommended that the national committee be a permanent and not an *ad hoc* body.

7. The ICRC Advisory Service on International Humanitarian Law

Through its Advisory Service on International Humanitarian Law, the ICRC encourages and assists governments and national committees around the world to take all requisite measures for the implementation of humanitarian law. The Service operates through a decentralized network of lawyers and local experts, and has had to deal with issues going beyond the legal field: the need to generate political will; the concerns of cautious legislators; and, in many countries, the paucity of public resources. It has nevertheless met with a positive response, with many governments now introducing new legislation and establishing national committees to promote the implementation of humanitarian law.

In promoting national implementation, it is essential to take account of local needs and conditions. The structure and working methods of the Advisory Service have therefore been designed to enable it to respond flexibly to specific requirements and opportunities, and to provide advice which is tailored to different political and legal systems.

The Advisory Service was created to supplement the resources of States by providing advice and information on national implementing measures. Since its creation in 1996, the Service has provided technical assistance in relation to the drafting, adoption and amendment of national implementing legislation in many countries. Guidelines and model laws have been produced with the assistance of external experts and placed at the disposal of national authorities as potential aids in the process of implementation.

In addition, the Advisory Service acts as a focal point for the collection and exchange of documentation and has developed a searchable database of national legislation and case-law and other material relevant to national implementation.

8. Final considerations

We shall end on a note of caution. Perhaps the greatest difficulty of the future lies in the changing nature of modern warfare itself and the increasing number of conflicts in which the normal structures of

authority do not apply. Promoting compliance with humanitarian law in conflicts where there are no clearly identified authorities and where humanitarian workers are themselves at risk may appear both impossible and irrelevant. Some have argued that the rules of humanitarian law need to be modified, but this seems to be a legal response to what is essentially a non-legal problem. Others argue that the solutions, if they exist, lie in the hands of psychologists and communications experts and not lawyers. The debate continues. One thing at least is clear – the problem of implementation, of respect for the rules, will continue to present one of the gravest challenges for humanitarian law in the years ahead.

THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

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The first United Nations High Commissioner for Human Rights took office in early April 1994, exactly one day before what is arguably the world's greatest humanitarian crisis since the second world war – the Rwandan genocide – began to unfold. From the beginning, the High Commissioner was deeply involved in Rwanda, supporting the first fact-finding mission of the Special Rapporteur, assuming responsibility for an important field mission presence, and contributing to accountability for the genocide before both the International Criminal Tribunal for Rwanda and the national courts. Since then, the High Commissioner for Human Rights has continued to be engaged in *"humanitarian"* issues, often acting as if the concept of international human rights encompasses the cognate but distinct area of international humanitarian law. This short paper considers the role of international humanitarian law in the activities of the United Nations High Commissioner for Human Rights.

1. Establishment of the position of High Commissioner for Human Rights

As early as 1947, one of the principal drafters of the Universal Declaration of Human Rights, the Nobel Peace Prize winner René Cassin, proposed the establishment of an *"Attorney-General for Human Rights"* whose mandate would include assisting and representing victims of human rights violations in proceedings before a proposed international human rights tribunal.[178] The proposal was revived in the early 1950s by Uruguay, in the course of debate about the implementation of the draft human rights covenants.[179]

In 1964, several non-governmental organizations met to consider the idea, under the auspices of the World Veterans Association, Amnesty International and the International Commission of Jurists.[180] This prompted Costa Rica to call for the establishment of a High Commissioner for Human Rights during the 1965 session of the United Nations Commission on Human Rights. The Commission debate led the Economic and Social Council to propose, in 1967, that the General Assembly proceed to create the position.

[178] J. E. LORD, *"The United Nations High Commissioner for Human Rights: Challenges and Opportunities"*, (1995) 17 Loyola Los Angeles Interantional & Comparative Law Journal, p. 329; R. S. CLARKE, *"A United Nations High Commissioner for Human Rights"*, The Hague: Martinus Nijhoff, 1972.
[179] *"Summary of Information Regarding Consideration by United Nations Organs of the Question of the Establishment of a Post of United Nations High Commissioner for Human Rights, Note by the Secretary-General"*, UN Doc. E/CN.4/Sub.2/1982/26.
[180] A. CLAPHAM, *"Creating the High Commissioner for Human Rights: The Outside Story"*, (1994) 5 European Journal of International Law, p. 556.

