

A sense of self-perceived collective victimhood in intractable conflicts*

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Abstract

A sense of self-perceived collective victimhood emerges as a major theme in the ethos of conflict of societies involved in intractable conflict and is a fundamental part of the collective memory of the conflict. This sense is defined as a mindset shared by group members that results from a perceived intentional harm with severe consequences, inflicted on the collective by another group. This harm is viewed as undeserved, unjust and immoral, and one that the group could not prevent. The article analyses the nature of the self-perceived collective sense of victimhood in the conflict, its antecedents, the functions that it fulfils for the society and the consequences that result from this view.

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It is probably universal that in every serious, harsh and violent intergroup conflict, at least one side – and very often both sides – believe that they are the victim in that

* The authors would like to thank Johanna Vollhardt, Sabina Čehajić-Clancy, Dinka Corkalo Biruski, Yechiel Klar and Dario Spini for their helpful comments on the earlier draft of the present paper. Correspondence regarding this manuscript should be sent to Daniel Bar-Tal, School of Education, Tel-Aviv University, Tel Aviv 69778, Israel, email: daniel@post.tau.ac.il

conflict. In intractable intergroup conflicts, this theme is well-developed.¹ It constitutes an inseparable part of the shared narrative among society members as constructed in their collective memory of the conflict and ethos of conflict,² and denotes that the rival group continuously inflicted unjust and immoral harm upon them throughout the conflict. The prevalence of this theme is not surprising in view of the fact that societies involved in intractable conflict believe that their goals in conflict are well-justified, perceive their own group in a very positive light, and delegitimize the rival.

Within this framework, it is just very natural that society members believe that they are the victims of the rival in the conflict. This collective sense of victimhood has important effects on the way these societies manage the course of the conflict, approach the peace process and eventually reconcile. In many cases it serves as a factor that feeds continuation of the conflict and as an inhibitor of peacemaking. Thus it is important to clarify the nature of the sense of collective victimhood, its antecedents, functions and consequences. This is the objective of the present paper.

In order to advance understanding of the phenomenon of the sense of collective victimhood, we will also draw on contributions made in the study of victimhood at the individual level. This line of research is developing in the social sciences. It is especially marked in criminology and psychology, where the sub-discipline of victimology has emerged, which studies victims' relations with their offenders, their behaviour, and the reactions of society (including those of various institutions) towards them.³ In contrast, very little has been written in terms of a comprehensive study of the collective sense of victimhood in the context of intractable conflict. This omission is strange, considering that a number of scholars have recognized the importance of the sense of collective victimhood in understanding the behaviour of society members, their relationship with the rival and with the international community at large.⁴

- 1 Intractable conflicts, in which the parties involved invest substantial material and non-material resources and which last at least 25 years, are characterized as being total, protracted, violent, central, and perceived as being unsolvable and of zero-sum nature. See D. Bar-Tal, 'Sociopsychological foundations of intractable conflicts', *American Behavioral Scientist*, Vol. 50, 2007, pp. 1430–1453-a.
- 2 We recognize that in almost every intergroup conflict at least one side experiences a sense of collective victimhood and that in many of them both sides have this sense. The present paper focuses on intractable conflicts, in which both sides always experience a sense of collective victimhood.
- 3 A. Karmen, *Crime Victims: An Introduction to Victimology* (2nd edn), Wadsworth: Belmont, CA, 1990; N. Ronel, K. Jaishankar and M. Bensimon, M. (eds), 2009, *Trends and Issues in Victimology*. Cambridge Scholars Publishing: Newcastle upon Tyne, UK; O. Zur, 'The psychology of victimhood', in R.H. Wright and N.A. Cummings (eds), *Destructive Trends in Mental Health*, Routledge: New York, 2005, pp. 45–64.
- 4 D. Corkalo Biruski and S. Penic (in preparation), 'Facing trauma, facing the enemy: War trauma, group identity, collective guilt and outgroup attitudes', in D. Spini, D. Corkalo Biruski, G. Elcheroth and M. Vasovic (eds), *Facing Massive Violence and Social Change: Collective Experiences in the Former Yugoslavia*; J.D. Frank, *Sanity and Survival: Psychological Aspects of War and Peace*, Vintage: New York, 1967; H.C. Kelman, 'Social-psychological dimensions of international conflict', in I.W. Zartman (ed), *Peacemaking in International Conflict: Methods and Techniques* (revised edition), United States Institute of Peace Press: Washington, DC, 2007, pp. 61–107; J. Mack, 'The Enemy System', 1990, in V. Volkan, J. Demtrios and J. Montville (eds), *The Psychodynamics of International Relationships, Vol. I: Concepts and*

Sense of victimhood: individual approach

There are many kinds of situations that can bring a person as an individual or as a member of a collective to have a sense of being a victim. It seems that victimhood describes some lasting psychological state of mind that involves beliefs, attitudes, emotions and behavioural tendencies. This results on the one hand from direct or indirect experience of victimization, and on the other hand from its maintenance in the personal repertoire. In other words, it is a state where the experienced harm and the long-standing consequences 'become elements in the victim's personality'.⁵

Experience

From the individual perspective, some researchers define victimization by focusing on the experienced events. For example, Aquino and Byron refer to 'the individual's self-perception of having been the target, either momentarily or over time, to harmful actions emanating from one or more other persons. In the most general sense, a victim is anyone who experiences injury, loss, or misfortune as a result of some event or series of events'.⁶ Other scholars have emphasized elements in victims' psychology that emerges as a result of the harmful event.⁷ They point to the observed feeling of helplessness and self-pity, self-inefficacy, low self-esteem, hopelessness, guilt, loss of trust, meaning and privacy, an absent sense of accountability, a tendency to blame, and a stable external locus of control (in this case, the belief is that the incident was beyond a person's control and choice, and is consistent with 'out-of-control' feelings).⁸ Finally, of special interest is the finding indicating that repeated experiences of victimization can trigger a pattern of requital behaviours of retribution and cycles of violence.⁹

Theories, pp. 83–95, Lexington, MA; V. Volkan, *Blood Lines: From Ethnic Pride to Ethnic Terrorism*. Westview Press: Boulder, Colorado, 1997.

5 J. Herman, *Trauma and Recovery*, Basic Books: New York, 1992.

6 K. Aquino and K. Byron, 'Dominating interpersonal behavior and perceived victimization in groups: Evidence for a curvilinear relationship', *Journal of Management*, Vol. 28, No. 1, 2002, p. 71.

7 M. Bard and D. Sangrey, *The Crime Victims' Book* (2nd edn). Brunner/Mazel Publishers: New York, 1986; see also O. Zur, above note 3.

8 In addition, it was found that personal victimization manifests itself in post-traumatic stress disorder (PTSD), symptoms of depression or substance abuse (P.A. Resick, 'The psychological impact of rape', *Journal of Interpersonal Violence*, Vol. 8, 1993, pp. 223–255; J. Wolfe and R. Kimerling, Gender issues in the assessment of post-traumatic stress disorder, in J.P. Wilson and T.M. Keane (eds), *Assessing psychological trauma and PTSD*, Guilford: New York, 1997, pp. 192–238), of fear and anxiety (S.E. Taylor, J.V. Wood and R.R. Lichtman, 'It could be worse: Selective evaluation as a response to victimization', *Journal of Social Issues*, Vol. 39, 1983, pp. 19–40) and of physical health problems (J.M. Golding, 'Sexual assault history and physical health in randomly selected Los Angeles women', *Health Psychology*, 13, 1994, pp. 130–138; H.S. Resnick, R.E. Acerno and D. Kilpatrick, 'Health impact of interpersonal violence I: Prevalence rates, case identification, and risk factors for sexual assault, physical assault, and domestic violence in men and women', *Behavioral Medicine*, Vol. 23, 1997, pp. 65–78).

9 R.J. Bies, T.M. Tripp and R.M. Kramer, 'At the breaking point: Cognitive and social dynamics of revenge in organizations', in R. Giacalone and J. Greenberg (eds), *Antisocial Behavior in Organizations*, Sage: Thousand Oaks, CA, 1997, pp. 18–36; D.P. Skarlicki and R. Folger, 'Retaliation in the workplace: The

Conditions for victimhood

Another approach taken delineates a series of necessary conditions for the emergence of a sense of victimhood. It suggests that individuals define themselves as a victim if they believe that: (1) they were harmed; (2) they were not responsible for the occurrence of the harmful act; (3) they could not prevent the harm; (4) they are morally right and suffering from injustice done to them; and (5) they deserve sympathy.¹⁰ The latter condition adds crucial aspects to the definition. It points out that mere experience of the harmful event is not enough for the emergence of the sense of being a victim. In order to have this sense there is the need to perceive the harm as undeserved, unjust and immoral, an act that could not be prevented by the victim. The need to get empathy then emerges.

Further analysis

In addition to the different specific definitions, diverse elaborations of the analysis of victimization have also appeared. For example, it has been proposed that the idea of victimization assumes that certain individual or collective rights were violated: either concrete rights such as the right to shelter and food, or more abstract rights such as the right to happiness, living space, self-determination and free expression of identity. This distinction leads to another differentiation which suggests that some victims experience a tangible violation of rights (territory, property, physical injury, murder), whereas other victims are affected by intangible experiences such as identity damage, other psychological trauma, loss of security and even loss of the 'old' self.¹¹ Therefore victimization is not only an objective occurrence, but is also based on a subjective experience, as some people can define themselves as 'victims' in circumstances that many others would regard as part of their everyday life.¹²

In addition, it should be noted that individuals may experience the harm either directly or indirectly. That is, they can suffer psychological or physical harm by themselves, or be related to other victimized individuals and therefore feel indirect victimization.¹³ Accordingly, there is an assumption that the most practical approach to understanding the sense of being a victim is to focus on the individual's perception of his/her unpleasant experience.¹⁴ It can be said that

roles of distributive, procedural, and interactional justice', *Journal of Applied Psychology*, Vol. 82, 1997, pp. 434–443.

10 C.J. Sykes, *A nation of victims: The decay of the American character*, St. Martin's Press: New York, 1992.

11 A. Confino, 'Remembering the Second World War, 1945–1965: Narratives of victimhood and genocide'. *Cultural Analysis*, Vol. 4, 2005, pp. 46–75.

12 S. Garkawe, 'Revisiting the scope of victimology – How broad a discipline should it be?' *International Review of Victimology*, 11, 2004, pp. 275–294.

13 D. Bloomfield, T. Barnes and L. Huyse (eds), *Reconciliation after violent conflict: A handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2003; R. Strobl, 'Constructing the victim: Theoretical reflections and empirical examples', *International Review of Victimology*, Vol. 11, 2004, pp. 295–311.

14 See K. Aquino and K. Byron, above note 6.

victimhood is a psychological state of an individual who perceives himself/herself as a victim and feels like a victim,¹⁵ or is holding 'victim beliefs'.¹⁶

However, the question that should be raised is whether the sense of victimhood is based on self-perception only. A number of scholars add another perspective to the analysis: the view of the social milieu. There is a 'social construction' of the sense of victimhood that defines the characteristics of 'victim', assigns them to the victims and their social environment and legitimizes the label.¹⁷ Once this legitimization takes place, individuals often make efforts to maintain that sense over time. In this vein, it is worth noting that reference to victimhood as a social construction allows cultural variation in the definition of the victim, according to different socio-political contexts¹⁸: 'Victimization happens within a context of relationship and a certain environment or culture. Hence, each participant's behavior must be understood within the framework of the relationship and its legal, economical, political, and social context'.¹⁹

Foundations

Hence the sense of victimhood has three foundations. First, it is rooted in a realization of harm experienced either directly or indirectly.²⁰ Second, mere personal perception is not enough. 'Victim' is also a social label – in other words, a result of social recognition of an act as illegitimate harm. Third, once individuals perceive themselves as victims, they often attempt to maintain this status.

Sequential stages: the process of victimization

It is thus possible to see victimization as a dynamic social process divided into several sequential stages that result in giving a certain individual or a group the status of victim.²¹ For example, according to the symbolic interaction approach, individuals and collectives come to be known as victims through the social process. This process requires an experience of a harmful act and then of suffering, removal of self-responsibility for the suffering, ascription of causes for the harmful act and specification of expected responses and behaviours. Viano²² suggested four complementary stages in a process of victimization:

1. individuals experience harm, injury or suffering caused by another person or persons or by institutions;

15 J.E. Bayley, The concept of victimhood, in D. Sank and D.I. Caplan (eds), *To be a victim: Encounters with crime and justice*, Insight Books: New York, 1991, pp. 53–67.

16 See C.J. Sykes, above note 10.

17 J.A. Holstein and G. Miller, Rethinking victimization: An interactional approach to victimology, *Symbolic Interaction*, 13, 1990, pp. 103–122.

18 See J.E. Bayley, above note 15; D. Bloomfield, T. Barnes and L. Huyse, above note 13.

19 See O. Zur, above note 3.

20 See D. Bloomfield, T. Barnes and L. Huyse, above note 13; R. Strobl, above note 13.

21 M.M. Lanier and S. Henry, *Essential Criminology*, Westview Press: Boulder, CO, 1998.

22 E.C. Viano, 'Victimology today: Major issues in research and public policy', in E.C. Viano (ed), *Crime and its victims: International research and public policy issues*, Hemisphere: New York, 1989, pp. 3–14.

2. some of them perceive this harm as undeserved, unfair and unjust, leading them to view themselves as a victim;
3. some of those who perceive themselves as a victim attempt to gain social validation by persuading others (family, friends, authorities, etc.) to recognize that the harm occurred and that they are victims;
4. some of those who assert that they have been victimized receive external validation of their claim, thus becoming 'official' victims (as a result they may receive social or institutional support and compensation).

Similarly, Strobl²³ proposed five minimum criteria as necessary to qualify for the status of victim:

1. identifiable single event of harm;
2. its negative evaluation;
3. its being viewed as an uncontrollable event;
4. its attribution to a personal or social offender; and
5. its consideration as violating a socially shared norm.

On the basis of the above clarifications of the victim's definition, status and conception, we would now like to turn to analysis of the collective sense of victimhood, which is our focal interest.

Collective sense of victimhood

Collective basis

The basic premise of this article is that just as individuals experience a sense of victimhood because of personal experiences, collectives such as ethnic groups may also experience this sense. It may result from events that harm the members of the collective because of their membership, even if not all the group members experience the harm directly.²⁴ Groups can suffer from collective victimization which, similarly to individual victimization, is not based only on an objective experience but also on the social construction of it. It means that at the collective level of victimization, members of a collective hold shared beliefs about ingroup victimization, i.e. of the social group to which they belong. Sharing these beliefs reflects a sense of collective victimhood. In this case the inflicted harm has to be perceived as intentionally directed towards the group, or towards the group members because of their membership in that group.

Group members experience this sense on the basis of their identification with the group. An act carried out with the intention to harm either the group as

23 See Strobl, above note 13.

24 In this conception we focus only on a sense of self-perceived collective victimhood that results from behaviour of another group or groups.

a whole or some of its members also affects the thinking and feeling of other group members who were not directly harmed.²⁵ They perceive this harm as directed towards them because of their identification with the causes of the group and their concerns about its well-being.²⁶

A social psychological theory of self-categorization, proposed by Turner and his colleagues²⁷ is especially relevant in discussing the relationship between group members, social identity and the sharing of beliefs within a group. Sharing beliefs is one of the basic elements for group formation and the expression of common social identity, since beliefs with particular contents prototypically define a group. Individuals, defining themselves as group members, acquire these beliefs through the process of depersonalization as part of their formation of social identity. They subsequently continue to adopt various beliefs, attitudes and emotions on the basis of experiences of their group.²⁸ In this vein there are, for example, clear indications that group members experience a vicarious empathy when they witness or are informed about distress and suffering experienced by compatriots.²⁹ This is an important psychological mechanism that underlies the development of a collective sense of victimhood among group members who do not experience harm directly. A large-scale study conducted by Cairns, Mallet, Lewis and Wilson³⁰ reveals that a great majority of Catholics and Protestants in Northern Ireland, despite not being directly harmed, labelled themselves as victims in the conflict because their fellow group members were hurt.

Thus the sense of self-perceived collective victimhood is based on and reflected in the sharing of societal beliefs,³¹ attitudes and emotions. These provide one of the foundations for a societal system. Shared societal beliefs, such as beliefs about victimhood, serve as a basis for construction of a common reality, culture, identity, communication, unity, solidarity, goal-setting, co-ordinated activities, and so on.³² Moreover, societies may choose to internalize past harms and to

25 M.J.A. Wohl and N. Branscombe, 'Collective guilt for current ingroup transgressions', *Journal of Personality and Social Psychology*, Vol. 94, No. 6, 2008, pp. 988–1006.

26 O. David and D. Bar-Tal, *Collective identity and nations: A Socio-psychological conception*, 2008, manuscript submitted.

27 J.C. Turner, 'Some current issues in research on social identity and self-categorization theories', in N. Ellemers, R. Spears and B. Dosje (eds), *Social Identity: Context, Commitment, Content*. Blackwell: Oxford, 1999, pp. 6–34; J.C. Turner, M.A. Hogg, P.J. Oakes, S.D. Reicher and M. Wetherell, *Rediscovering the Social Group: A Self-Categorizing Theory*. Blackwell: Oxford, 1987.

28 D. Bar-Tal, *Shared Beliefs in a Society: Social Psychological Analysis*, Sage: Thousand Oaks, CA, 2000; D.M. Mackie, T. Devos and E.R. Smith, *From Prejudice to Intergroup Emotions: Differentiated Reactions to Social Groups*, Psychology Press: New York, 2002.

29 M.H. Davis, *Empathy: A social psychological approach*, Hawthorne: New York, 1994.

30 E. Cairns, J. Mallet, C. Lewis and R. Wilson, *Who are the victims? Self-assessed victimhood and the Northern Irish conflict*, NIO Research and Statistical Series, Report No. 7, Northern Ireland Statistics and Research Agency, Belfast, 2003.

31 Societal beliefs are defined as shared cognitions by the society members that address themes and issues with which the society members are particularly preoccupied, and which contribute to their sense of uniqueness, see D. Bar-Tal, above note 28.

32 J.W.D. Dougherty (ed), *Directions in Cognitive Anthropology*, Urbana: University of Illinois Press, 1985; K. Mannheim, *Ideology and Utopia*, Harcourt, Brace and Company: NY, 1952; R.K. Merton, *Social Theory and Social Structure*, Free Press: NY, 1957; T. Parsons, *The Social System*, Glencoe, IL, The Free

‘transform them into powerful cultural narratives which become an integral part of the social identity’.³³ Finally, the collective sense of victimhood becomes a prism through which the society processes information and makes decisions.

Past foundations

An imperative aspect of the collective sense of victimhood is that a collective may experience this sense in the present as a result of harm done even in the distant past, as noted by Staub and Bar-Tal: ‘Groups encode important experiences, especially extensive suffering, in their collective memory, which can maintain a sense of woundedness and past injustice through generations’.³⁴ This encoding fulfils various functions, just as Liu and Liu³⁵ believe that cultures shape their collective memories³⁶ according to a ‘historical affordance’. This means that they preserve those narratives that can be functional in the life of the collective. Indeed, collective memory is entrenched in the particular socio-political-cultural context that imprints its meaning. Connerton pointed out that ‘our experience of the present very largely depends upon our knowledge of the past. We experience our present world in the context which is causally connected with the past event and objects’.³⁷

The lasting preoccupation with these memories, even after their effects have ceased, can be explained by the functions that the collective of sense of victimhood

Press, 1951; R.A. Shweder and R.A. Levine (eds), *Culture Theory*, Cambridge University Press: Cambridge, 1984.

33 A. Robben and M. Suarez-Orozco, *Cultures under siege: Collective violence and trauma*, Cambridge University Press: Cambridge, 2000, p. 23.

34 E. Staub and D. Bar-Tal, ‘Genocide, mass killing, and intractable conflict: Roots, evolution, prevention, and reconciliation’, in D.O. Sears, L. Huddy and R. Jervis (eds), *Handbook of Political Psychology*, 2003, Oxford University Press, New York, p. 722.

35 J.H. Liu and S.H. Liu, ‘The role of the social psychologist in the benevolent authority and plurality of powers systems of historical affordance for authority’, in K.S. Yang, K.K. Hwang, P.B. Pedersen and I. Daibo (eds), *Progress in Asian social psychology: Conceptual and empirical contributions*, Praeger: Westport, CT, 2003, pp. 43–46.

36 Collective memory is defined as representations of the past which are remembered by society members as the history of the group (see W. Kansteiner, ‘Finding meaning in memory: A methodological critique of collective memory studies’, *History and Theory*, Vol. 41, 2002, pp. 179–197). Collective memory contains the narratives, the symbols, the models, the myths, and the events that mould the culture of the group. It does not intend to provide an objective history of the past, but tells about the past that is functional and relevant to the society’s present existence and future aspirations. Thus it creates a socially constructed narrative that has some basis in actual events, but is biased, selective and distorted in ways that meet societal present needs (see E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition*, Cambridge University Press: Cambridge, 1983; J.H. Liu and D.J. Hilton, ‘How the past weighs on the present: Social representations of history and their role in identity politics’, *British Journal of Social Psychology*, Vol. 44, No. 4, 2005, pp. 537–556; B. Southgate, *What is History For?* New York, Routledge, 2005). Moreover, Corkalo *et al* talk about the ‘ethnization of memory’, where ‘memory itself and interpretation of the past become ethnically exclusive, creating subjective, psychological realities and different symbolic meanings of common events in people who belong to different ethnic groups’. D. Corkalo, D. Ajdukovic, H. Weinstein, E. Stover, D. Djipa and M. Biro, ‘Neighbors again? Inter-Community relations after ethnic violence’, in E. Stover and H. Weinstein (eds), *My neighbor, my enemy: Justice and community in the aftermath of mass atrocity*, 2004, Cambridge University Press: Cambridge, pp. 143–161.

37 P. Connerton, *How Societies Remember*, Cambridge University Press, New York, 1989, p. 2.

fulfils. Despite obvious discussed consequences of being a victim, a victim's position is also often a powerful one because it is viewed as morally superior, entitled to sympathy and consideration and protected from criticism.³⁸ As a result, a collective may cultivate the image of being a victim and embed it in their culture.

Groups maintain a sense of collective victimhood as a result of various traumatic experiences such as past colonial occupation, extensive harm done to them, inflicted wars or prolonged exploitation and discrimination, or of genocide – many of them within the framework of vicious and violent conflicts. For example, Serbs maintain a sense of collective victimhood because of their past experiences of violence. This sense is well expressed in a declaration issued in April 1997 by a prominent group of Serbian bishops, intellectuals and artists:

The history of Serbian lands ... is full of instances of genocide against Serbs and of exoduses to which they were exposed. Processes of annihilation of Serbs in the most diverse and brutal ways have been continuous ... yet they have always been self-defenders of their own existence, spirituality, culture, and democratic convictions.³⁹

Similarly, Poles suffered under the yoke of imperial domination by Prussia, Russia and Austria through the centuries and therefore 'a romantic myth emerged that ascribed to the Polish nation a messianic role as the "Christ of nations"', or 'the new Golgotha'.⁴⁰ Through its suffering Poland, the blameless victim, atones for the sins of other nations and thereby incurs their debt. The self-image of Poland as the innocent victim of aggression by powerful neighbours has endured throughout the centuries to this day and has an effect on the relationship with Germany and Russia.

In this vein, Volkan⁴¹ argues that groups may adhere to a particular experience of collective violence and loss that survivors are unable to mourn, and hold it in their collective memory. He suggested that 'if historical circumstances do not allow a new generation to reverse feelings of past powerlessness, the mental representation of the shared calamity still bonds members of the group together. But instead of raising a group's self esteem, the mental image of the event links people through a continuing sense of powerlessness, as though members of the group existed under a large tent of victim hood'. This experience is considered as a 'chosen trauma' and leads to the collective focus on the group's past experiences of victimization, to the point when the entire identity of the group's members may centre on it.⁴² It is maintained in the culture and transmitted to the new generations. Examples of such 'chosen traumas' are the defeat of the Serbs by the Turks in the Battle of Kosovo in 1389, the 1937 massacre of Chinese in Nanking,

38 M. Kanan, 'On victim and victimhood: The Iraqi case', *Current History*, Vol. 98, 1999, pp. 96–106.

39 Anzulovic, *Heavenly Serbia: From myth to genocide*, Hurst: London, 1999, p. 124.

40 A. Jasińska-Kania, 'Bloody revenge in "God's Playground": Poles' collective memory of relations with Germans, Russians, and Jews', *International Journal of Sociology*, Vol. 37, No. 1, 2007, p. 33.

41 See V. Volkan, above note 4, p. 47.

42 See V. Volkan, above note 4; H. Krystal, *Massive Psychic Trauma*, International Universities Press: New York, 1968.

the Holocaust in World War II, and the Palestinian Nakba (disaster) or exodus of the Palestinians in the 1948 war. Each of these events has great societal significance, is kept in mind, commemorated and used for various purposes in many different ways to provide an important lesson for the respective society, and is sometimes even used to justify violence against other groups.

It can be assumed that groups who focus in their collective memory on being a victim and view themselves as such are prone to view themselves also as victims in new situations in which they are harmed. These societies are very sensitive to particular cues and conditions and readily tend to use their inherent schema of victimhood to apply to the new situation. An example of this are Serbs who viewed themselves as victims in the wars that broke out in the former Yugoslavia in the 1990s, partly because of their collective memory of the Battle of Kosovo that took place some 600 years earlier, but also the traumatic events during World War II when hundreds of thousands of Serbs were massacred and others sent to concentration camps.⁴³ A traumatic re-enactment and exploitation of old fears and hatreds, as well as the emphasis placed on the victimization of Serbs in the past,⁴⁴ may have added to the nationalism that sparked the wars, horrendous acts of revenge, mass killings and ethnic cleansing in the former Yugoslavia.⁴⁵

The psychological nature of collective victimhood

We would like to define a sense of self-perceived collective victimhood as a mindset shared by group members that results from a perceived intentional harm with severe and lasting consequences inflicted on a collective by another group or groups, a harm that is viewed as undeserved, unjust and immoral, and one that the group was not able to prevent.⁴⁶ This mindset emerges as a result of cognitive construction of the situation in which such harm is inflicted. The perceived harm can be done in the present or fairly recent past, or well remembered in the collective memory as harm done in the distant past. It can be real or partly imagined, but usually is based on experienced events. It can be large-scale, as a result of a one-time event (such as the loss of a battle or war, genocide or ethnic cleansing) or of long-term harmful treatment of the group such as slavery, exploitation, discrimination or occupation.

43 See B. Anzulovic, above note 39.

44 J. Leatherman, W. DeMars, P.D. Gaffney and R. Vayrynen, *Breaking cycles of violence: Conflict prevention in intrastate crises*, Kumarian Press: West Hartford, CT, 1999; G. Ross, *The trauma vortex in action again in the Middle East*, 2001, available at <http://www.traumainstitute.org/articles.php> (last viewed on 24 April 2009).

45 E. Staub, 'Reconciliation after genocide, mass killing and intractable conflict: Understanding the roots of violence, psychological recovery, and steps toward a general theory', *Political Psychology*, Vol. 27, No. 6, 2006, pp. 867–894.

46 We do not claim that this mindset has to be shared by all the group members. We assume that at the height of an intractable conflict it is shared by the great majority of group members, but over time, when the peace process begins and continues, the sharing may be significantly diminished.

Symptoms of victimhood

When a collective develops a sense of victimhood, it consists of beliefs, attitudes, emotions and behavioural tendencies. The beliefs first of all focus on various types of harms such as losses, destructions, suffering, oppressions, humiliations or atrocities viewed as uncontrolled and unavoidable, which are inflicted on the ingroup by another group. They stress that the harm is undeserved and unjust; it is viewed as immoral because in the eyes of the group members it violates basic moral norms and codes that govern human behaviour. The beliefs ascribe the responsibility for the harm to the other group. They centre on the tribulations of the ingroup and its members; pertain to the duration and continuity of the harmful experiences, the circumstances surrounding them and the resulting severe consequences; and highlight the status of being a victim, the obligations of the perpetrator and those of the international community. The latter beliefs focus on the deservingness of apology, compensation or punishment of the perpetrator, and the entitlement to empathy, support and help from the international community.

The attitudes express negative feelings towards the perpetrator and towards those who do not recognize the group's status as being the victim, while positive feelings are expressed towards all those groups who empathize with, support and help the group. Emotionally, the sense of victimhood is usually associated with anger, fear and self-pity. Finally, this sense leads to various behavioural intentions such as the desire to prevent future harm and to avenge the harm already done. The described beliefs, attitudes, emotions and behavioural tendencies may become a very dominant part of the repertoire held by a collective, assimilated into its collective memory, where it is maintained, elaborated and activated frequently. It can then be labelled as a syndrome of victimhood.

Process of collective victimization

We accept the view that, as in the individual case, the collective sense of victimhood develops progressively. An act or acts carried out by another group are only the first phase in its development. Eventually those patterns of behaviour have to be assessed as being harmful. The assessment can be made immediately, following a particular event (for example an attack such as that on 1 September 1939, when Poland was invaded by Germany), or through a longer process of self-enlightenment as sometimes occurs in a situation of collective discrimination, oppression, maltreatment and exploitation. Again, the assessment of the harm must be accompanied by an evaluation of the act as unjust, undeserved, unavoidable and uncontrolled by the collective. On the basis of these findings, a collective labels itself a victim and attempts to impart this label and the rationale of this status to members of the collective. Once the collective views itself as a victim, it makes an active effort to persuade other groups and the whole international community that it has this status.

However, in contrast to the individual case, where there is need for acknowledgment by the social environment, the recognition of the international

community is not a necessary condition for the emergence and solidification of the collective sense of victimhood. A collective may continue to view itself as a victim despite the fact that the international community does not recognize its victimhood and sometimes even considers this same group as a perpetrator. One example is Iran, which perceives itself as a victim although the international community views that country very differently. Iran's President Ahmadinejad recently said: 'We've been victims of terrorism ...',⁴⁷ whereas many nations view Iran as a perpetrator that develops mass destruction weapons and exports terror.

Sense of victimhood in intractable conflicts

The sense of collective victimhood emerges as a major theme in the ethos of conflict⁴⁸ of societies involved in intractable conflict and is a fundamental part of the collective memory thereof. The ethos and collective memory of conflict are part of the socio-psychological infrastructure and provide the contents for a culture of conflict that evolves to meet the challenges of the conflict.⁴⁹ The shared societal beliefs of ethos and collective memory portray the own group as the victim of the opponent. The focus of these beliefs is on the unjust harm, evil deeds and atrocities perpetrated by the adversary. This view is formed over a long period of violence as a result of the society's sufferings and losses.⁵⁰ The more and the longer the society experiences harm (especially human losses) in conflict, and the more intensive and extensive is the view that the harm is undeserved and unjust, the more prevalent and entrenched is the collective sense of being the victim.

47 Sewell Chan, 'Iranian Leader, Calling Introductory Remarks Insulting, Addresses Columbia', *New York Times*, 25 September 2007.

48 *Ethos of conflict*, defined as the configuration of central societal beliefs that provide a particular dominant orientation to a society experiencing prolonged intractable conflict (see D. Bar-Tal, above note 28). It has been proposed that in the context of intractable conflict, such an ethos evolves with eight themes (see D. Bar-Tal, Societal beliefs in times of intractable conflict: The Israeli case, *International Journal of Conflict Management*, 9, 1998, pp. 22–50; and D. Bar-Tal, above note 1), as follows: *societal beliefs about the justness of one's own goals* first of all outline the goals in conflict, indicate their crucial importance and provide explanations and rationales for them. *Societal beliefs about security* stress the importance of personal safety and national survival, and outline the conditions for their achievement. *Societal beliefs of a positive collective self-image* concern the ethnocentric tendency to attribute positive traits, values and behaviour to one's own society. *Societal beliefs about one's own victimization* concern self-presentation as a victim, especially in the context of the intractable conflict. *Societal beliefs about the delegitimization of the opponent* are beliefs that deny the adversary's humanity. *Societal beliefs about patriotism* generate attachment to the country and society by propagating loyalty, love, care and sacrifice. *Societal beliefs about unity* refer to the importance of ignoring internal conflicts and disagreements during intractable conflict in order to join forces in the face of the external threat. Finally, *societal beliefs about peace* refer to peace as the ultimate desire of the society.

49 See D. Bar-Tal, above note 1.

50 D. Bar-Tal, Collective memory of physical violence: Its contribution to the culture of violence, in E. Cairns and M. D. Roe (eds), *The Role of Memory in Ethnic Conflict*, Palgrave Macmillan: Houndmills, UK, 2003, pp. 77–93; see also H.C. Kelman, above note 4; J. Mack, above note 4; J.V. Montville, *Conflict and Peacemaking in Multiethnic Societies*, New York: Lexington Books, 1991; see also V. Volkan, above note 4.

'The killing fields of national ethnic conflicts, the graves of the fallen, are the building blocks of which modern nations are made, out of which the fabric of national sentiment grows.'⁵¹

A sense of collective victimhood is unrelated to the strength and power of the collectives involved in intractable conflict. Collectives that are strong and powerful militarily, politically and economically still perceive themselves as victims or potential victims in the conflict. The self-assigned status as the victim does not necessarily indicate weakness. On the contrary, it provides strength vis-à-vis the international community, which usually tends to support the victimized side in the conflict, and it often energizes members of a group to take revenge and punish the opponent.

This has happened in the case of Russians in the Chechen conflict, Americans in the Vietnam War, Israeli Jews in the Israeli-Palestinian conflict, Turks in their conflict with Kurds, or Sinhalese in the Sri Lanka conflict. The sense of collective victimhood is a result of the inimical context and the socio-psychological repertoire that accompanies it. The violence, losses and unavoidable suffering together with their framing within the ethos of conflict lead to the inevitable inference of being a victim in the conflict.

The formation of the sense of collective victimhood is based on beliefs about the justness of the goals of one's group and on one's positive self-image, while emphasizing the wickedness of the opponent's goals and characteristics.⁵² In other words, focusing on the injustice, harm, evil and atrocities associated with the adversary, while emphasizing one's own society as being just, moral and human, leads society members to present themselves as victims.⁵³ Beliefs about victimhood imply that the conflict was imposed by an adversary who not only fights for unjust goals, but also uses violent and immoral means to achieve them. They provide the moral incentive to seek justice and oppose the opponent, as well as to mobilize moral, political and material support from the international community. In fact, these three themes of the ethos of conflict – societal beliefs about victimhood, justness of one's own goals, and delegitimization of the rival – form a triangular system that constitutes the core beliefs of the intractable conflict.⁵⁴ The three themes feed and sustain each other, contributing to the continuation of the conflict.

For example, in the context of the violent Northern Ireland conflict, both the Catholics and the Protestants each perceive themselves as victims of the other. The two groups focus on the terrorism of the other side, selectively

51 I. Zertal, *Israel's Holocaust and the Politics of Nationhood*, Cambridge: Cambridge University Press, 2005, p. 9.

52 See D. Bar-Tal, above note 1; J.D. Frank, above note 4; H.C. Kelman, above note 4; R.K. White, *Nobody Wanted War: Misperception in Vietnam and Other Wars*, Garden City, NY: Anchor Books, 1970.

53 B. Sahdra and M. Ross, 'Group identification and historical memory', *Personality and Social Psychology Bulletin*, Vol. 33, 2007, pp. 384–395.

54 U. Gopher, *Antecedents to the ethos of conflict in Israeli-Jewish society*, Master Thesis submitted to Tel Aviv University (in Hebrew), 2006.

remembering the violent acts and blaming the opponent for them.⁵⁵ The same holds true in the case of Israeli Jews and Palestinians in the Israeli-Arab conflict;⁵⁶ Serbs and Croats in the conflict following Croatia's declaration of independence in June 1991;⁵⁷ Greek Cypriots and Turkish Cypriots⁵⁸ and Tamils and Sinhalese in Sri Lanka.⁵⁹ Each community construes the other as the cause of their suffering and perceives their own side as not responsible – in other words, as the victim.

In sum, the sense of collective victimhood as defined has a number of important implications during intractable conflict:

1. it positions the society members in a particular state of mind;
2. it provides a rigid, durable self-perception that is unlikely to change while the intractable conflict lasts, and will most probably persist long after;
3. it is accompanied by intense negative emotions such as anger, fear or self-pity;
4. it appears automatically in situations of violence because of the underlying emotional and teleological nature;
5. it serves as a prism through which society members evaluate their experiences, especially in the context of the conflict;
6. it magnifies the difference between the groups engaged in conflict;
7. it implies that the rival has the ongoing potential for harming and thus the society lives under continuous conditions of threat;
8. it has serious cognitive and emotional consequences that also reinforce the self-collective view as the victim; and
9. it has behavioural implications for the society suggesting that it does not deserve to be harmed, and that therefore measures should be taken to prevent any further harm and punish the opponent for the harm already done.

Thus the sense of collective victimhood often leads to cycles of violence because of preventive and vengeful acts.

55 See E. Cairns, J. Mallet, C. Lewis and R. Wilson, above note 30; J.A. Hunter, M. Stringer and R.P. Watson, 'Intergroup violence and intergroup attributions', *British Journal of Social Psychology*, Vol. 30, 1991, pp. 261–266.

56 D. Bar-Tal, *Living with the conflict: Socio-psychological analysis of the Israeli-Jewish society*, Jerusalem: Carmel (in Hebrew), 2007; N. Caplan, 'Victimhood and identity: Psychological obstacles to Israeli reconciliation with the Palestinians', in K. Abdel-Malek and D.C. Jacobson (eds), *Israeli and Palestinian Identities in History and Literature*, St Martin's Press: New York, 1999, pp. 63–86; L. Khalili, *Heroes and Martyrs of Palestine – The politics of national commemoration*, Cambridge University Press: New York, 2007; N. Rouhana and D. Bar-Tal, 'Psychological dynamics of intractable conflicts: The Israeli-Palestinian case', *American Psychologist*, Vol. 53, 1998, pp. 761–770; J. Vollhardt, 'The role of victim beliefs in the Israeli-Palestinian conflict: Risk or potential for peace?' *Peace and Conflict: Journal of Peace Psychology* (in press).

57 See V. Volkan, above note 4, p. 54.

58 M. Hadjipavlou, 'The Cyprus conflict: Root causes and implications for peacebuilding', *Journal of Peace Research*, Vol. 44, No. 3, 2007, pp. 349–365.

59 R. Ramanathapillai, 'The politicizing of trauma: A case study of Sri Lanka'. *Peace and Conflict: Journal of Peace Psychology*, Vol. 12, 2006, pp. 1–18.

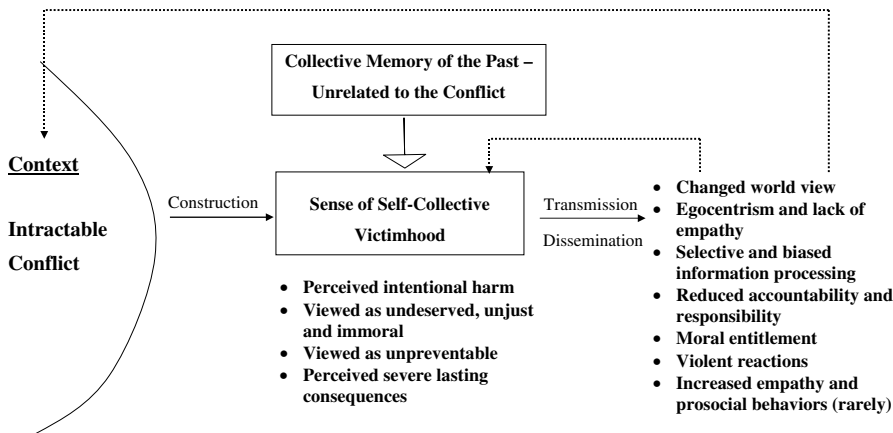


Figure 1: Model of Sense of Self-Collective Victimhood in Intractable Conflict

Functions

The sense of collective victimhood fulfils major functions for the societies involved in intractable conflicts.⁶⁰ These functions are of importance for understanding why groups make an active effort to create and then maintain the sense of victimhood.

Providing explanations

First, the beliefs about self-perceived collective victimhood perform the epistemic function of illuminating the conflict situation. The situation of intractable conflict is extremely threatening and accompanied by stress, vulnerability, uncertainty and fear, as well as shattering previously held world views. In face of the ambiguity and unpredictability, individuals must satisfy the need for a comprehensive understanding of the conflict, which provides a coherent and predictable picture of the situation.⁶¹ The societal beliefs about collective victimhood fulfil these demands, providing information and explanations about the conflict, explaining who is responsible for the harm it brings, which is the evil side in it and which is the victim.

Coping with stress

Furthermore, the sense of being a victim helps in coping with stress created by the conditions of intractable conflict. Successful coping with stress often involves

60 J. Holmwood, 'Functionalism and its critics', in A. Harrington (ed), *Modern Social Theory: an introduction*, Oxford University Press: Oxford, 2005, pp. 87–109.

61 J.W. Burton (ed), *Conflict: Human Needs Theory*, St Martin's Press: New York, 1990.

making sense of and finding meaning in the stressful conditions within existing schemes and the existing world view, or an adjustment of that view to the events.⁶² The societal beliefs of victimhood provide such meaning and allow 'sense-making'.

Moral justification

In its moral function, the sense of being a victim delegates responsibility for both the outbreak of the conflict and the subsequent violence to the opponent. In addition, it provides the moral weight to seek justice and oppose the adversary, and thus serves to justify and legitimize the harmful acts of the ingroup towards the enemy, including violence and destruction.⁶³

Differentiation and superiority

The sense of being a victim creates a sense of differentiation and superiority.⁶⁴ It sharpens intergroup differences because while it describes the opponent in delegitimizing terms and at the same time as responsible for the unjust and immoral acts, it presents the own society as a sole victim of the conflict. Since societies involved in intractable conflict view their own goals as justified and perceive themselves in a positive light, they attribute all responsibility for the outbreak of the conflict, its continuation and especially its violence to the opponent. The repertoire focuses on the violence, atrocities, cruelty, lack of concern for human life, and viciousness of the other side. It describes the other side as inhuman and immoral; the conflict as intransigent, irrational, far-reaching and irreconcilable; and this precludes any peaceful solution. These beliefs stand in contrast to the societal beliefs about positive collective self-image, which portray the ingroup in positive terms and as the victim in the conflict.

Preparation and immunization

The sense of being a victim prepares the society for threatening and violent acts of the enemy, as well as for difficult living conditions. It tunes the society to information that signals potential harm and continuing violent confrontations, allowing

62 A. Antonovsky, *Unraveling the Mystery of Health: How People Manage Stress and Stay Well*, Jossey-Bass: San Francisco, 1987; V.E. Frankl, *Man's Search for Meaning*, Washington Square Press: New York, 1963; R. Janoff-Bulman, *Shattered Assumptions: Towards a New Psychology of Trauma*, The Free Press: New York, 1992; S.E. Taylor, 'Adjustment to threatening events: A theory of cognitive adaptation', *American Psychologist*, Vol. 38, 1983, pp. 1161–1173.

63 D.E. Apter (ed), *Legitimization of Violence*, New York University Press: New York, 1997; J.T. Jost and B. Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations*, Cambridge University Press, New York, 2001.

64 J. Sidanius and F. Pratto, *Social Dominance*, Cambridge University Press, New York, 1999.

psychological preparations for the lasting conflict and immunization against negative experiences. The society is attentive and sensitive to cues about threats, so no sudden surprises can arise. In this sense the psychological repertoire also allows economic predictability, which is one of the basic conditions for coping successfully with stress.⁶⁵

Solidarity

The sense of being a victim serves as a basis for unity and solidarity because it implies a threat to the collective's well-being and even to its survival.⁶⁶ It heightens the need for unity and solidarity, which are important conditions for survival in view of the continuous harm caused by the rival. Collective victimhood may serve as 'social glue', bonding members of the collective together on the basis of the present threat and past 'chosen traumas'.⁶⁷ This basis for unity has been used by various societies, as this representation 'appears to be capable of smoothing over ethnic and regional differences'.⁶⁸

Patriotism and mobilization

The sense of being a victim has the function of motivating patriotism, mobilization and action.⁶⁹ It highlights security needs as a core value and indicates a situation of emergency which requires mobilization and sacrifice that are crucial for countering the threat. It implies the necessity to exert all the group's efforts and resources in the struggle against the perpetrator. It plays a central role in stirring up patriotism, which leads to readiness for various sacrifices in order to defend the group and the country and avenge acts of violence by the enemy. In addition, it reminds group members of past violent acts by the rival and indicates that they could recur. The implication is that society members should mobilize in view of the threat, and should maybe even take violent action to prevent possible harm and avenge the harm already done. This function is therefore essential to meet the challenge of withstanding the enemy in the conflict.

For example, in the case of Sri Lanka victimhood narratives were used by militant groups to recruit the Tamil people and induce them to commit violent acts.⁷⁰ Ramanathapillai claims that: 'Stories about the traumatic events became both a powerful symbol and an effective tool to create new

65 See A. Antonovsky, above note 62; R.S. Lazarus and S. Folkman, *Stress, Appraisal and Coping*, Springer Publishing Company: New York, 1984.

66 S. Rosenberg, *Victimhood*, Intractable Conflict Knowledge Base Project, Conflict Research Consortium, University of Colorado, 2003, available at <http://www.intractableconflict.org/m/victimhood.jsp> (last visited 27 April 2009).

67 See V. Volkan, above note 4.

68 See J.H. Liu and D.J. Hilton, above note 36, p. 546.

69 D. Bar-Tal and E. Staub, *Patriotism in the Life of Individuals and Nations*. Nelson-Hall: Chicago, 1997.

70 See R. Ramanathapillai, above note 59.

combatants'.⁷¹ Also, in a speech given just before Israel's invasion of Lebanon in 1982, Israeli Prime Minister Menachem Begin used collective victimization as an argument in favour of the war. 'It is our destiny that in Israel there is no other way but fighting', said Begin, and added: 'We won't allow another Treblinka'. By mentioning the notorious extermination camp, Begin activated beliefs about collective victimization.

Gaining international support

Victimhood in a conflict enables criticism to be avoided and support obtained from the international community, especially when the group or society concerned is the weaker side, suffers more and does not violate international moral codes of behaviour. Victims are not blamed for the outbreak of the conflict and the violence that follows, as they are suffering from the unjustified violence of the aggressor. This is crucial in obtaining the backing of worldwide public opinion and increasing the likelihood of moral, political and material support. In the post-conflict era, it puts the group or society at an advantage – especially if the rival accepts this status – as the one that should get support, assistance, compensation, apology, and so on.