But there was no consensus, and the initiative remained essentially dormant until it was revived by the Dutch section of Amnesty International as part of preparations for the 1993 World Conference.[181]

Secretary-General Boutros Boutros-Ghali spoke against the proposal immediately before the World Conference. But as Victor Hugo famously said, nothing can stop an idea whose time had come, and paragraph 18 of the Vienna Declaration and Programme of Action stated: *"The World Conference on Human Rights recommends to the General Assembly that when examining the report of the Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights."*[182] In December 1993, the United Nations General Assembly voted to establish the office.[183] A few months later, the first High Commissioner for Human Rights, José Ayala-Lasso, was appointed by the Secretary-General. Since then, three other distinguished international personalities have held the position: Mary Robinson (1997-2002), Sergio Viera de Mello (2002-2003), and Louise Arbour (2004 -).

Based in Geneva at the Palais Wilson, perhaps a kilometre or so from the headquarters of the International Committee of the Red Cross, the Office of the High Commissioner now employs more than 500 people. It maintains a branch office at United Nations headquarters in New York, and several field missions in troubled regions of the world. The work of the High Commissioner comprises a range of human rights responsibilities, including the provision of advisory services, coordinating United Nations education and public information, removing obstacles to the full realization of human rights, engaging in a dialogue with governments, coordinating human rights promotion and protection activities and rationalizing United Nations machinery in the area of human rights. For 2004, the regular budget was US$27.1 million, with a further US$54.8 million to be raised in the form of voluntary contributions. The mandate is described as being to promote universal ratification and implementation of human rights instruments; assist in the development of new norms; support human rights organs and treaty monitoring bodies; respond to human rights violations; produce manuals, handbooks and training materials; and develop technical cooperation programmes. There is not a word on the subject of *"international humanitarian law"* in the defining instruments of the Office of the High Commissioner for Human Rights.

2. Unclear Boundaries Between International Humanitarian Law and International Human Rights Law

To the general public, international humanitarian law and international human rights law would be viewed as synonyms. Even most law students, lawyers and judges would be hard-pressed to distinguish between the terms. Specialists understand that the two disciplines have different origins, with international humanitarian law being widely credited as being one of the forerunners of the more recent field of international human rights law. Still, there is no real evidence that international humanitarian law had any

[181] F. D. GAER, *"The United Nations High Commissioner for Human Rights: The Challenges of International Protection"*, American Journal of International Law, 98, 2004, p. 391,.
[182] *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (1993).
[183] UN Doc. A/RES/48/141 (1993).

influence on the drafting of the *Universal Declaration of Human Rights* in 1947 and 1948. Moreover, at the time the *Universal Declaration* was being drafted, there was a degree of tension between human rights law and humanitarian law. In 1949, the International Law Commission recommended that the United Nations leave the codification and progressive development of the *"laws of war"* to the International Committee of the Red Cross. It has been suggested, although the record of the International Law Commission does not really confirm this, that the United Nations ought not to engage in work on international humanitarian law (IHL) because this was incompatible with the prohibition of the use of force in article 2(4) of the Charter.

The relationship between IHL and international human rights law began to assume a more positive dimension with the Tehran Conference of 1968. Important components of the 1977 Additional Protocols were clearly inspired by evolving human rights norms. By the early 1990s, when the position of High Commissioner for Human Rights was established, the boundaries between IHL and international human rights law were no longer so easy to discern. It became increasingly common to speak of human rights and international humanitarian law as if they were two sides of the same coin.

One of the first manifestations of the overlap between the two fields was the Statute of the International Criminal Tribunal for the former Yugoslavia.[184] It asserted jurisdiction over *"serious violations of international humanitarian law"*, but then specified that this rubric included not only grave breaches of the Geneva Conventions and violations of the laws or customs of war, but also genocide and crimes against humanity. Earlier resolutions of the Security Council had also spoken of "*serious violations of international humanitarian law"*, but had confined themselves, in describing the content of this term, to grave breaches of the Geneva Conventions. The 1948 Convention for the Prevention and Punishment of the Crime of Genocide had not previously been viewed as an instrument of international humanitarian law. Moreover, article 1 of the Conventions specified that genocide could be *"committed in time of peace or in time of war"*, indicating that it was most definitely not a *"war crime"*. In 1995 the Appeals Chamber of the ICTY declared that crimes against humanity could also be committed in peacetime.[185] If two out of the four categories of crime over which the ICTY had jurisdiction could be committed in peacetime, the term 'serious violations of international humanitarian law' was surely inappropriate. The same language reappeared with the establishment of the International Criminal Tribunal for Rwanda in November 1994.

In the *Tadic Jurisdiction Decision* of 2 October 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber spoke of *"the more recent and comprehensive notion of international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict"*.[186] But the case law of the *ad hoc* Tribunals lacks a clear conceptual framework for the relationship between international humanitarian law and the law of human rights. A recent example concerns the admissibility of the defense of military necessity. There are specific references to the defense of military necessity in the statute of the International Criminal Tribunal for the former Yugoslavia, with

[184] UN Doc. S/RES/827, annex.
[185] *Prosecutor* v. *Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 78.
[186] *Ibid.*, para. 87.

respect to grave breaches and violations of the laws or customs of war.[187] The conditions under which the defense is admissible with respect to these provisions has been discussed by the Appeals Chamber,[188] and recently a Trial Chamber confirmed that the defense is available in situations of non-international armed conflict.[189] All of this is not particularly controversial.

However, in January 2005 an ICTY Trial Chamber also considered the defense of military necessity with respect to crimes against humanity. Historically, the category of crimes against humanity was developed to address atrocities committed within a State's own borders and against its own citizens. The definition was developed at Nuremberg in order to close a gap in international law, because prior to 1945 it was widely believed that international law did not address atrocities committed by a State against its own civilian population. Especially with the elimination of the *nexus* between crimes against humanity and armed conflict, the category is surely more closely related to international human rights law rather than international humanitarian law. Moreover the terminology used with respect to crimes against humanity has always been and continues to be informed by human rights language. In the recent decision, the Trial Chamber accepted that that forcible transfer or displacement of a civilian population, which is recognized as a crime against humanity in the case law of the ICTY, could be justified on grounds of *"overriding, i.e. imperative, military reasons".*[190] Perhaps in this latter category of crime against humanity, there is indeed some room for humanitarian law concepts. Article 7(2)(d) of the Rome Statute of the International Criminal Court says that forced displacement covers expulsion or other coercive acts of persons from the area in which they are lawfully present *"without grounds permitted under international law"*. If international humanitarian law authorises the forced displacement of civilians on grounds of military necessity, then arguably the concept has its place with respect to this form of crime against humanity.

More troubling is the recognition by the same Trial Chamber that attacks on civilian property, which might qualify as the crime against humanity of persecution, could be justifiable under certain circumstances, supporting its opinion with reference to the recognition of military necessity as a defence to the war crime of destruction of civilian property.[191] Given that the crime against humanity of persecution requires evidence of a discriminatory intent or motive,[192] it seems inconceivable that military necessity could be an admissible defence to such a crime.

In 1996, in its advisory opinion on Nuclear Weapons, the International Court of Justice (ICJ) attempted to provide a degree of clarification on the relationship between the two legal disciplines. Some States had argued that the prohibition of arbitrary deprivation of life set out in article 6 of the International Covenant on Civil and Political Rights did not apply during wartime. The Court disagreed, but said the test

[187] *Statute of the International Criminal Tribunal for the former Yugoslavia*, UN Doc. S/RES/827, annex,, art. 2(d), art. 3(c)
[188] *Prosecutor* v. *Blaskic* (Case No. IT-95-14-A), Judgment, 29 July 2004, para. 109; *Prosecutor* v. *Kordic & Cerkez* (Case No. IT-95-14/2-A), Judgment, 17 July 2004, para. 54.
[189] *Prosecutor* v. *Strugar* (Case No. IT-01-42-T), Judgment, 31 January 2005, para. 228.
[190] *Prosecutor* v. *Blagojevic* (Case No. IT-02-60-T), Judgment, 17 January 2005, para. 598.
[191] *Ibid.*, para. 593; also para. 615.

of what is arbitrary deprivation of life during wartime *"falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".*[193] The Court returned to the issue in its 2004 advisory opinion on the wall in the Occupied Palestinian Territory:

> *106. [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law*.[194]

The reference to *lex specialis* in the Court's opinions is often misunderstood as representing a reconciliation of the two bodies of law. In fact, *lex specialis* is a concept that enables *conflicts* in legal regimes to be resolved. It may well be that in most cases of use of lethal force during armed conflict, norms of international humanitarian law provide an adequate scope for the boundaries of the concept of arbitrary deprivation of life, as this is set out in article 6 of the International Covenant on Civil and Political Rights. One area remains troublesome, however, and the ICJ does not address it. Surely deprivation of life is arbitrary if it results from the illegal or unjust use of force. This injects *jus ad bellum* into the debate about arbitrariness, a concept that international humanitarian law studiously, and quite rightly, ignores. Certainly the lawfulness of the use of lethal force is a relevant factor in the determination of the arbitrariness of deprivation of life when this occurs in peacetime, as article 2(2) of the European Convention on Human Rights demonstrates. Why, then, is it otherwise in the case of armed conflict? If my interrogation is valid, then the discussion of the relationship between IHL and international human rights law by the ICJ remains incomplete.