Competitive victimhood

As pointed out, 'The status of victim renders the victim deserving of sympathy, support, outside help. Victims, by definition, are vulnerable, and any violence on their part can be construed as the consequences of their victimization. The acquisition of the status of victim becomes an institutionalized way of escaping guilt, shame or responsibility.'⁷² It is thus not surprising that the described 'rewards' inherent in the status of victim can lead to a 'competitive victimhood' between two sides in an intractable conflict.⁷³ Each of the adversaries in intractable conflict makes every effort to persuade its own society, the rival side and the international community that it alone is the victim in the conflict. The side that wins this status is assured of international support and often financial aid, since the international community tends to assist groups that are perceived as victims. In this vein, Nadler and Shnabel⁷⁴ examined the frequent use of victim terminology among both Palestinians and Israelis. They argue that the 'victimhood competition' between

71 *Ibid*, p. 1.

72 M. Smyth, 'Putting the past in its place: Issues of victimhood and reconciliation in Northern Ireland's peace process', in N. Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Georgetown University Press: Washington, DC, 2001, p. 126,

73 M. Noor, R.J. Brown and G. Prentice, 'Precursors and mediators of intergroup reconciliation in Northern Ireland: A new model', *British Journal of Social Psychology*, Vol. 47, 2008, pp. 481–495.

74 A. Nadler and N. Shnabel, 'Instrumental and socio-emotional paths to intergroup reconciliation and the need-based model of socio-emotional reconciliation', in A. Nadler, T. Malloy and J. Fisher (eds), *Social Psychology of Intergroup Reconciliation*, Oxford University Press: New York, 2006, pp. 37–56.

those two rivals is actually a fight over moral social identity. Palestinians portrays Israel as an imperialist power, sometimes comparing Jewish soldiers with Nazis.⁷⁵ Israeli Jews, on the other hand, insist they are the victims of Arab aggression.⁷⁶ These two groups are striving to achieve a moral social identity by favouring their own-group tragedies over those of the other. Similarly, Noor *et al.*⁷⁷ found that Catholics and Protestants in Northern Ireland not only focus on their own ingroup's victimhood, but also engage in competition about which group's suffering is greater.

Maintaining the sense of collective victimhood

Considering the psychological, social and political profits to be gained by collective victimization, it is no wonder that societies involved in intractable conflict seek to maintain the sense of victimhood over time, or at least for the duration of the conflict. They make efforts to nurture the beliefs and feelings embedded in the sense of collective victimization and try to assimilate them into the society's collective memory and ethos of conflict and collective emotional orientation.⁷⁸

In order to maintain this theme in the repertoire of society members, the beliefs that impart the status of victimhood are transmitted and disseminated via societal channels of communication and societal institutions. These supplement interpersonal transmissions, as well as personal experiences of suffering. The educational system plays a major role in inculcating those beliefs through textbooks, educational programmes, school ceremonies and teachers' explicit and implicit messages. In addition, the public discourse in speeches by leaders, newspaper articles and texts in various other channels of communication continuously strengthens the sense of collective victimhood. Politicians often use collective victimization as a source of political power, and reminders of past and present victimization are a potent theme for recruitment and mobilization. At the formal societal and cultural level, memorial days, religious and national holidays and the ceremonies that accompany them serve as an annual routine to remind society members about their victimization. Finally, cultural products of various kinds are an important means of transmitting beliefs and feelings about the society's victimhood. Books, films, theatrical plays and even art exhibitions may convey the sense of collective victimhood to consumers of these cultural products. Israeli society provides an illustration of how societal, political, educational and cultural sources play a role in forming, transmitting and disseminating the sense of

75 N. Oren and D. Bar-Tal, 'The detrimental dynamics of delegitimization in intractable conflicts: The Israeli-Palestinian case', *International Journal of Intercultural Relations*, 31 (1), 2006, pp. 111–126.

76 See D. Bar-Tal, above note 56.

77 See M. Noor, R.J. Brown and G. Prentice, above note 73.

78 See D. Bar-Tal, above note 1.

collective victimhood.⁷⁹ The way Serbs maintain their sense of victimhood is another example of continuous societal socialization.⁸⁰

Consequences

A system of beliefs about victimization of one's own society has a profound influence on all aspects of life of its members and the society as a whole. A number of major consequences are outlined below.

Effects on world view

General world view

A sense of collective victimhood based on continuous harm or even a major traumatic event to which a group was subjected may become the cornerstone for the construction of a new reality. Those experiences and the subsequent beliefs about the group's victimhood may shake its general world view by shattering

79 L. Adar and H. Adler, *Values Education for Immigrant School Children*, Hebrew University and Ministry of Culture and Education Press: Jerusalem, 1965, (in Hebrew); R. Arviv-Abbramovich, *State ceremonies as mechanism for inculcating ethos of conflict in times of intractable conflict: The Israeli case*, 2004, Master Thesis submitted to Tel Aviv University (in Hebrew); D. Bar-Tal, above note 48; D. Bar-Tal, 'The rocky road towards peace: Societal beliefs functional to intractable conflict in Israeli school textbooks', *Journal of Peace Research*, Vol. 35, 1998, pp. 723–742; D. Bar-Tal, above note 56; D. Bar-Tal and D. Antebi, 'Siege mentality in Israel', *International Journal of Intercultural Relations*, 16, 1992, pp. 251–275; N. Ben-Shaul, *A violent world: TV news images of Middle Eastern terror and war*, Rowman and Littlefield: Boulder, CO, 2006; O. David, *The crystallization and transformations of the Jewish-Israeli identity: A study of identity reflection in Hebrew readers of the 20th century*, Doctoral dissertation, 2007, Tel-Aviv University (in Hebrew); R. Firer, *The Agents of Zionist Education*, Hakibutz Hameuhad Tel-Aviv, 1985, (in Hebrew); C.S. Liebman and E. Don-Yehiya, *Civil religion in Israel: Traditional Judaism and political culture in the Jewish state*, University of California Press: Berkeley, CA, 1983; D. Ofer, 'History, memory and identity: Perceptions of Holocaust in Israel', in U. Rebhun and C.I. Waxman (eds), *Jews in Israel. Contemporary social and cultural patterns*, Brandeis University Press: Hanover NH, 2004, pp. 394–417; E. Podeh, *The Arab-Israeli conflict in Israeli history textbooks, 1948–2000*, Bergin and Garvey: Westport, CT, 2002; D.A. Porat, 'From the scandal to the Holocaust in Israeli education', *Journal in Contemporary History*, Vol. 39, 2004, pp. 636–619; T. Segev, *The Seventh Million: The Israelis and the Holocaust*, Henry Holt and Co: New York, 2000; E. Shohat, *Israeli Cinema: East/west and the Politics of Representation*, University of Texas Press: Austin, TX, 1989; H. Yazo, *The Holocaust in Hebrew Literature – As historical and trans-historical fiction*, 1980, Tel-Aviv: Eked (in Hebrew); J. Yedger, *Our Story: The National Narrative and the Israeli Press*, Haifa University Press: Haifa, 2004, (in Hebrew); A. Yurman, *Victimization of the holocaust as a component of the cultural-political discourse in Israeli society between the years 1948–1998*, Doctoral dissertation, 2001, Bar-Ilan University (in Hebrew); I. Zertal, above note 51; M. Zuckermann, *Shoah in the sealed room – The Holocaust in the Israeli press during the Gulf war*, Hubermann: Tel-Aviv, 1993 (in Hebrew).

80 See B. Anzulovic, above note 39; S. Jansen, 'Why do they hate us? Everyday Serbian nationalist knowledge of Muslim hatred', *Journal of Mediterranean Studies*, Vol. 13, No. 2, 2003, pp. 215–237; D.B. MacDonald, *Balkan holocaust? Serbian and Croatian victim-centered propaganda and the war in Yugoslavia*, Manchester University Press: Manchester, 2002; N. Malcolm, *Bosnia: A Short History*, New York University Press: New York, 1994; T. Pavasovic, *The political dynamics of ethnicity change: A case-study of Serbian textbooks 1970–2002*, paper presented at the Harvard-Oxford-Stockholm Conference in Stockholm, 14–16 April 2006; V. Volkan, above note 4.

constructs of collective self-perception and transforming assumptions about intergroup relations and the world itself. The changes take place because naturally the victimized collectives try to explain the harm inflicted, make inferences, draw conclusions and imply lessons to be learned. The first result of these processes is to blame the perpetrator and the bystanders (groups who did not prevent the harm from being done) and nurturing vindictive feelings and intentions. Sometimes the collectives even tend to blame their own group because this appears to be a reasonable explanation for the absolutely inconceivable situation.⁸¹ Very often they affirm the perception of the world as a dangerous place, raise a sense of intense vulnerability, increase awareness of the group's dependence on others and undermine beliefs in a just world.⁸² Sometimes the sense of collective victimhood is accompanied by fear of physical or symbolic annihilation.⁸³ Furthermore, collectives often develop feelings of helplessness, humiliation, lack of control, mistrust of the rival group and the belief that little can be done to change the situation.⁸⁴

Stance on humanitarian norms

A specific effect that was investigated pertains to views of the humanitarian norms. On the basis of a very large-scale study in fourteen conflict areas around the globe, Elcheroth⁸⁵ found that at the individual level victims of violence tend to abandon the legal conception of humanitarian norms in favour of a conception that these norms can be violated under certain conditions. However, the same individuals continued to support moral principles of these norms. The surprising finding in this study is at the community level, which shows that a normative climate favouring the legal conception of humanitarian norms develops within the community. A different analysis of the same data by Spini, Elcheroth and Fasel⁸⁶ demonstrated an effect of collective vulnerability defined by them as a material or symbolic threat to the survival of a collective as a whole. The analysis shows that in

81 E. Staub, 'Breaking the cycle of genocidal violence: Healing and reconciliation', in J. Harvey (ed), *Perspectives on Loss*, Taylor and Francis, Washington DC, 1982, pp. 231–241; E. Staub and L.A. Pearlman, 'Healing, reconciliation and forgiving after genocide and other collective violence', in S.J. Helmick and R.L. Petersen (eds), *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation*, Templeton Foundation Press, Randor, PA, 2001, pp. 205–229.

82 See J. Herman, above note 5; J. Mack, above note 4; E. Staub and D. Bar-Tal, above note 34; O. Zur, 'Rethinking "Don't blame the victim": The psychology of victimhood', *Journal of Couples Therapy*, Vol. 4, 1994, pp. 15–36.

83 See J.V. Montville, above note 50.

84 J. Chaitin and S. Steinberg, 'You should know better: Expressions of empathy and disregard among victims of massive social trauma', *Journal of Aggression, Maltreatment and Trauma*, Vol. 17, No. 2, 2008, pp. 197–226; E.G. Lindner, 'Humiliation and human condition: Mapping a minefield', *Human Rights Review*, Vol. 2, No. 2, 2001, pp. 46–63; E. Staub and L.A. Pearlman, above note 81; V. Volkan, above note 4, and also 'Transgenerational transmission and Chosen Traumas: An aspect of large-group identity', *Group Analysis*, Vol. 34, 2001, pp. 79–97.

85 G. Elcheroth, 'Individual-level and community-level effects of war trauma on social representations related to humanitarian law' *European Journal of Social Psychology*, Vol. 36, 2006, pp. 907–930.

86 D. Spini, G. Elcheroth and R. Fasel, 'The impact of groups norms and generalization of risks on judgments of war behavior', *Political Psychology*, Vol. 29, 2008, pp. 919–941.

a conflict situation when the risks of becoming a victim are so extended that even the dominant groups cannot effectively protect their members – that is, develop collective vulnerability – a climate evolves favouring the defence of humanitarian norms within the community.

View of the conflict

The sense of being a victim in conflict not only influences the general world view but also the view of the conflict itself. First, the collective sense of victimhood greatly strengthens the societal beliefs in the justness of one's own goals in conflict and in delegitimization of the rival. This attitude substantially reinforces the ethos of conflict that is one of the major incentives for continuation of the conflict.⁸⁷ Thus a strong sense of victimhood has an effect on the course of the conflict. Society members, perceiving themselves as unjust victims, vigorously uphold their ethos of conflict and strive to achieve their goals, prevent future harm and avenge losses and destruction already done. All these ways of thinking and behaviours are accompanied by intense hostility, mistrust and hatred directed towards the rival, which prevents any peacemaking process even from beginning. A study conducted in Croatia and Serbia by Corkalo Biruski and Penic⁸⁸ showed that collective guilt assignment could serve as a mediating mechanism in the relationship between traumatic experiences and outgroup attitudes. In this study it was found that the more people suffered, the more they assigned collective guilt to the group perceived as being responsible for their suffering. This led to greater social distance from the target outgroup.

In a recent study carried out on a national sample of Israeli Jews in the summer of 2008, significant links were found between views about the Israeli-Arab conflict and the societal belief of being a victim in it (i.e. about 40.6% of respondents highly agreed or agreed with the statement that, 'Throughout all the years of the conflict, Israel has been the victim and the Arabs and the Palestinians are the side causing harm', and an additional 20.8% somewhat agreed with it). Specifically, the more a respondent believed that Israel is the victim in the conflict, the more he/she (1) accepted the Zionist narrative about the conflict; (2) believed that Jews have exclusive rights for the whole land of Israel; (3) expressed dehumanizing views of the Arabs and Palestinians; (4) attributed responsibility for the outbreak and continuation of the conflict to them; (5) believed that the Jews exhibited moral behaviour during the fighting; and (6) felt hatred towards the Arabs. Respondents strongly believing in Israel's victimhood were also less ready to compromise on various key issues at the core of the Israeli-Palestinian negotiations (i.e. withdrawal, Jerusalem and refugee issues), were more in favour of forceful acts

87 D. Bar-Tal and E. Halperin (in preparation), 'Socio-psychological barriers to conflict resolution', in D. Bar-Tal (ed), *Intergroup Conflicts and their Resolution: Social Psychological Perspective*, Psychology Press: New York.

88 See D. Corkalo Biruski and S. Penic (in preparation), above note 4.

towards the Palestinians, and were less open to alternative information about the conflict.⁸⁹

Siege mentality

One of the possible consequences of a continuous sense of victimhood is the evolvment of a siege mentality,⁹⁰ which denotes a generalized mistrust of other groups and negative feelings towards them. It is based on a system of beliefs indicating that other groups have negative intentions to harm the collective. This syndrome develops when other groups support either directly or indirectly the rival (the perpetrator) who is viewed as evil. The Soviet Union following the Bolshevik revolution or Iran today provide an example of such a siege mentality.

Effects on identity

In some cases, strong views on being a victim may redefine the collective identity, as noted by Volkan.⁹¹ In fact, Adwan and Bar-On⁹² proposed that to develop collective self-perception as the victim is an identity process, occurring in long and violent conflicts, in which one or both parties reconstruct their respective identity around their victimization by the other side. The imprint of the past experiences of Poles is an example of how beliefs about victimhood can affect the identity. It is based on shared traumas and memories of suffering and being harmed.⁹³ Also, the perception of the Jewish people as the victim of a hostile world, which emerged early on in its history,⁹⁴ has become a central part of the Jewish-Israeli ethos and identity, and has had a major effect on the way Israeli Jews view the situation and act through the course of the Israeli-Arab conflict.⁹⁵

Egocentrism and lack of empathy

Since the victims usually tend to focus on themselves and their suffering, their sense of collective victimhood may also lead to a reduced capacity for empathy. Mack⁹⁶ observed that a society that is engulfed by the deep sense of being a victim focuses on own fate and is completely preoccupied with its own suffering,

89 See E. Halperin and D. Bar-Tal (in preparation) *Collective beliefs about victimhood in the Israeli Jewish society and their effects on the view of the Israeli-Arab conflict*.

90 See D. Bar-Tal, above note 28; D. Bar-Tal and D. Antebi, above note 79.

91 See V. Volkan, above note 4.

92 S. Adwan and D. Bar-On, *Victimhood and Beyond: The Bethlehem Encounter*, Newton Center, Boston, 2001.

93 See A. Jasińska-Kania, above note 40.

94 See D. Bar-Tal and D. Antebi, above note 79; A. Hareven, 'Victimization: Some comments by an Israeli', *Political Psychology*, Vol. 4, 1983, pp. 145–155; C. Liebman, 'Myth, tradition and values in Israeli society', *Midstream*, Vol. 24, 1978, pp. 44–53; H.F. Stein, 'Judaism and the group-fantasy of martyrdom: The psycho-dynamic paradox of survival through persecution', *Journal of Psychohistory*, Vol. 6, 1978, pp. 151–210.

95 See D. Bar-Tal, above note 56.

96 See J. Mack, above note 4.

developing what he called an ‘egoism of victimhood’. It means that a collective in this state is unable to see things from the rival group’s perspective, empathize with its suffering and accept responsibility for harm inflicted by its own group.⁹⁷ Moreover, the victimized group also often finds it hard to identify with the suffering of other societies in completely different contexts and experience empathy towards them.

This consequence can be found, for example, in Japanese society. The historical narrative that has been canonized and passed down there focuses on the death and suffering of Japanese soldiers and Japan’s civilian population, omitting the death, suffering and destruction endured by other Asians at the hands of the Japanese during the years of World War II. The younger generation thus mostly views Japan as a victim of the war, not as a perpetrator or aggressor. A result of this self-perception of victimhood is that ‘many Japanese people find it psychologically disorienting to be asked to recognize the victimhood of others, especially when it involves admitting the unfamiliar possibility of Japan as victimizer and perpetrator’.⁹⁸

Selective and biased information-processing

The sense of collective victimhood also influences cognitive processes.⁹⁹ It causes individuals to be more sensitive to threatening information and become hyper-vigilant, constantly searching for threats¹⁰⁰ because the threshold of attention to threatening stimuli is lowered, as happens when individuals are under stress.¹⁰¹ In this case individuals tend to select and interpret information about possible harm too easily, sometimes biasing and distorting it. In other words, every item of information or cue is scrutinized for signs of negative intentions, and society members may be disposed to search for information that is consistent with these beliefs while disregarding evidence that does not support them.¹⁰² This processing is based on the suspicion that society members feel toward the victimizing group, and which is necessary to prepare them for any harm to come.

Reduced accountability and responsibility

As mentioned above, the sense of collective victimhood that is central to intractable conflicts delegates responsibility for the outbreak of violence and the violence that

97 S. Čehajić and R. Brown, ‘Not in my name: A social psychological study of antecedents and consequences of acknowledgment of ingroup atrocities’, *Genocide Studies and Prevention*, Vol. 3, 2008, pp. 195–211; J. Chaitin and S. Steinberg, above note 84; E. Staub, above note 45.

98 P.G. Schalow, ‘Japan’s war responsibility and the Pan-Asian movement for redress and compensation: An overview’, *East Asia*, Vol. 18, No. 3, 2000, p. 11.

99 R.F. Baumeister and S. Hastings, ‘Distortions of collective memory: How groups flatter and deceive themselves’, in J.W. Pennebaker, D. Paez and B. Rimé (eds), *Collective Memory of Political Events: Social Psychological Perspectives*, Lawrence Erlbaum: Mahwah, NJ, 1997, pp. 277–293.

100 See G. Ross, above note 44.

101 D.E. Broadbent, ‘Decision and Stress’, Academic Press: London, 1971; R.R. Mackie, *Vigilance: Theory, Operational Performance and Physiological Correlates*, Plenum: NY, 1977.

102 See H.C. Kelman, above note 4.

follows to the adversary. Indeed, the sense of victimhood reduces the activation of mechanisms that usually prevent individuals and groups from committing harmful acts. Feelings of guilt and shame, moral considerations or a positive collective self-view are the human safeguards of humane conduct, but they often fail to operate when individuals perceive themselves as being victims.¹⁰³

Reduction of group-based guilt

The sense of victimhood protects the group members' self-esteem and prevents feelings of guilt for committing harmful acts against the other group, acts which take place regularly in intractable conflict.¹⁰⁴ It suggests that from the perspective of victimization, the harm done was inflicted as a punishment and/or prevention, and victims cannot be blamed for acts that are viewed as protective. A perpetual collective perception of being a victim thus has great psychological value; it serves as a buffer against group-based negative thoughts and feelings.¹⁰⁵ When the ingroup's victimization is made salient, individuals reported less group-based guilt in response to violence perpetrated by their ingroup against another. The reduction in group-based guilt occurred in various ethnic-national groups when reminded of diverse historical victimizations. A recent study conducted in connection with the Israeli-Palestinian conflict discovered a strong association between a sense of victimhood among Israeli Jewish respondents and reduced group-based guilt over Israel's actions against the Palestinians.¹⁰⁶ Those who had a high sense of victimhood expressed less guilt, less moral accountability and less willingness to compensate Palestinians for harmful acts by Israel. They also used more exonerating cognitions, or justifications, such as 'under the circumstances, any other state would treat the Palestinians in the same way' and 'I believe the Palestinians brought their current situations upon themselves'.

Justifying negative ingroup behaviour

Similarly Čehajić and Brown¹⁰⁷ found that perception of victimhood serves the function of justifying ingroup negative behaviour after it has occurred and as such undermines one's readiness to acknowledge ingroup responsibility for committed

103 See M.J.A. Wohl and N. Branscombe, above note 25.

104 N.R. Branscombe, 'A social psychological process perspective on collective guilt', in N.R. Branscombe and B. Doosje (eds), *Collective Guilt: International Perspectives*, Cambridge University Press: New York, 2004, pp. 320–334; N.R. Branscombe, N. Ellemers, R. Spears and B. Doosje, 'The context and content of social identity threat', in N. Ellemers, R. Spears and B. Doosje (eds), *Social Identity: Context, Commitment, Content*, Blackwell Publishers: Oxford, England, 1999, pp. 35–58; N.R. Branscombe, M.T. Schmitt and K. Schiffrhauer, 'Racial attitudes in response to thoughts of White privilege', *European Journal of Social Psychology*, Vol. 37, 2007, pp. 203–215.

105 See M. Wohl and N. Branscombe, above note 25.

106 Y. Klar, N. Schori and S. Roccas, *The shadow of the past: perpetual victimhood in intergroup conflicts*, unpublished data, Department of Psychology, Tel Aviv University, 2009.

107 S. Čehajić and R. Brown (in preparation), *Victimhood and acknowledgment of ingroup atrocities*, unpublished manuscript.

misdeeds. Serbian adolescents who believe that their group is actually the true victim (in the 1991–95 war) and/or has suffered more than members of the other groups are less willing to acknowledge their group's responsibility for atrocities committed against others.

Moral entitlement

Victimhood is also strongly related to a feeling of moral entitlement, which can be defined as the belief that the group is allowed to use whatever means to ensure its safety, with little regard to moral norms. In the very recent study by Schori, Klar and Roccas,¹⁰⁸ the sense of self-perceived collective victimhood was found to be strongly positively associated with the feeling of moral entitlement and negatively associated with group-based guilt over Israel's actions in the occupied territories. It was also related with willingness to continue the military operations at all costs, even allowing for great losses to either the Israeli or the Palestinian side, and with the wish to continue punishing the enemy group, even if such punishment means retaliation and suffering inflicted upon the ingroup.

It is thus not surprising that the sense of being a victim frees the society from the limitations of moral considerations that usually limit its scope of action. It allows some freedom of action because the society believes that it needs to defend itself to prevent immoral and destructive behaviour of the rival. This need often allows the society to feel free from the binding force of international norms and agreements. Survival is instead its overriding consideration. An example of this is the Memorandum of the Serbian Academy of Sciences and Arts, which in 1986 argued that 'Serbia must not be passive and wait and see what the others will say, as it has done so often in the past'. Similarly, in 1973 Israel's Prime Minister Golda Meir responded to international criticism by saying: 'As for those who are trying to preach to us now ... You didn't come to the help of millions of Jews in the Holocaust ... you don't have the right to preach'.¹⁰⁹ Recently, Israel justified the wide-scale harm inflicted on the Palestinians in Gaza by the fact of being continuously bombarded with Palestinian rockets. A society may thus use the sense of being the victim in a conflict as a reason for rejecting pressures from the international community and to justify taking unrestrained courses of action.

Violent reactions

The sense of collective victimhood may lead to intensified violent reactions that are viewed as a punishment for the harm already done and/or as prevention of possible future harm. It provides moral power to oppose the enemy and seek justice.¹¹⁰ The

108 See N. Schori, Y. Klar and S. Roccas, *When past is present: reminders of historical victimhood and their effect on intergroup conflicts*, unpublished data, Department of Psychology, Tel Aviv University, 2009.

109 *Ha'aretz*, 29 April 1973.

110 See D. Bar-Tal, above note 1.

violent actions are based on absence of guilt feelings, feeling of moral entitlement and moral justifications for whatever actions the group takes to defend itself.¹¹¹

Rationalization of immoral acts

The status of being a victim is sometimes interpreted as a licence to commit immoral and illegitimate acts. This licence is based on several types of rationalizations: (1) a world that allowed such a thing to happen has no right to pass moral judgement on the ingroup; (2) if the trauma was allowed to take place, then moral conventions no longer apply, and the ingroup is not bound by them; (3) the ingroup is allowed to do everything within its power to prevent a similar trauma from ever happening again; (4) whatever the group may do, it is nothing in comparison with what has been done to it. The result of these justifications is that acts which under other circumstances might be considered by the same group as immoral and illegitimate are perceived as just and worthy when employed in defence of the group against new threats, both real and imaginary.

Victim-to-victimizer cycle

Horowitz¹¹² and Petersen¹¹³ provide numerous examples of inter-ethnic conflicts in which parties that suffered harm continue the acts of violence to teach the rival a lesson and to deter that group from committing future acts of aggression. In some cases, under certain conditions, a history of severe persecution may lead group members onto the path of becoming perpetrators themselves.¹¹⁴ A recent review by Lickel, Miller, Stenstrom, Denson and Schmader¹¹⁵ describes the psychological mechanisms that underlie acts of violence carried out as retribution by ingroup members, who were not even hurt, towards outgroup members who had done no harm. They suggested that factors such as initial construal of the event as a harmful act, identification with the ingroup, and homogenized perception of the rival lead to 'vicarious retribution'.

Botcharova¹¹⁶ delineates a circle of revenge that illuminates the feelings and processes stemming from personal and ethno-national trauma. The original feelings of suffering, injustice, anger and frustration may lead to the desire 'to do justice' and then directly to violent acts of 'justified aggression'. Similarly

111 See S. Čehajić and R. Brown, above note 97.

112 D.L. Horowitz, *The Deadly Ethnic Riot*, University of California Press: Berkeley, 2001.

113 R.G. Petersen, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe*, Cambridge University Press: Cambridge, 2002.

114 D. Enns, *Identity and Victimhood*, Berghof Occasional Paper No. 28, Berghof Research Center for Constructive Conflict Management: Berlin, 2007; E. Staub and D. Bar-Tal, above note 34.

115 B. Lickel, N. Miller, D.M. Stenstrom, T. Denson and T. Schmader, 'Vicarious retribution: The role of collective blame in intergroup aggression', *Personality and Social Psychology Review*, Vol. 10, 2006, pp. 372–390.

116 O. Botcharova, 'Implementation of track two diplomacy: Developing a model for forgiveness', in G. Raymond, S.J. Helmick and R.L. Peterson (ed), *Forgiveness and Reconciliation: Religion, Public Policy, and Conflict Transformation*, Temple Foundation Press: Philadelphia, 2001, pp. 279–304.

Staub¹¹⁷ proposed that the sense of collective victimhood is related to negative affective consequences of fear, reduced empathy and anger, to cognitive biases such as interpretation of ambiguous information as hostile and threatening, to emergence of the belief that violent action taken is morally justified, to reduced moral accountability and finally to a tendency to seek revenge. Bandura¹¹⁸ suggested a number of psychological mechanisms that serve as facilitators of moral disengagement leading to acts of violence. Among them, he noted moral justification, euphemistic labelling, advantageous comparison between the groups, disregard or distortion of the severe consequences of violence, and dehumanization of the rival. This analysis can be easily applied to the victims' state of mind that facilitates the harm they inflict in turn. Ramanathapillai¹¹⁹ described how this process led Tamils, who had themselves experienced continuous atrocities, to perform acts of indiscriminate violence that killed many innocent Sinhalese. The genocide in Rwanda is one of the most poignant examples of the victim-to-victimizer cycle. In a book about the horrendous events that took place during the 1990s, Mamdani¹²⁰ poses a series of questions which shed light on elements of the process that locks victims into the cycle of victim-turned-perpetrator:

'What happens when yesterday's victims act out of a determination that they must never again be victimized, *never again*? What happens when yesterday's victims act out of a conviction that power is the only guarantee against victimhood, so that the only dignified alternative to power is death? What happens when they are convinced that the taking of life is really noble because it signifies the willingness to risk one's own life, and is thus, in the final analysis, proof of one's own humanity?'

Increased empathy and pro-social behaviours

The above description focuses on the negative effects of the sense of victimhood because it seems that these negative patterns of thought and behaviour are highly prevalent; therefore, most of the literature refers to them. However, it is recognized that the sense of collective victimhood may under certain circumstances lead to heightened sensitivity to the suffering of others, empathy, understanding and willingness to aid other groups in need¹²¹ but this form of reaction seems to be the exception rather than the rule.

Vollhardt¹²² presented this effect of victimhood by differentiating between exclusive and inclusive victim beliefs. The latter emphasize the shared existential

117 See E. Staub, above note 45.

118 A. Bandura, 'Moral disengagement in the perpetration of inhumanity', *Personality and Social Psychology Review*, Vol. 3, No. 3, 1999, pp. 193–209.

119 See R. Ramanathapillai, above note 59.

120 M. Mamdani, *When victims become killers: Colonialism, nativism, and the Genocide in Rwanda*, Princeton University Press: Princeton, 2001, p. 34.

121 See J. Chaitin and S. Steinberg, above note 84; J. Vollhardt, above note 56.

122 See V. Vollhardt, above note 56.

experience of victimization and suffering between groups. According to the logic of this line of reactions, when group members experience harm, it tunes their sensitivity to suffering in general and under some conditions to perceived similarity with other groups' experiences, even including those of the rival in conflict. In turn, this empathy may facilitate courses of action that promote peacemaking, including various co-operative activities with members of the rival society who have had similar experiences and whose repertoire of beliefs and attitudes is similar.

The most vivid example of this type of effect is the activity of the Forum of Israeli and Palestinian Bereaved Families for Peace, established in 1995 by Yitzhak Frankenthal whose son was killed by the Palestinians. Today the Forum consists of several hundred Israeli Jews and Palestinian families (half from each side) who have lost their loved ones in the conflict and decided to devote their lives to peace-building in order:

'to prevent further bereavement, in the absence of peace; To influence the public and the policy makers – to prefer the way of peace on the way of war; To educate for peace and reconciliation; To promote the cessation of acts of hostility and the achievement of a political agreement; To prevent the usage of bereavement as a means of expanding enmity between our peoples'.

This exceptional example testifies to the possibility of escaping from the narrow confines of a particular group or society's sense of collective victimhood into the open fields of universal moral considerations.

Conclusion

The objective of the present article is to describe the psychological foundations and dynamics of the collective sense of victimhood in intractable conflict. There was no intention whatsoever to diminish the status of the victim. On the contrary, we recognize that intractable conflicts are violent, harsh and vicious, causing tremendous suffering to society members involved in them. Throughout history, in various conflicts, there are societies that experienced great losses and we did not intend to argue against their collective sense of victimhood. However, it is well established that in intractable conflict both sides almost always perceive themselves as being victims of the rival.

It is therefore essential to illuminate the nature and meaning of the collective perception of victimhood. Self-perceived collective victimhood is a state of mind that is brought into being by society members and transmitted to the members of new generations. The establishment of this state of mind is based on real experiences and on the process of social construction. Once it evolves it is solidified and has important implications for society members, for the way the conflict is managed and for general intergroup relations of the victimized group.

Of great importance for us is the effect of this state of mind in intractable conflicts. The present analysis indicates that it may be one of the factors that fuels continuation of the intractable conflict and inhibits its peaceful resolution. Victims

cease to view the present as the preparation for defining a new future, but simply as a continuation of the same past. On the one hand, the sense of victimhood is one of the foundations of the core societal beliefs of the ethos of conflict and collective memory that maintain the conflict, and on the other hand it is one of the major factors that sustain violence. When this state of mind prevails on both sides in intractable conflict, then these sets of beliefs help to perpetuate the cycles of violence. However, in very rare cases, the sense of being a victim leads to consideration of peaceful ways to resolve the conflict.

Yet groups do sometimes overcome the barriers to peaceful conflict resolution and embark on the road to reconciliation, as has happened in Northern Ireland. In these cases, there is a need to address the feeling of victimhood. Without doing so it is hard to bring about any reconciliation, which demands a change in the psychological orientation toward the past rival and towards the collective self. Almost all theorists, experts and practitioners of reconciliation hold that in this process it is necessary to address issues of justice and truth, which in essence pertain to the harm done during the conflict. This requires an examination of the harm done by both sides, its extent and nature, the responsibility for it, and due accountability. Through this process both sides can, by getting to know the two narratives of the conflict (including those about victimization), at least acknowledge what happened in the past.

Often, however, more than that is required for preoccupation with the past to be resolved. The successful process of reconciliation should ultimately lead to collective healing and forgiveness for the adversary's misdeeds. It allows the emergence of a common frame of reference that enables and encourages societies to acknowledge the past, confess the wrongs, relive the experiences under safe conditions, mourn the losses, validate the experienced pain and grief, receive empathy and support and restore the broken relationship, and eventually creates a space where forgiveness can be offered and accepted. It is also recognized that intractable conflicts may be asymmetrical in the way the sides involved carried or carry out harmful acts. In these cases, it is essential that the side that is to a greater extent the perpetrator takes responsibility for the inflicted harms. They should not only stop carrying out these harmful acts, but also initiate acts of benevolence such as apology and compensation in order to speed the process of reconciliation.

The sense of self-perceived collective victimhood is an unavoidable part of the human repertoire in the context of intractable conflict. Societies involved in this type of conflict experience losses, bleed and suffer, and themselves cause losses, injuries, destruction and suffering to the rival. However, the real test for humanity is whether the groups involved eventually begin to see the contours of human beings on the other side of the fence, through the dark clouds of enmity that obscure them. This phenomenal discovery may eventually lead to the great revelation that both sides are victims of the conflict, and that it is therefore time to end it.

Interview with Khaled Abu Awwad and Roni Hirshenson*

Khaled Abu Awwad is the General Manager of the Israeli-Palestinian Bereaved Families Forum. Roni Hirshenson is the Forum's president and one of its founders. Established in 1995 with an Israeli office in Tel Aviv and a Palestinian office in A-Ram (north of Jerusalem), the Bereaved Families Forum is a grassroots organization of Palestinian and Israeli families who have lost family members to the violence in the region. These families have united in a joint mission to prevent further bereavement by working for peace and reconciliation. The Forum has received several international awards in recognition of its work, including the Eisenhower Medallion, the Three Cultures Award, the Solidar Silver Rose Award and the Common Ground Award. More information about the Forum is available at www.theparentscircle.com.

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Can you tell us about your loss?

Khaled Abu Awwad (K.A.A.): The immediate tragedy that brought me to the Forum took place on 16 November 2000. My brother Youseff was killed by the Israeli military. A soldier shot him in the head and he died on the spot. The incident occurred in the village of Beit Omar where Youseff had been living with my family and where I continue to live with my family to this day.

On that day, Youseff had been driving his car in the village. A group of six or seven soldiers had entered the village, as part of the military policy at that time [*the beginning of the Al-Aqsa intifada – O.S.*], to demonstrate to the villagers who was boss. They erected a checkpoint in the village, stopped all the cars and inspected them. The village youth greeted the soldiers with stones. It was their way

* The interview was conducted in June 2009 by Ofer Shinar, who is a lecturer in the Department of Administration and Public Policy and the Department of Social Work at Sapir College, Israel, and a PhD candidate at the School of Public Policy, Hebrew University, Jerusalem. He was formerly the research and development manager at the Bereaved Families Forum.

of sending a message to the soldiers that they were not welcome guests in the village.

The first car that was stopped at the checkpoint was Youssef's. His car was caught in the middle between the stone throwers on one side and the soldiers on the other. At one point Youssef exited the car and appealed to the stone throwers, 'Stop, can't you see that we're caught here in the middle?' In effect Youssef was asking this of his neighbours, of the children of the village. All the stone throwers knew who he was – in the village everyone knows each other. His words had an effect. The youth understood what Youssef had said and what he had requested and they desisted.

One of the soldiers was apparently insulted by the ease with which Youssef had ended the stone throwing, and he began to throw stones at Youssef's car. Youssef again exited the car and said to the soldier, 'You asked me to pull over and I pulled over. I asked the boys to stop throwing stones at you. Why are you throwing stones at me?' This set off a verbal fight between the soldier and Youssef, with Youssef asking the soldier to settle down. Ultimately the soldier said to Youssef, 'I'll kill you.' The soldier put the weapon to Youssef's head and pulled the trigger, and Youssef fell and died on the spot. Immediately following the gunshot a riot broke out in the village – everyone ran in the direction of Youssef. It was a very difficult sight. Everyone understood that there was a possibility that Youssef had been killed. The commanding officer started to shout at the soldier, 'What have you done to me? What have you done to me?' The military forces hastily dismantled the checkpoint and immediately departed the village. The residents took Youssef and began to drive in the direction of Al Ahli hospital in Hebron, where he was pronounced dead.

I came to the hospital. I was on my way back from work – Youssef was supposed to have picked me up on the way to take me home. Youssef was five years younger than me. He was 31 years old when he was killed. He had two small children, a daughter and a son.

I heard that this was one of five fatal incidents that the military wanted to investigate. We learned that the army did conduct an inquiry which revealed the identity of the soldier who killed Youssef, but no-one was made to stand trial. This is despite the fact that the soldiers and the officer and obviously many residents of the village witnessed the killing. Those who were present told me that the officer had taken the weapon away from the soldier immediately following the incident, so the officer certainly knew what the soldier had done. The army asked us to prove that the soldier had committed a criminal act, but they refused to investigate and to seek witnesses. I brought Youssef's body to the coroner and he determined that the distance between the rifle and Youssef's head had been less than one metre.

Another brother, Sa'ed, was shot on 26 February 2002. He was a young boy, fourteen-and-a-half years old. He had returned home from school and gone outside to play with a friend in the village, near his home. The friend owned a convenience store across from my mother's house. A sniper bullet was shot from the military tower on Road 60, which is about 600 metres from the home, and hit Sa'ed in the head. Sa'ed died on 6 March 2002 in Al-Mukassad hospital in

Jerusalem, after having been on a ventilator for 10 days. He had been right at the entrance to the convenience store when he was shot. The spot where the bullet hit the entryway of the convenience store is still visible today.

Roni Hirshenson (R.H.): On 22 January 1995, a suicide bomber exploded near a group of soldiers at Beit Lid junction. Eight soldiers were killed in the explosion and several others were injured. My son, Amir, who had been dispatched to patrol the junction, was a paratrooper – a new recruit who had been serving in the army for three months. Amir was rushing to help his friends when the second suicide bomber struck, detonating himself and killing Amir. In total, twenty-one soldiers and one civilian were killed.

Regrettably, this was not the only tragedy. The first soldier to fall in the Gaza strip at the beginning of the second *intifada* was David Biri. David was the best friend of my younger son, Elad, who was also a soldier at the time, serving in Galey Tzahal [*army radio*]. Three weeks later Elad put an end to his life. He left a letter in which he wrote that he couldn't bear the sorrow and pain of losing his brother and losing his best friend, who was also like a brother to him.

How did you come to join the Forum?

K.A.A.: It all began at a meeting with people from the Forum in Beit Omar in July 2002. At the meeting I discovered many others who were like me. Before the encounter, owing to the tragedies that had befallen me, I had been strongly opposed to meetings with Israelis. I felt very bad after the two incidents. I understood that the situation was not improving. I didn't want to see anyone from the other side. The encounter with members of the Forum enabled me to meet other victims of the occupation. Everyone told their stories and I felt an immediate connection with them. I felt that I was part of them. I felt that these people had experienced painful emotions that were similar to mine. I spoke about my anger and pain for the first time, and I spoke about how the occupation and the violence must end.

I joined the Forum in 2002 and I started to become active. But the occupation and my family's tragedies did not end as a consequence of my involvement in activities promoting peace between the peoples. In 2004, while I was at a lecture by the Forum together with an Israeli friend, I received a telephone call – in the course of a lecture to Israeli youth – that my son, Mo'ayed, had been seriously injured. He had participated in a demonstration on the day of Arafat's funeral. Earlier that day there had been a clear instruction to the Israeli military not to enter the Palestinian cities and villages. The demonstration was inside the village. Despite this instruction two border patrol jeeps entered the village and started shooting at the youth. One of the youths was killed and my son Mo'ayed was seriously injured. Mo'ayed was 16 years old. He was treated at Hadassah Ein Karem hospital for over two months. Afterwards he was transferred to the Beit Jala rehabilitation centre, where he stayed for another six months. Unfortunately, he continues to be seriously handicapped to this day and it appears that his injury will not heal. The

lawyers I spoke to requested a large sum of money to take on the case, so I didn't file a lawsuit. It was the same with the deaths of my brothers Youssef and Sa'ed.

R. H.: A few months after Amir died I was walking down the street and saw an advertisement showing photographs of all the Israeli casualties since the beginning of the Oslo peace process. It was published by the extreme right, which was then called the *Match Ma'amatz*. Beneath the photographs of my son and others they had written, 'This is a consequence of the Oslo Accords and of the activities of a regime of blood.' At that moment I understood that I must stand up and do something. You can't go and take the memory of my son in order to ram the peace process.

Itzhak Frankenthal, who lost his son Arik in the Hamas attack in July 1994, asked me to join a group of bereaved parents who supported the Oslo process. During this time, there were attacks on Itzhak Rabin, primarily by bereaved families, calling on him not to conduct negotiations with the enemy. They even came to the Nobel Peace Prize Award Ceremony to demonstrate against the Oslo process, and in effect they appropriated national bereavement to themselves. Initially, when Frankenthal turned to me, we organized twenty-four bereaved families. Very quickly, it expanded to 120. Everywhere we voiced our position in Israel, we were told that we wouldn't find others like us on the Palestinian side, people who had lost their loved ones and who didn't want revenge but rather were looking for a path to dialogue and reconciliation.

From there, through connections we made with Hisham Abdel-Razeq, the Minister for Prisoners' Affairs in the Palestinian Authority, we reached bereaved Palestinian families in Gaza. Very quickly, we saw that we shared with them the same pain and the same desire to end the conflict. Revenge was not on the agenda in any form – not for us and not for them.

What were your thoughts when you first joined the Forum?

K.A.A.: At the initial meeting with Israeli members of the Forum I felt for the first time that I and the Israeli shared the same fate. I felt that all the members of the Forum understood me and understood my motivations and my pain.

R. H.: When the Forum was founded I had the sense that there was a lot to say and a lot to do. You want the whole world to hear you, you want everyone to understand that this battle is futile, and you ask your friends in the Forum what to do. You search for something to do with the pain that wants to break out and cry, 'Enough!' You ask how to make others understand that all of this is futile, that this violent struggle leads nowhere.

The first meeting with people from the Forum signified for me an opening to hope – if not only I think this way, but many others do too, then this message can be passed onward. The message and principles can be disseminated.

How did you initially respond to your loss?

K.A.A.: During the years of the first *intifada* I took part in the struggle, but in the course of the Oslo process I changed and I started to work with Israelis.

I befriended many of them and I felt that they were part of my family and that I was part of their family. When the first tragedy struck, essentially I put all Israelis in the same box. The occupation and the expulsions that befell us, the violations of our rights and the tragedies of Youssef and later of Sa'ed – all these cause me a great deal of anger toward Israelis. After the death of Youssef, many Israeli friends wanted to share my loss. They tried to contact me and talk. I avoided them – I couldn't speak to them.

R.H.: In effect, immediately when Amir fell, I understood that he wasn't killed because of terror but because of a lack of peace. I felt a need and a desire to do everything to end the conflict between us and the Palestinians so that no-one else would experience the pain of bereavement.

My initial response was a desire to prevent others from suffering as I was suffering. I also wanted to seek a way to hasten the end of this conflict. I'm surprised I didn't feel angry – maybe it's a little unpleasant to say this. I understood that the reason a tragedy like this could occur was the existence of the conflict itself. As long as the conflict continues, extremists will carry out unconscionable acts and kill each other – we them and they us. As long as the conflict bleeds, people will be wounded here. I thought, 'Now it has reached me.'

How did your thoughts and emotions develop with time?

K.A.A.: Today I see things differently. The solution will never be achieved through force. A solution through force will bring about more tragedies and will cause more families to experience indescribable personal pain. Tragedy can befall anyone – anyone, Israeli or Palestinian, can become a victim of the occupation. I might have become one of those who adopt violent means, but despite my pain and anger, I chose another path. Not everyone has that strength. Not everyone can even withstand being abused by a soldier at a checkpoint. The thing that characterizes the members of the Forum is that we took the pain inside every one of us and used it to achieve a different goal: to prevent further bereavement. We are prepared to open a new page. Conversely, those who choose revenge are adding fuel to the fire.

R.H.: My suffering caused me to look empathically upon the suffering of the other. Now I look more deeply. I feel more open to listening to the suffering of another. This is true for any suffering, not only for the suffering of Palestinians, but for human suffering in general. What is happening in Darfur speaks to me more because I know what suffering is. The abduction of Gilad Shalit keeps me from sleeping at night, his family's suffering drives me mad.

What role do you think the families of victims play in the conflict? Are these roles different in either society?

K.A.A.: Both societies find it difficult to face up to their bereaved families. No one can say to a bereaved family, 'You don't care about us.' When I became active in the Forum I felt that our opinion was respected. Our terrible tragedies transformed us into people of truth. You cannot be a political person when you are talking

about your brother who was killed. You cannot be political when you talk about the pain you and your family experienced.

The Palestinian people treat families of the *shahids* ('fallen soldiers') in a very respectful way, and likewise in Israeli society. The difference, if one exists, is that in Palestinian society there are many bereaved families. This is the central difference that I sense exists between the two societies. Nonetheless, I wouldn't say that we are not respected as a family of a *shahid* in Palestinian society – even though there are many like us.

R.H.: The role is clear, to make an emotional breakthrough. The co-operation between Israeli and Palestinian bereaved families shows the two societies that people who paid the greatest price in the conflict – the loss of a family member – have hope. The joint action shows that there is a future and that there is hope for ending the conflict because if those who paid the highest possible price can work together, there is no reason why people who have not been hurt cannot do the same, much less the politicians.

There are more similarities between the two societies than differences. In both societies there is great respect for those who have been hurt by the conflict and have paid the price, both here and there – parents of a *shahid* over there are like bereaved parents in Israeli society.

What do you think is the role of victims themselves in your society? Has this changed over the years? Do you think that your society is preoccupied with victimhood, trauma and loss?

K.A.A.: Society can receive meaningful support from us. An important part of the conflict is the prisoners and the victims of the conflict. Sometimes there is also misuse of bereavement. In Israeli society, as a democratic society, the voices of bereaved families who oppose the continuation of the peace process have greater resonance. I don't know Palestinian families of *shahids* whose bereavement is used in this way.