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[192] *Prosecutor* v. *Kordic & Cerkez* (Case No. IT-95-14/2-A), Judgment, 17 July 2004, para. 101. Also: *Prosecutor* v. *Blaskic* (Case No. IT-95-14-A), Judgment, 29 July 2004, para. 131, referring to *Prosecutor* v. *Krnojelac* (IT-97-25-A), Judgment, 17 September 2003, para. 185.
[193] *Advisory Opinion of the ICJ on Nuclear Weapons*, 8 July 1996, para. 25.
[194] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106.

The law of occupation is another area where human rights law and international humanitarian law overlap. The European Court of Human Rights opened the floodgates in its 1995 ruling holding that Turkey was liable for violations of the European Convention of Human Rights in the portion of Northern Cyprus that it had occupied since the 1974 invasion.[195] Subsequently, the Court revisited the issue of extraterritorial liability of European States when it declared inadmissible the application directed against NATO members with respect to the bombing of Belgrade in 1999. The Court said that States parties to the European Convention were only liable when they exercised *"effective control"* over a territory, thereby distinguishing between occupied Cyprus and independent Belgrade.[196] Building upon this precedent, the United Kingdom has been charged with violating human rights during its occupation of Iraq. A judgment of the English Divisional Court says that the European Convention does not apply,[197] but it is surely not the last word on the subject. Assuming, for the sake of this discussion, that the European Convention did apply to occupied Iraq in 2003 and 2004, with respect to the United Kingdom, an interesting problem arises with respect to the end of military occupation. Article 77 of the fourth Geneva Convention states that *"[p]rotected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory"*. This is precisely what the British and their American allies did with Saddam Hussein in late-June 2004. But in doing so, the British turned over a prisoner to a legal regime which would expose him to the death penalty, an act that is prohibited by article 19 of the European Union's Charter of Fundamental Rights as well as article 3 of the European Convention on Human Rights, if a dynamic interpretation is given to the *Soering* ruling of 7 July 1989. Does article 77 of the fourth Geneva Convention take precedence over the European Convention on Human Rights, or vice versa? The answer seems to depend on which regime is the *lex generalis* and which one is the *lex specialis.*

This brief discussion is inadequate to explore all of the facets of this difficult issue. Its ambition is only to highlight some of the problems that concern the relationship between international humanitarian law and international human rights law. To the extent that the boundaries between the two are blurred, it is inevitable that the High Commissioner for Human Rights engage with questions of international humanitarian law. Indeed, the High Commissioner for Human Rights would seem to be an ideal focal point for the evolving debate about the relationship between IHL and international human rights law. The current High Commissioner, Louise Arbour, certainly knows something about the subject, as she spent three years during the late 1990s as Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

3. IHL and Activities of the High Commissioner

It is the activities of the High Commissioner, as much as the applicable law, that lead to overlap with international humanitarian law. The field offices of the High Commissioner are located in the centres of

[195] *Loizidou v. Turkey*, 18 December 1996, Reports 1996-VI, p. 2231.
[196] *Bankovic* v. *Belgium* et al., [2001] 11 BHRC 435.
[197] *Al Skeini* v. *Secretary of Defence*, [2004] EWHC 2911 (Admin).

humanitarian conflict. Often, their officials work side by side, and frequently in collaboration, with representatives of the International Committee of the Red Cross. This is not as obvious as it might seem at first blush. The High Commissioner might well have taken on a more discreet role, focussing energy on negotiations and *good offices*. This seems to be the approach taken by the far less well-known Commissioner of Human Rights of the Council of Europe.

Some of the involvement of the High Commissioner in international humanitarian law is not based on an overlap with human rights law, and is in fact quite explicit. From 2002 to 2004 the most important project of the High Commissioner for Human Rights was the Sierra Leone Truth and Reconciliation Commission. Sierra Leone's Truth and Reconciliation Commission was a product of the *Lomé Peace Agreement* of 7 July 1999, a negotiated truce between the Government of Sierra Leone and the rebel Revolutionary United Front.[198] The High Commissioner was involved from the outset in the establishment of the Commission, supporting the drafting of appropriate legislation, establishing the start-up activities and, most importantly, raising the funds. Sierra Leone's Truth and Reconciliation Act 2000, an enactment of the Parliament of Sierra Leone, assigns the High Commissioner the responsibility for appointing the three non-national commissioners on the seven-person commission.

The mandate of Sierra Leone's Truth and Reconciliation Commission was charged with examining *"violations and abuses of human rights and international humanitarian law"*. It was mandated to *"create an impartial historical record"* of such violations and abuses[199] and to *"investigate and report on the causes, nature and extent"* of the violations and abuses.[200] Thus, it was an organ for the enforcement of both international human rights law and international humanitarian law. The distinction between the two disciplines was clear enough. The High Commissioner considered it to be entirely appropriate that she be engaged in matters of international humanitarian law.

4. Is the Car in the Wrong Garage?

One of the speakers at this conference referred to the International Fact-Finding Commission established by Additional Protocol I as being a beautiful car that has been kept in the garage. The institution, which was created in the early 1990s following the twentieth declaration of acceptance of article 90, has never in fact been called into action, because it has never been so requested by a State.

Although it is a creature of international humanitarian law, the International Fact-Finding Commission looks rather more like an institution of international human rights law. Its closest relatives are the various commissions and treaty bodies used for the enforcement of human rights treaty norms. It would seem only logical that it attempt to develop a relationship with the High Commissioner for Human Rights.

The International Fact-Finding Commission has jurisdiction to *"facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol"*. The authority is not unlike

[198] *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, Lomé, 7 July 1999, art. XXVI.
[199] *Truth and Reconciliation Commission Act 2000*.
[200] *Ibid.*, s. 6(2).

that of the High Commissioner for Human Rights, in her own area of expertise. But were the High Commissioner for Human Rights to use her good offices to promote an attitude of respect for international humanitarian law, in addition to international human rights law, few would challenge this as an excess of jurisdiction. Here the blurring of the distinction between the two disciplines would favour effective intervention by the High Commissioner.

Perhaps, then, the High Commissioner for Human Rights holds the key to unlocking the garage in which the International Fact-Finding Commission has been hidden away for so many years. Could the High Commissioner, with her prestige and influence, propel the International Fact-Finding Commission to a more prominent role, ensuring its effective engagement in humanitarian crises? The International Fact-Finding Commission has probably missed opportunities over the years that it might have exploited had there been a closer relationship with the High Commissioner for Human Rights. The Commission might also provide the High Commissioner with authoritative guidance in the area of international humanitarian law norms, given the likelihood that she continue to work in the area. Both institutions might discover that they have a mutual interest in bringing the beautiful but untested vehicle that is the International Fact-Finding Commission out of the garage.

PRESENTATION DES RAPPORTS DES II^{EME}, III^{EME} ET IV^{EME} SEANCES

François BUGNION
Director, International Law and Cooperation within the Movement, ICRC

Avec votre permission, nous nous arrêtons ici. Je ne vais pas rouvrir la liste des orateurs et je m'en excuse auprès de toutes celles et de tous ceux d'entre vous qui souhaiteraient encore prendre la parole, mais il ne nous reste que quatre minutes pour conclure cette session et je m'en voudrais d'empiéter sur le temps de parole réservé à notre Président. Je m'exprimerai en français, en raison du principe d'impartialité, le français étant encore, je crois, l'une des langues de votre Institut.

En votre nom à tous, je souhaite renouveler encore l'expression de notre gratitude aux sept rapporteurs que nous avons entendus ce matin et à tous ceux qui ont contribué à nos débats.

Trois remarques en tant que président de cette session.

La première: Nous sommes tous d'accord sur la pertinence du thème que l'Institut International de Droit Humanitaire a retenu pour notre session, sur cette interaction des différents régimes juridiques dans la situation de violence que nous connaissons aujourd'hui, et nous sommes également d'accord sur un élément fondamental qui a été rappelé ce matin, c'est-à-dire la pertinence du droit international humanitaire par rapport à la situation à laquelle nous sommes confrontés.