R.H.: Israeli society views fallen soldiers as its protectors – they fell for the sake of the security of the state. The victims are seen as a price that must be paid for security.

The halo surrounding bereaved families is not what it used to be. Today there is a growing sense that the deaths are senseless, especially following the first Lebanon war. People understood that staying there for 19 years was pointless. In retrospect, the withdrawal from Lebanon caused many to feel that the victimization had been in vain. Even though the families themselves find it difficult to admit this, this is the sense in the society.

There is fatigue in Israeli society of the chronic ritual of war followed by a period of quiet, a peak in violence followed by a decline, a ritual that continues without end.

It is difficult for me to say this, but I feel that I am a victim of obliviousness and stupidity. People reach the conclusion to go to war on the basis of faulty data.

Perceptions of the conflict are inaccurate. Decision-makers don't see things accurately, don't read the facts on the ground, don't delve into the issues. They harbour prejudices and make decisions accordingly, without considering facts. Those who are positioned to collect data – security personnel, the military – have personal interests. The data are not objective, and then we go to war.

Do you think victimhood has been politicized in Palestinian or Israeli society? Is this increasing?

K.A.A.: There are Palestinian leaders who say that because of the families who lost their loved ones, compromises cannot be made. I don't understand how statements like this can benefit either society.

R.H.: You might think that in a society where people are victims of bereavement, the natural and correct thing to do, for them, is to seek revenge. This is partly true, but not entirely. People do not change their opinions due to trauma. Behaviour does become more extreme, but a person who is humane by nature in his opinions and principles will not necessarily choose violence as a course of action consequent to his injury. As opinions in society are diverse, they are similarly diverse among those who are affected by bereavement. But people are more willing to listen to a member of a bereaved family.

To some degree, exploitation of victimhood exists in both societies. Not releasing prisoners, for example. Not releasing prisoners reinforces hatred.

Do you think there is a competition between the two societies over who is the ultimate victim of the conflict?

K.A.A.: There has always been and always will be competition between the two societies on the matter of victimhood. Each one is of the opinion that his pain is the greater. Maybe at one time things appeared different to me, but today I understand that this competition is an integral part of human nature. This competition will not end unless and until the conflict ends. In most of the activities that we as a Forum conduct in civil society, we come upon such claims as, 'We suffer more.' This is a significant problem, inasmuch as both societies try to prove that they are the victim of the conflict.

R.H.: I agree that such a competition exists between the two societies, but in the work of the Forum we understand that there is no point in creating such a competition. Each society has its pain. I don't think that those who lost one child hurt less than those who lost two children. At the same time, it is clear, objectively, that Palestinian society suffers more on a daily basis. The situation of a person who is not only bereaved but also humiliated at a checkpoint is objectively worse, even though the pain of bereavement is the same.

In Israel, victimhood is periodically used – 'If we release prisoners, how will we look the bereaved families in the eyes?'

Do you think you are perceived as a patriot in your own society?

K.A.A.: I feel that I am respected more because of the history of my family, as a family active against the occupation in the 1970s and '80s. In these decades we became a family of *shahids*. These things together caused Palestinian society to grant my family respect on account of all that we suffered, of our opposition to the occupation and the very dear price that we have paid. Our opinion is perceived as an important opinion in Palestinian society.

R.H.: I think 'patriot' is too big a word. I might be perceived as a person to whom society is important, a person to whom the existence and welfare of the community is important. 'Patriot', in the sense of preserving nationalism – that's not something I have felt.

I think the Forum and my activities make me seem like a strange bird in Israeli society, but people are always willing to listen to me.

What makes you different from other families of victims in your society?

K.A.A.: My family represents a large segment of the families of *shahids* in Palestinian society whose views are not remote from ours. There are people whose opinions are different. There are families who have lost their loved ones whose political views are less firm.

R.H.: I think the more people are involved with themselves, with their own pain and with the narrow scope of their own family, their own temple, the narrower and the more myopic their outlook. This type of outlook is less humane and doesn't allow one to see beyond one's personal pain. People like that can't see the pain of those who are outside their society. They may be local patriots, but not humane people.

Recognizing universal human values, that a human being is a human being: this is the basis of all the principles I lived by, before and during the bereavement and today. The value of human rights, of humaneness regardless of race, religion, or sex, has always guided me.

The Palestinian who killed my son committed suicide. Am I supposed to hate all of Islam because the person who killed my son was Palestinian? Maybe I should hate only the residents of Gaza because the bomber came from Gaza?

What are your thoughts on the use of suffering as a justification for violence? On revenge?

K.A.A.: The first emotion that I felt after Youseff was killed was the desire for revenge. When I returned the next day, I sought the soldier who killed my brother. I started to ask everyone in the village what he looked like. There are also people who come to you and ask to be your right-hand man, to help you take revenge. Today I view revenge as an expression of internal anger. Today I understand that there is a need to behave according to one's wits and not to let ourselves be directed

by anger. Revenge is in essence an invitation to join the conflict's cycle of blood. Revenge will only inflict suffering on more families.

R.H.: Revenge will not bring back my son. Revenge will only intensify the cycle of violence, will accelerate it. Those who take revenge suffer no less than the victim. I have never seen someone take revenge and benefit from it. I don't think that revenge can have a positive influence – not on the victim and not on the avenger.

Can you explain how you have worked to achieve the Forum's ambitious goals of peace and reconciliation?

K.A.A.: The Forum tries to work towards its goals in two ways. First, there is the daily work of members of the Forum who meet with groups in Israeli and Palestinian society to tell their personal stories. The members of the Forum embody a model for proceeding in a different way – not choosing anger but trying to end the conflict. We enlist everyone we meet for the purpose of reconciliation and resolution of the conflict.

In addition, I feel that we assume importance when issues relating to the conflict arise in public discourse, such as our activities for the release of Palestinian prisoners and for the release of Gilad Shalit. We also acted against the war in Gaza in like manner. Unfortunately, some of us – Israeli members – were arrested by the police in Israel on account of these activities.

R.H.: Unmediated encounters between Israelis and Palestinians – our aim is to humanize the conflict. The violent struggle has caused both societies to move further apart from one another, and then an entire generation in Israel grows up never even speaking to Palestinians. All knowledge is received through the media, which by definition means ideas that are bad – a Palestinian is someone who always wears a *kaffiyeh* and an explosive belt. There are people behind the stigma.

The Forum conducts encounters between groups in the country and overseas. Ordinarily, two members of the Forum are present at the encounters, one Israeli and one Palestinian. The encounters are usually very moving to those present. The very existence of the encounter plants hope in their hearts that there is someone to talk to, that human beings are human beings, on the Israeli side and on the Palestinian side. Reconciliation seems possible after such encounters.

We produced a television series, a drama, *Good Intentions*, which was broadcast on the most popular station on Israeli television. Given that at its height the series drew a 13.5% rating, I can estimate that 600,000 or even 700,000 people watched the series. The series included a clear statement about the futility of the violent struggle. Today we are producing a 90-minute movie based on the series, and we have also produced a 45-minute movie on the making of the series. We screen it at conferences and at the Forum's events.

A large project that we are currently planning is to bring Palestinian families to Yad Vashem. We brought 70 Palestinians and 70 Israelis there. Afterwards they visited a Palestinian village that was wiped out in 1948. Becoming familiar with the narrative of the other is a fundamental precondition for

reconciliation. One need not agree, but it is important to be familiar with the facts and with the emotions that people feel regarding the narrative. We want to broaden this project for others in Israeli and Palestinian society. Bereaved families will accompany and organize such groups.

The Israeli and Palestinian societies do not know each other's narrative. There could be activities which will be aimed to overcome this problem. For example, Holocaust survivors can assist in explaining to Palestinians that they arrived in Israel not to expel them but because of what had happened to them in Europe. Palestinians can show Israelis where they lived, where the family's fig tree was planted, and explain that today they live as refugees in a refugee camp. Acknowledging the suffering of the other national group stimulates the desire to be lenient with the other national group. This is a good way to reach compromise and reconciliation. No one has a monopoly on suffering – both nations are sharing the same land and must compromise on their dreams.

How is the Forum viewed by members of your society? Why is this so, in your opinion?

K.A.A.: The Forum is a well-known organization in Palestinian society. Many view the Forum with respect but oppose its positions. The daily suffering incurred by Palestinians seriously damages their capacity to sustain hope. The responses we hear are, 'How can you go with the families of the soldiers?' For Palestinians, Israeli soldiers are the ones who take away our freedom. This is the source of all our suffering and anger. Many do not understand how we can make any comparison between the victim and the killer. Despite this, we know that the human connection conveyed by the Forum succeeds in overcoming all these feelings. The Forum introduces Palestinian society to the mothers and fathers and families of the soldiers and this is the secret of our strength.

R.H.: The Forum is very well known among those who work for peace but not necessarily in Israeli society at large. We are not a mass movement. Our projects are well known, but they are not always attributed to us, for example the television series *Good Intentions*.

How do you cope with the risk of re-traumatization, given your involvement in the Forum?

K.A.A.: Today I try not to recount the stories of the tragedies that my family experienced. The stories bring me back to very difficult places. These feelings cannot be expressed in words. I continue to appear before Israeli and Palestinian audiences, but I try to do this only when there is no other option.

R.H.: It is very difficult to recount the story and the losses again and again, but I feel that it is an obligation that I must carry out. It is also in effect a kind of duty to the memory of my children. The only way I can believe that their sacrifice was not in vain is if I carry out an act to foreshorten this conflict.

What are the Forum's sources of strength?

K.A.A.: The Forum represents one of the most important elements in the conflict – the victims. The conflict is about territory but it also stems from the high price exacted to this day from the many victims killed in the course of the conflict.

R.H.: To a certain extent, there is pluralism and openness in Israeli society and the society is able to listen to different views. Whenever something happens, we are called to be interviewed and to speak. For example, there is an exhibit now at the Dvir Gallery entitled *It Won't Stop Until We Talk*. The gallery owners adopted this phrase – one of the mottos that the Forum originated and circulates – as their statement that the purpose [of the exhibit] is to contribute to the cessation of the conflict. I will be interviewed soon on Israeli television and will discuss this.

What is the unique value of the Forum compared with other peace organizations? Can the Forum's activities help to transform the conflict?

K.A.A.: Another important part of the strength of the Forum stems from the fact that we are a joint organization. In Arabic there is an adage: you cannot clap with one hand. There is a need for joint action by both sides, and the Forum is such an organization. Everything in our Forum is done jointly. Moreover, the Forum does not choose its members – fate chooses our members on behalf of the Forum. Therefore we feel that we are of the people. New members join all the time, though not many. We do not actively recruit members, but to our sorrow, the organization is growing. To the best of my knowledge there are about 700 Palestinian and Israeli members listed today.

R.H.: We are unique as an organization in that we are bi-national, Israeli and Palestinian. Most peace organizations in Israel are organizations that operate on behalf of Palestinians. We have a joint bank account, joint management in which all decisions are made by both sides. This is a true partnership – a single non-profit in which both Palestinians and Israelis are members. We implement what should be happening between the two states: full co-operation.

There is agreement to listen to the victims of the conflict and to try to empathize with their views as well as their pain. In other organizations, there is maybe less listening. The Forum does not provide solutions to the conflict, but we provide support to every representative body of the two sides in order to reach agreement. We support the fact of the need to reach agreement.

What have been the Forum's most successful projects? Why were they successful?

K.A.A.: The lectures that we provide are, in my opinion, a most successful activity. Another successful project has been house visits that we arranged in Israeli and Palestinian society. Another successful project, 'Hello Shalom,' was a phone line that connected hundreds of thousands of Palestinians and Israelis, and allowed

them to speak to one another. Today I feel that the peace emissaries project, in which Israeli and Palestinian students meet one another, is a success.

R.H.: The first projects we conducted were to acquaint the public with the Forum – for example, a tent in Rabin Square [*central Tel Aviv*], as well as a display of coffins [*on which Israeli and Palestinian flags were draped to symbolize the victims of the conflict. This was also displayed in New York outside the United Nations building – O.S.*]

Afterwards we conducted a great many lectures in schools. Today we are active in a new area, advancing the creativity of emissaries of reconciliation. The emissaries are students from Jenin and Hebron who meet with students from Sapir College. The students in essence decide what to do in the encounters between them. This project began when we lectured to students, and stems from the enthusiasm of the students and their desire to carry out activities on behalf of the ideas of the Forum. Thus the idea of creating a framework for ongoing activity came about.

The series *Good Intentions* was also very significant for the Forum.

Have there been any failures?

K.A.A.: The attempt to preserve the lack of politicization of the Forum is sometimes problematic to me. In my view sometimes there is no escaping the need to take a clear stand.

R.H.: The greatest failure of the Forum is that the ideas of the Forum are ideas that cannot be marketed like a consumer product. They require Sisyphean work in the field, a lot of money and a lot of time. You make one step forward and then some war comes along and makes you feel like you've been put several steps back. It makes you frustrated. But we don't have the privilege of losing hope. There are two nations living in this country and neither one of them is going anywhere.

What are the barriers and difficulties you experience in each society regarding the Forum's work?

K.A.A.: With regard to Israeli society, one can see that the memory of the Holocaust, at least in some measure, is being used in an attempt to prove to the Palestinians that the suffering of the Jewish people has been greater than their suffering. I feel that the fear of Israelis, which originates in large part from the Holocaust, is what impels Israelis' behaviour toward Palestinians. I am aware that it is likely that few may share this point of view. In this light, the future will not be easy in my view: the state of Israel has become a prison due to the building of the Wall. The only option that remains is to erect a wall in the air, above the state of Israel.

Palestinian society, too, must understand that our reality is not that of 1948. The reality before 1948 was very different to what we know now. At that time there were not millions of Jews living among us in the same land. You cannot keep looking at things according to the relationship that existed then and demand solutions that were appropriate to the situation that existed here sixty years ago.

R.H.: Prejudices in Israeli society and the barricades of the media and politicians who obstruct the truth. People get messages from the media and from politicians – a virtual truth which then supplants the actual truth.

What is required to transform the beliefs and emotions in each society to support a stable and lasting peace?

K.A.A.: The Arab initiative, in my opinion, is a basis for peace. If it was in my power, I would advance the initiative and recruit the thousands of Israelis and Palestinians who already support it today to advance further support in Israel. I feel that a decisive majority of Palestinians supports the Arab initiative.

R.H.: Regarding the change in Israeli society, Obama must talk to us above the heads of our politicians – he should not talk to the leaders but to the people themselves. When Sadat came to Israel, the IDF Commander-in-Chief at the time, Motta Gur, said that when his plane opened the Egyptians would open fire on all who came to receive Sadat [*Israeli government and state leaders* – O.S.]. When Hussein [*King of Jordan*] came to visit the bereaved families following the bombing that was carried out by a Jordanian national, it had a deep influence on Israeli society. Arab leaders must market the Arab initiative directly to the people, not through advertising but through direct conversation with the Israeli people.

Will we see peace between Israelis and Palestinians in our lifetime?

K.A.A.: The moment we lose the hope for peace is the moment of our demise. We must not lose hope. Hope is our ship for crossing the ocean and trying to overcome these soaring waves. Therefore, losing hope is not an option for us.

R.H.: On one hand the possibility of peace is nearly here, just around the corner, and on the other hand it is a matter of generations. The agreement is all but ready, but on the other hand it is still light years away.

Victim identity and respect for human dignity: a terminological analysis

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Abstract

The use of the term 'victim' as an identity can have different implications, depending on who is using it, claiming it, rejecting it or attributing it to others. Its negative connotations may have an impact on the person or persons concerned. This implies that the term should be used with some care and insight. The article analyses the use and function of the word 'victim' at different levels in the work and actions of the International Committee of the Red Cross (ICRC). Noting the extent to which the term is or is not used with caution, it points to the evolution in awareness from a certain institutional discourse to the current careful wording displayed in research and publications. The article stresses the importance of aid workers being able to recognize

* The author takes an external point of view in composing this text and writes about aid workers in the third person; the arguments in it are, however, influenced by her personal experiences as an aid worker with the International Committee of the Red Cross. As the sole author of this article she obviously takes full responsibility for its content, which expresses her own views and not those of the organization or her colleagues. She wishes to thank Mr Daniel Glinz, trainer responsible for the Integration Programme at the ICRC's Human Resources Department, and Mme Laurence de Barros-Duchêne, health co-ordinator in charge of psychological support programmes at the ICRC's Assistance Division, for their time and fruitful discussions.

the potential and active identity of a person beyond the institutional label as ‘victim’, as this constitutes an important step in respecting that person’s human dignity.



Understanding different uses of the term ‘victim’

When reading or talking about victims, does one take the time to understand to what the word actually refers, to whom it refers in a particular context, and what message it carries? The term ‘victim’, in the singular or the plural, has different functions depending on who is using it, when and with what intentions; it should not be used lightly. It can be used in various circumstances and contexts, where it can reflect different standpoints and perceptions.

Victimhood

First, in the adjectival sense the word can refer to the fact that a person is or has been the direct or indirect victim of some harm, caused intentionally or due to an unintentional event. A ‘victim’ is therefore commonly understood as someone who is or has been affected, injured or killed as a result of a crime or accident, or who has been cheated or tricked. Certain attributes are often associated with the state of victimhood (or ‘being the victim of something’), resulting from the harm experienced. They include suffering (physical and/or psychological), vulnerability (when certain capabilities are weakened as a result and therefore in turn render the person more likely to be harmed again in the same or other ways), weakness and passivity (as opposed to the active element or person inducing harm, momentarily in a dominant position), distress, discouragement and helplessness. All these attributes suppose, on the one hand, the existence of needs – medical, psychosocial, material, financial or other – as a result of the harm experienced, and on the other hand the total or partial inability of the person harmed to meet them on his or her own. Among other dimensions of the state of victimhood, there is sometimes the feeling of not being responsible for what has happened and therefore being innocent, as opposed to the perpetrator, who is by extension considered responsible and guilty.

Victim identity

Second, the term ‘victim’ can as a noun refer to an identity or status. The identity of ‘victim’ in the sense of a label or status can be used either by people affected by a crime or an accident to describe themselves, or by others when they refer to such people in their discourse.¹ Rather than indicating the actual vulnerable state of a

¹ A discourse can be understood as the combination of the various statements and practices that come from a certain position of enunciation, and in turn reflect it. A discourse is more than simply language, as it encompasses the written, oral, imaginary and practical dimensions that together express, assert and

person or group and their needs, the term 'victim' when used in this way relates to a much more abstract and contestable dimension, involving self-perception (as a victim or not), identity (understood as the different ways in which one relates to oneself and presents oneself to others), and feelings (e.g. of self-worth, self-respect, confidence and dignity, or on the contrary demoralization, depression, hurt and loss of confidence). Finally, it can also involve interests: the desire to gain social recognition, to seek justice, to benefit from reparations, to influence public opinion, to highlight the guilt of perpetrators, etc. It can also motivate either the harmed person to claim victim status or another person to attribute this status to others. Uses or rejections of the term 'victim' as an identity can be illustrated by the following cases, to mention only a few. There is for instance the girl who, seriously injured by a landmine in Cambodia like many others, has become an anti-landmine campaigner, vindicating her rights as a 'victim' and demanding forms of justice through her presence and slogans in front of the United Nations in Geneva. Or the teacher from a village in Darfur who lost several members of his family in the conflict there, and now comes to work every day at one of the international aid organizations. He keeps a low profile, never giving his colleagues any idea of the suffering he has gone through, but instead appearing content enough to be considered as an active colleague rather than as a 'victim of the conflict' – the category of people he himself is helping. Or lastly there is the government that will seek to reshape its world image as a 'victim' after being the target of terrorist attacks, whereas another state that has experienced similar deadly events will integrate the sombre episode in its history but will not seek to include the aspect of victimhood in a new national identity.

The attributes linked to the term 'victim' when it refers to a state of vulnerability may remain present when it is claimed or attributed as a status, though sometimes not so evidently. The negative connotation of those attributes may, however, affect the people they are meant to describe, by devaluing them. This impact is not always taken into consideration. On the contrary, the term 'victims' is often used and understood in a straightforward way as referring to the state of victimhood, when in fact its impact is more that of labelling a group of individuals. The enunciator might not always be aware of the underlying devaluing connotations mentioned above and their effect on the people concerned.

defend the interests, sets of values and ideas, frames of reality, that are shaped by the position of enunciation (or standpoint). Discourses compete in social reality. Some are dominant while others are marginal, but according to Michel Foucault, all discourses involve and produce power. (See e.g. Jenny Edkins, *Poststructuralism and International Relations: Bringing the Political Back In*, Lynne Rienner Publishers, London, 1999, p. 59. A discourse produces subjects as well as a 'legitimation of power'.) In contrast to languages, which are 'groups of signs (signifying elements referring to contents or representations), [...] [discourses are] practices that systematically form the objects of which they speak.' (Michel Foucault, *The Archaeology of Knowledge*, transl. A.M. Sheridan Smith, Routledge, London, 1989, p. 49, quoted in Edkins, *ibid.*, p. 47.) Some of the work of the sociologist Michel Foucault has concentrated on understanding what the conditions of existence of dominant discourses are. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, transl. Alan Sheridan Smith, Penguin, Harmondsworth, UK, 1991; and *Madness and Civilization: A History of Insanity in the Age of Reason*, transl. Richard Howard, Routledge, London, 1989.

Exclusion of other identities

The ‘victim’ identity is one of several identities by which subjects can define themselves. When someone refers to a person as a victim in their discourse, they are potentially excluding other identities that may better define that person, at least in his or her own eyes. Deliberately or not, the enunciator may run the risk of excluding the other identities the individual persons possess that would reflect other attributes or states they define themselves by, for example their nationality, their profession, their cultural or religious beliefs, their motivations, their role or position in their family. Arguably, it is not a harmless or insignificant event to bring any particular identity of a person or group to the fore at the expense of others. As a poststructuralist theorist² puts it, ‘... naming is not just the pure nominalistic game of attributing an empty name to a preconstituted subject. It is the discursive construction of the subject itself. [...] The essentially performative character of naming is the precondition for all hegemony and politics.’³ Naming oneself, another individual, or a group ‘a victim’ can therefore become a performative act that has the power to validate, and therefore ‘produce’ a subject with this particular identity and the attributes that go with it (vulnerable, passive, helpless etc.). Such a discourse may be sending powerful messages and reflecting particular motivations meant to achieve certain goals, but the latter are not always easy to ‘decode’.

Victims in the social space

The use of the word ‘victim’ in a particular context, or by contrast its deliberate absence, are worth noting and reflecting upon in order to better understand some of the issues and interests at stake. In the first case, for example, consider the president of a country telling the world: ‘We’re among the victims. I’m a victim. [Our] state [...] is a victim. We are victims of this war ...’⁴ One is prompted to ask

2 Poststructuralist theories about the subject provide a useful perspective on identity formation. Each in turn, theorists like Saussure, Freud and Lacan participated in what is sometimes called ‘decentring the subject’, a move aimed at challenging the Enlightenment’s Cartesian subject – conscious, rational – by questioning its sense of rationality and completeness. For Lacan, the subject is neither full nor the master creator of its identity; rather, it is always incomplete and subject to the meanings, structures and power relations existing within social reality. Social reality is understood as a symbolic realm that already exists when an individual enters it at birth. The discourses making social reality form the baby individual into a subject: giving it an identity (starting with a name), a gender, and a language structure carrying meanings and values. The subject is thus created through its confrontation with social reality. In turn, it identifies itself as ‘itself’ through this passage (Lacan’s mirror stage), following the assertion by the external Other (parents, authority) that the reflected creature it gazes at (in a mirror or in external discourses) is none other but itself, a full, complete subject. Both the interpellation by the Other, and its validation of the subject’s identification with itself are done through systems of signs, such as language. See namely Slavoy Žižek, *The Sublime Object of Ideology*, Verso, London/New York, 1989, pp. 100–102 and 113, and Jacques Lacan, *Écrits: A Selection*, transl. Alan Sheridan, Routledge, London, 1980.

3 Ernesto Laclau, preface in Žižek, above note 2, p. xiv.

4 President Asif Ali Zardari of Pakistan, quoted in Syed Irfan Raza, ‘Indian misstep to hit war on terror, US told: US military chief meets Zardari, Gen Kayani’, *Dawn Internet Edition*, 4 December 2008, available at: <http://www.dawn.com/2008/12/04/top1.htm> (visited 18 March 2009).

what message he is sending, why the recognition of his country as a victim is so crucial, and in what ways this desire for a particular identity or status reflects a national interest. When the victim concept is used in political discourse, it may have a strong impact because of its emotive content.⁵ Moreover, people and groups who describe themselves as victims do not always share the same reasons for this identification or interests in it (e.g. survivors and perpetrators, for in some circumstances the latter can also perceive themselves as, and actually be, victims). One should also ask what underlying message is conveyed by a discourse that claims that 'my [or our] sufferings were different, greater than those of others, and cannot be compared with them'. A critical understanding of this type of discourse could help to identify the stakes and values dominant in a particular social space.⁶

In contrast, to give examples of the second case, news articles announce daily how 'a suicide bomber has killed at least eight people ... seven civilians who happened to be passing by at the time were killed ... at least 49 people were injured ... two drivers were killed in a grenade and gun attack ... killing at least 15 people, injuring dozens more ... bodies strewn across the ground ... explosives killing a woman, a doctor and his wife ... the blasts took place ... the explosions happened ... a female suicide bomber detonated her explosives ... security forces stormed the house dragging out some 250 settlers who barricaded themselves inside and hurled rocks, eggs and chemicals at their evictors ... 20 people on both sides were hurt ... TV images showed two young girls punching and hitting soldiers.'⁷ In this journalistic discourse, people who are killed or injured are not described as victims. Instead, the stories are told as though captured through the objective eye of a telephoto lens and describe the scene coldly, in an insensitive and unemotional way. The lens saw 'individuals' and 'bodies', where others such as the people involved and their relatives would probably see 'victims'. It all depends on the point of view and the aim of the discourse. The practice of avoiding the term

5 See e.g. 'La victoire des victimes', *Le Temps*, No. 3261, 1 December 2008, p. 1; and Denis Masmajan, 'Pédophiles: Justice sans pardon', *Le Temps*, 1 December 2008, p. 2, on the Swiss people's vote in favour of the non-prescription of punishment for paedophiles: '... le scrutin [...] met en relief la difficulté de combattre une revendication qui nourrit sa légitimité en prenant, directement ou indirectement, le parti des victimes. Celui-ci est politiquement une valeur sûre.'

6 See e.g. Amitav Ghosh, 'India's 9/11? Not exactly', *The New York Times Online*, Op. Ed., 2 December 2008, available at: <http://www.nytimes.com/2008/12/03/opinion/> (visited 4 December 2008). Ghosh writes: 'Since the terrorist assaults began in Mumbai last week, the metaphor of the World Trade Center attacks has been repeatedly invoked. From New Delhi to New York, pundits and TV commentators have insisted that "this is India's 9/11" and should be treated as such. [...] But [...] [n]ot only were the casualties far greater on September 11, 2001, but the shock of the attack was also greatly magnified by having no real precedent in America's history. India's experience of terrorist attacks, on the other hand, far predates 2001...'

7 Quotes taken from three articles: 'Deadly bombings strike Iraqi city', *BBC News Online*, 4 December 2008, available at http://news.bbc.co.uk/2/hi/middle_east/7764576.stm (visited 18 March 2009); 'Car bomb kills several in Pakistan', *Al Jazeera News Online* (Al Jazeera.Net), 1 December 2008, available at: <http://english.aljazeera.net/news/asia/2008/12/200812164740256637.html> (visited 18 March 2009); 'Israel completes forcible evacuation of disputed Hebron house', *Haaretz News Online*, available at: <http://www.haaretz.com/hasen/pages/1043612.html> (visited 1 December 2008).

‘victim’ is arguably intended to safeguard the standards and values that define journalism, among them that of projecting an ‘objective’ and ‘neutral’ point of view, which should allow the reader or viewer to interpret the story independently. The above examples help to show that use of the term ‘victim’ should not be considered harmless and insignificant.

In recent years, academic circles have highlighted a rapidly increasing use of the term ‘victim’ in the social space and have called for a better co-ordinated study and greater understanding of this rhetorical and social phenomenon. Scholars and international specialists met at a conference in Geneva in spring 2006 to analyse the source, development and impact of the growing attention given to categories of ‘victims’ today, as well as the stakes involved.⁸ Recent research and literature on this topic have shed light on the unfixed nature of the signifier ‘victim’, discussing its different uses as an identity or status (which is, at different times and for different reasons, sought, claimed, begging for recognition, attributed or denied).⁹ This perspective promotes an informed but critical, and therefore engaged but cautious, reading of discourses about victims. As such, it helps to understand the dynamics of social relations and identify some of the stakes involved, as well as the groups or individuals who either defend and claim the victim identity for themselves, reject it, or attribute it to others. More broadly, it encourages a critical reading and understanding of social, political and other discourses competing in social reality, which may seek to impose their meanings as ‘true’ meanings and then influence subjects into adopting their ‘truth’.

8 Irène Herrmann, ‘La revanche des victimes’, *Revue Suisse d’Histoire (RSH)*, Vol. 57, No. 1, 2007, Société suisse d’histoire, p. 5. Underlying this meeting was the hypothesis that the plights of the individuals and groups referred to in victim-discourses could potentially be levelled and thus minimized, because of the more and more common use of the word in many different discourses (pp. 5, 9–10). This hypothesis is certainly interesting when it is read in parallel to the arguments presented within the same debate about the ‘forgotten victims’, or how victims were visibly ‘forgotten’ in the recording of history until the late twentieth century. The tendency to read history as having forgotten about victims, in the sense of having neglected them as a social group, occulting them before finally recognizing them, is arguably based on the belief that ‘victims’ as a collective identity has always existed, but was ignored for some specific reasons. It is a different matter to argue that, because individuals or groups were not recognized as ‘victims’ in the discourses of the time, including in their own, they did not ‘exist’ as such (as subject-victims) in discursive reality and therefore in the social frame. The argument about the ‘forgotten victims’ seems to say that the plights of the individuals were being neglected, as reflected by the fact that their recognition as victims did not exist. The twin arguments thus appear to take the following shape: on the one hand, the plight of individuals was forgotten because they were not identified as ‘victims’ until now; while on the other hand, their plight now risks becoming minimized and forgotten because today too many people are identified as ‘victims’!

9 For this article a number of pieces of work were reviewed at the Library and Research Service of the ICRC in Geneva and the library of the University of London School of Oriental and African Studies (as an independent visiting researcher), as well as on the Internet. Without being exhaustive, the review provided a good basis to detect the direction(s) of current research about victims. For an overview, see all the essays in *RSH*, above note 8); Jean-Michel Chaumont, *La Concurrence des Victimes*, Editions La Découverte, Paris, 1997; Denis Salas (ed), *Victimes de Guerre en quête de Justice: Faire entendre leur voix et les pérenniser dans l’Histoire*, Editions L’Harmattan, Sciences Criminelles, Paris, 2004.

‘Victims’ in the humanitarian discourse of the ICRC

Victims are omnipresent in the humanitarian discourse. This is hardly surprising since at face value the presence of the former justifies the existence of the latter. ‘Everything that humanitarian organizations such as the Red Cross do must be undertaken with the sole aim of helping the victims – and potential victims – of armed conflicts and other situations of violence, and of respecting their rights.’¹⁰ Looking at the use of the term ‘victim’ at different levels in the International Committee of the Red Cross (ICRC) – in the legal framework of international humanitarian law, official texts defining and presenting the institution, the humanitarian principles, the activities of the ICRC in the field, the role of aid workers (especially delegates), communication, and finally internal publications and research – it is interesting to note how each level proves to be more or less aware of the care required when using the term. For example, official documents constituting the identity of the organization appear to be using the word ‘victim’ on the assumption that it is a simple and straightforward term, the use of which does not require particular precaution or at least a certain awareness of its broader implications. By contrast, recent publications show a clear disposition to take care when using the word, and an awareness of its possible impact in devaluing the people concerned.

Analysis of different dimensions

There are various reasons why it is important that ICRC representatives should be aware of the potential implications when using the term ‘victim’. One is that they would have a greater capacity to distinguish between the victim identity promoted, somewhat simplistically, at certain levels of the institutional discourse and other identities a person might in fact be projecting. Thanks to this discernment the aid worker could see beyond the ‘victim’ label and recognize other identities projected by a person, such as ‘teacher’, ‘community leader’ or ‘parent’. To make this act of recognition is particularly valuable because it forms an important part of the humanitarian duty to respect a person’s human dignity. As human dignity is related to the sense of identity that is part of us as human beings, to respect and protect someone’s dignity implies identifying that person in the way they define themselves, be it as a victim – or not. Recognition of a person by the identity they personally claim, and not mistakenly or deliberately by another identity attributed to them (especially if that identity has some negative and devaluing connotations), is an important expression of respect for their dignity.

The notion of ‘victim’ has been discussed from three different perspectives: international law, criminal law, and the humanitarian discourse.¹¹ In

10 Cornelio Sommaruga, in Daniel Thürer, ‘Dunant’s pyramid: Thoughts on the “humanitarian space”’, *International Review of the Red Cross*, Vol. 89, No. 865, March 2007, pp. 47–61 and 57.

11 See ‘Editorial’, *International Review of the Red Cross*, No. 851, September 2003, pp. 465–466.

outlining the definition of the term in the latter, the editor usefully considers three important dimensions: the legal structure, in this case the Conventions and Protocols that constitute international humanitarian law; the action, encompassing the various activities that make up humanitarian assistance (and protection); and the guiding narrative, provided by a set of humanitarian principles. In the humanitarian field, victims can accordingly ‘be understood as [...] all persons whom humanitarian law seeks to protect in the event of international or non-international armed conflict. It is well known that armed conflicts often affect – directly or indirectly – the entire population of the country or countries at war, and that any person may be harmed physically or mentally, be deprived of their fundamental rights, suffer emotional distress or lose their property. Humanitarian assistance for all victims of war, within this meaning of the term, is intended to attenuate as far as possible the harmful effects of conflicts. [...] [and] must be given to the victims impartially and without discrimination. At the end of hostilities, humanitarian action should conform to the same principles [i.e. the Fundamental Principles of the Red Cross and Red Crescent.]’¹² The term ‘victim’ is used in a particular way in each of these three dimensions, and also at the levels of institutional presentation – the role of the delegate, communication, internal publications and research.

In relation to the legal structure, the term ‘victim of armed conflict’ refers to a person who meets the criteria defined in the relevant legal framework, i.e. international humanitarian law.¹³ This means that many people will be considered to belong to the ‘victim’ category, with little consideration for other attributes that could be central to their perception of themselves. The link between the use of the term ‘victim’ and the development of legal frameworks that provide it with a definition (many of which are much debated), and give individuals and groups an interest in claiming it, is a key point in the current academic discussion surrounding the victim concept.¹⁴ One argument holds that subjects as victims are

12 *Ibid.*, p. 465. The International Committee of the Red Cross, like the other components of the International Red Cross and Red Crescent Movement – the National Societies and the International Federation of Red Cross and Red Crescent Societies – must ensure that its work conforms at all times to the Fundamental Principles of the Red Cross and Red Crescent, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

13 Criteria laid down in the Geneva Conventions as to who, in case of need, can or should benefit from protection and assistance from the ICRC, include the wounded, sick, shipwrecked, prisoners of war whether they are members of the armed forces or other militias – medical personnel, chaplains and in general all civilians and other persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

14 Several pieces of work consider how the position of the victim concept has changed in the discourse of international law and show how it has gained greater space, importance and centrality over the last few years, parallel to developments in those bodies of law. See e.g. Annie Deperchin, ‘Victimes du premier conflit mondial et justice’, in Salas, above note 9, p. 29. Deperchin writes: ‘La Grande Guerre constitue un précédent historique dans la mesure où elle voit apparaître l’idée de responsabilités liées à la guerre et cela suppose qu’émerge le concept même de victime de guerre. [...] Cependant, les victimes civiles n’étaient pas assez nombreuses et n’avaient pas suffisamment conscience de l’être pour constituer le vecteur des progrès de la justice de guerre qu’elles deviendront par la suite.’ Deperchin therefore argues that the self-perception of civilians as victims was crucial in constituting their discourse, whose power helped shape the legal discourse. Some research, by contrast, argues that it is the discourse of justice and

'produced' by being recognized as such, through evolutions of legal discourse. Arguably, the same process occurred in international humanitarian law: the history of the Geneva Conventions and their Additional Protocols¹⁵ pertains to how different categories of people were officially recognized as victims over time.¹⁶ This way, only the people who match the appropriate legal criteria and definition at a certain point in time can officially benefit from the ICRC's protection and assistance, and by extension are the ones generally referred to as victims of armed conflict. This group of people is sometimes understood, as cited above, as 'the entire population of the country or countries at war'. It is crucial, however, to consider that some of the people affected by war might actually not define themselves as victims,¹⁷ whereas certain people not meeting those criteria (e.g. perpetrators of crimes) might personally define themselves as victims (e.g. of central authority, of the 'system') and claim some form of recognition of that identity.¹⁸ Instead, the organization has embraced the all-encompassing term 'victims' to refer to a group of people that is certainly not homogeneous in terms of their perceptions of themselves.

its legal counterpart that shapes and validates the identity of victim. In Salas, above note 9, it is pointed out that: 'C'est ainsi seulement au terme de ce travail de justice, qui débute avec l'enquête, et s'achève à l'heure du verdict, qu'elles seront reconnues pour telles et définitivement investies de leur statut de victimes', Bénédicte Chesnelong, 'Victimes et justice des crimes de guerre et contre l'humanité', in Salas, above note 9, p. 31; 'C'est avec la guerre en Bosnie que le viol en temps de guerre a été reconnu comme "acte de guerre", et qualifié de crime, "crime contre l'humanité" par le Tribunal Pénal International pour l'ex-Yougoslavie (suivi en cela par le Tribunal Pénal International pour le Rwanda). C'est donc la première fois que les femmes qui l'ont subi se voient reconnaître comme des victimes', Gisèle Donnard, 'Les victimes de viol "arme de guerre": Crime contre l'humanité', in Salas, above note 9, p. 111; 'Si le mot "victime" avait un sens, ce terme s'appliquerait à juste titre aux Cambodgiens. Il faudrait avoir subi les pertes des êtres chers, dans des conditions injustes, atroces et tragiques qui vous marquent à vie, pour pouvoir comprendre vraiment la douleur qui vous ronge et qui vous brûle. Chaque être, même un animal, a un besoin inné de justice. [...] Nous les victimes insistons et demandons la création d'un tribunal pénal international ...', Billon Ung Boun Hor, 'Les victimes du génocide des Khmers Rouges: Un cri contre l'oubli et pour la justice', in Salas, above note 9, p. 164.

- 15 The original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864, followed by the four Geneva Conventions of 12 August 1949.
- 16 See Annette Becker, 'Les victimes entre oubli et mémoire', in *RSH*, above note 8. As Becker writes: '... toute victime est bonne à secourir [...] du moment qu'elle rentre dans les mesures conventionnelles. Or, les civiles, nouvelles victimes à partir de 1914, n'avaient pu être placés sous la juridiction conventionnelle comme les prisonniers militaires et les blessés' (p. 18).
- 17 For comments on this point, see e.g. Joanne Dover, 'The impact of the Northern Ireland "trouble" on victims in Britain', in *Proceedings of the Study Days held in October 2005: Promotion of Resources for Victims of Terrorist Acts and Their Families*, Eureka.org, European Resources Terrorism, Belgium Red Cross, European Union, 2005, available at http://www.eureka.org/userfiles/files/texteng/Joanne_DOVER_les_actes_ENG.pdf (visited 15 April 2009). Based on her work and research with people who experienced violence from acts of terrorism, the author observes that, 'It is important also to remember the resilience of human beings. We have the ability to cope with the most demanding and horrendous circumstances, something I see in my work every day. People come through these experiences and come out the other side with a good quality of life, having integrated the experiences and losses into a new existence' (p. 53).
- 18 For more on this subject, see e.g. Daniel Munoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004, pp. 8, 9, 11; Jacques Sémelin, 'Quand les bourreaux se présentent comme des victimes' and Sophie Wahnich, 'La confusion des victimes, des héros et des bourreaux: Un symptôme d'amoralité?', both in *RSH*, above note 8.

In texts defining the ICRC, the term ‘victims’ (or more specifically victims of armed conflict or war victims) is therefore relatively broad in that it can include the entire population of a war-torn country, but it is also restrictive in that it can seem to apply the identity of ‘victim’ invariably to a large group of people. The ICRC’s Mission Statement reads: ‘The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.’¹⁹ This is the discourse that most people will be familiar with and will come across when they hear about the ICRC or even start working as a delegate in the field. Such a use of the term that does not suppose any ambiguity or implications is perhaps fundamental to the ICRC’s institutional presentation. However, the absence of discussion at this level as to these implications fortunately stands in contrast to more careful uses of the term ‘victim’, and its link with the concept of ‘human dignity’, in other areas of the organization.

As for humanitarian action, the objective of each of the ICRC’s protection and assistance activities is to respond to the needs of people or communities affected by conflict or other situations of violence, as defined in international humanitarian law. That those people have needs is often taken for granted, since they have already been ‘labelled’ with the term ‘victims of armed conflict’ in the institutional language, underscoring their vulnerability. However, the nature and extent of their needs have to be determined, and the individuals or community concerned are in theory best placed to know what they are. It is up to the aid workers representing the organization to respond to those needs accordingly without any further detrimental effects. In doing so, they may decide to target one group in particular of the people understood to be ‘victims of armed conflict’ if an impartial assessment of their needs indicates that some are more vulnerable than others. Medical care, water supplies and sanitation, food, economic aid or material forms of assistance are services that aim to help in a concrete and direct way the individuals who suffer most. The protective measures adopted, the time and attention devoted to vulnerable persons whose rights are threatened or violated, who are either in detention, in danger in their homes or alone and unable to fend for themselves, also aim to transcend the simplistic consideration of the group’s collective status as unquestioned victims by responding to and alleviating individual and family suffering. Thus at the level of humanitarian action, the term ‘victim’ refers to the entire population or group that is considered to be a legal beneficiary thereof, but aid workers have some margin of manoeuvre, in accordance with the principle of impartiality, to ‘bypass’ the institutional label

19 ‘The ICRC’s Mission Statement’, 19 June 2008, available at <http://icrc.org/web/eng/siteeng0.nsf/htmlall/icrc-mission-190608?opendocument> (visited 5 December 2008).

and orientate relief work among all the 'victims' towards those with the most urgent needs.²⁰

The humanitarian principles²¹ are the guiding spirit of the ICRC's humanitarian action. At this level the notion of 'victims' is directly related to the principle of humanity²² and the notion of human dignity. As a humanitarian practitioner of the Red Cross Movement wrote, 'Meeting critical human needs and restoring people's dignity are core principles for all humanitarian action.'²³ If on the one hand the humanitarian mission of the ICRC is to 'protect the lives and dignity of victims of armed conflict',²⁴ on the other hand 'Humanity is the exclusive goal of the Red Cross and defines its sphere of competence. Indeed, it constitutes the basis for its values and *raison d'être*.'²⁵ The act which expresses the attitude of humanity is that of giving help without discrimination to those who are suffering. It is noteworthy that the word 'victim' does not appear in any definitions of the Fundamental Principles of the Red Cross and Red Crescent Movement, nor does it seem to have been used at all in the wording of the Geneva Conventions. The overarching term appears to have been used much more systematically in the ICRC's institutional definitions, such as its Mission Statement (as seen above), as well as in its Statutes.²⁶

Incidentally, regarding the relationship between the victim concept and the principle of humanity, it is very interesting to observe that those who have discussed this principle and its sister notion of 'dignity', such as Jean Pictet, an eminent scholar and authority on international humanitarian law, and former ICRC Presidents Max Huber and Cornelio Sommaruga, have highlighted the empathy motivating this attitude – an empathy felt not for the subject as victim, but more deeply for the human being behind all subjective (or externally

20 The principle of impartiality of the International Red Cross and Red Crescent Movement reads: 'It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.' See 'The Fundamental Principles: Extract from the XXVIth International Conference of the Red Cross and Red Crescent', 1 January 1995, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jmf?opendocument> (visited 27 April 2009).

21 See above note 12.

22 The principle of humanity states that: 'The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, 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, co-operation and lasting peace amongst all peoples.' See 'The Fundamental Principles', above note 20.

23 Peter Walker, 'Victims of natural disasters and the right to humanitarian assistance: A practitioner's view', *International Review of the Red Cross*, No. 325, December 1998, p. 615.

24 'The ICRC's Mission Statement', above note 19.

25 Thürer, above note 10, p. 57.

26 Art. 4(d): 'The role of the ICRC shall be in particular [...] to endeavour at all times [...] to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.' Available at [http://icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$File/Statutes-EN-A5.pdf](http://icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf) (visited 11 March 2009).

attributed) identities.²⁷ Calling to mind the parable of the Good Samaritan, Thürer asks: ‘Is there a model for the idea of humanity (embodied in the Red Cross and elsewhere) – that is, the idea of helping those who suffer, whoever they may be? [...] What is interesting is that the person who helped [i.e. the Good Samaritan] was an outsider and that the identity of the victim is not a matter for discussion; as [Max] Huber says, it is the human being as such who is being helped, the human being as he is and not because he is like this or like that.’ Why? ‘Because, as Huber says, in an emergency “the duty is to act, not to talk”.’²⁸ Therefore the humanitarian duty, understood as the attitude of humanity, would be to look, see, reach out beyond all attributes of a person, visible or invisible, and touch the human core of the individual in distress. In other words, the humanitarian gesture is motivated by the human being in distress, whether or not that person is considered or considers himself or herself as a ‘victim’. The action thus transcends the discourse, because it stretches beyond rhetorical structures.

Emphasis on human dignity

The notion of human dignity is central to the discourse of the ICRC and what it wants for the victims of conflicts – to protect their dignity.²⁹ There are various facets to human dignity. They include a sense of self-worth involving self-perception and arguably a recognition of worth and a sense of belonging bestowed by others, be it the family or the wider community. In this regard, human dignity relates partly to one’s own sense of identity and worth.³⁰ The act of recognizing the identity projected by a person is thus an act of respect for that person’s dignity and should therefore, in theory, be part of any humanitarian gesture. The failure to do so (in the sense both of recognition denied and of misrecognition as

27 See Thürer, above note 10, pp. 56–57: ‘Max Huber described humanity as the “unconditional recognition of the value of whatever has a human face, in particular where people are helpless, weak, sick, imprisoned, endangered, deprived of their rights and impoverished”.’

28 *Ibid.*, p. 51.

29 See Marion Harroff-Tavel, ‘Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent’, *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 471ff. The author explains this ambition clearly and defines in her own words the notion of dignity: ‘[T]he ICRC wants the victims of armed conflicts to feel that their dignity is respected. The essence of dignity is a universal notion that is rooted in cultures, religions, value systems, ideologies and education. Its content varies from one context to another. Everywhere in the world, however, certain attitudes are basic to meaningful dignity: respect for life and for every person’s physical and spiritual integrity; protection against arbitrary acts, abuse of power and discrimination; recognition of others as people able to find solutions; support for people who have been so humiliated that they have lost their self-esteem and no longer trust in their own capacities. The ICRC’s ultimate goal is to help people or communities affected by armed violence to live in conditions that they consider respectful of their dignity. To that end, their fundamental rights must be respected, the needs they deem essential, in their cultural context, to a dignified life must be met, and they must play an active part in the implementation of lasting solutions to their humanitarian problems as identified by them.’ *Ibid.*, pp. 471–472.

30 Another definition of human dignity is found in Thürer, above note 10, p. 57: ‘... The general principle of respect for human dignity [...], the very *raison d’être* of international humanitarian law and human rights law, [...] is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.’

something one is not) can have a negative impact on the person concerned.³¹ The act and its impact are arguably the same whether it is a recognition of oneself (one's own identity and humanity), thereby preserving one's sense of dignity, or of the identity and the humanity of someone else, thereby giving that person respect and valuing their sense of dignity.

The idea that humanitarian action is centred not only on improving a person's living conditions, but also on restoring a person's dignity, informs all ICRC activities. It is expressed clearly in key documents and guidelines.³² First, for example, it is stated that activities on behalf of prisoners should '[create] the necessary conditions for safeguarding or restoring personal dignity: [...] restoring personal dignity does not depend merely on improving material conditions or trying to eradicate torture. It is in this sense that ICRC visits to prisoners have an extremely important "side-effect", and can contribute in various ways to alleviating the consequences of stress.'³³ Second, a guideline for the services working to re-establish family links explains that the essence of those activities is to: '[alleviate] the suffering of people who have no news of their families. Relationships with our families are an essential element of our human identities. [...] Respect for the unity of the family is an integral part of a broader respect for human dignity.'³⁴

Restoring and respecting a person's dignity is therefore mainly achieved through the combination of the various activities of protection and assistance.³⁵ However, this ambition should also be encouraged in different ways, through

31 For studies that discuss the importance of the inter-social act of recognition of a person's identity and its perception as an act acknowledging and respecting her humanity, see for example: Rona M. Fields, 'Impunity versus healing', *Ko'aga Rone'eta*, se.iii, v. 3, 1996, paper presented at the International Conference on 'Impunity and its Effects on Democratic Processes', Santiago de Chile, 14 December 1996, available at: <http://www.derechos.org/koaga/xi/2/fields.html> (visited 14 November 2008). From a psychological point of view, the author explains that: 'The vindication and validation requisite to social and psychological wholeness, can only be provided through public acknowledgment. When the victim's suffering continues exacerbation by his/her pariah status vis à vis the social political system, torture is extended in perpetuity', p. 5. See also Jean-Michel Chaumont, *La Concurrence des Victimes*, above note 9, pp. 36–37. An important point Chaumont touches on is that the gaze of the Other (external discourses, the public, the authority) in recognizing Jews who survived the Nazi concentration camps as 'victims', as opposed to other identities such as 'survivors', is the necessary condition for many of them to feel that they exist in social reality. To be denied recognition as a victim by the Other is described by those people as a second death.

32 See for example: ICRC, 'Assistance: General Introduction', available at http://www.icrc.org/web/eng/si-teeng0.nsf/html/assistance_general_intro (visited 24 April 2009).

33 Pascal Daudin and Hernan Reyes, 'ICRC action on behalf of prisoners', in *International Responses to Traumatic Stress*, Yael Danieli, Nigel Rodley and Lars Weisaeth (eds), Baywood Publishers, United Nations, 1996, p. 16. This section was handed over to delegates during their integration course (2006).

34 'Report on the Restoring Family Links Strategy (and Implementation Plan) for the International Red Cross and Red Crescent Movement (2008–2018)', CD/07/4.1, prepared by the ICRC Central Tracing Agency, Geneva, October 2007, following the Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, 23–24 November 2007, p. 4.

35 See David P. Forsythe, 'The ICRC: A unique humanitarian protagonist', in *International Review of the Red Cross*, Vol. 89, No. 865, March 2007, pp. 63–96, for a discussion of the debate whether '... the ICRC, with its limited mandate, and tied as it is to states and the state system of international relations, can really do very much to protect human dignity' (p. 64).

the act of recognizing a person's identity. So far, there are visible attempts to encourage people who are external to the conflict (those in the field such as ICRC representatives, or the general public) to feel less remote from people who suffer in conflicts. At certain levels within the organization there appear to be efforts to draw attention to individual sufferings, individual plights and stories – as opposed to generalized collective suffering, a viewpoint that inevitably creates a distance between the people observing (in the field or from their living-rooms) and the people affected.

Encouraging sensitivity towards individual plight

On the one hand, ICRC representatives in the field are today trained by the organization – through role-playing exercises, discussions and lectures on humanitarian ethics and cultural sensitivity – to try their best to understand what a person who is in any way affected by conflict might feel, and conversely how that person perceives the humanitarian worker. In its human resources policy the ICRC lays down specific guidelines and codes of conduct for all its staff, among them the requirement that: 'ICRC staff work constantly to promote respect for human beings and their dignity, in all their activities, at all times and in all circumstances. They abstain from any discrimination based on origin, race, ethnic group, sex, birth, wealth, religion or belief, political or other opinion, or any other consideration related to the individual.'³⁶ The process of training, awareness-building and encouraging sensitivity towards each individual's plight and story is fundamental to creating and preserving a respectful relationship with someone who is suffering or has suffered in the past. It is also valuable in order to understand how to 'promote respect for human beings' and what exactly is meant by their 'dignity', for these are not the simplest concepts to put into words, let alone into action. What is expected of ICRC staff can be summarized by a statement from guidelines laid down for visits to places of detention: 'Thanks to their training and especially the experience accumulated in a variety of geographical, cultural and political environments, ICRC representatives learn not to merely rely on outward appearances, but rather to interpret any signs and hints, and to decode gestures, body language, and speech. The expression of suffering takes on very different forms, and this aspect must not be neglected or overlooked.'³⁷

On the other hand, the ICRC also addresses the general public through press conferences and public statements in a way that highlights the unique character of each individual person in distress.³⁸ In the words of Pierre Krähenbühl,

36 'Working for the ICRC: Values and principles', 5 September 2003, available at: <http://icrc.org/Web/eng/siteeng0.nsf/html/5R4JLY> (visited 5 December 2008).

37 'Applying culturally appropriate solutions', above note 33, p. 10.

38 See e.g. ICRC Iraq Delegation 'Women in war: The International Committee of the Red Cross in Iraq' (newsletter), March 2009, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/iraq-women-newsletter-050309/\\$File/iraq-women-in-war-eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/iraq-women-newsletter-050309/$File/iraq-women-in-war-eng.pdf) (visited 15 April 2009). 'The voices of women affected by the war in Iraq, such as those we have collected here, need to be better heard.' (p. 1)

Director of Operations: ‘Beyond the statistics, there are the individual destinies and tragedies. Every injured person we speak about after a suicide attack or an aerial bombardment has a name, a family, a history.’³⁹ Giving a voice, space and particular attention to suffering individuals is undoubtedly a sign of respect for them. Yet there is another step towards respecting a person’s sense of dignity that the humanitarian discourse can take. The ICRC has to date taken this step in some research papers and publications. Apart from recognizing individuals on account of their suffering, it aims to recognize individuals on account of their potentialities and therefore avoids referring to them as ‘victims’ without also carefully qualifying this term.

In one of her articles published in a previous issue of the *Review*, Marion Harroff-Tavel provides such a focus when she briefly examines aspects of the term ‘victims’ as used in the conduct of humanitarian action in post-conflict contexts.⁴⁰ The observations she makes are intended to explain the work of the ICRC in such situations to outsiders, but insiders can also always benefit from clarifications and guidelines. Whereas the content of the text is inspired by an official guideline, the form is obviously her input.⁴¹ She recommends remaining aware of the nuance between subjects who consider themselves as victims, and subjects whom the humanitarian discourse identifies as such. The author draws attention to the possible misuse of the term ‘victims’ without having a clear idea who is using it to refer to whom and why, and to the importance of recognizing other identities that an attributed victim identity may wrongly overshadow. It is worth quoting her at length:

‘The use of the word “victim”, for lack of a better term, must not obscure the fact that during periods of transition the people who were affected by the armed conflict or internal strife have many other identities. They may, for instance, be members of a local association or religious community that comes to the aid of the destitute. Many of them have resources and capacities. They should not be perceived as mere victims. Indeed, they may reject that position in spite of their dire circumstances and not, for example, register as displaced persons, thus depriving themselves of the aid provided to that category of people. Some of them develop their own ways of improving their plight, having come up with survival mechanisms during the combat phase. Sometimes called “survivors”, these people are also agents of change.

This is especially true of women, who often did not take part in the fighting and whose experience of the war is therefore different from that of the men. They are the driving force behind the improved psychological health of those around them. By recreating identity-based groups (women’s associations, local non-governmental associations) and thereby meeting the need

39 ‘Civilians increasingly at risk in Afghanistan’, press briefing, 2 March 2009, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/afghanistan-press-briefing-020309> (visited 4 March 2009).

40 Harroff-Tavel, above note 29.

41 *Ibid.*, p. 467, note 2.

every individual feels to belong, by giving the members of their families the feeling they have a home, by showing concern for the plight of others, in particular children, they demonstrate that it is possible to manage suffering and to look to the future. Hence the importance of sparing them the social exclusion, stigmatization or discrimination of which they are all too often the victims ...⁴²

The thoughts expressed above contribute to the current academic discussion about the implications inherent in the use of the term 'victim'. They also point to the need for a more careful analysis of the context in order to identify emergent capabilities and initiative within a group of people experiencing hardships because of a conflict or other situations of violence. Recent ICRC publications show that this approach is gaining ground: the term 'victim' is questioned, qualified when necessary and applied with due consideration for its implications, namely the negative attributes that are generally associated with it. In its study on the roots of behaviour in war and violations of international humanitarian law, the ICRC for example discusses the fact that some combatants may have been victims of harm themselves, and how their self-perception as having the status of victims influences their behaviour in engaging in more violence.⁴³ As a second important example, the recent study on women and war⁴⁴ also shows a commitment to caution when using the term 'victim' coupled with a clear desire to keep the concept in its place, leaving enough room for all the other identities that people living in a conflict environment (women in this case) can have and perceive themselves as having. The first page of the study sets the tone: 'Women are not a homogeneous group, and they experience war in a multitude of ways – as victims, combatants or promoters of peace. [...] Despite all the hardships women endure in armed conflicts, the image of women as helpless victims of war is flawed. Women are playing an increasingly active role in hostilities – whether voluntarily or involuntarily. [...] Women are often portrayed as helpless victims and as a particularly vulnerable group in situations of armed conflict. However, women are not vulnerable as such. On the contrary, many display remarkable strength and courage in wartime, protecting and supporting their families, or perhaps taking on the role of combatant or peace activist. They often find ingenious ways of coping with the difficulties they face.'

To sum up, the ICRC's institutional use of the term 'victim' at the level of official definition and presentation currently takes little account of its implications. Conversely, the use of the term and its connotations are discussed at other levels. At the practical level – in training, the ICRC's various activities and public communication – people are highlighted as individuals with their different ways of

42 *Ibid.*, pp. 470–471.

43 Munoz-Rojas and Frésard, above note 18, pp. 8, 9.

44 *Women and War*, ICRC, Geneva, February 2008, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0944/\\$File/ICRC_002_0944.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0944/$File/ICRC_002_0944.PDF) (visited 15 April 2009); see also the first study on this subject: Charlotte Lindsey, *Women Facing War*, ICRC, Geneva, 2001.

suffering and the impact it has on their particular lives. Nonetheless, each person is still to some extent considered as a victim, given the focus on their vulnerability, suffering and weakness. Recent research and publications have, however, prominently acknowledged the many positive attributes including leadership displayed by active, enterprising and courageous people despite, and sometimes as a result of, the harm and violence they have experienced. The change in approach is visible, as are the current gaps between the different uses of terminology within the organization. Among other contemporary challenges, the proliferation of the word 'victim' in society and the sensitivity with which it should be used and is received – and is indeed sometimes strongly denounced by people who experience conflict but do not want to be perceived as 'poor victims' – could be a legitimate concern for a humanitarian organization such as the ICRC, whose public image (institutional presentation and discourse) is as important as its work.⁴⁵

Human dignity and the responsibilities of the humanitarian worker

Aid workers at field level would benefit in many ways from a policy that promotes a careful use of the term 'victims'. They already have partly learned to do so through carrying out relief activities, and from the training they may have received. With these and other tools⁴⁶ that enable them to exercise caution in their use of the word 'victim', aid workers could contribute in an even more personal and psychologically effective way to promoting respect for the sense of dignity of all people with and for whom they work. How? By a willingness to recognize the identity projected by the person helped, and above all to do so whether it is the victim identity or not, for this act is a recognition of their humanity and endorses their sense of dignity.⁴⁷ It is important here to acknowledge that some aid workers, especially local staff, may already possess a baggage of experience, including that of having been a conflict victim. As such, they are examples of people once affected by violence and

45 See 'ICRC Strategy 2007–2010: Committed to meeting new challenges through action', 7 February 2007, available at <http://icrc.org/web/eng/siteeng0.nsf/htmlall/strategy-2007-2010?opendocument> (visited 5 December 2008).

46 See e.g. the practical guide relating to the ICRC study *Women Facing War* (2001): 'Addressing the needs of women affected by armed conflict: an ICRC guidance document', ICRC, Geneva, 2004. According to the executive summary, '[b]oth the study and the guidance document itself endeavour to show that while women may be placed at risk by the outbreak of hostilities, they are not necessarily and inevitably victims.' (p.1, available at [http://icrc.org/Web/eng/siteeng0.nsf/htmlall/p0840/\\$File/0840_002_Executive_summary.pdf](http://icrc.org/Web/eng/siteeng0.nsf/htmlall/p0840/$File/0840_002_Executive_summary.pdf), visited 27 April 2009).

47 For a similar and very interesting argument, see Gilbert Holleufer, 'Le sentiment d'humiliation dans les guerres contemporaines', in Philippe Cotter et Gilbert Holleufer, *La Vengeance des Humiliés: les révoltes du 21^e siècle*, Editions Eclectica, Geneva, 2008. He writes about the need to '... restituer la nature de l'impératif humanitaire et d'identifier un paradigme d'empathie qui permettrait d'inclure non seulement les victimes mais aussi les hommes ordinaires, détruits par la violence sans avenir des guerres infratétiques. Et, ainsi, de s'occuper des nouveaux besoins des communautés en conflit, qui, dans le long cheminement vers le retour à la normale, dépendent peut-être davantage de ressources psychologiques et morales que matérielles.' (p. 98)

war who today are respected for their active role and valuable work within their own or other war-torn societies.

Such a tool can be found in *Reconciliation after Violent Conflict: A Handbook*. A short text that perfectly summarizes all the main challenges that can arise when using the term ‘victim’, the chapter entitled ‘Victims’ covers many dimensions of the concept and reviews its use as an identity in different discourses.⁴⁸ The Handbook was published with the specific aim of providing ‘practical tools and lessons from experience to inspire, assist and support all those who struggle for reconciliation in different contexts around the world’, to quote the foreword by Archbishop Desmond Tutu. The understated argument conveyed by the mere presence of such a chapter is that an awareness of the multiple uses of the term ‘victim’ and their implications is crucial for ‘policy-makers and practitioners, to assist them in designing the most suitable reconciliation process for their particular needs.’⁴⁹ This awareness is in fact essential for anyone who wishes to understand better not only the facts but also the underlying statements and power relations that exist in the social realm, and in particular for those who, like aid workers, are working directly with victims and groups labelled as such. Understanding the implications of the use of the term ‘victim’ is important not only at the time of reconstruction and reconciliation, but before and during a conflict as well. As one scholar writes, ‘...victim rhetoric [...] is a powerful tool. It taps into our essential human compassion for those who suffer, and raises our indignation; and these two emotions can move people to action.’ He further considers that, ‘As a strategy of analysis, the focus on victimhood is useful because it promises to reveal the underlying political interests and, if the analytical results are brought into the political arena, shift the terms of debate in which opposing sides are entrenched. [...] [The exercise of] revealing the ideologies of power, that is, the parameters that circumscribe our comprehension of others’ victimhood, enables us to transcend them.’⁵⁰ Sergio Vieira de Mello, then UN High Commissioner for Human Rights, wrote of the Handbook that it ‘should be required reading for the blue helmets and international civil servants of the next UN operation and, indeed, for all concerned actors, including local community leaders, in nations beset by conflict.’⁵¹ As a concise summary of the ways the term ‘victim’ is used in contemporary discourses, and which are discussed by many academics and specialists, the aforesaid chapter of the Handbook should certainly be required reading for all aid workers as well, who are also ‘concerned actors’ in such situations. In general, aid workers could benefit from any tools helping to give

48 Luc Huyse, ‘Victims’, in David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation after Violent Conflict: A Handbook*, Handbook Series, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, pp. 54–66.

49 Karen Fogg, preface in Bloomfield, Barnes and Huyse (eds), above note 48.

50 James J. Orr, ‘Victims and perpetrators in national memory: Lessons from post-World War Two Japan’, in *RSH*, above note 8, pp. 55, 57.

51 Bloomfield, Barnes and Huyse (eds), above note 48, back page comments.

them a more informed and critical insight into the social, political, economic, humanitarian and other dimensions surrounding their work.

Conclusion

Humanitarian workers would be doing the best they possibly can for those in their care by carrying out their protection and assistance duties, within the humanitarian framework, on behalf of people often perceived unquestioningly as 'victims of armed conflict', while simultaneously transcending this discourse to recognize the identity, and thus the humanity, of the individuals or groups with whom they interact. Perhaps it will be a victim identity, but chances are that it will not. One aid worker acknowledged this point when he wrote: 'The burden of responsibility for providing humanitarian relief falls on many shoulders. The people directly affected by a disaster and their neighbours are always those who respond first in any crisis.'⁵² People affected by harm who uphold their identity as active players in their situation deserve to be recognized as such and not mistakenly categorized as 'victims', a label which, as mentioned above, primarily highlights weak and passive aspects such as vulnerability, distress, discouragement and helplessness.

The institution concerned is responsible for offering an appropriate and pertinent image of its humanitarian work. The aid worker, on the other hand, arguably shares the responsibility of keeping a critical eye on this image to which he or she inevitably belongs and therefore plays a part in consolidating and projecting. Within contexts, social paradigms and humanitarian practices that are dynamic and evolving, it is hoped that observations and points of view of this kind will benefit the humanitarian community and the ICRC in particular. Questioning assumptions is a good step towards helping the spirit of humanity to prevail and flourish.

52 Walker, above note 23, p. 616.

Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims

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Abstract

This article presents an overview of the various mechanisms to improve the situation of people affected by armed conflict. Some are anchored in international humanitarian law, but numerous actors are increasingly contributing to its implementation outside the original framework established for that purpose. Human rights monitoring bodies, the diverse organs and agencies of the United Nations and regional organizations, and governmental and non-governmental organizations are seeking to address situations of armed conflict. However, humanitarian action unattached to any political agenda and combining protection and assistance is often the only remedy for the plight of the victims of armed conflicts.

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At the last International Conference of the Red Cross and Red Crescent, the ICRC reminded the assembled delegates that ‘the main cause of suffering during armed

* The opinions expressed here are those of the author and do not necessarily reflect the position of the ICRC.

conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or for another reason – rather than a lack of rules or their inadequacy'.¹ In the heat of battle, when the wagers of war and their victims are prey to mistrust and hostility, compliance with the rules does not come easily. Passions are unleashed and hatred and the desire for revenge give rise to all manner of depredations, sweeping aside calls to preserve a modicum of humanity even in the most extreme situations. Yet to make just such a call is the very purpose of international humanitarian law.

The present article deals with the way international humanitarian law is implemented and war victims are protected and assisted.² The first part describes the mechanisms provided for under international humanitarian law itself and briefly analyses their importance in practice. Particular emphasis is placed on the work of the ICRC and the implementation of international humanitarian law in non-international armed conflicts. Next, the growing tendency of human rights monitoring bodies to scrutinize situations of armed conflict is examined. An account is then given of the institutions and agencies that work to help war victims obtain due respect for their rights and person, independently of the framework provided for under international humanitarian law, i.e. through the UN system, regional organizations, intergovernmental organizations and NGOs. The various mechanisms and approaches vary considerably. In order to protect and assist war victims effectively, the international efforts should build on the comparative advantages of the different mechanisms and actors.

Mechanisms originating in international humanitarian law

The obligation of parties to a conflict to respect and ensure respect for international humanitarian law

The 1949 Geneva Conventions and 1977 Additional Protocol I thereto stipulate that the parties to an international armed conflict must undertake to respect and to ensure respect for those treaties. Each party is therefore obliged to do what is necessary to ensure that all authorities and persons under its control comply with the rules of international humanitarian law. The enforcement can include a wide variety of measures, both preventive and repressive, to ensure observance of that law. While this article focuses on the legal measures, other non-legal steps to create

1 *International humanitarian law and the challenges of contemporary armed conflicts*, Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007, *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 721.

2 In 2003, the ICRC organized a series of regional expert seminars on the theme of improving compliance with international humanitarian law (IHL) – see *Improving compliance with international humanitarian law*, ICRC Expert Seminars, Report prepared by the International Committee of the Red Cross, Geneva, October 2003, annexed to the report presented by the ICRC to the XXVIII International Conference of the Red Cross and Red Crescent, December 2003, pp. 48–74, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5tam64?opendocument> (visited on 28 May 2009).

an environment conducive to compliance with minimal rules, even during the worst situations, are absolutely essential to give the law a chance to be respected.

On a more practical level, the parties to an armed conflict must issue orders and instructions to ensure that these rules are obeyed and must supervise their implementation.³ Military commanders in particular have a great responsibility in this regard.⁴ However, in the final analysis each and every soldier and individual involved in the conflict must observe the rules of humanitarian law.⁵

The particular feature⁶ of international humanitarian law governing non-international conflicts is that it is addressed not only to the states party to those treaties, but more broadly to the 'Parties to the conflict', in the words of Common Article 3,⁷ or, according to Additional Protocol II, to 'dissident armed forces or other organized armed groups ...',⁸ but without conferring any legal status on them.⁹ Common Article 3 even governs situations¹⁰ in which state structures have totally collapsed,¹¹ for a conflict of this type can take place without the state itself being involved. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and by other persons or groups acting *de facto* on its instructions or under its control. As in international conflicts, the rules on non-international conflicts are ultimately destined for all persons taking direct part in the hostilities¹² and oblige them to conduct themselves in a particular manner.¹³

3 Article 80, Additional Protocol I (AP I).

4 See Jamie Allan Williamson, 'Some considerations on command responsibility and criminal liability' *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, pp. 303–317.

5 See also the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction (Trial Chamber), 10 August 1995, paras. 31 and 36, and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 128.

6 But also difficulties of legal interpretation. See for example Jean Pictet, *The 1949 Geneva Conventions, Commentary*, Geneva, ICRC, 1952–1959, Vol. I, p. 37, and Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary on the Additional Protocols)*, ICRC, Geneva, 1987, p. 1359.

7 For the different types of armed conflicts, see Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 69–94.

8 Article 1(1), with the restriction subsequently introduced into the Protocol according to which they require 'such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

9 Common Article 3, para. 4.

10 Neither Protocol II nor human rights law can provide legal responses to these situations, as they both presuppose that a State is 'operational'.

11 In English-speaking countries, the term 'failed state' is frequently used. See the results of the first Periodical Meeting of the States Parties to the Geneva Conventions on International Humanitarian Law, Geneva, 19–23 January 1998, Document No 37, p. 802, Section 2, *Armed Conflicts Linked to the Disintegration of State Structures*. See also Robin Geiss, 'Failed States'. *Die normative Erfassung gescheiterter Staaten*, Duncker & Humbolt, Berlin, 2005.

12 See the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 991–1047.

13 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, above note 5, para. 65–67, and Theodor Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law*, Vol. 89, 1995, p. 561 ff.

National implementation measures

To ensure that international humanitarian law is applied in situations of armed conflict, the entire range of implementation mechanisms provided for in the law itself must be used to the full, including in peacetime. National measures to implement humanitarian law arise from the pledge given by states party to humanitarian law treaties¹⁴ to respect those treaties and ensure that they are respected. This duty is made explicit in a series of provisions that oblige states to take particular implementation measures. Moreover, like all international treaties, the humanitarian law treaties call for a number of measures to be incorporated in national legislation, if this is not already the case.

The general obligation to take ‘measures for execution’ is laid down in Article 80 of Protocol I, which states that the parties ‘shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol’. Among the numerous measures set out in the Geneva Conventions and the Protocols additional thereto, two types of national measures are particularly important, namely the adoption by states of national laws to ensure that the treaties are applied,¹⁵ and measures relating to dissemination and training.

National implementing legislation is necessary for treaty provisions that are not self-executing and therefore require a legislative act for them to become applicable. Apart from the general obligation to ensure that the treaties are applied through primary and secondary legislation,¹⁶ the four Conventions and Protocol I provide for states to adopt any necessary legislative measures to determine appropriate penal sanctions for grave breaches of international humanitarian law.¹⁷

14 In particular the four Geneva Conventions of 12 August 1949 [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949 (GC II); Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (GC III); Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (GC IV)] and Additional Protocols I and II thereto of 8 June 1977 [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (AP II)]. For a full list of all treaties, see <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (visited on 28 May 2008). The point is under consideration every second year by the UN General Assembly: see *Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*, A/RES/63/125 (2008).

15 The Geneva Conventions (Article 48, GC I; Article 49, GC II; Article 128, GC III; Article 145, GC IV) and Article 84 of AP I require that the High Contracting Parties ‘communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers’ (in case of hostilities), their official translations of the treaty in question and ‘the laws and regulations which they may adopt to ensure its application’. The translations (in languages other than those of the original texts) are to be done by their government authorities. The ‘laws and regulations’ to be adopted and communicated are all the legislative acts to be performed by the various authorities invested with the powers to issue primary and secondary legislation that have a connection with the application of these instruments.

16 Article 48, GC I; Article 49, GC II; Article 128, GC III; Article 145, GC IV. AP I sets out the same obligation in Article 84.

17 Defined in Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV; and Articles 11(4) and 85, AP I.

Finally, legislation is needed to be able to prevent or punish misuse of the emblem and distinctive signs at any time.¹⁸ However, various attempts to strengthen the treaty-based obligations to prevent violations of international humanitarian law have failed. For example, a proposal to introduce an obligation for states to report to an international commission on the way national measures are applied was rejected.¹⁹

To put the law into effect and give effective protection to people affected by armed conflict, widespread knowledge of the law and training of those who will have to apply it are indispensable. Dissemination activities must be stepped up in wartime, but must already be in place in times of peace. States undertook, as an initial obligation, to disseminate the texts of the treaties in peacetime and in wartime, and to include study of these in military and if possible civilian instruction programmes, so as to ensure that the armed forces and the entire population are familiar with their content.²⁰ International humanitarian law is largely made up of obligations with which armed and fighting forces must comply, and must therefore form an integral part of their regular instruction and practical training. Yet despite their importance, the rules of war often feature only marginally in the military instruction programmes of most states.

The implementing measures required in peacetime to back up the obligation to spread knowledge of the Geneva Conventions and the Protocols thereto 'as widely as possible' are the training of qualified staff,²¹ the deployment of legal advisers in armed forces,²² emphasis on the duty of commanders²³ and special instruction for the military and authorities who may be called upon to assume relevant responsibilities.²⁴

18 Articles 53–54, GC I; Articles 43–45, GC II.

19 At the meeting of the Intergovernmental Group of Experts – see 'Follow-up to the International Conference for the Protection of war victims, (Geneva, 30 August–1 September 1995)', *International Review of the Red Cross*, No. 304, January–February 1995, pp. 4–38. It included an ICRC proposal of a reporting system and the setting up of an international committee of experts on IHL 'to examine the reports and advise States on any matters regarding the implementation of IHL' (pp. 25–27).

20 Article 47, GC I; Article 48, GC II; Article 127, GC III; Article 144, GC IV (the wording is almost identical in the four Conventions); Articles 19 and 83, AP I; Article 19, AP II.

21 Para. 1 of Article 6, AP I requires that the High Contracting Parties 'also in peacetime, endeavour, [...], to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.' This training should take place with the assistance of the National Society.

22 Article 82, AP I. The role of the legal advisers will be 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'.

23 Article 87, para. 1, AP I.

24 Article 83, AP I. Knowledge of international humanitarian law is also required on the part of civilian and military authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol' and hence in relation to protected persons. Paragraph 2 requires that such authorities 'be fully acquainted with the text' of these instruments.

Punishment for breaches

Several articles of the Geneva Conventions and Protocol I²⁵ specify the breaches that are to be punished by the states party to those instruments. All other violations constitute conduct contrary to the Conventions and Protocol and should be dealt with by means of administrative, disciplinary and criminal measures that the contracting parties are required to take to punish the perpetrators. Grave breaches are expressly listed; their distinguishing feature is that the parties to a conflict and the other contracting parties have an obligation to prosecute or extradite the perpetrator of such a breach, regardless of his nationality and the place of the breach, in accordance with the principle of universal criminal justice.²⁶ Grave breaches are considered war crimes.²⁷ Punishment of violations at national level immediately upon outbreak of a conflict and while it continues are particularly important if a negative spiral of serious and repeated violations of the law is to be avoided. A system of penalties must be an integral part of any coherent legal construct, from the point of view of deterrence and of coercive authority.²⁸

As the system of universal criminal jurisdiction had largely been left in abeyance by states, there was previously no effective prosecution and punishment of these types of crimes. However, international mechanisms such as the *ad hoc* Criminal Tribunals for the former Yugoslavia and for Rwanda, set up by the UN Security Council,²⁹ and in particular the International Criminal Court, have given an impetus to prosecutions at national level. International criminal law and its application by the international courts and tribunals is playing an increasingly important part in the interpretation and enforcement of international humanitarian law and in individual criminal liability for war crimes, as well as crimes against humanity and genocide often committed during armed conflicts. The role of the International Criminal Court is complementary to that of national justice systems. It will investigate or prosecute only where the state is ‘unwilling or unable genuinely to carry out the investigation or prosecution’.³⁰

The credibility of the International Criminal Court and its ability to perform its role of punishing international crimes depend on the adherence of as many states as possible to it. The fact that a number of influential states and some states currently involved in armed conflicts have not ratified the Rome Statute indicates a double standard in the implementation of international criminal law.

25 Articles 49–54, GC I; Articles 50–53, GC II; Articles 129–132, GC III; Articles 146–149, GC IV and Articles 85–89, AP I.

26 This principle imposes on the states parties to the humanitarian law treaties an obligation to prosecute and punish grave breaches. The obligation is absolute and cannot be attenuated, even by agreement between the interested parties (see common Article 51, GC I; Article 52, GC II; Article 131, GC III; Article 148, GC IV). The principle of universal jurisdiction in itself, however, only means that breaches (grave or not) may be prosecuted and punished by any State.

27 Article 85, para. 5, AP I.

28 See the sanctions issue of the *International Review of the Red Cross*, Vol. 90, No. 870, June 2008.

29 S/RES/827 (1993) resp. RES/955 (1994).

30 See Article 17, Rome Statute of the International Criminal Court of 7 July 1998.

This undermines its credibility to some extent and tends to confirm that political considerations carry the day even where international crimes have been perpetrated. Moreover, the international legal apparatus which aims mainly to punish the perpetrators can often only act years after the end of a conflict and cannot replace non-judicial means,³¹ although the creation of international courts and tribunals has strongly promoted recourse to that avenue for enforcing international humanitarian law.

Enquiry procedure

An enquiry procedure is provided for under the Geneva Conventions,³² but to date has never been used since its inception in 1929.³³ Its dependence on the belligerents' consent is doubtless one of the reasons why this mechanism has not been put to the test.

The International Fact-Finding Commission

Article 90 of Additional Protocol I was an attempt to systematize the enquiry process by instituting an International Fact-Finding Commission. This Commission is competent to 'enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violations'³⁴ thereof and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.' In particular, the idea was that the activities of the Commission should help to prevent polemics and violence from escalating during a conflict. It is doubtful, though, whether it could achieve this in practice without an operational arm on the ground and the necessary rapid-response capacity.

31 See Marco Sassòli, 'Humanitarian law and international criminal law', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford 2009, pp. 111–120.

32 Article 52, GC I; Article 53, GC II; Article 132, GC III; Article 149, GC IV. The procedure referred to by this common Article must be distinguished from an enquiry carried out by a detaining Power in accordance with Article 121, GC III or Article 131, GC IV (case of prisoners of war or civilian internees wounded or killed in special circumstances).

33 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929, Article 30. This mechanism was replicated in each of the 1949 Conventions. For further details, see Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruylant, Brussels, 1999, p. 30.

34 The expression 'grave breach' has a specific meaning and refers to the breaches listed as such in the four Conventions and Protocol I. However, the expression 'serious violation' is to be taken in the ordinary sense, which is left to the Commission's own appreciation. As Eric David remarks in his *Principes de droit des conflits armés* (4th edn, Bruylant, Brussels, 2008, p. 670), it can be deduced from the very general wording of Article 90(2)(d) that the Commission could be asked to enquire into violations of the law of armed conflict committed in a non-international armed conflict. Article 90(2)(d) refers to 'other situations', that is situations other than a 'grave breach' or a 'serious violation' of the Geneva Conventions and Protocol I; it requires the consent not of the 'High Contracting Parties' but of a 'Party to the conflict' and 'the other Party or Parties concerned'.

The Commission is competent to find facts and not to decide on points of law or to judge,³⁵ but even if it were to limit itself to findings of fact,³⁶ their pronouncement would often lead to their legal categorization and the elucidation of responsibilities.³⁷ Under Article 90, paragraph 5, the Commission is required to submit a report to the parties concerned on its findings of fact, with such recommendations as it deems appropriate. This article further specifies in subparagraph (c) that the Commission shall not report its findings publicly, unless all the parties to the conflict have requested it to do so.³⁸ The fact that its conclusions must remain confidential is reminiscent of the ICRC's *modus operandi*, but confidentiality is not really an appropriate way for an international commission to work.

In principle, the International Fact-Finding Commission can undertake an enquiry only if all the parties concerned have given their consent,³⁹ but there is nothing to prevent a third state from requesting an enquiry by the Commission into a grave breach or serious violation of humanitarian law committed by a party to conflict, provided that the party concerned has also recognized the Commission's competence.⁴⁰ This possibility arises out of the obligation to 'ensure respect for' the law of armed conflict.

Though established in 1991, the Commission has not yet been activated,⁴¹ nor is it likely to be unless it is enabled to undertake an enquiry on its own initiative or at the request of only one party to a conflict, or by virtue of a decision by another body (e.g. the UN Security Council).⁴² In practice, the enquiry commissions set up and foisted even on unwilling states by the UN Security Council⁴³ are better placed to meet the international community's expectations.

35 Sandoz *et al.*, *Commentary on the Additional Protocols*, above note 6, p. 1045, para. 3620.

36 The Commission's role can go beyond simple fact-finding, as it is authorized to lend its good offices to facilitate the restoration of an attitude of respect for the Conventions and Protocol I. By 'good offices', we may understand communication of conclusions on the points of fact, comments on the possibilities of a friendly settlement, written and oral observations by States concerned (*ibid.*, p. 1046, para. 3625).

37 David, above note 34, p. 672.

38 One may wonder what interest a Party against which a violation is committed might have in requesting an enquiry from a Commission that has no power to punish and which does not make public its findings even if it discovers the most abominable massacres. The only possible 'sanction' – publication of the results of the enquiry – is virtually ruled out. Although discretion may be justified in the case of a body working for victims on the ground, it is less so when it comes to fact-finding, unless it serves to facilitate domestic criminal prosecutions.

39 Art. 90, AP I. In any case, acceptance of the Commission's competence by the impugned State certainly does not guarantee that the procedure will be a success: a belligerent State accused of violating the law of armed conflicts is hardly likely to assist the fact-finding body mandated to determine the truth of such an accusation (David, above note 34, pp. 673–675).

40 'Optional competence': Article 90(2)(d). However, States that ratify Additional Protocol I can make a declaration recognizing the 'compulsory competence' of this body in advance (Article 90(2)(a)).

41 See the website of the Commission at <http://www.ihffc.org/> (visited on 1 June 2009).

42 For further details, see Vité, above note 33, pp. 43, 99, 117.

43 For example, acting under Chapter VII of the United Nations Charter and adopting Resolution 1564 (2004), the Council requested the Secretary-General to rapidly establish an international commission of inquiry to investigate reports of human rights violations in Darfur, and determine whether acts of genocide had occurred there.

Protecting Powers

A Protecting Power is a neutral state mandated by a belligerent state to protect its interests and those of its nationals vis-à-vis an enemy state.⁴⁴ Its role is twofold: it can conduct relief and protection operations in aid of victims, and can at the same time supervise the belligerents' compliance with their legal undertakings. The Protecting Powers' tasks are huge and varied in view of the needs of persons protected for instance by the Third or Fourth Geneva Convention.

Since the Second World War, this system has very rarely been set in motion⁴⁵ and the chances of its being used successfully in future are slim, given the politically delicate role a state would have to play to discharge its responsibilities as a Protecting Power.⁴⁶ Article 5 of Protocol I, which assigns the ICRC a new role, allows it to tender 'its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent'.⁴⁷ However, the ICRC has acted more as a substitute,⁴⁸ for it has in effect assumed the great majority of the humanitarian tasks assigned to Protecting Powers. It has done so without prejudicing its other expressly recognized activities, but restricting itself to humanitarian activities in accordance with its mission.

Reparations

In an international armed conflict, the warring parties can be held responsible for breaches of international humanitarian law. An obligation to pay compensation for violations of international humanitarian law is laid down in Article 91 of Protocol I, and even as early as Article 3 of the 1907 Hague Convention.⁴⁹ According to the general international law of state responsibility, compensation is to be understood

44 Articles 8 and 10, GC I–III; Articles 9 and 11, GC IV.

45 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC/MacMillan, Geneva, 2003, pp. 860–901. These events are the Suez conflict (1956), the Goa crisis (1961), the conflict between France and Tunisia over Bizerte (1961), the Indo-Pakistani conflict (1971) and the South Atlantic conflict between Argentina and the United Kingdom (1982). 'Et même dans ces cas, le fonctionnement de l'institution était soit incomplet, soit le résultat du hasard, soit sujet à controverse': Georges Abi Saab, 'Les mécanismes de mise en œuvre du droit humanitaire', *Revue Générale de Droit International Public*, Vol. 82, 1978, pp. 103–129. This failure can be explained mainly in terms of political motives. It is rare for States to agree to submit to supervision by a third State in a situation of armed conflict.

46 For a more detailed discussion of these obstacles, see Vité, note 33 above, pp. 34 ff.

47 Article 5(3), AP I.

48 Articles 10, GC I–III; Article 11, GC IV and Article 5(4), AP I.

49 See the statement by the Permanent Court of International Justice (PCIJ) that 'any breach of an engagement [of international law] involves an obligation to make reparation' (PCIJ, *Case Concerning the Factory at Chorzów* (Merits), PCIJ Collection of Judgements, Series A, No. 17, 1928.). See also the International Court of Justice (ICJ), *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 152 and 153 and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)*, ICJ Reports 2005, para. 221. In general, see Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 497–527 and Emanuela-Chiara Gillard, 'Reparations for violations of international humanitarian law', *idem*, pp. 529–553.

more broadly as reparations⁵⁰ and encompasses a range of measures, including non-monetary means of restitution (re-establishment of the situation before the wrongful act was committed), satisfaction (acknowledgement or apology) and/or rehabilitation (including medical or psychological claim, or legal and social rehabilitation), and guarantees of non-repetition.⁵¹

Even in situations where large numbers of people have been victims of violations,⁵² those who have suffered direct or indirect personal harm as a result thereof are entitled to reparation.⁵³ However, purely monetary compensation could easily constitute an excessive burden in view of the limited resources available, the significant war damage and the enormous task of reconstruction after a conflict and require both an individual and a collective assessment, taking the scope and extent of any damage into account.⁵⁴ Rulings on reparations in individual cases can take account of the collective dimension of certain violations⁵⁵ and can lead to wider settlements for larger communities.

It is, however, disputed whether an individual right to reparations is recognized or not by international humanitarian law. Despite ‘an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparations directly from the responsible State’,⁵⁶ it does not yet form

50 The duty to make ‘reparations’ for violations of IHL is explicitly referred to in the Second Protocol to the Hague Convention for the Protection of Cultural Property (Article 38).

51 See Articles 30–37 of the *Draft Articles on State Responsibility*, adopted by the International Law Commission at its 53rd session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). Rehabilitation and guarantees of non-repetition are not included therein, but are considered part of the concept of reparation in Principle 18 of the *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by General Assembly Resolution 60/147 of 16 December 2005 (*Basic Rights on the Right of Remedy and Reparations*). Measures to sanction perpetrators of violations are sometimes also considered as part of reparations; see Inter-American Court of Human Rights, *Durand y Ugarte v. Perú (Reparations)*, Judgement of 3 December 2001, Series C, No. 89, para. 68; Art. 22 (f) of the *Draft Articles on State Responsibility*.

52 The Inter-American Court, for instance, recognized as victims 702 displaced persons who had fled their homes because of the lack of protection of the State against massacres of armed groups, and ordered measures to facilitate their return as reparation – see *Case of the Ituanga v. Colombia*, Judgement of 1 July 2006, Series C, No. 148, para. 234.

53 See International Criminal Court (ICC), *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgement on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victim’s participation of 18 January 2008, 11 July 2008, para. 38. See also European Court of Human Rights, *Cakici v. Turkey*, Judgement of 8 July 1999, Reports 1999-IV, para. 98.

54 See e.g. Rule 97 (1) of the Rules of Procedure and Evidence of the International Criminal Court, as well as Rule 98 on the Trust Fund for victims. See also Art. 6 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997 and Art. 5 of the Cluster Munitions Convention of 2008, which contain clauses on victim assistance that require States to develop and implement assistance plans and programmes, but are not focused on an individual right to reparations.

55 See for instance the Inter-American Commission for Human Rights in cases concerning indigenous communities: *Principal Guidelines for a Comprehensive Reparations Policy* (Colombia), OEA/Ser/L/V/II.131, Doc. 1, 19 February 2008, para. 15.

56 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC/Cambridge University Press, Geneva/Cambridge, 2005, p. 541. See in particular the *Basic Principles and Guidelines on the Right to Remedy and Reparations*, above note 51.

part of customary law.⁵⁷ Preclusion by a peace settlement, sovereign immunity or the non-self-executing nature of the right to reparations under international law mostly rule out successful individual claims. Victims can thus only approach their own government, which may submit their complaints to the party or parties that committed the violation – a procedure that depends on relations between states, which have often both committed violations. In non-international armed conflicts, there is no treaty rule obliging states or non-state armed groups to make reparations for violations of international humanitarian law.⁵⁸

The possibility for an individual victim to claim reparations for a violation of international humanitarian law can nonetheless be inferred from Article 75 of the Statute of the International Criminal Court.⁵⁹ More importantly, human rights treaties require states to provide a remedy for violations.⁶⁰ At a regional level, both the Inter-American and the European Court of Human Rights have ordered reparations for victims of human rights violations that were simultaneously violations of international humanitarian law. They have done so in both international and non-international armed conflicts, e.g. in relation to Turkey, Cyprus, Chechnya, Guatemala, Colombia, Peru, and Bosnia and Herzegovina.⁶¹ Reparation has also been provided directly to individuals via different procedures, in particular through mechanisms set up by the Security Council,⁶² inter-state agreements⁶³ and unilateral acts such as national legislation,⁶⁴ or in response to requests submitted directly by individuals to national courts.⁶⁵

57 National courts rejected individual claims, notably the German Constitutional Court (Bundesverfassungsgericht), 2 BvR 1476/03 – Decision of 15 February 2006, para. 20–22, available at http://134.96.83.81/entscheidungen/rk20060215_2bvr147603.html (visited on 29 May 2009) and the Japanese Court (Claims for compensation from Japan arising from injuries suffered by former POWs and civilian internees of the ex-Allied Powers, Decision rendered by the Civil Division No. 31 of the Tokyo District Court, 26 November 1998, reprinted in Fujita *et al.*, *War and the Right of Individuals*, Nippon Hyoron-sha Co. Publishers, Tokyo, 1999, p. 104).

58 See Henckaerts and Doswald-Beck, above note 56, p. 549.

59 Para. 6. See also the Victims Trust Fund, established pursuant to Article 79.

60 Article 2(3), International Covenant on Civil and Political Rights (ICCPR), European Convention of Human Rights (ECHR) Art. 13 American Convention on Human Rights (ACHR) Art. 10 and 25, African Charter on Human and Peoples Right (Art. 7 (1)a (implicit)).

61 See in particular Karine Bonneau, 'Le droit à réparation des victimes des droits de l'homme, le rôle pionnier de la Cour interaméricaine des droits de l'homme', *Droits fondamentaux*, No. 6, janvier 2006–décembre 2007, available at www.droits-fondamentaux.org (visited on 1 June 2009); Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd edition, Oxford University Press, Oxford, 2005, pp. 397–454.

62 See the UN Compensation Commission established by S/RES/687 (1991) and 692 (1991), which reviews claims for compensation for direct loss and damage arising 'as a result of (Iraq's) unlawful invasion and occupation of Kuwait.' See Fred Wooldridge and Olufemi Eljas, 'Humanitarian considerations in the work of the United Nations Compensation Commission', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 555–581.

63 See for example the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, Article 1(1). It established the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, stating that these persons have the right to restitution of property of which they were deprived during hostilities.

64 See in particular the different treaties concluded and laws passed by Germany to indemnify victims of the war and the Holocaust.

65 See the examples in Henckaerts and Doswald-Beck, above note 56, pp. 542–549.

Nevertheless, broader international and/or national reparations schemes and especially those implemented via transitional justice mechanisms (including truth and reconciliation commissions)⁶⁶ can and should complement this rather selective legal regime. It is difficult to resolve claims on a case-by-case basis and the mere use of the term ‘reparation’ presupposes a violation of international law. This approach leaves out all the victims of armed conflicts who are not victims of violations and in particular all those affected by – lawful – collateral damage. Only a wider definition of victims including all persons affected by a conflict could enable the victims’ interests to be met more satisfactorily, and dealing with past conflicts requires much broader societal measures than just individual reparations.