Deuxième remarque: Je crois que cette discussion venait à son heure; elle touche l'un des défis les plus brûlants de notre temps en ce qui concerne la protection des victimes de la violence armée.

Troisième conclusion: Il convient de relever la très forte complémentarité qui s'est manifestée tout au long des débats entre les ordres juridiques que nous avons évoqués, entre les différents corps de droit que nous avons évoqués : les droits de l'homme, le droit des réfugiés, le droit pénal, aussi bien national qu'international, et, bien entendu, le droit international humanitaire. Nous avons également relevé la complémentarité des mécanismes qui existent pour assurer la mise en œuvre et le respect de ces différents ordres juridiques. Il n'y a pas lieu de s'en étonner. En effet, ces différents ordres juridiques – qu'il s'agisse du droit humanitaire, des droits de l'homme, du droit des réfugiés ou du droit pénal – visent tous en définitive un objectif de protection de la personne humaine. Pour être impartial dans l'impartialité, je me permettrais, si vous le voulez bien, une citation en anglais car elle souffrirait de la traduction: *«The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international»* écrivait l'éminent juriste et ancien juge à la Cour internationale de Justice Sir Hersch Lauterpacht. Ces ordres juridiques ont tous le même objectif: assurer la protection et le respect de la

personne humaine en toute circonstance et même dans les situations extrêmes de violence qui sont celles de la guerre. En revanche nous avons aussi reconnu que ces ordres juridiques ont leurs spécificités, que leurs mécanismes de mise en œuvre ont leurs spécificités, et l'un des principaux défis auxquels nous sommes confrontés – et je dirais "nous" dans cette salle, en tant qu'internationalistes, plus encore que tous les autres – c'est d'arriver à organiser la relation entre ces différents ordres juridiques et entre les différents mécanismes, sans pour autant abolir les spécificités qui leur sont propres.

"Where do we go from here?" Quelle conclusion tirer ? Quelle suite donner à nos débats? Tout d'abord, je souhaiterais rappeler, ainsi que cela a été signalé par le Président Kellenberger tout au début de nos travaux, que les délibérations de ces trois jours s'inscrivent dans une continuité et notamment dans la continuité de la série cinq conférences régionales d'experts que le Comité International de la Croix Rouge (CICR) a organisées au Caire, à Pretoria, à Kuala Lumpur et à Mexico. La cinquième aura lieu à Bruges dans quelques jours. Nous souhaitons aussi tirer profit des délibérations d'aujourd'hui pour finaliser un rapport que le Comité international de la Croix-Rouge entend soumettre à la 28ème Conférence internationale de la Croix-Rouge et du Croissant-Rouge sur les défis du droit international humanitaire aujourd'hui. Je précise que ce sera un rapport synthétique, sans attribution personnelle, puisque le temps ne permets pas de retourner vers les différents orateurs pour s'assurer que nous avons bien transcrit leurs interventions.

La 28ème Conférence internationale de la Croix-Rouge et du Croissant-Rouge, qui se réunira à Genève en décembre prochain, sera une étape importante, puisqu'elle réunit aussi bien les Etats parties aux Conventions de Genève que les Sociétés Nationales de la Croix-Rouge et du Croissant-Rouge, ainsi que différents observateurs. Mais ce n'est qu'une étape d'un processus qui est appelé à se poursuivre en 2004, peut être même au-delà, avec un objectif de clarification de certaines questions juridiques. Pour que le droit soit respecté, il faut en effet arriver à un consensus sur la signification des règles et à un objectif de réaffirmation. D'ailleurs, notre Table Ronde, comme les séminaires qui l'ont précédée, a clairement démontré la pertinence du droit. Le fait que la question de la pertinence du droit international humanitaire au regard des conflits de notre temps n'ait même pas été soulevée à aucun moment de nos débats en est en soi la meilleure preuve. L'objectif ultime est bien entendu d'assurer le respect du droit et la protection des victimes de la guerre.

Le débat va donc se poursuivre et nous-mêmes, en tant que Comité international de la Croix-Rouge, avec les responsabilités que vous connaissez en ce qui concerne le respect et le développement du droit humanitaire, nous serons toujours reconnaissants pour les propositions, les suggestions, les idées, dont vous pourriez souhaiter nous faire part à l'avenir par correspondance, par e-mail ou par d'autres moyens.