The International Committee of the Red Cross (ICRC)

As the above international mechanisms for enforcing international humanitarian law work only very patchily, if at all, it is worth dwelling at greater length on the role assigned to the ICRC in the implementation of this body of law. In practice, the ICRC plays a key role in the protection of war victims.

Its principal mandate is to provide the victims of armed conflict with protection and assistance. It is enjoined ‘to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law’ and ‘to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’.⁶⁷ The ICRC’s internal basic doctrine with regard to its mission and activities has declared the dual nature of its work – operational help for victims of armed conflict on the one hand, and developing and promoting international humanitarian law and humanitarian principles on the other – to be part of the institution’s identity.⁶⁸

There are a hundred or so references to the ICRC in the 1949 Geneva Conventions and the Protocols thereto, and most of them are injunctions to act.⁶⁹

66 See the issue of the *International Review of the Red Cross* on Truth and Reconciliation Commissions (Vol. 88, No. 862, June 2006).

67 Article 5(2)(c)–(d), Statutes of the International Red Cross and Red Crescent Movement. These Statutes are approved by the International Conference of the Red Cross and Red Crescent that brings together the States party to the Geneva Conventions, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, and the National Red Cross and Red Crescent Societies. The International Tribunal for ex-Yugoslavia referred to the ‘fundamental task’ conferred upon it by the international community in accordance with the relevant provisions of international humanitarian law, namely to ‘assist and protect victims of armed conflicts’.

68 *The ICRC: Its Missions and Work*, Policy Document, adopted by the ICRC Assembly in June 2008, published in the *International Review of the Red Cross*, Vol. 91, No. 874, June 2009.

69 These mainly concern supervision of the application of international humanitarian law, the Central Tracing Agency (CTA), co-operation, dissemination and the repatriation of the wounded.

Other tasks are left to the ICRC's own discretion.⁷⁰ Finally, its exercise of the right of initiative⁷¹ is determined by needs and circumstances.

The various aspects of its mandate are the practical expression of what is often referred to as the ICRC's role as guardian of international humanitarian law.⁷² However, it is not the guarantor of humanitarian law. That role must be performed by the High Contracting Parties in accordance with their obligation under Common Article 1. They must, however, 'grant the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it [...] in order to ensure protection and assistance to the victims of conflicts ...'⁷³ In the *Simic* case, the International Criminal Tribunal for the former Yugoslavia⁷⁴ acknowledged the specific role of the ICRC in the implementation of international humanitarian law by upholding its immunity from the obligation to testify, even before international tribunals, in the interests of its ability to perform that role.⁷⁵

The ICRC has taken various steps to ensure that international humanitarian law is put into effect before war breaks out, and to step up both the protection of war victims and compliance with the rules.⁷⁶ It has, for example, been active in supporting national implementation measures and efforts to spread knowledge of the relevant law. It has set up an advisory service at headquarters and in the field to explore the entire range of measures for integrating international

70 For example, the collection and transmittal of information on protected persons and other tasks of the CTA.

71 See for example Yves Sandoz, 'Le droit d'initiative du Comité international de la Croix-Rouge', *German Yearbook of International Law (Jahrbuch für internationales Recht)*, Vol. 22, 1979, pp. 352–373.

72 See Yves Sandoz, 'Le Comité international de la Croix-Rouge: gardien du droit international humanitaire', *Mélanges Sahovic, Revue yougoslave de droit international*, 1996, available at <http://www.icrc.org/web/fre/sitefre0.nsf/html/about-the-icrc-311298> (visited on 28 May 2009).

73 Article 81(1), AP I.

74 See ICTY, *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness (Trial Chamber), 27 July 1999, paras. 47 and 72. See also Stéphane Jeannot, 'Recognition of the ICRC's long-standing rule of confidentiality – An important decision by the International Criminal Tribunal for the former Yugoslavia', *International Review of the Red Cross*, Vol. 82, No. 838, June 2000, p. 403–425.

75 See Anne-Marie La Rosa, *ICRC and ICC: two separate but complementary approaches to ensuring respect for international humanitarian law*, web interview available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/international-criminal-court-interview-101008> (visited on 1 June 2009).

76 To support the efforts made by the ICRC headquarters in Geneva and its delegations in conflict situations, the ICRC has set up a network of delegations that covers almost all countries not directly affected by an armed conflict. These regional delegations currently exist in 21 States, and each of them covers several countries. They are decentralized extensions of the headquarters and serve as relays to help it implement its general objectives and permanent tasks (national implementation measures, dissemination and development of international humanitarian law, co-operation with National Red Cross and Red Crescent Societies, etc.), in other words to perform the ICRC's overall mandate as set out in Article 5 of the Statutes of the International Red Cross and Red Crescent Movement. These delegations are supposed to alert headquarters rapidly in case of an emergency and prepare themselves to become operational during a conflict. They make possible a bilateral and multilateral dialogue with States, as well as with National Red Cross and Red Crescent Societies, to further the implementation of international humanitarian law.

humanitarian law into domestic systems,⁷⁷ and its staff review states' domestic legislation, military doctrine, education, training and sanction systems and propose any changes needed to bring them into line with the state's obligations under the humanitarian treaties. The ICRC's main target groups are 'those actors that have a significant capacity to influence the structures or systems (e.g. legislation, military doctrine and training, disciplinary and penal sanctions) associated with the actual and potential humanitarian problems identified. These actors include political authorities and parties, the judiciary, arms carriers, National Red Cross/Red Crescent Societies, the media, the private sector, religious groups, academic circles, non-governmental organizations (NGOs) and international organizations. Such actors may have a positive (or negative) impact on the lives and dignity of persons affected by armed conflict [...], and they may be in a position to facilitate (or hamper) the ICRC's access to concerned populations.'⁷⁸

Operations during an armed conflict

In working for the faithful application of international humanitarian law, the ICRC endeavours to persuade states and other parties concerned to accept and comply with the rules of international humanitarian law applicable in a given situation. The obligations that arise for them will differ, depending on whether a situation is classified as an international armed conflict or not, and this classification also determines whether or not a state is obliged to accept the ICRC's offers of services. In the case of an international armed conflict, most victims have the status of protected persons and states are under specific obligations both towards them and towards the ICRC,⁷⁹ whereas the law applicable to internal conflicts does not impose those same constraints on the belligerents.

In international conflicts, the ICRC has traditionally drawn the parties' attention in a formal manner to the essential rules of international humanitarian law.⁸⁰

77 The ICRC set up its Advisory Service on International Humanitarian Law in 1996 to step up its support to States committed to implementing IHL. Specifically, the Advisory Service organizes meetings of experts, offers legal and technical assistance in incorporating IHL into national law, encourages States to set up national IHL committees and assists them in their work (see National Committees on IHL), promotes the exchange of information (for instance through its database), publishes specialist documents (for instance fact sheets, ratification kits, model laws, biennial report and biannual update) – see ICRC, *National Implementation of International Humanitarian Law (IHL) and the ICRC Advisory Service*, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/advisory_service_ihl?Opendocument (visited on 28 May 2009).

78 See 'ICRC Prevention Policy', p. 3, adopted by the ICRC Assembly on 18 September 2008, published in the *International Review of the Red Cross*, Vol. 91, No. 873, June 2009.

79 See Article 126, GC III and Article 143, GC IV. In these areas, the ICRC has a real right of intervention and supervision, in addition to its convention-based right of initiative set out in Article 9, GC I–III and Article 10, GC IV. Moreover, it can be appointed as (and act as a substitute for) a Protecting Power.

80 Recent examples: Chad/Libya (1987), the Gulf War (1990), Ecuador/Peru (1995) Ethiopia/Eritrea (1999), Afghanistan (2002), Iraq (2003) Lebanon–Gaza–Israel (2006/2009). On the practice in the Iraq war, see Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict', *German Yearbook of International Law*, Vol. 47, 2004, pp. 293–342.

Its memoranda⁸¹ to them contain a reminder of the relevant principles and rules of that law; they include the rules on the conduct of hostilities and on the protection of people affected by war. Legal classification of a situation as an armed conflict serves to highlight the belligerents' obligations, sets out a framework for the ICRC's operations, and provides guidance for its delegates in the field. The ICRC's overarching aim is to ensure that victims benefit at least *de facto* from treatment that complies with humanitarian rules, especially in internal conflicts.

In order to carry out their humanitarian operations, ICRC delegates must not only be present in warring countries but must also have access to the areas affected by the hostilities, as close proximity to the victims is vital for humanitarian protection and assistance. A headquarters agreement and a presence limited to the capital city will never be an adequate substitute for direct access to the people in need. Similarly, the ability of delegates to work in conflict-torn and potentially dangerous areas and to get to especially vulnerable people – in particular prisoners of war, detainees and civilian internees – is a *sine qua non* of what is known as protection work. In international conflicts, this right of access is expressly provided for in the Conventions⁸² and includes a real right of supervision.⁸³

Access naturally has to be negotiated with the authorities, and if necessary with all the warring factions. Their consent is indispensable to vouchsafe a minimum level of security. The negotiations have to take account of military interests and security considerations that often take precedence over humanitarian principles. Politics (foreign and domestic), the media, and economic parameters play a part. Although an agreement in principle is often relatively easy to obtain, putting it into practice is often much more difficult. Moreover, access to conflict areas does not in itself enable the ICRC to conduct all its humanitarian operations. For instance protection activities, particularly those related to detention, require specific agreements.⁸⁴

Once the ICRC has access, its treaty-based right of initiative authorizes it to undertake any humanitarian activity with the consent of the parties to the conflict concerned.⁸⁵ If the proposed action is explicitly based on humanitarian law, the ICRC has a wide scope for action (for example requesting a temporary

81 A sample was published in the *International Review of the Red Cross*, No. 787, January–February 1991, pp. 24–27. It is the *note verbale* and annexed memorandum of 14 December 1990 addressed to all the States party to the Geneva Conventions shortly before the outbreak of the Gulf War.

82 Article 126, GC III and Article 143, GC IV: ICRC delegates (like those of Protecting Powers) 'shall have permission to go to all places where prisoners of war may be [...]. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses [...]. They shall have full liberty to select the places they wish to visit [...].'

83 As in the case of visits to prisoners of war (Article 126, GC III). Beside Articles 126 and 143, GC IV, the word 'Supervision' appears in the margin. The titles that appear in the margins of the Conventions were added by the Secretariat of the diplomatic conference and are not part of the official texts. They therefore have only an indicative value. They are referred to in the edition of the Geneva Conventions published by the ICRC.

84 Although visits by ICRC delegates to prisoners of war (Article 126, GC III) and civilian internees (Article 143, GC IV) are an obligation in international armed conflicts, they nevertheless require negotiations to determine the modalities.

85 Article 9, GC I–III; Article 10, GC IV; Article 3 common to the four Geneva Conventions, paras. 2 and 3.

cease-fire to allow evacuation of the wounded, repatriation of wounded prisoners of war, creation of hospital and safety zones, protection of hospitals, organization of relief convoys through front lines). It may also have discussions with authorities in order to perform its role as a neutral intermediary in humanitarian matters that call for negotiations with or between the parties to a conflict – the purpose here is to alleviate the actual or potential humanitarian consequences of a conflict.⁸⁶ Another activity based on humanitarian law is that of its Central Tracing Agency (CTA), which gives moral and practical support to people of concern for the ICRC and to their families. It helps to trace the wounded and dead,⁸⁷ detainees,⁸⁸ civilians isolated in enemy-controlled territory,⁸⁹ displaced people and refugees⁹⁰ and unaccompanied children,⁹¹ and to reunite people with their families.⁹²

However, the ICRC's work is often carried out without a firm basis in the rules of international humanitarian law. Even limited *ad hoc* agreements often make it possible to save human lives or alleviate suffering during a conflict. The ICRC can prepare such agreements or respond to requests from parties to a conflict without having any justification other than the humanitarian nature of the action required (resettlement of displaced persons, exchange or release of prisoners, disarmament of armed groups, evacuation or surrender of fighters, etc.) In these situations the action must be based on specific and concurring requests from the parties. At the same time the ICRC must ensure that it does not risk compromising its fundamental principle of neutrality by giving a political or propaganda advantage to either party, or jeopardizing its traditional protection and assistance operations.

Indeed, the ICRC's credibility and acceptance among the parties to conflicts are based on its strict respect for the Fundamental Principles of the Red Cross and Red Crescent, which the States Parties to the Conventions have themselves recognized and agreed to respect. In situations of armed conflict, the principles of humanity, neutrality, impartiality and independence are particularly relevant.⁹³ These principles determine its approach and positions⁹⁴ and guide its operational

86 To be distinguished from the consequences related to the causes of a dispute or even its very object. The nature of these actions is already limited by the ICRC's role as a humanitarian organization, the priority to be given to its protection and assistance work, and by the Fundamental Principles of the Movement.

87 For the wounded, sick and dead of the armed forces (see Articles 15–16, GC I; Articles 18–19, GCII).

88 See Articles 70, 71, 120, 122 and 123, GC III for prisoners of war and Articles 107, 112, 113 and 129, GC IV for civilian internees.

89 See Articles 136 and 140, GC IV concerning the centralization of information relating to protected persons.

90 Article 73, AP I.

91 Article 78, AP I.

92 Article 74, AP I.

93 See Jean Pictet, *Red Cross Principles*, ICRC, Geneva, 1966, and *The Fundamental Principles of the Red Cross, Commentary*, Henry Dunant Institute, Geneva, 1979.

94 See Jean-Luc Blondel, 'The meaning of the word "humanitarian" in relation to the Fundamental Principles of the Red Cross and Red Crescent', *International Review of the Red Cross*, No. 273 November–December 1989, pp. 507–515, Marion Harroff-Tavel, 'Neutrality and impartiality – The importance of these principles for the International Red Cross and Red Crescent Movement and the difficulties involved in applying them', *idem*, pp. 536–552.

activity in the field. In its judgment in the *Nicaragua* case, the International Court of Justice confirmed the importance of the Red Cross principles by singling out humanity and impartiality as the essential conditions for all humanitarian action.⁹⁵

Protection and assistance

Through its operations, the ICRC endeavours to shield conflict victims from dangers, suffering and abuse to which they may be exposed and to provide them with support. Geared to the victims' vulnerabilities and needs, they will therefore vary according to circumstances and cover a wide range of activities, from dissemination of the humanitarian rules and principles to medical, nutritional and material aid. These activities are closely interrelated and can be viewed only as an inseparable whole. In armed conflicts, protection and assistance are inextricably linked: the ICRC sees protection first and foremost as an active presence in the vicinity of people affected by a conflict. Assistance activities often have a protection dimension and vice versa.⁹⁶

The primary aim of the ICRC's operations must be to confront the parties to an armed conflict with their responsibilities and get them to comply with their obligations under international humanitarian law to preserve the safety, physical integrity and dignity of people affected by the conflict. Its work is designed to help them shoulder those responsibilities. It includes activities that seek to increase the safety of individuals and limit the threats they face by reducing their vulnerability and/or exposure to risks.⁹⁷ Firsthand information gathered by the ICRC through its presence *in situ* and its access to victims serves as input for its representations, based on fact or law, to the authorities to persuade them to 'work for the faithful application' of humanitarian law.

These representations take place as part of a regular dialogue with the main contenders in an armed conflict, particularly the political and military authorities.⁹⁸ They can be made at various levels – for example, to the commander of an individual camp, the official responsible for all prison camps, the general headquarters, or even at ministerial or presidential level. They may be made by a delegate, the head of the local or regional delegation, the ICRC Director of Operations or the ICRC President. They may be made orally or in writing, by letter

95 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ICJ Reports 1986, p. 14, para. 243.

96 See the ICRC Assistance Policy, adopted by the ICRC Assembly on 29 April 2004, published in the *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 677–693, as well as the ICRC Protection Policy, adopted by the Assembly of the ICRC on 23 September 2008, published in the *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 751–775.

97 See ICRC Protection Policy, above note 96, p. 752.

98 Ministries of Foreign Affairs are the usual diplomatic channel, but most of the ICRC's representations are made to Ministries of Defence, Security or the Interior, or to the President's office (often with the aid of a liaison officer).

or by *note verbale*. The type of representation will depend on the gravity of the violation, the urgency of the matter and above all the interests of the victims.⁹⁹

These approaches may take various forms. The extent to which they achieve their aims will obviously depend on the relationship of trust between the authorities and the ICRC. Although as a general rule the ICRC's representations remain confidential,¹⁰⁰ in the case of serious and repeated violations it can nevertheless appeal to the international community, even denouncing those violations publicly and calling for an end to them.¹⁰¹ In recent years such appeals have become more and more frequent, particularly in major conflicts such as those in Somalia, Rwanda, Congo, the former Yugoslavia, Afghanistan, Iraq, and Israel and the occupied territories.¹⁰² Nevertheless, the ICRC's practice in this regard is cautious so as not to make the numerous widespread violations appear banal by raising the alarm too frequently, and also not to jeopardize its ability to take action on the ground.

More often than not, the protection activities have to be complemented with assistance activities. Whereas the parties to a conflict bear the primary responsibility for meeting the basic needs of the civilian population under their control, relief operations are required to make up for a lack of supplies essential for the population's survival. Under international humanitarian law, parties to a conflict need only guarantee access to assistance operations on condition that the assistance is impartial and neutral, and if the supply of goods essential to the survival of the civilian population is insufficient.¹⁰³ An assistance operation therefore

99 See Deborah Manicini-Griffoli and André Picot, *Humanitarian negotiation, A Handbook for securing access, assistance and protection for civilians in armed conflicts*, Centre for Humanitarian Dialogue, Geneva, October 2004. For a practical example of the different interventions, see Toni Pfanner, 'Principled humanitarian action in the East Timor crisis', in Larry Minear and Hazel Smith (eds), *Humanitarian Diplomacy: Practitioners and their Craft*, United Nations University Press, Tokyo, 2007, pp. 174–193.

100 On dialogue and confidentiality, see ICRC Protection Policy, above note 96, pp. 758–761.

101 Public statements are subject to specific and cumulative conditions defined in the ICRC's institutional policy (namely, '(1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of the violations have been established of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to violations; (4) such publicity is in the interest of the persons or populations affected or threatened.' – see 'Action by the ICRC in the event of violations of international humanitarian law', *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400):

102 The first appeal to the international community in the Iran/Iraq war, based on Article 1 common to the four Conventions, was still an exceptional step (see *International Review of the Red Cross*, No. 235, July–August 1983, pp. 220–222 and No. 239, March–April 1984, pp. 113–115). In connection with the conflict in the former Yugoslavia alone, the ICRC issued over 50 public appeals, often in response to particularly tragic or deadly events, in order to express its acute concern at the serious violations of international humanitarian law that were taking place there.

103 See Articles 23 and 55, GC IV; Article 70, AP I; Article 3 common to the four Geneva Conventions and also *Compilation of United Nations Resolutions on humanitarian assistance*, OCHA Policy Studies Series, 2009, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112152> (visited on 7 August 2009). See also Article 18, AP II. For more details on the rules of international humanitarian law applicable to relief, see Sylvain Vité, *Rights and duties of all actors under international humanitarian law*, presented at the Expert Meeting on Humanitarian Access in Situations of Armed Conflict,

must be negotiated in advance with the warring parties. In an international armed conflict, consent must be given where the said conditions are met.¹⁰⁴ However, authorization to deliver assistance is often delayed or withheld without any justification based on overriding military necessity.¹⁰⁵ The ICRC can only carry out an assistance operation if it is able to ascertain the urgency and nature of the needs on the ground by assessing the categories and numbers of potential beneficiaries and organizing and supervising the distribution of relief accordingly.¹⁰⁶ It closely supervises the use to which assistance is put in order to prevent misappropriation and politicization of its aid by armed forces or groups. It is obliged to do so in order to comply with the requirements of humanitarian law.¹⁰⁷ Unlike some other players, and strictly following the Red Cross principles, it wants to provide assistance independently of political or military structures and without taking sides as to the cause of conflict.¹⁰⁸

Co-operation with the National Red Cross or Red Crescent Society

Co-operation with National Societies is indispensable for the ICRC to promote contingency measures for the implementation of international humanitarian law,¹⁰⁹ and even more so when it is preparing to conduct operations during a conflict. Humanitarian work by National Societies is mainly based on the Conventions themselves, and the primary responsibility for rendering assistance to the victims of armed conflicts rests with the respective National Society as a humanitarian auxiliary to the public authorities.¹¹⁰ Article 81(2) of Protocol I,¹¹¹ which is addressed mainly to public authorities and their subsidiary bodies, stipulates that the parties to a conflict 'shall grant to their respective National Societies the facilities necessary for carrying out their humanitarian activities, in accordance with the fundamental principles of the Red Cross'.¹¹²

30th June–1st July 2008, Montreux (on file with the author); François Bugnion, above note 45, pp. 658–67, 804–844.

104 See Articles 23 and 55, GC IV.

105 See Article 71(3), AP I (temporary restriction of the movements of relief personnel). However, famine is often illegally used as a weapon, either to gain control of a group of people (by drawing civilians towards regions where supplies are less scarce) or to drive a group of people out of a particular region. Starvation of the civilian population is prohibited according to Article 54 para. 1, AP I.

106 See ICRC Assistance Policy, above note 96.

107 I.e. the requirement that assistance be neutral and impartial – see Article 23, GC IV and Article 18, AP II.

108 Pierre Krähenbühl, 'The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 505–514.

109 See Article 3(2), subpara. 3, and Article 5(4)(a), Statutes of the International Red Cross and Red Crescent Movement.

110 See for example Article 26, GC I; Articles 24–25, GC II; Article 63, GC IV; Articles 6 and 17, AP I; Article 18, AP II and Article 3(2), subpara. 2, Statutes of the International Red Cross and Red Crescent Movement (above note 67).

111 Para. 2.

112 It also calls upon National Societies to provide them with the same facilities under the same conditions (para. 3). For the Co-operation within the Red Cross and Red Crescent Movement see the Agreement on the Organization of the International Activities of the Components of the International Red Cross and

The objective of the operational partnership is to reach persons affected by conflict and respond to their needs as quickly and efficiently as possible. Close co-operation has been established, for example, in first aid,¹¹³ public health,¹¹⁴ assistance programmes and tracing missing persons. The activities conducted by the ICRC, except for those assigned to it by its specific mandate under international humanitarian law and more specifically the various protection activities, can often be carried out just as well or even better and with due respect for the Fundamental Principles of the Red Cross by the National Society concerned. Only when the National Society cannot assume its responsibilities does the ICRC offer to step in. In an internal conflict, however, the principles (independence vis-à-vis the authorities, neutrality in the conflict and impartiality of aid) are difficult for National Societies to comply with, and they are rarely able to do their job throughout the territory, particularly in rebel-controlled areas. Since national humanitarian organizations are often unable in such situations to respond to needs, international operations need to be present to plug any gaps in the national relief system.

Limitations

To be able to perform its specific role, the ICRC has to carefully weigh all the implications its public reactions to violations could have for the victims and, as a secondary consideration, for its own activities on their behalf. When faced with the dilemma of either remaining silent and being able to help the victims, or speaking out and not being able to alleviate their plight, the ICRC chooses the first approach.¹¹⁵ By the same token, the need to safeguard its operational mandate restricts its ability to co-operate with enquiries or judicial procedures, as it would have to break its commitment to confidentiality vis-à-vis both the parties to conflict and the victims themselves to do so. It would thereby risk forfeiting the trust of the authorities and other parties with whom it engages in dialogue and being refused access to victims.¹¹⁶

The ICRC's role as a neutral and independent humanitarian organization is therefore first and foremost an operational one. Its objective is to bring relief to

Red Crescent Movement, adopted by the Council of Delegates, Seville, 25–27 November 1997 (Seville Agreement), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP4Y> (visited on 28 July 2009). Each Movement component (National Red Cross and Red Crescent Societies, their International Federation and ICRC) has distinct but closely related and complementary rules. The ICRC will act as lead agency, as provided for in Article 4 of the Agreement, in situations of international and non-international armed conflicts, internal strife and their direct results (Article 5.3.1, Seville Agreement).

113 Training of relief workers, supply of drugs and medical supplies, reinforcements for the ambulance service, etc.

114 Mobile clinics, water and sanitation programmes, logistical and administrative support for medical and surgical teams, etc.

115 See Jakob Kellenberger, 'Speaking out or remaining silent', *International Review of the Red Cross*, Vol. 85, No. 855, September 2004, p. 593–610.

116 See also Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', *Yearbook of International Humanitarian Law*, Vol. 10, December 2007, pp. 45–75.

the victims, improve their situation in practical ways, and persuade those responsible to treat them with humanity and work for better application of the law. Quasi-judicial supervision *a posteriori*¹¹⁷ to restore victims' rights is not part of its mandate. It cannot be 'at once champion of justice and of charity'.¹¹⁸

Implementation in non-international armed conflicts

A distinction is made in international humanitarian law between international and non-international armed conflicts. It is also reflected in the implementation mechanisms: in the latter case they are addressed to the 'parties' to non-international armed conflicts, i.e. states but also non-state groups. Neither Article 3 common to the four Geneva Conventions nor Additional Protocol II expressly provides for international implementation mechanisms. All attempts to create such mechanisms, let alone a real system of legal supervision, were thwarted by the 'internal affairs' reflex.¹¹⁹ Besides the humanitarian right of initiative enshrined in Article 3, only an obligation to disseminate the Protocol remains in its Article 19.

Neither Protecting Powers nor enquiry or fact-finding procedures¹²⁰ are provided for in the law applicable to non-international armed conflicts. It is at best uncertain to which extent armed opposition groups incur responsibility and are under an obligation to make reparations. The obligation to prosecute and try war criminals, which is also implicitly contained for non-state entities, is hard for them to implement, and the parties to such conflicts are moreover often unwilling to enforce criminal responsibility.¹²¹ Before adoption of the Statute of the International Criminal Court, there was no specific mechanism in international humanitarian law to prosecute and try perpetrators of violations of that law or put an end to such violations. However, the general rule enshrined in Article 1 common to the Geneva Conventions means that the warring parties are bound to

117 See David, above note 34, p. 645–648. This is rather a restriction that the ICRC imposes on itself, because of the way it perceives its role; for the Protecting Power, the mandate could be construed differently.

118 Cf. Jean Pictet, *The Fundamental Principles of the Red Cross*, above note 93, p. 54.

119 In Protocol II, it is stated that nothing in the Protocol shall be invoked 'for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State' or 'as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs' (Article 3, paras. 1 and 2).

120 Immediately following its constitutive meeting in Bern on 12–13 March 1993, the International Fact-Finding Commission expressed its readiness to conduct enquiries, subject to the consent of all parties to the conflict, on violations of humanitarian law other than grave breaches and other serious violations, including those committed in civil wars. Although the extension of the Commission's mandate to non-international armed conflicts is to be welcomed, we may wonder whether it really has the capacity to look into all violations. In any given armed conflict, there will be hundreds and even thousands of serious violations. The Commission would be in danger of being flooded with allegations if the offer were to be really taken up.

121 See Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflicts', *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, pp. 655–690.

ensure respect for international humanitarian law¹²² and to prevent and punish violations of it. Indeed, according to the International Court of Justice¹²³ the obligation to ensure respect for the Conventions also applies to Common Article 3 and hence to non-international conflicts. This obligation applies to third states too.

The criminalization of violations of Common Article 3 as violations of the laws and customs of war¹²⁴ or as defined in the Statute of the International Criminal Court¹²⁵ cannot obscure the fact that state practice, not to mention that of non-state entities, is still embryonic in terms of effective prosecution and punishment of violations of the laws and customs of war in internal conflicts. The measures for implementing international humanitarian law therefore essentially rest with authorities at the national level.

Special agreements and unilateral declarations

The rules on internal conflicts as laid down in Common Article 3 and Protocol II can be supplemented by those that govern international armed conflicts. In terms of Common Article 3(2), parties to a conflict must endeavour to put all or part of the other rules of the Conventions into effect by means of special agreements. In order to interpret the rudimentary rules pertaining to non-international conflicts and make them easier to understand and apply, it is necessary to proceed by analogy with the more detailed (and more demanding) rules applicable to international conflicts. This is an appropriate course to take, as the humanitarian and military challenges of both types of situation are often similar and there can be no real justification for differentiating between them.¹²⁶ Problems arising over the legal classification of a conflict can be overcome pragmatically by means of an agreement, since this will have no impact on the legal status of the contracting parties.¹²⁷

An agreement can be entered into on all or some of the provisions relating to international armed conflict. Such agreements mostly concern particular provisions (e.g. setting up of safety zones,¹²⁸ simultaneous release of wounded prisoners, etc.). There have also been broader references to humanitarian law

122 The ICJ took the view in *Military and Paramilitary Activities in and against Nicaragua* (above note 95, p. 129, para. 255) that Article 1 imposed obligations of conduct in relation to an international armed conflict too.

123 *Ibid.*, p. 114, para. 220.

124 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, para. 86; Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusho Tadić*, 17 July 1995 (Amicus Curiae brief submitted by the United States), p. 37; Antonio Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts', in Antonio Cassese (ed), *Current Problems of International Law*, Giuffrè, Milan, 1975; Meron, above note 13, p. 560. See also Article 8(e), Rome Statute of the International Criminal Court.

125 See Article 8(e), Rome Statute of the International Criminal Court.

126 For example, the rules on conduct of hostilities.

127 Common Article 3, para. 4.

128 See Yves Sandoz, 'The establishment of Safety Zones for Persons Displaced within their Country of Origin', N. Al-Nauimi and R. Meese (eds), *International Legal Issues Arising under the Decade of International Law*, 1995, pp. 899–927.

treaties or parts of treaties, e.g. in the case of the conflict in the former Yugoslavia.¹²⁹ These special agreements are often the result of an ICRC initiative, and are often prepared by the ICRC and concluded under its auspices.¹³⁰

Special agreements between the parties to a non-international armed conflict (either between a State and an armed group or between armed groups) allow for an explicit commitment to comply with a broader range of rules of international humanitarian law. An agreement may be constitutive if it goes beyond the treaty or customary provisions already applicable in the specific context (thereby creating new legal obligations), or it may be declaratory if it is simply a restatement of the law that is already binding on the parties independently of the agreement. As pointed out by the International Criminal Tribunal for the former Yugoslavia, the former category implicitly develops the customary law applicable to internal armed conflicts.¹³¹

States are often unwilling to enter into such agreements with armed groups, as they may be concerned about appearing to grant legitimacy to an armed group party to a conflict. In practice, special agreements are more frequently attempted and successfully concluded when the conflict is both seemingly intractable and more 'equal' in terms of the fighting between the State and armed groups (i.e. that the armed group is more 'State-like' in terms of territorial control, effective hierarchical chain-of-command, etc.).¹³²

Armed groups party to non-international armed conflicts may also make a unilateral declaration (or 'declaration of intention'), in which they state their

129 In the *Tadic* case, the ICTY Trial Chamber did not examine the question of whether the provisions on grave breaches apply as a result of agreements concluded under the auspices of the ICRC. The Appeals Chamber nevertheless concluded that the agreements call for the prosecution and punishment of all violations that take place in the conflict (ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, para. 136).

130 See the agreements published in the annexes to Michèle Mercier, *Crimes sans châtiement – L'action humanitaire en ex-Yugoslavie 1991–1993*, Bruylant, Brussels, 1994, Documents III, IV and V, as well as the following agreements: Mozambique National Resistance (RENAMO) Joint Declaration with the Government of Mozambique on the guiding principles of humanitarian assistance, 16 July 1992; Frente Farabundo Martí para la liberación nacional – FMLN, San José Agreement on Human Rights, 26 July 1990 (both reproduced in NSA Database/Geneva Call, 'Statements of Non-State Armed Actors under International Humanitarian Law', March 2000, pp. 8 and 14, available at <http://www.genevacall.org/resources/testi-reference-materials/testi-nsa-states/nsa-states-mar00.pdf>; Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998, available at <http://www.philsol.nl/A03a/CARHRIHL-mar98.htm>; Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-combatant civilians and civilian facilities from military attack, 10 March 2002, available at <http://www.vigilsd.org/resolut/agreemsd.htm#Agreement%20between%20the%20Government%20of%20the%20Republic> (all sites visited on 7 August 2009).

131 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, paras. 104–109.

132 As noted in the *Commentary* to Common Article 3 (Pictet, above note 6, p. 43), a special agreement 'will generally only be concluded because of an existing situation which neither of the parties can deny, no matter what the legal aspect of the situation may in their opinion be.' See also Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.

commitment to comply with international humanitarian law or specific rules thereof.¹³³ Some armed groups take the initiative to make such declarations through a public statement or press release. At other times the ICRC (or another humanitarian actor or organization) initiates, negotiates and/or receives the declarations.

There is a long history of general¹³⁴ or partial¹³⁵ declarations of intent. The primary function of a unilateral declaration is to provide armed groups (or their proxies) with an opportunity to express their consent to be bound by the rules of humanitarian law, given that they cannot ratify or formally become party to humanitarian law treaties. Express commitment through a unilateral declaration provides the hierarchy with an opportunity to take ownership of ensuring respect for the law by their troops or fighters. In addition, it can lead to better accountability and compliance by the armed group, through providing a clear basis for follow-up, as well as dissemination to its members, especially when the declaration explicitly mentions the armed group's responsibility to disseminate international humanitarian law and to punish breaches. Similar functions can be fulfilled by the inclusion of humanitarian rules in armed groups' codes of conduct.

133 See Denise Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé', *Revue belge de droit international*, 1984–1985/1, pp. 298–320.

134 See for instance: the response of General de Gaulle of the *Comité National Français* (which was in effect the 'Free French' government between 1941 and 1943) – ICRC archives, A/CICR, B G70/I 1940–1941; *Letter of General de Gaulle to Max Huber*, 19 November 1941. See also the declarations of the following organizations: the Agence Juive, Vaad Leumi and the Arab High Committee (*Revue Internationale de la Croix Rouge*, No. 353 (1948), p. 335; the Palestinian Liberation Organisation (1989 declaration on adherence to the GCs, available at <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS> – see also the corresponding note of the Swiss Federal Council, reproduced in the *Revue Internationale de la Croix Rouge*, No. 781 (1990), pp. 69–70); the South West Africa People's Organization (SWAPO/Namibia), reproduced in NSA Database/Geneva Call, above note 130; the African National Congress (ANC), *International Review of the Red Cross*, No. 200 (1977), p. 479 (see also ANC declaration to the ICRC of 28 November 1980, in NSA Database/Geneva Call, above note 130); ANC-ZAPU (Rhodesia/Zimbabwe), *International Review of the Red Cross*, No. 200 (1977), p. 479; the União Nacional para a Independência Total de Angola/Angola, *International Review of the Red Cross*, No. 219 (1980), p. 320; the Liberation Tigers of the Tamil Eelam (Sri Lanka/1988), quoted in the *Israeli Yearbook on Human Rights*, Vol. 30, 2000, p. 213, and also available at <http://www.tamilnation.org/unitednations/uncom92.htm#a16>; the Revolutionary People's Front (RPF/North-East India/1997), available at http://www.geocities.com/CapitolHill/Congress/4568/documents/main_d.html; New Peoples' Army/NDFP (Philippines/1973/1991), available at <http://home.casema.nl/ndf/>; the Justice and Equality Movement (JEM) and the Sudan Liberation Movement/Army, available at <http://www.hdcentre.org/files/110708.pdf>; PKK (Turkey/1994), available at <http://www.kurdistan.org/Articles/ismet.html> (as well as its 1995 statement to the UN, available at <http://www.hartford-hwp.com/archives/51/009.html>). All sites visited on 7 August 2009.

135 The 'partial' declarations relate only to selected aspects of IHL as applicable, mostly the recruitment of child soldiers and the use of anti-personnel mines. For the latter, a number of examples can be found in NSA Database/Geneva Call, above note 130. The Geneva Call Deed of Commitment on Landmines and a list of its signatories can be found at <http://www.genevacall.org/signatory-groups/signatory-groups.htm> (visited on 7 August 2009). Such declarations can, however, also cover particular aspects of IHL (e.g. declarations to refrain from attacking civilians) through various means (including e.g. *fatwas*).

The most common argument against the promotion of unilateral declarations is that they are often made in an attempt to gain political legitimacy and there might be little chance of implementation of the commitments.¹³⁶ However, practice suggests that even if the primary motivation appears to be political, one can nonetheless capitalize on the express commitment made by an armed group, using it strategically as an operational tool to promote and improve compliance with the law. Declarations provide a point of entry, or essential ‘first step’, to establishing contact and beginning a dialogue. The negotiations can help to identify a responsible interlocutor with whom to begin a strategic dialogue and work towards building understanding and improving the political will, capacity, and practice of compliance of the party.

The right of humanitarian initiative

There remains the right of initiative conferred on the ICRC by Common Article 3, paragraph 2. Under this provision, ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’¹³⁷ Although the ICRC does not have a monopoly on this right of initiative,¹³⁸ states have nevertheless enshrined it in the Statutes of the Red Cross/Red Crescent Movement¹³⁹ as a veritable international mandate for the ICRC.

Parties to conflict can decline the ICRC’s or any humanitarian organization’s offers but must give them due consideration.¹⁴⁰ The obligation not to decline ‘for arbitrary or capricious reasons’ an offer made in good faith and intended

136 However, it is important to recognize that States also are often politically motivated when ratifying treaties or making other international commitments. This does not stop the international community from accepting these commitments or from attempting to hold States accountable to them.

137 Protocol II does not provide for the same right of initiative for the ICRC, even in cases where this Protocol is applicable. See Sandoz, above note 71, pp. 364–367.

138 If the criteria laid down in Common Article 3 (humanity, impartiality and non-discrimination) are met, any organization may offer its services. On the Red Cross Fundamental Principles as criteria for humanitarian action, see ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 243.

139 See Statutes of the International Movement of the Red Cross and Red Crescent, Article 5(2)(d) ‘[...] to endeavour at all times – as a *neutral institution* whose humanitarian work is carried out *particularly in time of international and other armed conflicts or internal strife* – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’ (emphasis added). The ICRC often bases its offers of services on this provision in cases where it does not wish to make a legal classification of a conflict.

140 Pictet, above note 6, Vol. I, p. 57. See also Article 5, para. 2 of the resolution on human rights protection and the principle of non-intervention in the internal affairs of States adopted by the International Law Institute on 13 September 1989. Robert Kolb takes the view that a refusal is not arbitrary when, for example, the offer or its implementation is not politically neutral, where the aid offered is to be dispensed to enemy combatants, etc. (Robert Kolb, ‘De l’assistance humanitaire: la résolution sur l’assistance humanitaire adoptée par l’Institut de droit international à sa session de Bruges en 2003’, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 853–878).

exclusively to provide humanitarian assistance¹⁴¹ dovetails in effect with the requirements of human rights law.¹⁴²

The offer is to be addressed to the parties to a conflict. Depending on the type of conflict and the needs ascertained, the organization will make its offer to the government, the dissident authority or other warring parties (for example, rival armed factions) with a view to gaining access to all the victims on the respective territories they control. It may make an offer to one party independently, as the only relevant condition is the impartial nature of the humanitarian operation. Once a party has accepted its offer, the ICRC takes the view that it is entitled to provide the services concerned, irrespective of the other warring parties' acceptance.¹⁴³ However, it does seek the government's consent to access the whole of the territory, including areas under the control of an armed group. To perform its humanitarian task to the full, the humanitarian organization must enjoy the complete trust of the authorities that control *de jure* or *de facto* the territory where the operation is taking place. In the absence of consent, whether explicit, implicit or at least tacit, the aid workers would rapidly encounter safety and security problems.

An offer of services is not simply intended to enable aid workers to be sent to a country engaged in an armed conflict. Through such an offer the humanitarian organization also makes known its willingness to perform certain tasks under its mandate (visits to security detainees and vulnerable groups within the civilian population, provision of medical, nutritional and material assistance, tracing of missing persons). As the conflict develops, and with it the needs of the people affected, specific offers will have to be prepared, discussed and accepted. Day-to-day negotiations at several levels are often necessary at that stage. They may concern agreements on visits to prisoners or to a single individual, but mostly deal with matters such as how and under what conditions the humanitarian organization can access conflict areas.

The responsibility of the international community

'Ensure respect' for international humanitarian law

The undertaking in Article 1 common to the four 1949 Geneva Conventions to 'ensure respect for' international humanitarian law means that the Contracting

141 Institut de droit international, *L'assistance humanitaire*, para. VIII.1. See also Juan Antonio Carrillo Salcedo, 'Le droit à l'assistance humanitaire: à la recherche d'un équilibre entre les devoirs des autorités territoriales et les obligations des donateurs des secours humanitaires,' *Law in Humanitarian Crises/Le droit face aux crises humanitaires*, Vol. II, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 112.

142 For example, 'the prevention of access to humanitarian food aid in internal conflicts or other emergency situations' is a violation of the right to adequate food (Committee on Economic, Social and Cultural Rights, *General Comment No. 12*, E/C.12/1999/5, 12 May 1999, para. 19).

143 Sandoz, above note 71, p. 364; Michael Bothe also takes the view that an action undertaken unilaterally by the ICRC would be in keeping with international law (see 'Relief Actions: The Position of the Recipient State', in Frits Kalshoven (ed), *Assisting the victims of armed conflict and other disasters*, Martinus Nijhoff, Dordrecht, 1989, p. 96.

Parties are obliged to help bring about compliance with the Geneva Conventions whenever they are applicable, even in conflicts in which those parties are not involved. This provision thus reinforces the responsibility of each contracting state, which besides regulating its own conduct must act by all appropriate means to ensure that humanitarian law is observed by all other states. 'It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.'¹⁴⁴

This article has been invoked several times, by the UN General Assembly,¹⁴⁵ the Security Council¹⁴⁶ and the International Court of Justice,¹⁴⁷ as well as by the ICRC.¹⁴⁸

The said undertaking by the states party to the Geneva Conventions and the Protocols additional thereto to 'respect and ensure respect for' those instruments 'in all circumstances' encompasses a wide range of means (in addition to those expressly provided for by international humanitarian law, for example the appointment of Protecting Powers or the International Fact-Finding Commission). These include diplomatic, confidential or public approaches and public appeals.¹⁴⁹ The scope of this obligation¹⁵⁰ can only be assessed case by case, depending on factors such as the appropriateness of the various means available and the nature of the relationship between third states and the warring parties. The challenge posed by this provision was consequently not to spell out its content, but

144 Pictet, above note 6, vol. I, p. 26.

145 See e.g. A/RES/63/96 (2008).

146 See e.g. S/681 (1990), S/RES/764 (1992) and S/RES/ 955 (1994).

147 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, paras. 96–98 and 158–159; ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 220.

148 In 1983 and 1984, the ICRC based itself on Article 1 common to the Geneva Conventions in issuing formal appeals to the States party to the Geneva Conventions to use their influence with Iraq and Iran, then at war with one another, and prevail upon them to comply with the law of armed conflict (see above note 102).

149 For an account of the means to which States can resort to meet this obligation, see Umesh Palwankar, 'Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law', *International Review of the Red Cross*, No. 298, February 1994, pp. 11–27, and the European Guidelines on promoting compliance with international humanitarian law (IHL), *Official Journal of the European Union*, 2005/C 327/04 (in particular part III, Operational Guidelines, Means of Action at the Disposal of the EU in its Relations with Third Countries).

150 Before the ICJ's *Wall* opinion (above note 49), the legal scope of the obligation to 'ensure respect for' international humanitarian law was disputed, particularly with regard to whether the obligation binds only the parties to a conflict or whether it also implies a duty (and, if so, what duty) for third States. At the least, States should 'not [...] encourage persons or groups engaged in [conflict] to act in violation of the provisions of Article 3 common to the four Geneva Conventions' – ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 220. For more details, see Luigi Condorelli and Laurence Boisson de Chazournes, 'Quelques remarques à propos de l'obligation de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"', in Christophe Swinarski (ed), *Mélanges Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 17–35; Nicolas Levrat, 'Les conséquences de l'engagement pris par les Hautes Parties Contractantes de faire respecter les Conventions humanitaires', in Frits Kalshoven and Yves Sandoz (eds), *Mise en oeuvre du droit international humanitaire*, Martinus Nijhoff, Dordrecht, 1989, pp. 263–296; Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3–61.

rather to identify as precisely as possible the measures available to third states for influencing the parties to a conflict.¹⁵¹ Although Article 1 throws the doors wide open to action in support of compliance with the law, states have rarely ventured beyond discreet representations behind the scenes.

Provision for a further type of ‘co-operation’ in the event of serious violations of international humanitarian law is made by Article 89 of Protocol 1, in which the Contracting Parties undertake to ‘act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’. If the violations are on such a scale that a continuation of them would constitute a threat to international peace and security (within the meaning of Article 39 of the UN Charter), it is up to the United Nations Security Council to take note of the fact, to make recommendations and, if it deems necessary, to decide on measures to be taken under Articles 41 and 42 of the Charter. The use of force can then be envisaged: the purpose of such measures is not essentially to enforce humanitarian law, but to terminate a situation that is a threat to international peace and security. In this case, the legal basis is not to be found in humanitarian law.¹⁵²

Specific multilateral fora for international humanitarian law?

The establishment of a new specific body that would allow compliance with international humanitarian law to be examined in a multilateral forum has been proposed on several occasions. Certain mechanisms of the United Nations could have a specific competence to deal with international humanitarian law (e.g. a specific subsidiary body of the Human Rights Council), a High Commissioner of International Humanitarian Law¹⁵³ could exercise functions similar to those of the bodies for implementation of human rights,¹⁵⁴ or a limited inter-state body could supervise the application of international humanitarian law, whether treaty- or resolution-based.¹⁵⁵

During the drafting of the 1977 Protocols additional to the Geneva Conventions, the ICRC itself put forward various ideas for international supervision of parties involved in a conflict.¹⁵⁶ Among the avenues suggested were potential roles for existing international and regional organizations, the establishment of an international commission on humanitarian law or the creation of an international court on international humanitarian law.¹⁵⁷

151 ICRC, *Improving Compliance*, above note 2, p. 6.

152 See section on the Security Council starting at note 201 below.

153 See *Report of the Secretary General on the Respect of Human Rights in Armed Conflicts*, Doc. UN A/8052 (1970), p. 54.

154 By examining reports presented by States (and even possibly non-state actors), individual complaints procedures, etc.

155 e.g. by the UN General Assembly or the International Conference of the Red Cross and Red Crescent

156 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 3, annex 21 and Vol. 2, Sect. B, p. 61.

157 See also the various proposals in ICRC, *Improving Compliance*, above note 2, p. 28.

In 1998 the Swiss government organized a First Periodical Meeting of States parties to the Geneva Conventions (as provided for by Article 7 of Protocol I) on general problems concerning the application of international humanitarian law. The discussions centred on two general topics: respect for and security of the personnel of humanitarian organizations, and armed conflicts linked to the disintegration of state structures.¹⁵⁸ The opportunity has not been taken to develop this forum for discussion of the implementation of the law, as no second meeting has yet been organized. Although they deal generally with international humanitarian law, the International Conferences of the Red Cross and Red Crescent – which assemble the States parties to the Geneva Conventions together with the components of the International Red Cross and Red Crescent Movement – carefully avoid being drawn into questions of implementation, as the participants (the Movement in particular) fear a politicization and possible polarization of the Conference.

The history of international humanitarian law shows that states have consistently rejected any form of binding supervision of their conduct in armed conflict, especially in non-international conflicts. It is not surprising that experts ‘pointed to the existing low level of enthusiasm for the current mechanisms on the part of States party to the Geneva Conventions and Additional Protocols, and warned that, although it might be a laudable long-term goal, it is too idealistic in this climate to think about the introduction of new permanent bodies or mechanisms.’¹⁵⁹ If such a mechanism were to come about, it would often overlap with human rights procedures and would probably lead to interminable discussions about whether or not international humanitarian law is applicable in a specific situation. In his report to the Millennium Summit the UN Secretary-General nonetheless recently proposed, without further specification, ‘establishing a mechanism to monitor compliance by all parties with existing provisions of international humanitarian law’.¹⁶⁰

‘Responsibility to Protect’ (R2P)

Also pertinent to the international community’s responsibility but independent of international humanitarian law, the concept of ‘Responsibility to Protect’ (R2P) has recently become a widespread topic of debate in humanitarian and political spheres. Its rationale is ultimately to increase the protection of individuals against

158 Acting in its capacity as depositary of the Geneva Conventions, the Swiss Government convened the Conference in Geneva, from 19 to 23 January 1998 pursuant to Recommendation VII of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, January 1995) and Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, December 1995). The meeting was attended by the representatives of 129 States parties to the Geneva Conventions and 36 observer delegations. Preliminary discussions had indicated that States wished the debates to be informal and did not intend to negotiate any new texts. Accordingly, the Chairman presented his conclusions in a report which is not binding on the participants. See *International Review of the Red Cross*, No. 323 (1998), pp. 366–394.

159 ICRC, *Improving Compliance*, above note 2, p. 10.

160 Report of the Secretary-General, *We the Peoples: the role of the United Nations in the 21st Century*, A/54/2000, 27 March 2000, para. 212.

the most heinous crimes. It was developed from the notion of ‘humanitarian intervention’ as reflected in the 2001 Report of the International Commission on Intervention and State Sovereignty.¹⁶¹ The 2005 World Summit Outcome anchored the concept in the UN environment. It affirmed the responsibility of each state to protect its population against genocide, war crimes, ethnic cleansing and crimes against humanity, and invited the international community,¹⁶² whenever necessary, to help states in this task and to take action collectively in cases where a state fails to uphold that responsibility.¹⁶³ The Security Council introduced R2P into its deliberations when discussing the protection of civilians in armed conflict.¹⁶⁴

In substance, R2P refers to the responsibility to prevent those crimes and to react to them. In terms of prevention, it consists of action to ‘encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability’. Parts of the reactive responsibilities of the international community, namely to ‘use appropriate, humanitarian and other peaceful measures to help to protect populations from those crimes’,¹⁶⁵ are already contained in Article 1 common to the Geneva Conventions. In referring to enforced collective action through the Security Council based on Chapter VII of the Charter – ‘should peaceful means be inadequate and national authorities manifestly fail to protect their populations’¹⁶⁶ – R2P goes beyond the system of international humanitarian law. The Outcome document, however, limits this responsibility: it does not refer to an ‘obligation’ but to being ‘prepared’ to take collective action, ‘on a case-by-case basis and in co-operation with relevant regional organizations’. This part of R2P is a declaration of the willingness to act and an essentially political concept. It has not yet attained the status of an international rule, irrespective of the fact that it is derived from international norms

161 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, accessible at <http://www.iciss.ca/pdf/Commission-Report.pdf> (visited on 28 May 2009). See also *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, set up by the Secretary-General of the UN (UN Doc. No. A/59/565), available at <http://www.un.org/secureworld> (visited on 28 May 2009). The concept has evolved from the initial concept of the ‘*droit d’ingérence*’ (cf. General Assembly (GA) Resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990). See also the website of the International Coalition for the Responsibility to Protect <http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents> (visited on 1 June 2009) and of the International Crisis Group (including the list of literature) at <http://www.crisisgroup.org/home/index.cfm?id=4521> (visited on 1 June 2009).

162 UN General Assembly, 2005 *World Summit Outcome*, paras. 138 and 139, 15 September 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (visited on 28 May 2008).

163 On 12 January 2009, the UN Secretary General addressed a report to the UN GA containing proposals regarding the operational implementation of the R2P concept. This report had not yet been discussed by the GA at the time of writing the present document.

164 See Security Council Resolution 1674 (2006) operative para. 4. Equally, several States referred to R2P in the deliberations of the Security Council on 14 January 2009 in its debate on the same issue. See Provisional Meeting report S/PV.6066, accessible at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20SPV%206066.pdf> (visited on 28 May 2009). The final text will be printed in the *Official Records of the Security Council*.

165 UN GA, 2005 *World Summit Outcome*, para. 138, 15 September 2005, accessible at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (visited on 28 May 2008).

166 *Idem*, para. 139.

such as the provisions of international humanitarian law and is described as an ‘emerging norm of collective responsibility to protect’.¹⁶⁷ There is no systematic obligation to act collectively to stop the most heinous crimes from occurring, but the Security Council – an essentially political organ – can selectively decide how and in which situations it may act. However, the concept of R2P implicitly underlines the *erga omnes* character of certain obligations¹⁶⁸ of international humanitarian law and is a reminder that all states have a legal interest in seeing that those obligations are respected.¹⁶⁹

Protecting war victims through human rights treaty bodies

International humanitarian law and its implementation are not a closed system. They form part of the general framework of international law. The protection of victims of armed conflicts concerns first of all the parties to a conflict and their obligations under the international instruments drawn up to implement that protection.

The close relationship between humanitarian law and human rights

Despite differences in their historical and philosophical origin, their approaches to codification, their scope both *ratio materiae* and *ratio personae* and the fact that different institutions oversee their implementation, international humanitarian law and human rights often converge. They pursue a common aim, namely protection of the human being. The overlapping, complementarity and mutual influence of these two branches of law¹⁷⁰ are also reflected in their implementation. Except in cases of derogation, international human rights law applies during armed conflict. The various bodies of the United Nations, along with national and international jurisprudence and doctrine, affirm the principle that ‘[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’¹⁷¹ According to the International Court of Justice in its *Wall* decision, ‘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

167 See the conclusions in Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights*, UN, New York, 2005.

168 The scope of States’ obligations, including their secondary responsibilities, is wider under international humanitarian law than under the R2P concept, which focuses only on the four crimes that it covers and does not cover other obligations under international humanitarian law.

169 See also ICJ, *Barcelona Traction Light and Power Co Ltd*, ICJ Reports 1970, paras. 33–34.

170 See Cordula Droege, ‘Elective affinities? Human Rights and humanitarian law’, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 501–548.

171 UN GA Resolution 2675 (XXV), *Basic principles for the protection of civilian populations in periods of armed conflict* (9 December 1970). The two Additional Protocols explicitly acknowledge the application of the human rights during armed conflicts (Article 72, AP I; Preamble, AP II).

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.¹⁷²

The fundamental questions as to the relationship between humanitarian law and human rights law are overshadowed by the legal, but even more political question of whether human rights implementation mechanisms should also govern situations of armed conflict. The mechanisms provided for in humanitarian law are often considered to be less stringent, only exceptionally applied and only rudimentarily developed, especially in non-international armed conflicts. Human rights mechanisms, however, promise a more open – and often judicial – treatment of serious violations of ‘fundamental human rights in armed conflict’.

Human rights treaty monitoring bodies

The human rights treaty monitoring bodies¹⁷³ favour a strict interpretation of their mandates and confine themselves to applying the conventions they were set up to monitor. They generally do not incorporate international humanitarian law in their work.¹⁷⁴ Of the bodies in charge of monitoring the present eight international human rights treaties,¹⁷⁵ there is only one notable exception in this regard, namely the Committee on the Rights of the Child, as the Convention on the Rights of the Child refers explicitly to international humanitarian law.¹⁷⁶ However, the bodies mandated to monitor the compliance of states parties with their treaty obligations have not hesitated to affirm that the respective treaties apply in situations of international and non-international armed conflicts or in cases of occupation.¹⁷⁷

172 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 106; confirmed in ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, General List No. 116, para. 216.

173 See Françoise J. Hampson, ‘The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body’, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 549–572.

174 On this practice, which dates back to the former United Nations Human Rights Commission, see U. Sundberg, ‘The Role of the United Nations Commission on Human Rights in Armed Conflict Situations’, *Human Dignity Protection in Armed Conflict*, Institute for International Humanitarian Law (28th Round Table, San Remo, 2–4 September 2004), Nagard, Milan, 2006, pp. 30–36.

175 Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT) & Optional Protocol to the Convention against Torture (OPCAT) – Subcommittee on Prevention of Torture Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW) and Committee on the Rights of Persons with Disabilities (CRPD).

176 Article 38(1), Convention on the Rights of the Child (1989): ‘States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.’

177 See for example CCPR, *Concluding Observations: Democratic Republic of Congo (DRC)*, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; CESCR, *Concluding Observations: Colombia*, UN Doc. E/C.12/1/Add.74, 30 November 2001; CERD, *Concluding Observations: Israel*, UN Doc. CERD/C/304/Add.45, 30 March 1998; CEDAW, *Concluding Observations: Sri Lanka*, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002; CRC, *Concluding Observations: Colombia*, UN Doc. CRC/C/COL/CO/3, 8 June 2006.

Moreover, almost all states in the Americas and Europe and several in Africa are party to a regional human rights convention.¹⁷⁸ The Inter-American Commission and Court have recognized the applicability of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights to armed conflict situations.¹⁷⁹ The European Court of Human Rights has applied the European Convention both in non-international armed conflict¹⁸⁰ and in situations of occupation;¹⁸¹ in recent years that Court in particular has rendered several judgments which have an impact on the legal reading of situations of armed conflict and the applicable law. It has notably agreed to hear cases, brought by Chechen civilians against Russia, of human rights abuse during the Second Chechen War and has made more than 30 rulings to date.¹⁸²

The Inter-American Commission on Human Rights refers freely to international humanitarian law where necessary, both in general reports and in individual decisions.¹⁸³ This suggests that the Commission considers itself competent to examine not only the conduct of states but also that of non-governmental armed groups.¹⁸⁴ However, the Inter-American Court of Human Rights takes the view that, while it cannot apply international humanitarian law directly, it can use it to interpret the provisions of the American Convention on Human Rights when they have to be applied in times of armed conflict.¹⁸⁵ In contrast, the European Court of Human Rights has never explicitly referred to international humanitarian law to

178 All 47 Members of the Council of Europe are party to the European Convention and 24 of the 35 Organisation of American States are parties to the American Declaration of Human Rights. The African Charter on Human and Peoples' Rights (ACHPR), adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986. Presently, 25 States are party to it.

179 Inter-American Court of Human Rights (IACtHR), *Ba'maca Vela'squez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, para. 209; Inter-American Commission on Human Rights, *Coard v. the United States of America*, Case 10.951, OEA Doc. OEA/ser.L/V/II.106.doc.3rev, 1999, para. 37; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

180 See e.g. European Court of Human Rights (hereinafter ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005; *Ergi v. Turkey*, Judgment of 28 July 1998, Reports 1998-IV; *Ahmet Oezkan and others v. Turkey*, Judgment of April 6, 2004.

181 See e.g. Report of the European Commission of Human Rights, *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, European Commission of Human Rights Decisions and Reports 125; ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV.

182 More than 3300 applications have been filed with the ECtHR by ethnic South Ossetians against Georgia. As of 18 March 2008, over 100 cases had been filed against Russia, involving approximately 600 Georgian applicants and Georgia has filed an interstate application against Russia.

183 See e.g. Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, OEA/Ser.L/V/II.98 doc. 6 rev., 13 April 1998, Original: Spanish; *Violence and discrimination against women in the armed conflict in Colombia*, OEA/Ser.L/V/II. Doc. 67, 18 October 2006, Original: Spanish.

184 Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev.1, at 72, para. 6, based on AG/RES. 1043 (XX-0/90) of 1990.

185 *Las Palmeras, Preliminary Objections*, Judgment of 4 February 2000, Series C, No. 67, paras. 32–34; *Bámaca Velásquez v. Guatemala*, above note 179, para. 207–209. The UN Human Rights Committee has also acknowledged that it can take into account other branches of international law to assess the legality of derogations (*General Comment No. 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev1/Add.11, 24 July 2001, para. 10).

support its judgements, even in cases linked to armed conflicts.¹⁸⁶ It has refrained from even mentioning humanitarian law, probably to avoid potential problems of material competence; but even so, the Court could not avoid referring to concepts stemming directly from humanitarian law, namely the distinction between combatants and civilians.¹⁸⁷ In the African human rights system, treaties on the protection of women and children specifically address the context of armed conflict.¹⁸⁸ Yet the judicial body, the former African Commission on Human and Peoples' Rights, based its decisions almost entirely on human rights law. Nevertheless, it did hold in connection with the right to life that the state must take all possible measures to ensure compliance with international humanitarian law in a civil war.¹⁸⁹ In 2004, the Commission was replaced by the African Court of Human and Peoples' Rights, which was subsequently merged with the African Court of Justice to form the African Court of Justice and Human Rights.¹⁹⁰ These mechanisms have not yet become operational, in effect leaving victims of violations in Africa without any judicial recourse when their national systems fail to provide a remedy.

The issue of regional human rights mechanisms is of even greater importance, since the human rights treaties may apply not only within the national borders of the state party thereto but also to acts committed by it abroad – including in situations of armed conflict. The International Court of Justice,¹⁹¹ the Human Rights Committee¹⁹² and the Inter-American Court¹⁹³ endorsed this principle of extraterritorial application of human rights by emphasizing that it is unconscionable to permit states to do abroad what they are prohibited from doing at home.¹⁹⁴ The jurisprudence of the European Court of Human Rights – in particular, on the meaning of 'effective control' and the question whether the

186 On the practice of the ECtHR, see William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', *European Journal of International Law*, vol. 16, 2005, pp. 741–767.

187 *Ibid.*; Michael J. Dennis and Andre M. Surena, 'Application of the international covenant on civil and political rights in times of armed conflict and military occupation: the gap between legal theory and state practice', *European Human Rights Law Review*, Issue 6, 2008, pp. 714–73; Michael Bothe, 'Die Anwendung der Europäischen Menschenrechtskonvention in bewaffneten Konflikten – eine Überforderung', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 65, 2005, p. 615.

188 Article 11, Protocol to the ACHPR on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, 11 July 2003; Article 22, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

189 African Commission on Human and Peoples' Rights, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999), para. 50.

190 See Protocol on the Establishment of the African Court of Human and Peoples' Rights, entered into force on 25 January 2004, available at http://www.achpr.org/english/_info/court_en.html (visited 7 August 2009); Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at <http://www.unhcr.org/refworld/docid/4937f0ac2.html> (visited 7 August 2009).

191 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 106.

192 Human Rights Committee, *General Observation No. 31* [80], CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

193 See IACtHR Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, 30 October 1997.

194 See the various contributions in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp/Oxford, 2004.

application is restricted to detention of persons – demonstrates the uncertainty as to how far human rights treaties should govern situations in which humanitarian law is *lex specialis*.¹⁹⁵ Differing jurisdiction and jurisprudence of the various treaty bodies may directly affect the actual conduct of hostilities and the distribution of roles among allied parties to a conflict, especially as acts of different belligerents may or may not be subject to review by human rights bodies.

This tendency to examine the conduct of war through human rights mechanisms has met with opposition from various quarters. First, states are averse to any form of judicial supervision of their behaviour during hostilities that could hamper their ability to wage (and win) a ferocious and bloody war. Second, they argue that the reality of conflict and the disruption of justice systems in wartime are not conducive to a judicial approach. Further objections are that simultaneous application of international humanitarian law and international human rights law, which sometimes lead to contradictory conclusions, could destabilize armed forces and facilitate a ‘pick and choose’ approach which could ultimately dilute universally applicable standards. Non-state entities taking part in a conflict would not fall within the purview of an international judicial system based on human rights, and some of the roles played by human-rights monitoring mechanisms seem ill-adapted to the characteristics of non-governmental armed groups. Finally, it is argued that this type of approach could lead to a regionalization of the law applicable in armed conflicts, as not all regions have judicial human rights mechanisms such as those found in Africa, the Americas and Europe.¹⁹⁶

Despite these issues judicial human rights mechanisms, and in particular the Inter-American Court of Human Rights and the European Court of Human Rights, have provided a considerable boost to the implementation of international humanitarian law even though they do not formally apply it. Moreover, prompted by the International Court of Justice’s interpretation of the law in the *Wall* case,¹⁹⁷ these courts uphold the extraterritoriality of human rights and their consequent applicability in military operations and armed conflicts outside the borders of the states party to the relevant treaties. Although the contours of this case-law have not yet been finally determined, this interpretation overturns the earlier view of the difference between international humanitarian law and human rights law, as regards both substance and implementation. In its boldest formulations, it is a major step towards a larger role for judicial processes in the context of war – as intimated by the first judgements handed down by the international criminal tribunals – and towards greater protection for war victims, including provision for reparation which is almost entirely lacking in international humanitarian law.

195 ECtHR, *Issa and others v. Turkey*, Judgement of 16 November 2004, para. 71; see also *Isaak v. Turkey*, Appl. No. 44587/98, Admissibility Decision of 28 September 2008, p. 19. See also House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, Decision of 13 June 2007, [2007] UKHL 26, paras. 61–83, 91, 105–132.

196 ICRC, *Improving Compliance*, above note 2, p. 17.

197 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 102.

Protecting war victims through the United Nations system

The obligation to ensure respect for international humanitarian law by the parties to a conflict also applies to third states. The most high-profile contributions to this implementation effort are made through the United Nations, regional organizations and non-governmental organizations, even though they are given no specific role, or only a marginal one, under the terms of that body of law.¹⁹⁸

Clearly, the United Nations cannot but be concerned by armed conflicts. Recourse to war is no longer a legitimate way of settling disputes, and keeping or where necessary restoring international peace and security is one of the UN's fundamental aims. Once an armed conflict breaks out, the various UN bodies, each within its own specific role, must concern themselves with international humanitarian law, which is an integral part of the corpus of international law that the United Nations must comply with and promote.

In working towards respect for human rights¹⁹⁹ the relevant UN bodies have come to assign ever greater significance to compliance with international humanitarian law within the framework of human rights law, outside the treaty system. However, the relationship between the different human rights monitoring systems and their respective link with international humanitarian law remains a moot point.²⁰⁰ The few observations below illustrate and explain the importance attached by the various UN bodies to the implementation of humanitarian law.

The Security Council

The Security Council has often called for respect for international humanitarian law and has gone so far as to express the view that compliance with its rules and principles is an important factor for restoring peace. Compliance with international humanitarian law by warring parties can help to avoid a spiral of violence and be a first step in a conflict-settlement process. Over the past two decades, humanitarian matters have loomed large in the Security Council's deliberations and decisions, frequently in the absence of any immediate hope for a settlement to a conflict. This concern was particularly evident in connection with the conflict in the former Yugoslavia.²⁰¹

198 Their pronouncements can also refer directly to international humanitarian law. Under Article 89 of AP I, '[I]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'. Formally, this provision does not allow them to act in situations other than international armed conflicts. Article 1 common to the four Geneva Conventions, in which the contracting States undertake to ensure respect for the law, goes further in that it also covers internal conflicts and addresses the entire international community, represented by its world body.

199 Articles 1(3) and Article 55(c), United Nations Charter.

200 See Christine Byron, 'A Blurring of Boundaries: The application of International Humanitarian Law by Human Rights Bodies', *Virginia Journal of International Law*, Vol. 47 (2007), pp. 839–896.

201 More than thirty Security Council Resolutions adopted in connection with that conflict contain references to international humanitarian law (see for example S/RES/ 743 (1992) that established the FORPRONU; S/RES/770 (1992) on humanitarian assistance for the former Yugoslavia; S/RES/771(1992) on ICRC access

The UN Charter as framework

As long as the Security Council remains within the broad framework of the UN Charter, it is not limited to the instruments made available to it by international humanitarian law and can innovate. It can take wide-ranging decisions and even create new mechanisms²⁰² as long as it acts in accordance with the purposes and principles of the Charter²⁰³ and does not violate the norms of *jus cogens*. The main check on the Security Council's decisions is, however, the possibility that states may disregard its decisions: without the Member States' support, the resolutions are mere wishful thinking.²⁰⁴

Whereas the system established under international humanitarian law rests essentially on the consent of the parties to a conflict, particularly in internal conflicts, the measures authorized by Chapter VII of the Charter require no consent and can be imposed. The Security Council does not remain within the framework of international humanitarian law, and often combines aspects of *jus ad bellum* (direct or indirect interventions in current military operations) and of *jus in bello* (initiatives to protect war victims). In doing so, especially where force is used to impose these measures, the Security Council is implementing the UN Charter and not humanitarian law, which does not admit of any interference in a conflict. It cannot be neutral between an aggressor and the victim of an aggression. This differs from the approach necessary for proper application of international humanitarian law, in which neutrality is *de rigueur* and which makes it vital that the Security Council should also, as stated in the preamble to Protocol I additional to the Geneva Conventions, apply its provisions 'to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.

The Security Council's practice furthermore reveals a difference in treatment inasmuch as it does not consider conflicts that arise within or involve a permanent member of the Security Council (or their allies) in the same way as conflicts arising in other states. Although the Charter does not explicitly oblige the Security Council to act impartially, these differences of treatment – or double standards – affect the credibility of the Council and do little to bolster support for

to camps and prisons; S/RES/808 (1993) and S/RES/827 (1993) on the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law on the territory of the former Yugoslavia; S/RES/913 (1994) on events in Graze; S/RES/941 (1995) condemning ethnic cleansing, particularly in Banja Luka and Bijeljina, and S/RES/1010 (1995) on release of detained persons in Bosnia and Herzegovina.

202 See e.g. S/RES/ 1820 (2008) on women, and peace and security and sexual violence in situations of armed conflict.

203 Article 24, para. 2 of the Charter; cf. ICTY, *Prosecutor v. Tadic*, above note 5, paras. 28–30.

204 See for instance the critical remarks of the Secretary General on the lack of implementation of travel bans and asset freezes by Member States, *Report of the Secretary General on the protection of civilians in armed conflict*, (S/2009/277), p. 5 (at 21).

the crucial tenet that international humanitarian law must be applied ‘in all circumstances.’²⁰⁵

Situation-specific practice

The list of actions in Article 41 of the Charter is merely indicative and does not limit the Security Council’s choice of means for achieving the desired objective or restoring and keeping the peace.²⁰⁶ In its practice, the Security Council has been primarily concerned with the effects of international conflicts and frequently calls upon the belligerents to respect humanitarian law (examples include the Iran/Iraq conflict,²⁰⁷ the territories occupied by Israel,²⁰⁸ the invasion of Kuwait,²⁰⁹ Ethiopia/Eritrea,²¹⁰ Iraq,²¹¹ Georgia, etc.²¹²). It has, however, increasingly addressed non-international armed conflicts (such as Somalia, Rwanda, Liberia, Afghanistan²¹³). These can also constitute a threat to international peace and security, have an impact on neighbouring countries (huge influxes of refugees), provoke interventions by third countries or destabilize entire regions. Moreover, the international community cannot stand by and watch hundreds of thousands of people die, as a catastrophe of that nature is in itself a threat to international peace and security.

The Security Council has, for instance, called for recognition of the applicability of the Fourth Geneva Convention;²¹⁴ for prisoners of war to be released and repatriated;²¹⁵ for unrestricted access and safe passage to be given to aid deliveries;²¹⁶ for travel bans and asset freezes for those responsible for violations;²¹⁷ for a commission of enquiry to be set up;²¹⁸ for *ad hoc* criminal tribunals to be established;²¹⁹ or for a situation to be referred to the International Criminal Court, even if the state concerned is not a party to the Rome Statute.²²⁰

205 See the Preamble of AP I, para. 5.

206 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, paras. 22 and 31.

207 S/RES/598 (1987) on repatriation of prisoners of war in the Iran/Iraq conflict and S/RES/540 (1983) on attacks against the civilian population in the Iran/Iraq conflict.

208 S/RES/681 (1990) on the application of the Fourth Geneva Convention in the occupied territories.

209 S/RES/687 (1991) on repatriation of Kuwaiti detainees held in Iraq; S/RES/674 (1990) and 670 (1990) on the applicability of the Fourth Geneva Convention in Kuwait.

210 S/RES/1320 (2000).

211 S/RES/1546 (2004).

212 S/RES/1808 (2008).

213 Among the numerous resolutions, see for example S/RES/1872 (2009) on Somalia; S/RES/1870 (2009) on Sudan; S/RES/925 (1994) on Rwanda, S/RES/1383 (2001) on Afghanistan.

214 S/RES/681 (1990) on Israel and the Occupied Territories.

215 S/RES/598 (1987) on repatriation of prisoners of war in connection with the Iran/Iraq war.

216 S/RES/1870 (2009) on Sudan.

217 S/RES/1572 (2004) on Côte d’Ivoire and 1591 (2005) on Sudan.

218 S/RES/1564 (2004) on Sudan.

219 S/RES/808 (1993) and 827 (1993) for the former Yugoslavia and S/RES/935 (1994) for Rwanda.

220 S/RES/1593 (2005) on Sudan.

However, it can also set up UN Protection Forces,²²¹ protected towns²²² and humanitarian corridors,²²³ a compensation system for the victims of armed attacks²²⁴ or even a reporting system related to international humanitarian law.²²⁵

In the words of the Secretary-General, the 'Security Council [...] has a critical role in promoting systematic compliance with the law. In particular, the Council should: (a) Use all available opportunities to condemn violations, without exception, and remind parties of, and demand compliance with, their obligations; (b) Publicly threaten and, if necessary, apply targeted measures against the leadership of the parties that consistently defy the demands of the Security Council and routinely violate their obligations to respect civilians; (c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court.'²²⁶

Protection of the civilian population

In 1999, the Council adopted the ground-breaking thematic resolution on the protection of the civilian population, articulating clearly and specifically the link with the Council's responsibilities for the maintenance of international peace and security.²²⁷ Since then, the Secretary-General has reported seven times on this issue to the Security Council,²²⁸ which discusses the reports and their recommendations and increasingly refers to the concept of R2P.²²⁹ The main challenges are currently considered to be promoting greater compliance with the legal obligations, also by non-state entities, the growing role of peacekeeping missions in the protection of civilians, humanitarian access and increased accountability.²³⁰

Even a cursory examination of the mandates of peacekeeping forces shows that the scope of their operations is no longer limited to and indeed goes well beyond classic activities such as supervising and maintaining cease-fires, observing borders or acting as a buffer between belligerents. The protection of civilians is now considered to be a task inherent in all peacekeeping missions, not merely a military

221 S/RES/743 (1992) that set up the FORPRONU in the former Yugoslavia.

222 S/RES/824 (1993) on safe areas in Bosnia and Herzegovina and 819 (1992) for Srebrenica.

223 S/RES/918 (1994) for Rwanda.

224 S/RES/687 (1991) setting up a fund to compensate foreign governments, nationals and corporations for any direct loss, damage or injury caused by Iraq's unlawful occupation of Kuwait.

225 *Monitoring and Reporting Mechanism on Children Affected by Armed Conflict*, set up under Security Council Resolution 1612 (2005).

226 *Report of the Secretary General on the protection of civilians in armed conflict*, above note 204, p. 8 (at 37).

227 See S/RES/1265 (1999) and its sister resolution S/RES/1269 (2000).

228 See the last report of 29 May 2009 (S/2009/277, above note 204) which gives an overview of the last decade.

229 See e.g. the last report S/PV.6151 (Resumption 1). The Security Council furthermore established an Expert Group on the Protection of Civilians.

230 See S/2009/277, pp. 10–12.

task. The range of possible assignments includes protection of the civilian population, distributing information and collecting data on violations of human rights and humanitarian law, and assistance for war victims. This role is performed by military observers and by police and human rights specialists. In the former Yugoslavia, for example, the UNPROFOR units in charge of supervising compliance with human rights (the Civilian Affairs department and civilian police force) have already played an important part in ensuring respect for humanitarian law.

However, the fact that military and humanitarian operations coexist within peacekeeping forces is not unproblematic. Military operations go beyond purely humanitarian objectives and encompass political aims, whereas humanitarian action, by its very nature, can never be coercive. The use of force, even for valid humanitarian reasons, inevitably transforms a humanitarian action into a military one, and a threat of force to facilitate a humanitarian operation may be enough to jeopardize that very operation. Nor can such a threat be maintained indefinitely – if it is not put into effect, it is likely to undermine not only the credibility of the military operation but also all efforts made to ensure that humanitarian operations are carried out on the basis of consent, as humanitarian law requires.

The General Assembly

In its Resolution 2444 (XXIII) of 19 December 1968 entitled ‘Respect for human rights in armed conflicts’, the United Nations General Assembly did not confine itself to listing the principles to be observed in such situations. It also paved the way for resolutions calling for compliance with international humanitarian law in general, as well as in specific situations. The broad functions and powers of the General Assembly allow it to discuss and make recommendations on all matters that fall within the purview of the United Nations, subject to the prerogatives of the Security Council.²³¹ Through its resolutions on specific conflicts, the General Assembly draws the attention of the states making up the international community to their responsibility under Article 1 common to the four Geneva Conventions to ‘ensure respect for’ international humanitarian law.²³² The following subsidiary bodies are particularly important:

The Human Rights Council

Since the establishment of the Human Rights Council in March 2006, there has been some uncertainty about the relationship between the Council and the Social,

²³¹ Art. 10–12, 14 and 15 of the UN Charter.

²³² See e.g. A/RES/63/96 (2008) (concerning the Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories).

Humanitarian and Cultural Affairs Committee (Third Committee),²³³ as both of these two subsidiary bodies of the General Assembly are in charge of promoting and implementing human rights at world level. However, neither of them hesitates to invoke humanitarian law to underpin their recommendations. States are also divided as to how far the Council, and above all the special procedures mechanisms set up by the former Human Rights Commission and taken over by the Council,²³⁴ should take international humanitarian law into consideration. Some states fear that selective treatment of certain armed conflict situations, particularly in the Middle East, may further politicize the Council, whereas other states, knowing their strong position in this forum, favour discussions in it about the application of international humanitarian law. Whatever the decision, the Council should not assume the function of the various human rights treaty bodies which bring some impartiality to the often politicized debate.

The main aim of the Human Rights Council is 'to address situations of violations of human rights [...] and make recommendations thereon.' However, it also concerns itself with armed conflict situations, albeit from a human rights angle.²³⁵ The first resolution of the Council's very first special session already dealt with humanitarian law, even though it was entitled 'Human rights situation in the Occupied Palestinian Territory'.²³⁶ Eight of the eleven special sessions held to date have dealt with armed conflict situations, five of them in the Middle East.²³⁷ When such a situation is considered²³⁸ (as is currently the case for Sudan, Somalia or Israel/Occupied Palestinian Territories),²³⁹ or a matter within the purview of

233 An important part of the Committee's work focuses on the examination of human rights questions, including reports of the special procedures of the newly established Human Rights Council. The Committee hears and interacts with 25 such special rapporteurs, independent experts, and chairpersons of workings groups of the Human Rights Council.

234 'Special procedures' is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 30 thematic and 8 country mandates. Special procedures mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories (country mandates), or on major phenomena of human rights violations worldwide (thematic mandates).

235 See for example Human Rights Council Resolution 9/9, 24 September 2008, on the protection of the human rights of civilians in armed conflict, in which the Council requested relevant special procedures and the Human Rights Council Advisory Committee, and invited human rights treaty bodies, within their respective mandates, to continue to address the relevant aspects of the protection of human rights of civilians in armed conflicts in their work.

236 Human Rights Council, S-1/Res.1, 6 July 2006.

237 Israel/OPT (1st session, July 2006), Israel/Lebanon (2nd session, August 2006), Israel/OPT (3rd session, November 2006), Sudan/Darfur (4th session, December 2006), Israel/West Bank-Gaza (6th session, January 2008), Congo (8th session, November 2008), Israel/Gaza (9th session, February 2009), Sri Lanka (11th session, May 2009).

238 Which situations are addressed by the Council, whether a country is condemned for violations or whether a special rapporteur is appointed are all matters subject to political haggling and are not necessarily decided on the basis of objective criteria.

239 In practice, the references to international humanitarian law are often very general. For recent examples, see *Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia* (Mr Ghanim Alnajjar), A/HRC/7/26, 17 March 2008; *Report of the Special Rapporteur on the situation of human rights in the Sudan* (Sima Samar), A/HRC/9/13, 2 September 2008.

international humanitarian law is addressed,²⁴⁰ at least an otherwise unscheduled discussion forum on the law applicable during an armed conflict is then possible. States and public opinion pay close attention to the discussions in these fora, and although those in the Council are highly politicized and the emphasis is placed on human rights, they can have a deterrent effect and perform a ‘naming and shaming’ function.

One innovation ushered in with the Council is the Universal Periodic Review (UPR). This mechanism provides for a review of the human rights situation in each of the 192 UN Member States. Resolution 5/1 specifically empowers the UPR to consider compliance *inter alia* with international humanitarian law obligations. This law has been touched upon on several occasions in the review process in cases where the country in question was involved in an armed conflict.²⁴¹ References to it have also been made in the other mechanisms, for instance the new Human Rights Council Advisory Committee that serves as a think-tank for the Council and provides it with expertise and advice on thematic human rights issues,²⁴² the special procedures mechanisms²⁴³ and the revised complaint procedure that enables individuals and organizations to bring human rights violations to the Council’s attention.²⁴⁴ The Human Rights Council thus continues to work with the UN ‘special procedures’ mechanisms. The working groups, representatives or special rapporteurs mandated by the Council to review particular situations certainly should consider the interaction between human rights and humanitarian law, but have not done so systematically.²⁴⁵

240 Several of the themes addressed also arise in armed conflicts (torture, mercenaries, terrorism, disappearances, extrajudicial killings, etc.).

241 See for example the UPR process outcome on Israel, Cape Verde, Colombia and Uzbekistan, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/VDUX-7QBUCS?OpenDocument> (visited on 28 May 2009).

242 Pursuant to Human Rights Council Resolution 5/1, the Human Rights Council Advisory Committee, composed of 18 experts, has been established to function as a think-tank for the Council and work at its direction. The Advisory Committee replaces the former Sub-Commission on the Promotion and Protection of Human Rights. The function of the Advisory Committee is to provide expertise in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Such expertise shall be rendered only upon the latter’s request, in compliance with its resolutions and under its guidance. See *Human Rights Council Advisory Committee: Establishment*, available at <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm> (visited 28 July 2009).

243 See Philip Alston, Jason Morgan-Foster and William Abresch, ‘The competence of the UN Human Rights Council and its Special Procedures in relation to armed conflict: Extrajudicial executions in the “war on terror”’, *European Journal of International Law*, Vol. 19, 2008, pp. 183–209.

244 See the Human Rights Council President’s text entitled ‘UN Human Rights Council: Institution Building’ (Resolution 5/1) by which a new Complaint Procedure is being established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms. ECOSOC resolution 1503 (XLVIII) of 27 May 1970 served as a working basis for the establishment of a new Complaint Procedure.

245 See for example the reports prepared by the *Monitoring and Reporting Mechanism on Children Affected by Armed Conflict*, set up under Security Council Resolution 1612, above note 225, which hardly make any reference to IHL in their conclusions.

The Economic and Social Council

The principal organ of the United Nations for the co-ordination of economic and social affairs, the Economic and Social Council (ECOSOC),²⁴⁶ is particularly relevant for formulating policy recommendations addressed to the Member States and the UN system on strengthening the co-ordination of UN humanitarian and disaster relief assistance.²⁴⁷ The reports submitted to ECOSOC by the Secretary-General describe the major humanitarian trends and challenges, including those in situations of conflict, and the key processes to improve humanitarian co-ordination.²⁴⁸ While mainly concerned with increasing the efficiency of humanitarian action by the UN system, it also highlights the challenges to principled humanitarian action largely drawn from international humanitarian law²⁴⁹ and the Fundamental Principles of the Red Cross and Red Crescent Movement, on which the ECOSOC bases its recommendations.²⁵⁰

The Secretary-General and the UN agencies

The UN Secretary-General obviously plays a key role in the implementation of humanitarian law, as he takes care of the practical arrangements for and the follow-up to the actions of the other non-judicial UN bodies, and may bring matters to the attention of the Security Council on his own initiative.²⁵¹ Acting under his authority, the UN High Commissioner for Human Rights is responsible for the UN's activities in the human rights sphere.²⁵² In addition to co-ordinating and rationalizing these activities, the High Commissioner has to 'play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world ...'²⁵³ Under this mandate the High Commissioner has sent human rights observers to countries in conflict, and has gradually begun to take an interest in respect for international humanitarian law. Over the years, the Office of the High Commissioner for Human Rights (OHCHR) has stepped up its presence on the ground in order to promote human rights and help strengthen national

246 See Chapter X of the UN Charter. Under Article 62 of the UN Charter, ECOSOC may make recommendations 'for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.

247 Prior to 2006, ECOSOC acted in its capacity as co-ordinator of humanitarian assistance or via recommendations of the Human Rights Commission, set up by ECOSOC in 1946.

248 See e.g. A/64/84-E/2009/87, 28 May 2009.

249 *Idem*, pp. 7–9, e.g. the safety and security of humanitarian personnel, the increase of actors in humanitarian assistance, the distinguishing between humanitarian and military or political actors.

250 See e.g. ECOSOC resolution 2008/36, 25 July 2008.

251 Article 99, Charter of the United Nations.

252 In Resolution A/RES/48/141 of 20 December 1993, the General Assembly endorsed the recommendations of the World Conference on Human Rights held in Vienna in 1993 and the role of the High Commissioner.

253 A/RES/48/141, 20 December 1993, para. 4(f).

institutions and civil society.²⁵⁴ It has expanded his operational mandate to include technical co-operation, in particular for the administration of justice. The work of these ‘human rights observers’ is therefore highly varied, ranging from information-gathering on past violations to emergency operations.

In a bid to meet the needs of victims of armed conflicts and natural disasters more effectively, the UN Under-Secretary-General for Humanitarian Affairs has set out to strengthen ‘the co-ordination of humanitarian emergency assistance of the United Nations’.²⁵⁵ The Department of Humanitarian Affairs, with the support of its Inter-Agency Standing Committee (IASC), is supposed to ensure that there are no overlaps or gaps in humanitarian aid by distributing tasks to the various UN agencies concerned in keeping with their mandates.²⁵⁶ The proliferation of agencies carrying out humanitarian work and the diversity of their areas of specialization, their abilities and their working methods has fostered a spirit both of complementarity and of competition.

Under international humanitarian law, no entity within the UN system has the same specific role as the ICRC of providing conflict victims with protection and assistance; but all the UN bodies deal with conflict situations in some way or another and can and must concern themselves with war victims within the terms of their mandates, at least on the periphery of areas affected by conflict. Besides the High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees (UNHCR),²⁵⁷ the World Food Programme (WFP), the United Nations Children’s Fund (UNICEF),²⁵⁸ the United Nations Development Programme (UNDP) and to a lesser extent the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO),²⁵⁹ among others, have acted on behalf of conflict victims.

According to the Secretary-General, ‘blurring of humanitarian, political and security objectives can also occur within United Nations operations,

254 Of the eleven national OHCHR offices, most are in countries affected by conflict. OHCHR has a Rapid Response Unit that supports its work and helps it to deploy staff into the field very quickly. To enable the UN to anticipate and respond to deteriorating human rights situations in different parts of the world, OHCHR is often asked to send or support missions or commissions of enquiry to look into allegations of serious human rights violations. Since it was set up in 2006, the Rapid Response Unit has sent missions or commissions of enquiry to Timor Leste, Western Sahara, Liberia, Lebanon and Beit Hanoun (Occupied Palestinian Territories).

255 See UN General Assembly, *Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, A/RES/46/182, 19 December 1991. For the newest resolution on this topic, see A/RES/63/139, 11 December 2008.

256 The ICRC and the International Federation of Red Cross and Red Crescent Societies attend the IASC as observers.

257 The United Nations Secretary-General mandated the Office of the High Commissioner for Refugees to act as lead agency for the United Nations in the former Yugoslavia in order to provide refugees and displaced persons with protection and assistance (letter of 14 November 1991 addressed by the Secretary-General to the High Commissioner for Refugees – on file with the author). This role has been confirmed in a number of conflicts and has been endorsed by the United Nations General Assembly (see for example A/RES/48/116, 20 December 1993).

258 UNICEF and the ICRC conducted a major operation to protect women and children in Cambodia in 1980 (see William Shawcross, *The Quality of Mercy*, Simon and Schuster, New York, 1984).

259 For the protection of cultural property in armed conflict.

particularly in so-called integrated missions, where humanitarian actors work alongside political and peacekeeping missions.²⁶⁰ In post-conflict situations,²⁶¹ but also in conflict situations,²⁶² he reaffirmed integration as the guiding principle where the UN has a country-team and a multi-dimensional peacekeeping operation or a political mission/office, in order to 'maximise the individual and collective impact of the UN's response'. Co-ordinated but diverse approaches should take full account of the various strengths of the objectives of political and humanitarian mandates.

However, political, military and humanitarian actors are not always pursuing the same goal. Peace-making or peace-building, for instance, are not the primary aims of humanitarian actors, even though they consider the impact of their humanitarian work on reconciliation between adversaries and refrain from any activity which might inadvertently fuel violence; they even consider setting up projects that could ease tensions at the local level. Their primary aims are to save lives and alleviate human suffering. The subordination of humanitarian activities to political goals risks causing insurgents, or parts of the population, to perceive humanitarian agencies as instruments of a foreign agenda, entails security risks, fuels scepticism about the accountability of humanitarian actors and can be detrimental to bringing independent and impartial aid to conflict areas.²⁶³

In all operations conducted under the aegis of the United Nations, a clear distinction should be made between humanitarian activities and the political activities that form part of the remit of the UN Secretary-General. To the extent that the UN agencies contribute to the implementation of humanitarian law, they have to enjoy a degree of independence, sometimes referred to as the 'humanitarian space', in relation to the political organs of the United Nations, and have to be able to guarantee the impartiality of their humanitarian operations. The United Nations accordingly refers to 'the humanitarian principles of humanity, neutrality, impartiality and independence' 'within the framework of humanitarian assistance'.²⁶⁴ However, the understanding of those principles can vary.²⁶⁵

260 See e.g. A/64/84-E/2009/87, 28 May 2009, p. 9.

261 See *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict*, A/63/881-S/2009/304, 11 June 2009.

262 See Decisions of the Secretary-General – 25th June meeting of the Policy Committee (26 June 2008). This was followed up by Policy Instructions on *OCHA's Structural Relationship Within an Integrated UN Presence*, 1 May 2009.

263 See e.g. *An ICRC perspective on integrated missions*, Official Statement, 31 May 2005, at <http://www.icrc.org/web/eng/siteeng0.nsf/html/6DCGRN> (visited on 7 August 2009).

264 See S/RES/ 1674 (2006), operative para. 21.

265 In particular, the principles of neutrality and independence. For the interpretation of these principles by the ICRC, see Pictet's *Red Cross Principles* and *The Fundamental Principles of the Red Cross* (both above note 93). The principle of neutrality is interpreted differently by the Red Cross and the United Nations (see Umesh Palwankar (ed), *Symposium on Humanitarian Action and Peace-keeping Operations*, ICRC, Geneva, 1994, in particular the glossary at the end of the report). See also Frits Kalshoven, 'Impartiality and neutrality in humanitarian law and practice', *International Review of the Red Cross*, No. 273, November–December 1989, pp. 516–535 and Maurice Torelli, 'From humanitarian assistance to "intervention on humanitarian grounds"?' *International Review of the Red Cross*, No. 795, May–June 1992, pp. 228–248.

The International Court of Justice

The International Court of Justice, as principal judicial organ of the United Nations, contributes to the implementation of humanitarian law through its jurisprudence and its advisory opinions. It may be called upon to settle a dispute between states concerning the application of international humanitarian law if both states have accepted the Court's jurisdiction.²⁶⁶ Generally, the Court has jurisdiction only on the basis of consent and only states may be parties in contentious cases.²⁶⁷ When requested to hear a case or give an opinion on a matter linked to an armed conflict, the International Court of Justice quite naturally applies international humanitarian law, as unlike many other international judicial bodies it is free to refer to all applicable international law, not just a selected branch or treaty.²⁶⁸ In *Nicaragua v. the United States of America*, the United States, which had previously accepted the Court's compulsory jurisdiction when it was created in 1946, withdrew its acceptance following the Court's judgment in 1984 that called on the US to 'cease and to refrain' from the 'unlawful use of force' against the government of Nicaragua. The Court ruled that the United States was 'in breach of its obligation under the Treaty of Friendship with Nicaragua not to use force against Nicaragua' and ordered the United States to pay war reparations.²⁶⁹ In its final judgment in the *Congo case*, the Court held that the armed activities of Uganda in the Democratic Republic of Congo (DRC) between August 1998 and June 2003 violated international human rights and international humanitarian law and ordered Uganda to pay reparations to the DRC.²⁷⁰ Both judgements may have influenced conscious building, but had not been implemented yet. The advisory opinions on the *Legality of Nuclear Weapons* and on the

266 Chapter XIV of the United Nations Charter authorizes the UN Security Council to enforce the rulings, but such enforcement is subject to the veto power of the five permanent members of the Council.

267 See Article 36, Statute of the International Court of Justice.

268 See Article 38(1), Statute of the International Court of Justice.

269 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, paras. 60 and 218. The United States refused to participate after the Court rejected its argument that the ICJ lacked jurisdiction to hear the case. The US later blocked enforcement by the Security Council, making Nicaraguan attempts at obtaining compliance futile. At the end of 2008, the Nicaraguan head of state made a renewed request for reparations (17 billion USD) based on this judgement: see Ivan Castro, 'Nicaragua asks U.S. for war reparations in aid row', Reuters, 2 December 2008, available at <http://www.reuters.com/article/domesticNews/idUSTRE4B115920081202> (visited on 7 August 2009).

270 Having found Uganda to be an occupying power in Ituri (DRC), the Court found that Uganda was responsible for violations of international human rights and humanitarian law in that territory. Those alleged violations included wide-scale massacres of civilians, acts of torture, and other forms of inhumane and degrading treatment. Additional claims included the unlawful seizure by Ugandan soldiers of civilian property, the abduction and forcible conscription of several hundred Congolese children by the Uganda People's Defence Force in 2000, and the failure of Ugandan forces to distinguish between combatants and non-combatants, as required under international humanitarian law. See *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, paras. 181–221. The DRC claimed ten billion US dollars in reparations, but the compensation has to be worked out through bilateral negotiations between the two states. However, the negotiating process could be so protracted that a settlement might take many years to conclude, if ever – it will also be very difficult to enforce this compensation ruling.