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Deux mots encore en ce qui concerne la Table Ronde de San Remo de 2004. Ce sera la 28ème, si je ne me trompe pas. La Commission du Droit International Humanitaire de votre Institut a eu des échanges de correspondance à ce sujet; elle s'est également réunie à deux reprises en marge de notre Table Ronde. Votre Commission a retenu deux propositions:

La première proposition est de consacrer la Table Ronde 2004 à la protection des biens culturels en période de conflit armé. Pourquoi ce choix ? Pour deux motifs: le premier c'est que les conflits récents ont été des conflits non seulement d'État à État, pour reprendre la fameuse formule de Jean-Jacques Rousseau, mais malheureusement aussi de peuple à peuple, des conflits trop souvent dirigés contre l'identité des peuples. D'où les agressions dirigées contre des biens culturels dont nous avons été les témoins ces dernières années, contre des monuments, contre des églises, contre des mosquées, contre d'autres lieux de culte, contre des monastères, contre des musées et des bibliothèques. Tout cela est très regrettable, parce que c'est tout un patrimoine commun de l'humanité, des pans entiers de la conscience collective des peuples et de l'humanité, qui ont été irrémédiablement détruits. En outre, l'année 2004 marquera le 50ème anniversaire de la Convention de La Haye pour la protection des biens culturels en cas de conflit armé et nous pensons que ce serait une bonne occasion pour réanimer l'intérêt pour cette Convention, qui répond à un besoin plus urgent aujourd'hui que cela n'a jamais été le cas. Une condition essentielle pour la mise en œuvre de cette proposition et du programme qui a été établi est évidemment un intérêt et un soutien de la part de l'institution la plus directement concernée, c'est-à-dire de l'UNESCO. Des contacts vont être pris à cet effet. Si cet intérêt est confirmé, c'est le thème qui sera retenu pour 2004.

Si ce n'est pas le cas, nous avons une autre proposition qui a également été examinée dans le cadre de votre Commission: c'est la question de l'équilibre entre le besoin de faire respecter la justice, de sanctionner les crimes commis à l'occasion des conflits armés, d'une part, et la nécessaire réconciliation, de l'autre. Bien entendu, la question sera abordée dans la perspective qui est la nôtre, c'est-à-dire celle du droit international humanitaire. Nous pensons que cette question serait également d'une très grande actualité en raison de l'entrée en vigueur du Statut de la Cour Pénale Internationale, de la nomination des juges ce printemps, et, espérons-le d'ici l'année prochaine, de l'entrée en fonction de la Cour et, déjà, des premiers cas.

Il me reste à renouveler nos très vifs remerciements aux orateurs, qui ont préparé les différents exposés, tous d'une qualité remarquable. Nous sommes infiniment reconnaissants pour ces contributions, pour les contributions des différents *"panelists"* et pour celles de tous les intervenants. Un grand nombre d'idées ont été évoquées lors de ces délibérations et il y a là beaucoup de matière sur laquelle il nous sera possible de travailler dans l'avenir.

Je souhaite aussi remercier les présidentes et présidents des séances plénières et des commissions, ainsi que les rapporteurs qui nous ont présenté d'excellents rapports tout au long de cette Table Ronde. Je souhaite bien sûr remercier Mme Baldini et l'ensemble du personnel de l'Institut International de Droit Humanitaire, ainsi que l'Institut lui-même, sans le soutien duquel cette Table Ronde n'aurait pu avoir lieu et qui nous a également fait bénéficier, comme chaque année, d'une merveilleuse hospitalité. Je ne doute pas que je puis me faire l'interprète de toute la salle en leur adressant nos très vifs remerciements.

Avec votre permission je souhaite aussi remercier mes collègues de la Division juridique du CICR pour leur contribution à la préparation de ce séminaire, particulièrement M. Jean-François Quéguiner, qui est resté dans l'ombre, mais qui a fait un immense travail de préparation, ainsi que Mme Jelena Pejic, à qui nous devons la conception de cette Table Ronde. Je souhaite également remercier très vivement les traducteurs, sans lesquels nous n'aurions pu délibérer, et grâce auxquels nos discussions ont été aussi animées.

Avec votre permission, je souhaite réserver les derniers mots de remerciement au Professeur Jovan Patrnogic, créateur de cet Institut, qui en a suivi le développement comme une mère éduque son enfant, pendant maintenant plus de trente ans, et qui a également fait preuve pour l'organisation de cette réunion du dynamisme inlassable qu'on lui connaît. Professeur, mille et mille remerciements.

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