Construction of a Wall in the Occupied Palestinian Territories were legal and political highlights,²⁷¹ but did not lead to practical changes in their respective fields. Though the opinions are influential and widely respected, under the Statute of the Court they are inherently non-binding.

Activities of regional organizations

Like the United Nations, regional organizations are not primarily concerned with implementing international humanitarian law. Nevertheless, the consequences of armed conflicts have prompted them to take an ever greater interest in the humanitarian dimension of conflict. They engage in efforts not only to prevent wars where possible, or at least contain them, but also to find peaceful solutions. Where there are no more promising avenues to take, these solutions often begin with a modicum of respect for humanity in the midst of combat.

The growing interest of regional organizations in international humanitarian law finds expression at several levels. The Organization of American States (OAS),²⁷² the African Union (AU),²⁷³ the European Union (EU)²⁷⁴ and the Organization for Security and Co-operation in Europe (OSCE), for example, have all made pronouncements based on international humanitarian law. The recognition of the significance of international humanitarian law by member states is also reflected by the reference in an article of the ASEAN Charter.²⁷⁵

However, they do not restrict themselves to passing resolutions; they also attempt to play a mediating role and frequently send observers into conflict areas with a broad mandate that often includes monitoring compliance with that law, in particular in Europe. European observers whose main task, in co-operation with the OSCE, was to supervise compliance with a cease-fire in the former Yugoslavia²⁷⁶ quickly became involved in humanitarian operations such as visits to prisons and

271 See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226; ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, p. 13.

272 AG/RES. 2293 (XXXVII O/07) *Promotion of and Respect for international humanitarian law*, adopted at the 4th plenary session of the General Assembly, held on 5 June 2007.

273 See for example: African Union Peace and Security Council, *Communiqué of the 163rd Meeting*, PSC/MIN/Comm. 4 (CLXIII), 22 December 2008, para. 9 (condemning attacks on civilians and humanitarian workers in Somalia); Central Organ of the Mechanism for Conflict Prevention Management and Resolution (Central Organ) at Heads of State and Government Level, *Communiqué of the Seventh Ordinary Session*, Central Organ/MEC/AHG/Comm. (VII), 3 February 2003, para. B.4 (urging respect for human rights and humanitarian law in Côte d'Ivoire); Central Organ at Ambassadorial Level, *Communiqué of the 86th Ordinary Session*, Central Organ/MEC/AMB/Comm. (LXXXVI), 29 October 2002, para. B.4 and D.4 (calling on parties in the DRC and Liberia to observe humanitarian law).

274 In particular through the organs of the Council of Europe. See in particular the European Guidelines on promoting compliance with international humanitarian law (IHL), *Official Journal of the European Union*, 2005/C 327/04.

275 See Art. 2 of the ASEAN Charter (into force since December 2008): 'ASEAN and its Member States shall act in accordance with the following Principles: ... (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.'

276 See the Brioni Joint Declaration by the Yugoslavian government and the European Troika of 7 July 1991 following the Slovenia war (published in Mercier, above note 131, pp. 260–266) which conferred on the

the escorting of convoys. The consolidation of the OSCE as an institution²⁷⁷ has been followed by a high-profile observer presence in the Balkans and the southern Caucasus. The Parliamentary Assembly of the Council of Europe has conducted several fact-finding missions to countries and territories affected by armed conflicts (and other forms of violence), leading to the adoption of resolutions and recommendations addressing issues of a humanitarian nature.²⁷⁸ Implementation of the provisions spelled out in the recommendations adopted is then assigned to the Committee of Ministers. The African Union finally began to play a visible role in the field within the framework for the prevention, management and settlement of conflicts set up in Cairo in June 1993.²⁷⁹

If regional organizations monitor compliance with international humanitarian law, there is bound to be a positive impact on its implementation, but the essentially political nature of these organizations may be reflected in their operations and may sometimes jeopardize the work of humanitarian agencies that must be conducted with impartiality and remain untainted by political considerations.

Activities of governmental and non-governmental organizations

On the basis of Article 1 common to the four Geneva Conventions, states have, as already pointed out above, a broad range of means to discharge their obligation to ensure respect for international humanitarian law. A wide range of actions are possible, ranging from instruction in the law within the framework of military co-operation to supplying the logistical infrastructure to facilitate humanitarian operations. Governmental agencies are often present in conflict situations and provide financial and/or material support for humanitarian organizations²⁸⁰ or become operational themselves to alleviate the plight of war victims.²⁸¹ It is plain

European mediators a broad mandate in relation to the future of the Yugoslav Federation and opened the way to the deployment of a mission by OSCE observers.

277 The OSCE missions are conflict prevention and management instruments. As regards humanitarian law, see chapters VII and VIII of the *Code of Conduct on Politico-Military Aspects of Security*, adopted at the Conference on Security and Cooperation in Europe, Budapest, 1994. This Code reminds States at length of their obligations under international humanitarian law, particularly as regards dissemination and instruction. 'Appropriate CSCE bodies, mechanisms and procedures will be used to assess, review and improve if necessary the implementation of this Code' (Chapter IX).

278 See for instance Resolutions 1633 (2008) and 1857 (2009) on the consequences of the war between Georgia and Russia.

279 A joint African Union/United Nations Hybrid operation in Darfur was authorized by Security Council Resolution 1769, 31 July 2007. The Council, acting under Chapter VII of the United Nations Charter, authorized UNAMID to take necessary action to support the implementation of the Darfur Peace Agreement, as well as to protect its personnel and civilians, without 'prejudice to the responsibility of the Government of Sudan'. UNAMID formally began operations on 31 December 2007.

280 The different departments responsible for emergency or development aid, which are often present in the embassies of their countries, for example the Canadian International Development Agency (CADI), the UK Department for International Development (DFID), the Swedish International Development Agency (SIDA), the United States Agency for International Development (USAID). Also, at regional level, the European Community Humanitarian Office (ECHO).

281 *Corps Suisse d'Aide humanitaire, Gesellschaft für Technische Zusammenarbeit*, etc.

that when governments engage in such operations they will always be viewed with some suspicion, particularly if the humanitarian services they provide also benefit the opponents of the country's legal government. Moreover, when conducting operations in a conflict-driven country, it is not easy to refute an accusation of interference in domestic affairs.

Today's conflicts and emergency situations are quite diverse in nature, intensity and magnitude. Each of them produces a distinct mix of humanitarian needs and brings along its specific constraints. In the face of this enormous variety of humanitarian calls, the diversity of non-governmental organizations (NGOs) greatly enhances the flexibility and the appropriateness of the response. During war-time, NGOs are exercising the right of initiative provided for in international or non-international conflicts.²⁸² This right is not limited to the ICRC but can be exercised by 'any other impartial humanitarian organization'. In conflicts, NGOs often fill the gaps left by international organizations; they generally address specific issues and some of them have operations in many parts of the world. Examples are *Médecins sans Frontières* (Doctors without Borders), the Norwegian Aid Committee (NORWAC), the International Rescue Committee, CARE, Save the Children, OXFAM and the Islamic Relief Society, to name but a few. Activities stretch from emergency relief, mine action and primary healthcare, to human rights, conflict resolution, democracy and legal aid, and over to development, agriculture, trade, education, gender, environment, and even telecommunications. Many organizations combine a number of these and just add humanitarian relief to the mix. They assist various specific groups such as children, women, elderly, disabled, refugees/internally displaced/asylum seekers.

Where they come across indiscriminate acts of war, summary executions or acts of torture and misappropriation of humanitarian aid, the role of these organizations cannot remain restricted to that of a mere purveyor of medical and material aid; many are therefore gradually supplementing their emergency assistance operations with measures to protect conflict victims. Other non-governmental organizations actually focus on this very issue. Certain organizations such as Human Rights Watch, Amnesty International and the International Commission of Jurists mainly advocate respect for human rights by denouncing violations, but are also increasingly introducing humanitarian law into their arguments to draw attention to human rights violations in armed conflict.

Conclusions

There are obvious tensions – and even frictions – between protection of war victims in the midst of fighting and judicial supervision, between consent and

282 See for example Philippe Ryfman, 'Non-governmental organizations: an indispensable player of humanitarian aid', *International Review of the Red Cross*, Vol. 89, No. 865 March 2007, pp. 21–45; and Mario Bettati and Pierre-Marie Dupuis (eds), *Les ONG et le Droit International*, Economica, Paris, 1986.

enforcement, between humanitarian action and denouncing violations, and between an impartial humanitarian approach and a political approach. Improving the situation of victims of armed conflicts means using an adequate combination of the various means, and building on their comparative advantages. This must happen first and foremost at the field level, while the global level should strive to support field initiatives.

International humanitarian law and its mechanisms remain international law's modest response during periods of armed conflict. Today, international enforcement of the law is still exceptional in the absence of a central enforcement system. Willingness and ability to comply with the rules largely lie in the hands of belligerents, and supervisory mechanisms are merely based on their consent and good faith. Humanitarian law is best suited to supervision on the spot and endeavours to provide protection and assistance directly to the victims of armed conflicts. The goal is to reach *all* persons affected by armed conflict, unlike the restricted judicial approach which only takes victims of a violation of the law into account.

However, international humanitarian law needs political pressure to have a chance of succeeding. If the victims' interests so demand, recourse should be had to the States parties to the Geneva Conventions by virtue of their obligation to '*ensure respect for*' international humanitarian law under Article 1 common to the four Geneva Conventions. Humanitarian law does call upon states to take political measures, both individually and collectively through the United Nations, to induce belligerents to comply with its precepts. The Human Rights Council discusses situations of armed conflict and the Security Council in particular tries to enhance protection of the civilian population on the ground by mandating peacekeeping missions to carry out protection activities, or seeking to create a political environment conducive to facilitating humanitarian access. In exceptional circumstances, even military means may be the only remedy to stop endless killings. As ever in decisions by these essentially political organs, an impartial approach cannot always be guaranteed, and the 'responsibility to protect' in particular remains a deliberately vague concept.

Yet international humanitarian law would lose its *raison d'être* if politics were to take precedence over humanitarian considerations: the very essence of international humanitarian law is the divide it creates between *ius in bello* and *ius ad bellum*, so that victims are protected and assisted whatever the reasons for the conflict. In the face of widespread violations of the most basic rules by parties to conflict, and the inability or unwillingness of the international community to take bolder measures to stop the violations or even the conflict, humanitarian action not linked to any political agenda often remains the only remedy, at least for the situation of the conflict victims. The use of humanitarian action as a political tool and its integration into policy makes humanitarian operations captive to the political and military ambitions underlying the conflict, thereby undermining humanitarian access to victims.

International assistance for victims of use of nuclear, radiological, biological and chemical weapons: time for a reality check?

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Abstract

The risks of the use of nuclear, radiological, biological or chemical (NRBC) weapons are heterogeneous. Each risk has its own implications for developing and deploying any capacity to assist victims of an NRBC event and, in parallel, for the health and security of the people bringing this assistance. At an international level, there are no plans for assisting the victims of an NRBC event which are both adequate and safe. Recognizing the realities of the contexts associated with each risk throws up numerous challenges; such recognition is also a prerequisite for addressing these challenges. The realities that have to be considered relate to:

1. *developing, acquiring, training for and planning an NRBC response capacity;*
2. *deploying a response capacity in an NRBC event;*

* The views expressed in this article are those of the authors and do not necessarily reflect those of the ICRC.

3. *the mandates and policies of international organizations pertaining to NRBC events.*

The challenges that will pose the greatest difficulty for a humanitarian organization are those for which the solutions are ‘non-buyable’ and which involve making extremely difficult decisions. Attempting to assist victims of an NRBC event without a reality-based approach might generate ineffective and unacceptably dangerous situations for those involved.

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In a previous paper we asked who would bring assistance to victims of use of nuclear, radiological, biological and chemical (NRBC) weapons and how this assistance might be brought.¹ We concluded that whilst responses to assist victims of an NRBC event may be possible at a national level in some countries, it was not clear who would be responsible for mounting a response to assist victims of an NRBC event if an international response is required.²

Our paper included a risk assessment that pertained only to the risk of use of nuclear, radiological, biological and chemical weapons; it did not incorporate risks of other NRBC events. Risk was defined as a function of two variables, namely the probability of different kinds of NRBC weapons being used and the potential impact³ resulting from their use. The eleven risks identified can be summarized as follows:

1. Nuclear weapons (NW): Low probability – High potential impact
2. Improvised nuclear devices (IND): Low probability – High potential impact
3. ‘Radiological devices’ (RD): Medium probability – Low potential impact
4. Highly infective and contagious anti-human biological agents with global implications (BW1): Low probability – High potential impact
5. Bacterial agents which are infective but whose effects can be treated and of which human-to-human transmission is controllable (BW2): Low probability – Medium potential impact
6. Non-contagious agents (BW3): Medium probability – Low potential impact
7. Infective and contagious agents against animals or plants (BW4): Medium probability – Low potential impact
8. Chemical warfare (CW1): Low probability – High potential impact

1 D. Loye, R. Coupland, ‘Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?’, *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 329–344.

2 ‘An NRBC event’ means any use of a nuclear, radiological, biological or chemical weapon. It means also a situation in which there is a high probability of use of such weapons. It includes accidental release of NRBC agents in the event of an attack on a NRBC facility with conventional weapons as well as allegations of use. ‘Assistance to victims of an NRBC event’ means specialized (e.g. antidotes, agent specific antibiotics) and general (e.g. food, water) assistance to people who have been affected by NRBC weapons or agents; it also includes provision of general and specific means for the protection of people from potential exposure to the effects of NRBC weapons or agents.

3 The potential impact is estimated in numbers of direct death and injuries.

9. Limited or small-scale use of chemical weapons (CW2): High probability – Low potential impact
10. ‘New’ chemical weapons (NCW): Medium probability – Low potential impact
11. Riot control agents (RCA): High probability – Low potential impact

This risk assessment has been discussed with various experts and presented in different fora. We have not encountered any disagreement.

The risk assessment generates some important points:

1. The ‘NRBC risk’ is heterogeneous and each risk carries its own implications for assisting victims and for the health and security of personnel;
2. The lower probability risks are those with potentially the highest impact;
3. The risks which are of medium and high probability will have less impact (in terms of numbers of people directly affected);
4. Although not pertaining to risk of all NRBC events, this risk assessment provides a useful reference point for policy-making for a humanitarian organization planning to respond to any kind of NRBC event.

Whilst the risk assessment pertains to the use of NRBC weapons, we believe that in an armed conflict the probability of an event involving suspected or alleged use of a NRBC weapon is higher than an event involving confirmed use of such a weapon.⁴

Furthermore, dialogue based on this risk assessment provided our first indicator that international players lacked a reality-based approach to the subject of assistance for victims of an NRBC event. Another indicator of the lack of a reality-based approach is the ambiguity which exists with regard to who would assist the victims of an NRBC event requiring an international response. Our recognizing this ambiguity has caused some controversy. The controversy was minimized when it was clarified that what is meant by ‘assistance’ in pertinent treaties means assistance to a State and not necessarily assistance to the victims.⁵ In addition, the State in question has to request such assistance (and there are numerous reasons why a State might not want it widely known that an NRBC event has happened). This is rendered yet more complex because the personnel health and security policies of international organizations – including the International Committee of the Red Cross (ICRC) – may not be compatible with bringing assistance to victims or to an area that is potentially contaminated.

4 We reach this conclusion because claims of use of chemical and biological weapons are made in many conventional conflicts. Few such claims are ever verified.

5 See the Joint Radiation Emergency Management Plan, International Atomic Energy Agency, 2006; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) entered into force on 29 April 1997, Article X, Assistance and Protection against Chemical Weapons; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), entered into force on 26 March 1975, Article VII.

In our previous paper, we touched upon the question of how such an international response might be undertaken. We indicated some of the foreseeable difficulties. Further research into these difficulties has generated yet another reason for a reality-based approach and has driven the ICRC to begin addressing the tough questions about how an international response capacity to assist victims of an NRBC event might be developed or deployed whilst ensuring the security and health of personnel. The outcome of this process is the identification of a number of exacting challenges that would face any humanitarian organization planning to mount such an international response.

The challenges: those with ‘buyable’ and those with ‘non-buyable’ solutions

In our research into how an international response to assist victims of an NRBC event might be mounted, we found that the challenges that would face an organization such as the ICRC go much further than deciding what materials and equipment should be purchased and which people are needed with what skills. In other words, it is feasible to put an approximate price tag on developing such a response capacity for each of the eleven identified risks, but there are other and greater challenges facing decision-makers. We have therefore categorized the challenges into those for which the solutions are ‘buyable’ and those for which the solutions are ‘non-buyable.’ The challenges for which the solutions are ‘non-buyable’ comprise the process and content of internal decision-making, and external factors such as security, politics and co-ordination with other international organizations.

The recognition of, refining and classification of the challenges for which the solutions are ‘non-buyable’ will force any player in this domain to face many of the realities. Because a reality-based approach is lacking, we are sure it would not be possible for a humanitarian organization to mount an effective response to assist the victims of an NRBC event without squarely confronting these challenges. This confrontation will take the form of very difficult questions and dilemmas, many of which are foreseeable, but not necessarily resolvable in anticipation. These and other challenges will have to be faced at the time of deciding whether to acquire a response capacity; yet more will have to be faced at the time of deployment of that capacity in a given context.

We propose that the challenges for which the solutions are ‘non-buyable’ pertain to three domains: first, the many and complex practical aspects of developing, acquiring, training for and planning an appropriate response capacity to assist the victims of an NRBC event; second, the issues specific to deploying this capacity in an event; and third, the different mandates and policies of pertinent international organizations and how such organizations interact.

The overarching issue to which most of these challenges pertain is the set of specific risks to the health and security of personnel bringing the assistance. This

is the unique feature which differentiates NRBC events from other events in which conventional weapons have been used.

Developing, acquiring, training for and planning a NRBC response capacity

Is a military approach appropriate?

Most current thinking on assisting people who might be affected by NRBC weapons originates from military operational procedures and technical knowledge applied either to a battlefield scenario or to a NRBC event within a national boundary. Therefore, military personnel are expected to function *militarily* in a contaminated environment or to assist the authorities in a national response to a domestic NRBC event. Moving a military NRBC capacity to another country would almost certainly be undertaken to support the military forces concerned (or those of allies); it would not involve humanitarian assistance for the victims of an NRBC event.

By contrast, faced with a contaminated environment (if it was known that the environment was indeed contaminated), a humanitarian organization would probably use any NRBC-specific materials and expertise primarily to remain safe or to exit safely so as to reduce the chance of contamination of its personnel. Assistance to victims would then be brought when safe to do so; that is, later or at the outer limit of the contaminated area (assuming that such limits can be established).

There are excellent texts about the impact of NRBC weapons and what might be needed to assist victims, though the texts do not indicate how this assistance might be delivered in an international context.⁶ A response at an international level with the objective of assisting victims of a major NRBC event is largely untried. No single person or organization has significant experience. Equipment and systems have not been tested. It is far from clear whether the military operational procedures, exercises and expertise upon which current thinking is based are appropriate because they may not reflect realities including the objectives of and many constraints on humanitarian assistance. Therefore, planning an international response with military resources and operational procedures may not constitute an effective humanitarian response. This raises a much more provocative question: if such a response is unlikely to be effective as humanitarian action, can one justify the risk to the health and security of those bringing assistance? We conclude that it may be near to impossible for a humanitarian organization to develop, acquire, train for and plan an effective response to

6 See World Health Organisation (WHO), *Effects of Nuclear War on Health and Health Services*, WHO, Geneva, 1988; World Health Organisation, *Public Health Response to Biological and Chemical Weapons: WHO Guidance*, WHO, Geneva, 2004.

address all of the eleven identified risks if the planning, action and training is based on military operational procedures and materials. This is especially the case for the low probability NRBC events (NW, IND, BW1, CW1) which have high potential impact.

How can one plan assistance that is safe for those bringing it?

The act of assisting the victims has an inherent risk for those bringing assistance and this risk is specific to the NRBC agent in question. This, combined with our conclusion that effective humanitarian assistance may be near to impossible today, means that materials and expertise specific to preventing NRBC contamination would most likely be used to protect personnel and may be used to assist only a very few affected people. This raises a difficult ethical question: how much does an organization invest in preparing an assistance response which also ensures personnel health and security when that response might be ineffective and personnel health and security can best be assured by their withdrawing from the affected area and not attempting any response at all?

At present, the liability of international organizations towards their personnel (international and national) is not compatible with deploying a capacity to assist victims of an NRBC event.⁷ In relation to this, many humanitarian assistance organizations rely on the principle of voluntary service (i.e. nobody can be ordered to undertake an action.) This has clear implications for recruiting personnel for a response to an NRBC event. These have to be considered at a policy level in parallel to the process of developing an assistance capacity.

Do the different risks require different resources and plans?

We have argued that planning an effective response to a low probability/high impact risk is barely possible. No single organization could respond to the needs of all the people affected by, for example, the detonation of a nuclear device in an urban area. By contrast, repeated use of riot control agents affecting many people may elicit no response at all. Planning to assist in the event of *ad hoc*, small scale use of a chemical weapon or the detonation of a 'dirty bomb' (radiological device) may be quite feasible.

The necessity for different resources, plans and mechanisms to co-ordinate information according to the risk in question is best demonstrated in relation to 'B' risks. The public health community, including ministries of health, international organizations and NGOs, have extensive experience in responding to natural outbreaks such as cholera.⁸ In addition, there are international preparations pertaining

7 United Nations Security Co-ordinator, *Information Package for Staff on NBC Warfare Agents*, March 2003.

8 See World Health Organisation, *Global Alert and Response*, available at <http://www.who.int/csr/en/> (last visited 9 January 2009).

to more serious natural outbreaks, especially avian flu, SARS and smallpox.⁹ It would therefore appear that the mechanisms in place to assist victims of the 'B' risks (especially BW1 and BW2) are more advanced and are more likely to be based on reality because a certain relevant international experience has been accumulated. However, the public health community has not given adequate consideration to whether or how the public health response might differ if the outbreak of disease was the result of an intentional act. The first 'diagnosis' to be made in the event of people suffering an outbreak of an unusual disease would be to identify the causative agent; the second 'diagnosis' would be to establish that the outbreak was intentional. The second 'diagnosis' has important forensic and security implications. Days, weeks or months may elapse between the two 'diagnoses.' Those responsible for the public health response and the first 'diagnosis' are likely to be in possession of the information that pertains to the second 'diagnosis.' Who has a right to this information? Who will co-ordinate the information? Who will make the judgment call that it was or was not an intentional act? To whom is this judgment communicated – and how? In brief, the articulation of the public health response with law enforcement and/or international security imperatives in an NRBC event requiring an international response has not been adequately examined.

What is meant by 'assisting victims'?

Assisting victims of an NRBC event implies that the assistance will entail caring for and treating people who have been contaminated or who are potentially contaminated. There may also be many more people who are neither contaminated nor likely to be contaminated but who, because of the event, require assistance as a result of being displaced, homeless, in need of food, missing a family member or simply needing information. Unless the humanitarian organizations who would normally respond have knowledge and understanding of the nature, timing and location of the event, they may be deterred from bringing assistance to this broader category of victims – one reason being that personnel may not volunteer to go to or stay in that context even if the risk of contamination is minimal. As far as we are aware, no non-governmental organization working in the domain of international humanitarian assistance has any preparedness plans for an NRBC event.

What level of assistance?

Assisting victims of an NRBC event who have been contaminated and who have survived may take the form of initial measures such as decontamination or administration of medicines such as antibiotics, antidotes or iodine. However, many would also require admission to a hospital environment which could provide, for example, respiratory intensive care or burn surgery. Such hospital

9 See WHO, *Pandemic Preparedness of the World Health Organisation*, available at: <http://www.who.int/csr/disease/influenza/pandemic/en/> (last visited January 2009).

capacity is very unlikely to exist in the contexts in question. If this capacity exists, it would easily be overwhelmed or rendered non-functional by the event itself. Thus a truly effective response to assist victims of an NRBC event would also involve provision of this hospital capacity together with the materials and expertise to deliver the required specialized care. The financial costs alone (the ‘buyable’ solutions) would be enormous; the challenges for which the solutions are ‘non-buyable’ in getting the hospital infrastructure (with the right equipment and the right people) to the right place in good time – whilst ensuring that the hospital itself does not become contaminated – may be insurmountable.

The effectiveness of deploying a response capacity to assist victims of an NRBC event without a capacity to bring competent hospital treatment is unknown. Therefore, the question arises of whether one should plan to assist victims of an NRBC event without including the means to provide hospital treatment for those victims who really need – and potentially benefit most – from assistance. In other words, there may be a moral or political imperative to ‘do something’ even if, from a health perspective the effectiveness of the ‘something’ is in question. For a humanitarian organization planning a response, this question puts in a more critical perspective the trade-off between the desire to assist victims on one hand and the responsibility for personnel health and security on the other hand.

Are the financial demands excessive?

An organization planning an international response to an NRBC event must recognize that any capacity deployed would not be ‘expandable’ by employing locally available human resources, as in ‘conventional’ conflicts or disasters.¹⁰ Furthermore, the personnel deployed are likely to be of a different culture and language to those requiring assistance. The practical difficulties of communicating with people who, for example, require decontamination will be considerable. All this implies a necessity for advance training of personnel in high-risk areas (if such areas can be identified at all). It also implies a massive financial outlay in advance to build a capacity which, in reality, is unlikely to be deployed, and if deployed carries no guarantee of effectiveness. There is thus a fundamental dilemma: how much does an organization invest in developing this capacity? Should one prepare for the higher probability risks only? Or should one prepare for all risks including the low probability/high impact events (NW, IND, BW1, CW1)? Preparing for all risks is likely to be prohibitively expensive.

Whilst this article focuses on the reality of the challenges for which the solutions are ‘non-buyable’, the question must be asked whether donor governments would be prepared to invest in funding a humanitarian organization to develop a response capacity without any guarantee of eventual deployment of such

10 All hospital staff, first aid volunteers, ambulance drivers and stretcher-bearers would have to be trained in NRBC issues and personal protection in advance.

a capacity nor any evidence that such a capacity can, in reality, make a difference to those affected or potentially affected.

Deploying a response capacity in an NRBC event

How will a humanitarian organization know that an NRBC event has taken place?

Much of the literature, dialogue and planning about responding to NRBC events starts with assumptions that the agent is known and that the point of release or at least the space affected is known.¹¹ Making these assumptions may be reasonable for a military body working in a tactical scenario; they cannot be made for a humanitarian organization planning a response to assist victims of an NRBC event. It is unlikely that either the agent or the area will be known. The first information indicating that an NRBC event has taken place might be found in press reports, as allegations of use or in reports or photos of dead people and animals. There may be a number of people sick, representing an unusual outbreak of a disease. If, for example, a hospital reports a large number of people vomiting, this could indicate exposure to a radiological, biological or chemical agent and does not necessarily indicate the geographical location of the source. The time required for an adequate investigation (if this is possible) will extend beyond the time when the assistance for victims should be initiated. With time, the likely effectiveness of a response diminishes.

When should a capacity for international assistance for victims of an NRBC event be deployed?

It is likely that an event involving use of NRBC weapons will not be immediately confirmed as such. How does a humanitarian organization with a capacity to respond to an NRBC event respond appropriately to suspected or alleged use of NRBC weapons? Is it necessary to confirm the nature of the event before responding? If so, how will this confirmation be obtained? If not, is mounting a response seen as supporting suspicion or verifying allegations which would generate additional political and security issues?

What is required and where? How will it get there and when?

A humanitarian organization planning to respond to an NRBC event will need to know that an NRBC event has happened. Other necessary information includes what kind of event it is, who is affected, how the people are affected, where they are, what their needs are, how these NRBC specific needs relate to other assistance programmes and, importantly, how these needs can be addressed in a way that is compatible with ensuring the health and security of the people addressing these

11 This space is frequently referred to as the 'contaminated' or 'hot' zone.

needs. None of this information will be obtained easily but it all has major implications for what kind of assistance is appropriate and how it is delivered.

For a humanitarian organization planning to assist the victims, if the limits of a contaminated zone are known (and even this information may be extremely difficult to come by) one exercise would involve getting vulnerable or untrained personnel out of the contaminated zone and another exercise would involve bringing appropriate equipment and trained personnel to a point where their risk of contamination is minimal but where there is sufficient access to the affected people. In practical terms, this can be summarized in one extremely difficult question: where does one place the material and human resources to assist the victims of an NRBC event requiring an international response, whilst minimizing the risk to personnel health and security?

Another factor that would have to be taken into account is how the requirements change with time. Again, the military influence has dominated thinking; a response to an NRBC event is always seen as a matter of urgency. For example, if one suspects use of mustard gas, the response would seem to be to provide a capacity for decontamination. The reality is that if an international response is going to be mounted, by the time it reaches the affected people, there may be little need for decontamination and little risk of other people being contaminated secondarily. In this case, the most appropriate form of assistance may relate to managing and rehabilitating people who have suffered chemical burns and, at a later date, to giving consideration even to cancers and birth defects.

Are there security risks for a humanitarian organization besides exposure to an NRBC agent?

If a humanitarian organization deploys a capacity to assist victims of an NRBC event, this may generate additional security risks. Such deployment inevitably involves gathering facts, and the perpetrators of the event may wish to prevent any outside agencies being witness to or having knowledge of the effects of their acts. In addition, the local population might be in such a state of panic that any organization may be at risk from attack precisely because it possesses or is believed to possess appropriate vaccines, personal protective equipment, antidotes or even information. For example, when humanitarian workers wear protective masks and drive their vehicles through a populated area, the risk of being exposed to or contaminated by an NRBC agent might be outweighed by the risk of being attacked.

The mandates and policies of international organizations pertaining to 'assistance' in NRBC events

Who is responsible?

Given our premise that, at present, it is not clear who would mount an international response to assist the victims of an NRBC event, it is pertinent to ask how

different organizations would, in the future, act either alone or in co-operation with others to mount such an international response. The questions posed above about a potential response of a humanitarian organization drive another set of considerations for UN agencies. Which UN agency, if any, has the capacity to assist a significant number of victims? An assumption is made that States would make available their military expertise and resources. If this assumption is true, are the military expertise, resources and operational procedures appropriate? Who will transport this military capacity? Will air transport, military or otherwise, be allowed to land in the affected area? Who has overall responsibility for deciding what assistance is delivered, when it is delivered and where? If military assets are put at the disposal of UN agencies, for an NRBC event especially, these questions risk being answered on the basis of political priorities.

What triggers a response from a specialized UN agency and what is the response?

The mandate behind any potential response from specialized UN agencies is derived from treaties. A UN agency responsible for ‘assisting’ in an NRBC event relies on the affected State inviting their assistance. As mentioned above, ‘assistance’ is understood to be assistance to that State and not necessarily assistance to the victims. The result is that specialized UN agencies might provide advice to the State in question, but if that State does not have sufficient resources to assist the victims, this will not necessarily be brought in by the specialized agencies.¹² This generates other questions. What happens if the State concerned does not request assistance? What if no other State wants to assist? It is unclear what the trigger is for an international response to assist victims of an NRBC event. It is also unclear whether UN agencies (or other humanitarian organizations) can mobilize the necessary resources quickly enough.

Who will co-ordinate the international response to an NRBC event?

If the government concerned is unable or unwilling to co-ordinate an adequate response to assist the victims of an NRBC event, who will undertake such co-ordination? Are the co-ordination mechanisms that are in place for ‘classical’ humanitarian assistance sufficient and adequate for NRBC events? Without such co-ordination, will those organizations who might bring assistance, such as the ICRC or health-orientated NGOs, be put in an excessively dangerous position? These questions have complex implications for governments and international organizations alike; today they would not and could not be resolved to ensure timely assistance to victims of an NRBC event.

12 These agencies would, at present, rely on other States and on organizations providing generalized humanitarian assistance.

What happens if use of a NRBC weapon is not confirmed?

In cases of suspected, alleged or threatened use of NRBC weapons, it might be appropriate to deploy an assistance capacity. But what if, for example, a suspicious material is found, a number of people are sick or animals have died with nothing to indicate whether the causative agent is radiological, biological or chemical? Which UN agency is responsible? How do the different UN agencies articulate their mandates, findings and activities with other humanitarian agencies, or with the UN Security Council and the UN Secretary General's mechanism for investigating alleged use of chemical and biological weapons?¹³ Again, the legal, political and diplomatic complexities of all these questions are immense and it is unlikely that they will be resolved soon.

Conclusion

In posing a number of questions in this article, we have hoped to bring a realistic perspective to a series of issues relating to assisting victims of an NRBC event. More importantly, we think we have demonstrated the absolute need for a reality-based approach at every step, from developing a capacity to assist victims of an NRBC event to the eventual deployment of this capacity. Such a reality-based approach does not address all the difficult questions that decision-makers will have to face; however, we see such an approach as a prerequisite for any international organization planning assistance for victims of an NRBC event. We emphasize that this approach must be adopted for each of the eleven risks. Without such a critical approach, developing and deploying an NRBC response capacity is likely to be ineffective, a waste of resources and, more importantly, unnecessarily dangerous for those bringing that assistance.

13 See UN Security Council Resolution 620, 26 August 1988.

REPORTS AND DOCUMENTS

The International Committee of the Red Cross (ICRC): Its mission and work

(Adopted by the Assembly of the ICRC on 19 June 2008)

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1. The ICRC's mission

Since it was founded in 1863, the ICRC has been working to protect and assist the victims of armed conflict and other situations of violence. It initially focused on wounded soldiers but over time it extended its activities to cover all victims of these events.

In *A Memory of Solferino*,¹ Henry Dunant suggested creating national relief societies, recognizable by their common emblem, and an international treaty² to protect the wounded on the battlefield. A permanent committee was established in Geneva to further Dunant's ideas. A red cross on a white ground³ was chosen as the emblem and the committee went on to adopt the name of the International Committee of the Red Cross.

Initially, it was not the ICRC's intention to take action on the ground. However, the National Societies of countries in conflict – viewed as too close to the authorities – asked the ICRC to send its own relief workers, believing that humanitarian work in times of conflict needed to offer guarantees of neutrality and independence acceptable to all parties, which only the ICRC could do. The ICRC therefore had to build up operational activities very quickly within a framework of neutrality and independence, working on both sides of the battlefield. Formal recognition of this function came later, when the Geneva Conventions explicitly recognized the purely humanitarian and impartial nature of the ICRC's activities, and gave the organization a special role in ensuring the faithful application of international humanitarian law.

The ICRC defines its **mission** in the following terms:

“The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.”⁴

To be able to carry out its mission effectively, the ICRC needs to have the trust of all States, parties⁵ and people involved in a conflict or other situation of violence.⁶ This trust is based in particular on an awareness of the ICRC’s policies and practices. The ICRC gains people’s trust through continuity and predictability. Combining effectiveness and credibility irrespective of time, place or range of needs is a permanent challenge for the organization, because it must be able to prove it can be both pragmatic and creative. Within the framework of the ICRC’s clear strategy and priorities, its delegations in the field are thus given considerable autonomy to decide how best to help victims of conflict and other situations of violence.

This document describes how the ICRC was shaped, how it operates and how it distinguishes itself from other humanitarian organizations, in particular via its multidisciplinary approach. A lengthy oeuvre could be dedicated to this ambitious task, but the idea here is far more modest. The intention is to set forth within a few pages the characteristics of the ICRC’s identity and of the scope and

1 Dunant suggested that permanent relief societies be set up which would begin making preparations during peacetime so as to be ready to support the armed forces’ medical services in wartime. These societies would coordinate their efforts and be recognized by the authorities. He also proposed that an international congress be held ‘to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded,’ and would also protect the wounded and those coming to their aid (*A Memory of Solferino*, English trans., ICRC, Geneva, 1986, p. 126).

2 In making Henry Dunant’s ideas a reality, and in particular, promoting the adoption of a solemn commitment by the States to help and care for wounded soldiers without distinction, the ICRC was at the forefront of the development of international humanitarian law. Its field work was later given a legal basis through mandates contained in international humanitarian law and in resolutions adopted at meetings of the International Conference of the Red Cross and Red Crescent.

3 Reversing the colours of the Swiss flag and paying tribute to the country, as host of the Geneva International Conference of 1863.

4 Text featured in ICRC publications (latest update by the Committee, 19 June 2008).

5 In this document, ‘parties’ or ‘authorities’ should be understood to mean all entities (*de jure* or *de facto*) having obligations.

6 See Art. 5.3 of the Statutes of the Movement. In its capacity as a specifically neutral and independent humanitarian organization, the ICRC examines whether it is better placed than other organizations to respond to the needs arising from these situations, such as visiting security detainees in cases where information or rumour indicates there may be poor detention conditions or ill-treatment.

methods of its work. While this undertaking may seem somewhat reductionistic, it provides a useful synopsis of the ICRC as it is today.

2. The ICRC's identity

2.1 The ICRC's purpose

The *raison d'être* of the ICRC is to ensure respect, through its neutral and independent humanitarian work, for the lives, dignity and physical and mental well-being of victims of armed conflict and other situations of violence. All of the ICRC's work is geared towards meeting this fundamental objective and strives to fulfil this ideal. The ICRC takes action to meet the needs of these people and in accordance with their rights and the obligations incumbent upon the authorities.

2.2 The dual nature of the ICRC's work

The ICRC's work developed along two lines. The first of these is operational, i.e. helping victims of armed conflict and other situations of violence. The second involves developing and promoting international humanitarian law and humanitarian principles.

These two lines are inextricably linked because the first operates within the framework provided by the second, and the second draws on the experience of the first and facilitates the ICRC's response to the needs identified.⁷ This dual nature thus reinforces the very identity of the ICRC and distinguishes it from other international humanitarian organizations, private or intergovernmental, which generally concentrate on just one of these two priorities.

2.3 An organization with a mandate

A key characteristic of the ICRC⁸ is that it was given a mandate (or rather mandates) by the States party to the Geneva Conventions⁹ to help victims of armed

7 Assisting victims of anti-personnel mines is a good example. While treating them, the ICRC receives information that helps it map out the incidents, target representations to the groups responsible, set up awareness-raising programmes to prevent accidents among the local population, adapting the message to the commonest kinds of victims (children, women and shepherds), provide in certain circumstances mine-clearance organizations with information, organize rehabilitation for people with artificial limbs, and perhaps provide them with professional training and loans to start a business. Knowledge and experience of this kind also proved to be useful in the process leading to the adoption of a new treaty prohibiting the use of anti-personnel mines.

8 The ICRC is often considered to be *sui generis*: legally, it is neither an intergovernmental nor a non-governmental organization. It is a private association under Swiss law with international mandates under public international law.

9 International humanitarian law expressly confers certain rights on the ICRC, such as that of visiting prisoners of war or civilian internees and providing them with relief supplies, and that of operating the

conflict. Its work is therefore firmly rooted in public international law. In other situations of violence, the ICRC derives its mandate from the Statutes of the Movement.

The main legal basis for the ICRC's work is to be found in international humanitarian law. The Statutes of the International Red Cross and Red Crescent Movement¹⁰ (the Movement) and resolutions of the International Conference of the Red Cross and Red Crescent and the Council of Delegates underscore the legitimacy of the ICRC's work. International humanitarian law, like the Statutes of the Movement, confirms a historical tradition of ICRC action which predates its successive codifications.

The States gave the ICRC the responsibility of monitoring the faithful application of international humanitarian law. As the guardian of humanitarian law, the ICRC takes measures to ensure respect for, to promote, to reaffirm and even to clarify and develop this body of law. The organization is particularly concerned about possible erosion of international humanitarian law and takes bilateral, multilateral or public steps to promote respect for and development of the law.

The ICRC generally cites international humanitarian law in reference to its activities. It nevertheless reserves the right to cite other bodies of law and other international standards protecting people, in particular international human rights law,¹¹ whenever it deems it necessary.

The ICRC has developed several policy documents which draw on its long experience. These texts serve as a guide for its actions and aim to give the organization long-term coherence, which in turn gives the ICRC added predictability and credibility when exercising its mandate.

2.4 Membership in a Movement

Another characteristic of the ICRC is its membership in a Movement – a Movement which it initiated. The ICRC is one component, and the National Societies and the International Federation of Red Cross and Red Crescent Societies (the Federation) are the others.¹² This link with the Movement is reinforced by the

Central Tracing Agency (see Arts 73, 122, 123 and 126, GC III, and Arts 76, 109, 137, 140 and 143, GC IV). In addition, international humanitarian law recognizes the ICRC's right of initiative in the event of armed conflict, whether international or non-international (Art. 3 and Arts. 9/9/10 common to the four Geneva Conventions). The ICRC's role is confirmed in Art. 5 of the Statutes of the Movement. In situations falling below the threshold of international humanitarian law, this article of the Statutes alone recognizes that the ICRC has a mandate to take action.

10 The States party to the Geneva Conventions normally meet representatives from the components of the Movement (the ICRC, the Federation and the National Societies) once every four years within the framework of the International Conference. The latter is competent to amend the Statutes of the Movement (which define the ICRC's role) and can assign mandates to the various components, but it cannot modify the ICRC or Federation statutes or take any decisions contrary to these statutes (Art. 11.6 of the Statutes of the Movement).

11 The ICRC may cite international human rights law in addition to international humanitarian law when the latter is applicable, or in place of it when it is not.

12 See in particular Arts 1, 3 and 6 of the Movement Statutes.

similarity of tasks of all Movement components and by the use of common emblems.¹³ The mission of the National Societies is to carry out humanitarian activities within their own countries, particularly in the role of an auxiliary to the public authorities in the humanitarian field.

The ICRC undertakes procedures to recognize National Societies on the basis of criteria set out in the Statutes of the Movement. The recognition of National Societies makes them full members of the Movement and eligible to become members of the Federation. The ICRC cooperates with them in matters of common concern, such as their preparation for action in times of armed conflict, tracing and reuniting families and spreading knowledge of international humanitarian law and the Movement's Fundamental Principles. In armed conflict and other situations of violence, the ICRC is responsible for helping them boost their capacity to meet the increased need for humanitarian aid.¹⁴

Often it is thanks to the National Societies' presence, resources, local knowledge and motivation that the ICRC can successfully carry out its work in the field. National Societies may also be involved in international operations via the ICRC, the Federation or the National Society of the country in question. The ICRC benefits from a unique worldwide network made up of all the National Societies. Cooperation and coordination within the Movement help make the best possible use of the capacity of all members.

According to the Movement's agreements and rules, the ICRC directs and coordinates international relief activities in "international and non-international armed conflicts" and in situations of "internal strife and their direct results." It also directs and coordinates activities aiming to restore family links in any situation requiring an international emergency response. The ICRC thus has two levels of responsibility:¹⁵

- doing the humanitarian work that derives from its own mandate and its specific areas of competence;
- coordinating the international operations of the Movement's components.

13 The Movement's mission is:

- to prevent and alleviate suffering wherever it may be found;
- to protect life and health and ensure respect for the human being, in particular in times of armed conflict and other emergencies;
- to work for the prevention of disease and for the promotion of health and social welfare;
- to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance (Preamble to the Statutes of the Movement).

It may be added that by carrying out its activities throughout the world, the Movement contributes to the establishment of a lasting peace.

14 See 'Policy on ICRC cooperation with National Societies,' *International Review of the Red Cross (IRRC)*, No. 851, September 2003, pp. 663–678.

15 See in particular the Seville Agreement adopted by the Council of Delegates in 1997 (Resolution 6) and the Supplementary Measures adopted by the Council of Delegates in 2005 (Resolution 8).

2.5 The Fundamental Principles of the International Red Cross and Red Crescent Movement

The ICRC's endeavour is guided by seven Fundamental Principles which the organization shares with the other components of the Movement. The principles – humanity, impartiality, neutrality, independence, voluntary service, unity and universality – are set out in the Movement Statutes¹⁶ and constitute the common values that distinguish the Movement from other humanitarian organizations. The Movement has given the ICRC the task of upholding and disseminating these principles. The first four, which are set out below, are those most commonly cited by the ICRC and are specifically mentioned in its mission statement:

- Humanity is the supreme principle. It is based on respect for the human being and encapsulates the ideals and aims of the Movement. It is the main driving force behind the ICRC's work.
- Impartiality, a principle that rejects any form of discrimination, calls for equal treatment for people in distress, according to their needs. It enables the ICRC to prioritize its activities on the basis of the degree of urgency and the types of needs of those affected.
- Neutrality enables the ICRC to keep everyone's trust by not taking sides in hostilities or controversies of a political, racial, religious or ideological nature. Neutrality does not mean indifference to suffering, acceptance of war or quiescence in the face of inhumanity; rather, it means not engaging in controversies that divide peoples. The ICRC's work benefits from this principle because it enables the organization to make more contacts and gain access to those affected.¹⁷
- The ICRC's independence is structural: the Committee's members are all of the same nationality and they are recruited by cooptation. The ICRC is therefore independent of national and international politics, interest groups, and any other entity that may have some connection with a situation of violence. This gives the ICRC the autonomy it needs to accomplish the exclusively humanitarian task entrusted to it with complete impartiality and neutrality.

¹⁶ See the Preamble to the Statutes of the Movement. The Fundamental Principles were proclaimed by the 20th International Conference in Vienna in 1965 and were incorporated in a slightly different form in the Statutes of the Movement adopted by the 25th International Conference in Geneva in 1986 and amended in 1995 and 2006.

¹⁷ The role of neutral intermediary in resolving issues of humanitarian concern follows from the ICRC's distinctiveness as a *specifically* neutral and independent organization (Art. 5.3 of the Movement Statutes).

3. Scope of work and criteria for taking action

There are four different situations in which the ICRC takes action:

1. The ICRC's endeavour to help the victims of international armed conflicts and non-international armed conflicts is at the heart of its mission.¹⁸ The ICRC offers its services on the basis of international humanitarian law, and taking due account of the existing or foreseeable need for humanitarian aid.
2. In other situations of violence, the ICRC offers its services if the seriousness of unmet needs and the urgency of the situation warrant such a step. It also considers whether it can do more than others owing to its status as a specifically neutral and independent organization and to its experience. In these situations, its offer of services is based not on international humanitarian law but on the Statutes of the Movement.¹⁹
3. If a natural or technological disaster or a pandemic occurs in an area where the ICRC has an operational presence, meaning it can deploy quickly and make a significant contribution, the organization steps in with its unique capabilities, to the extent it is able and in cooperation with the Movement. It generally takes action during the emergency phase only.
4. In other situations, it makes its own unique contribution to the efforts of all humanitarian agencies, especially within its fields of expertise such as tracing work and disseminating international humanitarian law and the Fundamental Principles. These are all fields in which it has an explicit mandate.

The ICRC sets priorities on the basis of the following criteria:

- the extent of victims' suffering and the urgency of their needs: the principle of impartiality, mentioned in humanitarian law, remains the pillar of the ICRC's work, which is non-discriminatory and proportionate to the needs of the people requiring protection and assistance;
- its unique capabilities deriving from its distinctiveness as a neutral and independent organization and intermediary and its experience in assisting the victims of armed conflict (local knowledge, human resources, logistics, tracing work, etc.). The particular merit of the ICRC, which results from its principles and its operational experience, is recognized by the international community. It fits into the scheme of an environment for humanitarian work that is characterized by numerous very different agencies;

18 International humanitarian law continues to apply even after active hostilities have ceased. When hostilities come to an end, States still have certain obligations, while others come into effect at that point. The ICRC therefore continues to conduct some of its activities and begins others during this transition period. See Marion Harroff-Tavel, 'Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent,' *IRRC*, No. 851, September 2003, pp. 465–496.

19 See Arts 5.2(d) and 5.3 of the Movement Statutes.

- the legal basis for its work:²⁰ the ICRC endeavours to take action in situations where international humanitarian law is applicable and carefully considers the advisability of taking action in the context of the direct results of these situations and in other situations of violence not covered by international humanitarian law (internal disturbances and tensions). In all cases, it tailors its action according to the criteria set out above.

Operational considerations and constraints (such as impact on other activities, whether the ICRC has been invited to take action, and security issues) can be added to these criteria.

4. Strategies for fulfilling the mission: from comprehensive analysis to specific activities

4.1 A comprehensive analysis

For any action to be taken, a *comprehensive analysis* of the situation, the actors present,²¹ the stakes and the dynamics must be carried out. This enables the ICRC to identify the people adversely affected and their needs. It requires a clear understanding of the problems' causes and a good knowledge of local facilities, their capabilities and their potential. The ICRC endeavours to obtain an overall perspective of an issue of humanitarian concern by looking at all the aspects and at the different responses that would be suitable.

A number of factors should be considered: social, economic, political, cultural, security, religious and ethnic, among others. Analysis should also take account of the interdependence of local, regional and international factors affecting a situation of conflict or any other situation of violence.

Analysis provides a basis for deciding on an overall strategy, with specific *priorities* and *objectives*, and determines the types of problem and/or the categories of needs on which the ICRC is going to concentrate its efforts and its resources. It is then a matter of developing a strategy aimed not only at addressing the direct consequences of problems, but also – as far as possible within the framework of neutral and independent humanitarian activities – their origins and causes.

In so doing, the ICRC must first exploit its strong points²² and the opportunities offered by the local environment, and second try to minimize its weaknesses and neutralize or circumvent external difficulties. Because of the complementary role played by partners in and outside the Movement, the strong

20 Based on the facts on the ground, the ICRC will determine the legal nature of the situation, which will define its legal frame of reference.

21 Parties to the conflict and other protagonists: armed, humanitarian, UN, non-UN, political and civil society actors, etc.

22 The ICRC can always count on its delegation employees, who are familiar with the local environment and who are specialists in their work. Depending on the circumstances, it can also seek support from others in the Movement network.

and weak points of these partners must also be taken into account in strategy discussions.

Depending on what needs to be done, the various activities either start simultaneously or consecutively.

4.2 Four approaches set out in the mission statement that allow the ICRC to fulfil its purpose

As described in the ICRC's mission statement, the organization combines four approaches in its overall strategy after analysing a situation in order to, directly or indirectly, in the short, medium or long term, ensure respect for the lives, dignity, and physical and mental well-being of victims of armed conflict and other situations of violence.

4.2.1 *Protecting the lives and dignity of victims of armed conflict and other situations of violence*

The protection approach

- In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict and other situations of violence, this approach aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals.
- It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations.
- It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations.

4.2.2 *Assisting victims of armed conflict and other situations of violence*

The assistance approach

- The aim of assistance²³ is to preserve life and/or restore the dignity of individuals or communities adversely affected by armed conflict or other situations of violence.
- Assistance activities principally address the consequences of violations of international humanitarian law and other relevant bodies of law. They may also tackle the causes and circumstances of these violations by reducing exposure to risk.
- Assistance covers the unmet essential needs of individuals and/or communities as determined by the social and cultural environment. These needs vary, but responses mainly address issues relating to health, water, sanitation, shelter and

23 See 'ICRC assistance policy,' *IRRC*, No. 855, September 2004, pp. 677–693.

economic security²⁴ by providing goods and services, supporting existing facilities and services and encouraging the authorities and others to assume their responsibilities.

4.2.3 Directing and coordinating the Movement's international relief efforts in armed conflicts and other situations of violence

The cooperation approach

- The aim of cooperation²⁵ is to increase the operational capacities of National Societies, above all in countries affected or likely to be affected by armed conflict or other situations of violence. A further aim is to increase the ICRC's capacity to interact with National Societies and work in partnership with them.
- The cooperation approach aims to optimize the humanitarian work of Movement components by making the best use of complementary mandates and skills in operational matters such as protection, assistance and prevention.
- It involves drawing up and implementing the policies of the Movement that are adopted during its statutory meetings and strengthening the capacities of the National Societies, helping them to adhere at all times to the Fundamental Principles.

4.2.4 Endeavouring to prevent suffering by promoting, reinforcing and developing international humanitarian law and universal humanitarian principles

The prevention approach

- The aim of prevention²⁶ is to foster an environment that is conducive to respect for the lives and dignity of those who may be adversely affected by armed conflict and other situations of violence, and that favours the work of the ICRC.
- This approach aims to prevent suffering by influencing those who have a direct or indirect impact on the fate of people affected by these situations. This generally implies a medium- or long-term perspective.²⁷
- In particular, the prevention approach involves communicating, developing, clarifying and promoting the implementation of international humanitarian law and other applicable bodies of law, and promoting acceptance of the ICRC's work.

24 The responses are as varied as the needs. An exhaustive list would be impossible, since each new situation requires new responses. These responses also take into account protection of the environment. The ICRC also occasionally takes action in the event of natural disasters (see section 3.3 above).

25 See 'Policy on ICRC cooperation with National Societies,' *IRRC*, No. 851, September 2003, pp. 663–678.

26 See for example 'The role of the ICRC in preventing armed conflict: its possibilities and limitations,' *IRRC*, No. 844, December 2001, pp. 923–946.

27 Although the main aim of the ICRC is neither to promote world peace nor to prevent armed conflict, its work and that of the other components of the Movement make a direct contribution to this.

4.3 Combining activities: multidisciplinary

Each activity responds, in humanitarian terms, to a specific problem or to common problems. Each approach uses its own implementation strategies. These strategies combine different **activities** from the four programmes detailed in the annual planning tool: PROTECTION, ASSISTANCE, PREVENTION and COOPERATION. Thus, a protection strategy could also include activities from the assistance, prevention or cooperation programmes. Digging wells in a camp for the displaced may be one aspect of an assistance programme and may be intended to tackle the lack of water. It would therefore form part of the assistance approach. However, this activity could equally be intended primarily to protect people exposed to violence while looking for water outside the camp. It therefore also forms part of the protection approach.

Combining activities is particularly important. The ICRC is duty bound to use all means at its disposal, according to each situation and to the priorities and objectives identified. Furthermore, the different approaches are of mutual assistance; for example, ICRC staff may receive information on violations of international humanitarian law while carrying out assistance work and this can then provide the grounds for making representations to the authorities, which is part of the protection approach. In conflict situations, assistance activities often take on a protection nature, and vice versa, to the point of being inextricably linked. It was after all to the ICRC that the Movement assigned the task of endeavouring at all times to *protect and assist* victims of these events.²⁸

Combining activities is often supported by what the ICRC calls its **humanitarian diplomacy**. The aim is to influence – and if necessary modify – the political choices of States, armed groups, and international and supranational organizations in order to enhance compliance with international humanitarian law and to promote the ICRC's major objectives. To that end, the ICRC encourages the various services and hierarchical levels at headquarters and its network of delegations to increase dialogue with these entities on general issues of concern to it. The essential message of humanitarian diplomacy is the same for all delegations, whatever their operational priorities.

5. Coordination of humanitarian activities

Both from headquarters and in the field, the ICRC coordinates its activities with other humanitarian organizations²⁹ in order to improve the lives, directly or indirectly, of victims of armed conflict and other situations of violence. Coordination is only possible as far as the strictly humanitarian approach of the ICRC, as an

²⁸ Art. 5.2(d) of the Statutes of the Movement.

²⁹ Coordination within the Movement was discussed under section 2.4 above ('Membership in a Movement').

impartial, neutral and independent organization, allows.³⁰ Authority cannot be ceded to any other entity or group of entities.

6. Modes of action

In keeping with the emphasis it places on complementary roles, the ICRC takes into account its partners' (in and outside the Movement) strong and weak points and their fields of expertise in its strategic discussions.

The ICRC's strategy is based on combining "modes of action" and on selecting the appropriate activities depending on the approach (or approaches) chosen. Modes of action are the methods or means used to persuade authorities to fulfil their obligations towards individuals or entire populations.

The ICRC's *modes of action* are: raising awareness of responsibility (persuasion, mobilization, denunciation), support, and substitution (direct provision of services). The ICRC does not limit itself to any one of them; on the contrary, it combines them, striking a balance between them either simultaneously or consecutively.

1. The aim of raising awareness of responsibility is to remind people of their obligations and, where necessary, persuade them to change their behaviour. This translates into three methods:
 - a. *Persuasion* aims to convince someone to do something which falls within his area of responsibility or competence, through bilateral confidential dialogue. This is traditionally the ICRC's preferred mode of action.
 - b. The organization may also seek outside support, through *mobilization* of influential third parties (e.g. States, regional organizations, private companies, members of civil society or religious groups who have a good relationship with the authorities in question). The ICRC chooses such third parties with care, contacting only those whom it thinks will be able to respect the confidential nature of the information that they receive.
 - c. Faced with an authority which has chosen to neglect or deliberately violate its obligations, persuasion (even with the mobilization of support from influential third parties) may not be effective. In certain circumstances, therefore, the ICRC may decide to break with its tradition of confidentiality and resort to public *denunciation*. This mode of action is used only as part of the protection approach, which focuses on the imminent or established violation of a rule protecting individuals.
2. If authorities are unable to take action, the ICRC provides *support* where necessary to enable them to assume their responsibilities.
3. When the competent authorities do not take or are unable to take appropriate measures (owing to lack of means, or unwillingness, or when no such

30 See editorial in the *IRRC*, No. 865, March 2007, pp. 5–6.

authorities exist), the ICRC takes direct action in their place (*substitution*) to meet the needs of the people or populations affected. If the situation is critical, the ICRC acts first then speaks to the authorities to persuade them to take appropriate measures or to help them examine possible solutions.

7. Guidelines for action

The above-mentioned strategy is implemented with consideration for the following guidelines:

1. The ICRC's humanitarian work is *impartial, neutral and independent*. Experience has taught it that this approach offers the best chance of being accepted during an armed conflict or other situation of violence, in particular given the risk that actors at a local, regional or international level may become polarized or radicalized. The integration of political, military and humanitarian means as recommended by some States is therefore a major source of difficulty for the ICRC. The organization insists on the need to avoid a blurring of lines while still allowing for the possibility of complementary action.
2. Many of the ICRC's tasks are carried out *close to the people concerned* – in the field in other words, where the organization has better access to them. The individuals and communities concerned must be consulted in order to better establish their needs and interests, and they should be associated in the action taken.³¹ Their value systems, their specific vulnerabilities and the way they perceive their needs must all be taken into consideration. The ICRC favours a participatory approach aimed at building local capacities.
3. The ICRC's work has a *universal* vocation. It is not limited to certain places, or to certain types of people (such as children or refugees). With a presence in numerous regions of the world, the ICRC has an overall vision which enables it to undertake comprehensive analysis. The organization must have a coherent approach everywhere it works if it is to appear transparent and predictable. However, this does not mean that ICRC activities are uniform. Taking the context into consideration is still a key aspect of analysis and strategy.
4. The ICRC gets involved during the emergency phase and stays for *as long as is necessary*. However, the organization is careful to ensure that its involvement does not dissuade the authorities from fully assuming their responsibilities or the communities affected from relying on their usual coping mechanisms. It also takes care not to get in the way of other organizations and actors who are building up civil society's resources. Measures are taken so that

31 They should contribute, for example, to decisions regarding priorities and regarding the implementation, management and assessment of programmes.

the ICRC is able to leave the scene in an appropriate manner when the time comes.

5. The ICRC engages in *dialogue* with all those involved in an armed conflict (or other situation of violence) who may have some influence on its course, whether they are recognized by the community of States or not. No one is excluded, not only because engaging in dialogue does not equate to formal recognition but also because multiple and varied contacts are essential for assessing a situation and for guaranteeing the safety of ICRC activities and personnel. The ICRC maintains a network of contacts locally, regionally and internationally. In the event of violations of international humanitarian law or other bodies of law or other fundamental rules protecting people in situations of violence, the ICRC attempts to influence the perpetrators. In the first instance, it will take bilateral confidential action (see modes of action, section 6.1.a above). When it comes to confidential action and to its communication with the public, the ICRC wants to promote transparency and present itself as an organization acting in a credible and predictable manner. Moreover, reflecting the interest that the States have in the unique status and role of the ICRC, the organization's right to abstain from giving evidence has been recognized by several sources of international law.³²
6. While doing what it can to help needy people, the ICRC also takes into consideration the efforts of others since there is a wide variety of agencies in the humanitarian world. The main objective of *interacting* with other providers of aid is to make the best use of complementary efforts in order to meet needs. Interacting should provide the basis for building on the skills of each and hence for obtaining the best possible results, then continue to respond to needs in the long term through programme handover. Interaction should therefore be based on transparency, equality, effective operational capacities and a complementary relationship between organizations. It starts with – but is not limited to – the Movement and its universal network. Indeed, the other components emerge as the ICRC's natural and preferred partners, with whom it would like to develop and strengthen a common identity and vision (see section 2.4 above).
7. Through its work, the ICRC bears a certain responsibility for the individuals or entire populations it endeavours to protect and assist. Its fundamental concern is to have a genuinely positive *impact* on their lives. It has set up a framework of accountability and tools for planning, monitoring and assessing its actions; these help it examine its performance and results and hence constantly

32 In three sources principally: (1) Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court, (2) Decision of 27 July 1999 by the International Criminal Tribunal for the Former Yugoslavia in the case *Prosecutor v. Simić et al.*, 'Decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness,' and (3) headquarters agreements that the ICRC has signed with over 80 States.

improve the quality of its work. The ICRC evaluates all of its activities using various criteria and indicators, including thresholds of success and failure, so that it can become more effective and find the most appropriate way of answering to beneficiaries and donors. Its work is regularly assessed, and reoriented if necessary.

The war dead and their gravesites

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Abstract

International humanitarian law (IHL) contains various provisions pertaining to the dead in armed conflicts and their burial places. This article provides an overview of the various substantive obligations with regard to persons having lost their lives in armed conflicts and their gravesites. The temporal scope of application of these provisions – namely whether they apply in times of peace – will also be analysed. Finally, the reasons why IHL as in force today is applicable to questions concerning the dead and their gravesites will be considered.

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The respect and deference paid to the fallen in war can be seen throughout the world. In many cities, towns and villages the ‘harsh history of life and death in wartime is frozen in public monuments’¹ – be it in the form of a war memorial at a French railway station commemorating the railway workers who died in the First or Second World War, or a list of deceased Japanese soldiers displayed in a *Gokoku* shrine. Issues pertaining to persons who have lost their lives in war are highly sensitive and can easily cause public outrage. Thus the pictures of mutilated dead US soldiers dragged through the streets of Mogadishu in 1993 provoked consternation around the world and contributed to the withdrawal of the US troops from Somalia.² More recently, the removal of a Red Army war memorial and a dozen graves in Tallinn led to massive protests which left one person dead and had a negative impact on the relationship between Estonia and Russia.³ Disputes over the maintenance of war cemeteries also regularly arise in all parts of the world – for example, the 2008 debate in Norway on whether the state remains under any

international obligations with regard to deceased World War II combatants and their gravesites.⁴

Interests and humanitarian issues concerning the dead are many and varied. First and foremost, the personal dignity of the deceased must be safeguarded. In addition, the relatives' right to know the fate of their next of kin and their interest in recovering the dead or having access to the burial place must be ensured. Moreover, not only individuals but also states are stakeholders. Thus the home countries of soldiers buried on foreign soil generally have a keen interest in respect for and maintenance of their war graves. Finally, institutions mandated by the international community to investigate and prosecute crimes committed in armed conflict have an interest in obtaining evidence on the cause and circumstances of death.

Legal answers to questions concerning persons deceased in armed conflict and their gravesites are provided by various branches and sources of law, which are often cumulatively applicable. First, numerous bilateral or multilateral agreements between states – e.g. agreements on co-operation and mutual relations, peace treaties,⁵ or agreements exclusively dealing with war cemeteries⁶ – contain rules on the dead and their graves. Secondly, where such concrete rules are absent, fragmentary, non-binding or incompatible with international law, general norms of international humanitarian law and international human rights law⁷ can provide answers. Thirdly, international norms engaging individual criminal responsibility⁸ or state responsibility become relevant when primary norms laying down obligations towards the dead and their graves are violated. Fourthly, domestic law may be

1 Jay Winter, *Sites of Memory, Sites of Mourning: The Great War in European Cultural History*, Cambridge University Press, Cambridge, 1995, p. 78.

2 'Rebels drag soldiers' bodies through Mogadishu streets', *The Guardian*, 21 March 2007, available at: <http://www.guardian.co.uk/world/2007/mar/21/1> (last visited 21 May 2009).

3 'Estonia to remove Soviet memorial', *BBC News*, 12 January 2007, available at: <http://news.bbc.co.uk/2/hi/europe/6255051.stm> (last visited 21 May 2009); 'Estonia seals off Soviet memorial', *BBC News*, available at: <http://news.bbc.co.uk/2/hi/europe/6597497.stm> (last visited 21 May 2009).

4 Norwegian Parliament, written question from Ine Marie Søreide (H) to the Minister of Culture and Church Affairs (*Stortinget, Skriftlig spørsmål fra Ine Marie Eriksen Søreide (H) til kultur- og kirkeministeren*), 16 June 2008, available at: <http://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=40641> (last visited 21 May 2009).

5 See e.g. Articles 225 and 226 of the Treaty of Versailles of 28 June 1919, available at: <http://avalon.law.yale.edu/imt/partvi.asp> (last visited 21 May 2009).

6 See e.g. the Exchange of Notes (With Annexes) between the Netherlands and the United States of America Constituting an Agreement Concerning the American War Cemetery at Margraten, The Hague, 26 September 1951, 158 UNTS 468; or Exchange of Notes between Austria and India Constituting an Agreement Concerning the Commonwealth War Cemetery at Klagenfurt, Vienna, 10 July 1968, 645 UNTS 65.

7 The following human rights contained in almost all regional and international human rights treaties are particularly relevant with regard to the dead and their graves: human dignity, freedom of religion, prohibition of cruel, inhuman or degrading treatment, respect for family and private life, and the right to privacy.

8 Article 8(2)(b)(xxi) and (c)(ii) of the Rome Statute prohibits the commission of outrages upon personal dignity in international and non-international armed conflicts. According to the *Elements of Crimes*, a dead person is a potential victim of this offence. See note 70 below.

relevant, such as fundamental rights enshrined in constitutions or bills of rights, military law, public health law or criminal law.

This article focuses exclusively on the provisions pertaining to the dead and their gravesites that are contained in international humanitarian law. After providing an overview of the various substantive obligations and their temporal scope of application, namely whether they apply in times of peace, it will be discussed why IHL as in force today is applicable to questions concerning the deceased and their burial places.

The dead and their gravesites: what substantive obligations does international humanitarian law contain?

With regard to international armed conflicts, the four Geneva Conventions (GC I to IV)⁹ and Additional Protocol I (AP I)¹⁰ thereto contain various provisions specifically dealing with mortal remains and gravesites. The mesh of IHL provisions on the dead that are applicable in non-international armed conflicts is much less densely interwoven: the only provision explicitly mentioning the dead is Article 8 of Additional Protocol II (AP II).¹¹ However, the absence of specific norms pertaining to the dead does not mean that the parties to the conflict can act in a legal vacuum. On the contrary, they are obliged to respect general norms of IHL, such as the prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment;¹² the prohibition of cruel and inhuman treatment;¹³ and the prohibition of collective punishment.¹⁴ In addition, customary international law¹⁵ on the dead might fill protection gaps in both types of conflicts. According to the ICRC Study on Customary International Humanitarian Law (ICRC study), all customary rules on the dead (with the exception of Rule 114 on the return

9 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter GC I); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (hereinafter GC II); Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (hereinafter GC III); Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (hereinafter GC IV).

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (hereinafter AP I).

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (hereinafter AP II). Article 8 states that '[w]hen circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay [...] to search for the dead, prevent their being despoiled, and decently dispose of them'.

12 GC I-IV, Art. 3(1)(c), and AP II, Art. 4(2)(e).

13 GC I-IV, Art. 3(1), and AP II, Art. 4(1).

14 AP II, Art. 4(2)(b).

15 Reference will be made to the customary rules as identified in the ICRC study on customary international humanitarian law: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: *Rules*, Cambridge University Press, Geneva, 2006.

of mortal remains and personal effects of the deceased) also apply to non-international conflicts.¹⁶

Terminology: the dead and their gravesites

Different terms are used in IHL provisions on the dead to describe the person who died: ‘the dead’,¹⁷ ‘dead person’,¹⁸ ‘bodies’,¹⁹ ‘the killed’,²⁰ ‘the remains of deceased’,²¹ or ‘remains of persons who have died’.²² They should be understood as synonyms. Generally, the provisions on the dead and their graves equally apply to ashes.²³

While the term ‘dead’ is self-explanatory, a clear definition of the terms ‘grave’,²⁴ ‘gravesite’,²⁵ or ‘other locations of the remains of persons’²⁶ is lacking. It is necessary to determine, for instance, whether the terms encompass monuments as such in memory of the dead, or mass graves resulting from the commission of crimes. The very wording of Article 34(2) of AP I – ‘graves and, as the case may be, other locations of the remains of persons’ – suggests a broad understanding of these notions. This view is supported by the respective commentaries on that article: ‘The fact that “other locations of the remains” of such persons are mentioned in addition to graves is in order to take into account all eventualities, lawful or unlawful, such as, in particular, cremation, collective graves, and even mass graves consequent upon atrocities committed during hostilities.’²⁷ Or: ‘This broad terminology has been chosen in order to cover any form of disposal of the remains.

16 *Ibid.* The rules specifically dealing with mortal remains and gravesites are the following: – Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [International and Non-International Armed Conflicts]– Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [International and Non-International Armed Conflicts]– Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [International Armed Conflicts]– Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [International and Non-International Armed Conflicts] – Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [International and Non-International Armed Conflicts].

17 GC I, Arts. 15(1) and 17; GC II, Arts. 18(1) and 20(1); AP II, Art. 8; Henckaerts and Doswald-Beck, above note 15, Rules 112 to 116.

18 GC I, Art. 16; GC II, Arts. 19 and 20(2).

19 GC I, Art. 17(3).

20 GC IV, Art. 15.

21 AP I, title of Art. 34.

22 AP I, Art. 34.

23 See e.g. GC I, Art. 17(3), and GC III, Art. 120(6).

24 See e.g. GC III, Art. 120(6), and GC IV, Art. 130(1).

25 See e.g. AP I, Art. 34.

26 AP I, Art. 34(2).

27 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/Dordrecht, 1987, p. 370, para. 1314.

It covers cemeteries, any place where urns are stored, etc.²⁸ Such an understanding seems justified, given the variety of religious and cultural practices to dispose of the dead. Furthermore, only an inclusive reading of the term ‘gravesite’ ensures that locations containing human remains other than sites established for commemoration, e.g. mass graves constructed in order to conceal the commission of crimes,²⁹ are covered by IHL.

Even though a broad reading of the notion ‘gravesite’ seems justified, it needs to be determined whether sites not containing any mortal remains could qualify as a gravesite, such as the Cenotaph in Whitehall or the Monument to the Missing at Thiepval.³⁰ The wording of various gravesite provisions implies that the site in question must contain mortal remains: ‘graves together with particulars of the dead interred therein’³¹ or ‘[l]ists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere’,³² ‘remains of deceased’³³ or ‘other locations of the remains of persons’.³⁴ Hence monuments or memorials that are solely a remembrance without hosting any deceased cannot be subsumed under the term ‘gravesite’ as used in the treaty language.³⁵ However, to qualify as such it should be sufficient that the gravesite contained some mortal remains at some point in time.³⁶ Thus for instance, the obligation to maintain a cemetery should not terminate once the remains are completely decomposed, or when it is impossible to physically transfer all remains when a gravesite is relocated years after its creation.³⁷

28 Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 177.

29 That mass graves are covered by IHL provisions on the dead follows from Article 34(4) of Protocol I regulating exhumation in cases of investigative necessity; an obvious example of a gravesite that needs to be excavated for investigative purposes would be a mass grave.

30 The Cenotaph in Whitehall is an empty tomb in London that symbolizes the tomb of all those who died in the First World War; the Monument to the Missing at Thiepval in France displays on its internal walls the names of approximately 73,000 British and Allied men who died in the Battle of the Somme in 1916 and whose bodies were never found. See Winter, above note 1, pp. 102–105.

31 GC I, Art. 17(4).

32 GC III, Art. 120(6).

33 AP I, title of Art. 34.

34 AP I, Art. 34(2).

35 However, if a memorial forms a unity with the grave – such as the statues by the German sculptor Käthe Kollwitz at the German war cemetery at Roggevelde where her son was buried (see Winter, above note 1, pp. 108–113) – the notion of ‘gravesite’ could be understood as encompassing the memorial. The American Battle Monuments Commission, which assumes the functions assigned by IHL to a Graves Registration Service, distinguishes between ‘memorials’ and ‘cemeteries’. For a list of memorials, see <http://www.abmc.gov/memorials/index.php> (last visited 20 May 2009); for a list of permanent American burial grounds on foreign soil, see <http://www.abmc.gov/cemeteries/cemeteries.php> (last visited 20 May 2009).

36 Providing a definition that is neither overly inclusive nor too narrow is not simple in light of the variety of cultural and religious practices for disposing of the dead. The definition at hand excludes pure memorials; hence Shinto shrines – which do not host any dead bodies because they are perceived as impure and are therefore buried somewhere else – would for instance not be covered by the definition provided here.

37 E.g. the planned individual reburial of British and Australian troops found in a mass grave in France in 2008. See ‘Australian, British WWI remains to be reburied’, *Agence France Presse*, 1 August 2008,

Obligation to search for, collect, and evacuate the dead

Taking of all possible measures without adverse distinction

Parties to conflict are under an obligation to search for the dead.³⁸ Even though not explicitly stated in the respective treaty provisions – as it is in the customary rule³⁹ – the obligation must apply to all the dead ‘without adverse distinction’. Not only is this an underlying principle of IHL, it is also affirmed with regard to the wounded and sick⁴⁰ and can therefore be applied *mutatis mutandis* to the dead. Furthermore, the rules on the ‘General protection of populations against certain consequences of war’ in the Fourth Geneva Convention, to which the provision on the dead belongs, cover ‘the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion’.⁴¹ Under AP II, the general *ratione personae* provision also states that it ‘shall be applied without any adverse distinction [...] to all persons affected by an armed conflict’.⁴²

The search for the dead is a *sine qua non* for respect for other obligations pertaining to mortal remains and gravesites, such as returning the remains or providing a decent burial.⁴³ Persons who die as a result of armed conflict often remain unaccounted for because their death is not recorded; the recording of information in turn is very difficult if the bodies or mortal remains of those killed in action or in extrajudicial killings are not collected.⁴⁴ Thus for instance, the death of thousands of persons who died in concentration camps during the World War II, whose mortal remains were burned or otherwise disappeared, could only be established by assembling information found in the paper trail left by the Nazis, such as ‘death books’.⁴⁵

available at: <http://www.brisbanetimes.com.au/news/world/australian-british-wwi-remains-to-be-reburied/2008/08/01/1217097470597.html> (last visited 29 December 2008).

38 GC I, Art. 15; GC II, Art. 18(1); GC IV, Art. 16(2); AP II, Art. 8; Henckaerts and Doswald-Beck, above note 15, Rule 112.

39 Henckaerts and Doswald-Beck, *ibid.*, Rule 112.

40 GC I and II, Art. 12.

41 GC IV, Art. 13, read together with GC IV, Art. 16(2).

42 AP II, Art. 2(1).

43 Henckaerts and Doswald-Beck, above note 15, p. 407.

44 ICRC, *Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-Specialists, For All Armed Forces, For All Humanitarian Organizations*, p. 9, available at: [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0858/\\$File/ICRC_002_858.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0858/$File/ICRC_002_858.PDF!Open) (last visited 20 May 2009).

45 The Nazis entered the names of interned persons who were murdered or perished in concentration camps in so-called ‘Totenbüchern’ (‘death books’); however, these books do not account for every dead person, since many ‘death books’ were destroyed by the Nazis and no such books were kept in extermination camps where the newcomers from the transports were murdered on the spot. See http://www.its-arolsen.org/en/help_and_faq/glossary/index.html (last visited 20 May 2009). For a list of other documents used by the International Tracing Service to trace missing persons and to ascertain the fate of victims of Nazi persecution, see http://www.its-arolsen.org/en/help_and_faq/dokumentenbeispiele/index.html (last visited 20 May 2009).

The First and Second Geneva Conventions, as well as customary law and Protocol II, oblige the parties to conflict ‘to take all possible measures’. This wording indicates an obligation of means rather than result. The drafters were taking into account that in some cases collection of all the dead cannot be achieved – for instance because ongoing military operations make it impossible for medical personnel to search for and collect the dead (especially if priority must be given to the wounded),⁴⁶ or if in naval warfare a rescue operation would expose the vessel to attack.⁴⁷ The measures sufficient to meet this obligation can vary: in naval warfare, for instance, certain fighting ships such as fast torpedo-boats or submarines will have inadequate equipment or insufficient accommodation to pick up the crews of ships they have sunk. In these cases, the obligation can be met by alerting hospital ships or coastal authorities, requesting assistance from air forces or appealing to neutral vessels.⁴⁸

Time and circumstances

The various provisions differ with regard to when and under which circumstances rescue operations must take place. GC I requires that they be carried out not only after an engagement – as was stated in the 1929 Geneva Convention – but ‘at all times’. This broader time element was introduced in 1949 to take into account the realities of contemporary warfare in which hostilities became more continuous in character, compared with the past.⁴⁹ However, with regard to naval warfare the drafters were of the view that the term ‘after each engagement’ was better suited to the special conditions prevailing at sea than the wording ‘at all times’.⁵⁰ The provision in the Fourth Geneva Convention commands that the dead be searched for only ‘[a]s far as military considerations allow’.⁵¹

So while GC I and GC II emphasize the humanity principle, GC IV places the emphasis on military necessity. However, according to the ICRC Commentary, the ‘difference is more apparent than real’, and the extent of the obligation under GC IV would be similar to that under GC I and GC II – the different wording would only have been chosen because under GC IV, ‘the service responsible for searching for wounded and dead is placed not under the control of military commanders, but under that of the civilian authorities; it is obvious that the latter could not send relief teams into the battle area without taking into account the

46 See GC I, Art. 12(3), stating that only urgent medical reasons authorize priority in the order of treatment to be administered.

47 Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. I (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*), Art. 15, p. 151; Vol. II (*Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*), Art. 18, p. 131.

48 GC II, Art. 21(1); Pictet, above note 47, Vol. II, Art. 18, p. 131.

49 GC I, Art. 15; Pictet, *ibid.*, Vol. I, Art. 15, p. 151.

50 GC II, Art. 18; Pictet, *ibid.*, Vol. II, Art. 18, p. 132.

51 GC IV, Art. 16(2).

essential military requirements. Consequently, the Diplomatic Conference rejected various proposals that the reservation should be omitted.⁵²

The wording ‘at all times’ used in GC I might be misleading, as the obligation to search is not absolute but hinges on the realities on the battlefield. On the other hand, the formulation ‘[a]s far as military considerations allow’ used in GC IV could imply that considerations of humanity should not be given weight when deciding upon a rescue operation. Thus the wording in Article 8 of AP II and the customary norm⁵³ – ‘[w]henever circumstances permit, and particularly after an engagement’ – might best reflect the current understanding of when and under which circumstances the obligation to search, collect and evacuate has to be carried out, whether in international or non-international armed conflict.

The addressees of the obligation to search for, collect and evacuate the dead

In international armed conflicts, the obligation to search for the dead is addressed to the parties to the conflict. The ICRC Commentary on the First Geneva Convention reflects a traditional concept of warfare when stating that ‘the commonest and the most important case will be that of enemy troops retiring in the face of an attack. The occupant of the battlefield must then, without delay, make a thorough search of the captured ground so as to pick up all the victims’.⁵⁴ However, in times of remote warfare, the search for and collection of the dead might no longer be carried out first and foremost by the enemy troops, who are then not physically present on the battlefield.

In non-international armed conflicts, Article 3 common to the four Geneva Conventions implies that not only the ratifying (state) party, but every party to a non-international armed conflict, is required to apply its guarantees ‘by the mere fact of that Party’s existence and the existence of an armed conflict between it and the other Party’.⁵⁵ AP II likewise imposes the same duties on both state and insurgent parties to the conflict.⁵⁶ Thus it follows that non-state parties to a conflict are also bound by the obligation to search for, collect and evacuate the dead. However, to successfully discharge certain obligations, a certain degree of control over the territory might be necessary, meaning that all parties to the conflict might not be able to perform every obligation to the same extent at all times.

52 Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Art. 16, pp. 136–137.

53 Henckaerts and Doswald-Beck, above note 15, Rule 112.

54 Pictet, above note 47, Vol. I, Art. 15, p. 151.

55 *Ibid.*, Vol. I, Art. 3, p. 51.

56 Sandoz, Swinarski and Zimmermann (eds), above note 27, p. 1345, para. 4442.

Appeal to the civilian population and aid societies

Parties to conflict may appeal to – but have no right to ‘mobilize’⁵⁷ – the civilian population and aid societies to search for the dead and report their location.⁵⁸ The drafters’ intention in Article 17 of AP I was to limit the task of the civilian population and aid societies to searching for the dead and reporting their location, and to exclude the collection of the dead by them.⁵⁹ However, the functions of the teams mentioned in Article 33(4) thereof – which can consist of personnel of international humanitarian organizations⁶⁰ – include the collection of the dead. This contradiction between the two provisions of AP I (or rather their interpretations by commentators) does not seem to stand in the way of humanitarian organizations assisting parties to conflict in the collection of the dead. The ICRC and National Societies, for instance, not only engage in searching for and reporting the location of the dead, but also in the collection of mortal remains.⁶¹

The law of non-international armed conflicts does not specify how to carry out the search for and collection of the dead,⁶² but as relief societies and the civilian population may offer their services for the collection and care of the wounded, sick and shipwrecked,⁶³ they should by analogy also be able to do so with regard to the dead.

Persons covered by the obligation to search for, collect and evacuate the dead

It is submitted that ‘the dead’ covered by the GC I and GC II⁶⁴ provisions on the search, collection and evacuation of the dead include protected persons covered by general *ratione personae* provisions,⁶⁵ as well as a party’s own nationals, even though the latter are generally not beneficiaries of the Geneva Conventions.⁶⁶ First, the simple reference to ‘the dead’ can be contrasted with provisions on identification of the dead using the words ‘dead person of the *adverse* Party’.⁶⁷ The ICRC Commentary confirms (with regard to GC I) that Article 15 ‘deals with soldiers

57 Pictet, above note 47, Vol. I, Art. 17, p. 218.

58 AP I, Art. 17(2); provision for the civilian population (without mentioning relief societies) to assume such a role is made in GC I, Art. 18, only with regard to the wounded and sick; GC II, Art. 21(1), states that the parties to the conflict may appeal to the charity of commanders of neutral vessels to collect the dead.

59 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 17, p. 218, para. 724.

60 *Ibid.*, Art. 33, p. 363, para. 1289.

61 *Annual Report 2008*, ICRC, Geneva, 2008, p. 187 (on ICRC activities in Afghanistan pertaining to the collection, burial and/or repatriation of human remains after fighting) and p. 350 (on ICRC help for the Palestine Red Crescent and Ministry of Health emergency services in the collection of dead bodies).

62 See AP II, Art. 8.

63 AP II, Art. 18(1).

64 GC I Art. 15(1); GC II, Art. 18.

65 GC I and II, Art. 13. Similarly to GC I, Art. 13 of GC II defining the passive personal scope of application does not mention the dead, but simply the wounded, sick and shipwrecked at sea.

66 Pictet, above note 52, Vol. IV, Art. 4, p. 46.

67 GC I, Art. 16(1) (emphasis added); GC II, Art. 19 (emphasis added).

who have fallen wounded or sick in the actual area where fighting takes place, and defines the obligations incumbent on both *friend and foe* in regard to them', while on the other hand, Article 16 deals with obligations towards the wounded and sick of the opposing party once they have been collected.⁶⁸ Secondly, the corresponding obligation in GC IV applies to the whole civilian population – whether foreign or own nationals in the territories of the parties to the conflict.⁶⁹ It would consequently be difficult to argue that a state's own civilian nationals are covered in GC IV, but not its own combatants in GC I. Thus the obligation to search for the dead and prevent their being despoiled applies similarly to both enemy and own nationals.

In the law of non-international armed conflicts, Common Article 3 of the Geneva Conventions does not explicitly list the dead among the persons covered by its guarantees. However, the obligation to treat humanely all '[p]ersons taking no active part in the hostilities, including [...] those placed *hors de combat* by [...] any other cause' than sickness, wounds, or detention, could arguably apply to deceased persons.⁷⁰ Relatives of the deceased falling within the personal scope of application of Common Article 3 could also invoke its guarantees, for instance by claiming that non-respect for their relative's mortal remains constitutes inhuman treatment or, more specifically, an outrage upon their dignity.⁷¹ The obligations in Protocol II regarding the dead are for the benefit of 'all persons affected by an armed conflict',⁷² regardless of their location, as according to the ICRC Commentary, '[p]ersons affected by the conflict [...] are covered by the Protocol wherever they are in the territory of the State engaged in conflict.'⁷³

Respect for the dead

The command that mortal remains must be respected⁷⁴ is a concretization of the general obligation to protect the dignity of persons and the prohibition of outrages upon personal dignity. Such outrages can constitute an offence under the Rome Statute;⁷⁵ the respective Elements of Crimes specify that the victim need not

68 Pictet, above note 47, Vol. I, Art. 16, p. 159 (emphasis added).

69 GC IV, Art. 16 (obligation to search for the killed and to protect them against pillage and ill-treatment), read together with GC IV, Art. 13 (in which the definition of the persons covered by GC IV, Arts. 14 to 26, differs from that of GC IV, Art. 4).

70 The Assembly of States Parties to the ICC Statute considers that for purposes of the Statute, a dead person could potentially be a victim of the crime of committing outrages upon the personal dignity. See International Criminal Court, *Elements of Crimes*, adopted by the Assembly of States Parties, First Session, New York, 3–10 September 2002, Official Records ICC-ASP/1/3, Art. 8(2)(b)(xxi), fn. 49, and Art. 8(2)(c)(ii), fn. 57: 'For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation'.

71 For a practical example, see the text accompanying note 105 below.

72 AP II, Art. 2(1).

73 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 2, pp. 1359–1360, para. 4490.

74 See e.g. AP I, Art. 34(1).

75 Rome Statute, Art. 8(2)(b)(xxi) and Art. 8(2)(c)(ii).

personally be aware of the existence of the offence and that the term 'person' used in the criminal provision includes the dead.⁷⁶

The general notion of respect includes preventing the dead from being despoiled.⁷⁷ This concretization of the general prohibition of pillage is intended to guard the dead from those who may seek to lay hands on them and to prevent them from falling prey to the 'hyenas of the battlefield'. The US Military Tribunal at Nuremberg stated, in the *Pohl* case, that robbing the dead 'is and always has been a crime'.⁷⁸ While this pronouncement relates to the belongings of the dead, the prohibition of ill-treatment and mutilation⁷⁹ protects the mortal remains as such. Trials held in the aftermath of the Second World War revealed odious acts of mutilation of dead bodies,⁸⁰ as well as cannibalism.⁸¹ Respect further requires that dead bodies not be exposed to public curiosity and that this be avoided by placing them in an appropriate place before burial or cremation.⁸²

Identification and recording of information on the dead

'History counts its skeletons in round numbers. A thousand and one remain a thousand as though the one never existed.'⁸³ While accounting for every dead person might not be necessary in order to establish a reliable historical record, it is of major importance when seen through the eyes of surviving dependants. Often only the official establishment of death can close the circle of uncertainty and put an end to relatives' false hopes. In this way acknowledgment of the loss of life represents a first step in the mourning process. Being in possession of information about the fate of relatives not only has a psychological and emotional component, but is also of great legal significance: many rights of the survivors only take effect once death is established, for instance by the issuing of a death certificate. This in turn necessitates that human remains are identified and information is recorded and transferred to the respective authorities. Moreover, proper identification and

76 See International Criminal Court, above note 70.

77 GC I, Art.15; GC II, Art. 18(1); GC IV, Art. 16(2); AP II, Art. 8; Henckaerts and Doswald-Beck, above note 15, Rule 113.

78 US Military Tribunal at Nuremberg, *Pohl* Case, Judgment, 3 November 1947, reproduced in Henckaerts and Doswald-Beck, above note 15, p. 409.

79 GC IV, Art. 16(1); Henckaerts and Doswald-Beck, above note 15, Rule 113.

80 In 1946 the US Military Commission at Yokohama sentenced Japanese soldiers for 'bayoneting and mutilating the dead body of a United States prisoner of war' (*Kikuchi and Mahuchi* Case, Judgment of 20 April 1946). In 1947 the US General Military Court at Dachau found a German medical officer guilty of maltreating the body of a deceased US airman. The convicted officer had severed the head from the dead man's body, had baked it, removed the skin and flesh and bleached the skull (*Schmid* Case, Judgment of 19 May 1947). The cases are reproduced in Henckaerts and Doswald-Beck, above note 15, p. 409.

81 In 1946 the US Military Commission in the Mariana Islands convicted soldiers for 'preventing an honorable burial due to the consumption of parts of the bodies of prisoners of war by the accused during a special meal in the officers' mess' (*Yochio and Others* Case, Judgment 2–15 August 1946); reproduced in Henckaerts and Doswald-Beck, above note 15, p. 409.

82 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, p. 369, para. 1307.

83 Wislawa Szymborska, 'Hunger camp at Jasko', in Carolyn Forché (ed), *Against Forgetting: Twentieth Century Poetry of Witness*, W.W. Norton, New York, 1993, p. 459.

recording of information on the dead is also a means of fulfilling the right of human beings not to lose their identity after death.⁸⁴

All four Geneva Conventions require an examination of the body, preferably carried out by a physician, with a view to confirming death and establishing identity.⁸⁵ In addition, GC I and GC II oblige parties to the conflict to record as soon as possible any other information which may assist in the identification of the dead collected on the battlefield and provides an indicative list of particulars to be registered.⁸⁶ The Third and Fourth Geneva Conventions (GC III and GC IV), both dealing with persons in the hands of the enemy, oblige the detaining power to issue death certificates or certified lists containing, *inter alia*, information about the deceased person and the circumstances of death.⁸⁷ All four treaties provide for channels through which this information should pass from the enemy power to the respective addressee.⁸⁸ The injunction to collect, record and transmit information about the dead is intended to ensure that the person does not remain unaccounted for, and that the right of families to know the fate of their relatives⁸⁹ can be respected.

The wording ‘Parties to the conflict shall ensure...’ used in the respective provisions constitutes an obligation; hence they must ‘make certain that the prescribed task, for which they are responsible, is duly carried out. There is no justification for thinking that the task is optional’.⁹⁰ However, the obligation should be regarded as fulfilled as long as parties make every possible effort and use all means at their disposal to do so – even if this fails to result in an identification of the person. Thus other interests, such as public health concerns making swift burials imperative and not allowing for identification of all persons (as was the case in Chad in 2008),⁹¹ may be taken into account. Some identification measures are already foreseen in the Geneva Conventions, such as collecting half of the identity disk or conducting autopsies.⁹² Depending on the context and the warring parties, more elaborate means such as DNA samples may be used.⁹³

84 Interpol, ICPO-Interpol General Assembly, 65th session, Resolution AGN/65/RES/13 (1996), available at: <http://www.interpol.int/Public/ICPO/GeneralAssembly/Agn65/Resolutions/AGN65RES13.asp> (last visited 21 May 2009).

85 GC I, Art. 17(1); GC II, Art. 20(1); GC III, Art. 120(3); GC IV, Art. 129(2). No similar provision exists for non-international armed conflict; the obligations have however been consolidated in customary law. See Henckaerts and Doswald-Beck, above note 15, Rule 116.

86 GC I, Art. 16, and GC II, Art. 19(1).

87 GC III, Art. 120(2), and GC IV, Art. 129.

88 GC I, Art. 16(2) and (3); GC II, Art. 19(2) and (3); GC III, Art. 120(1) and (2); GC IV, Art. 129(1) and (3).

89 AP I, Art. 32.

90 Pictet, above note 47, Vol. I, Art. 16, pp. 176–177.

91 See e.g. ICRC, *Chad: Saving lives as fighting subsides*, Operational Update, 7 February 2008, available at: <http://icrc.org/web/eng/siteeng0.nsf/html/chad-update-070208> (last visited 30 March 2009).

92 Henckaerts and Doswald-Beck, above note 15, pp. 419–420.

93 Luc Capdevila and Danièle Voldman, ‘Du numéro matricule au code génétique: la manipulation du corps des tués de la guerre en quête d’identité’, *International Review of the Red Cross*, Vol. 84, No. 848, December 2002, pp. 751–765.

Return of mortal remains and personal effects of the dead

Mortal remains

GC I and GC II provide for the possibility of transferring bodies to the home country.⁹⁴ During the drafting of the Geneva Conventions some delegations wished to omit this reference altogether, since they preferred to have their combatants buried in the actual theatre of war where they fell. Others pleaded for an imperative clause to bring the dead home at the close of the hostilities. To strike a balance between these diverging views on where fallen soldiers should be laid to rest, the clause was left optional. In GC III and GC IV, only the possibility of returning ashes is explicitly stated.⁹⁵

For the High Contracting Parties to AP I in whose territory graves or mortal remains are situated, it is mandatory to conclude agreements in order to facilitate the repatriation of mortal remains.⁹⁶ A request for the return of mortal remains can be formulated either by the home country or by the next of kin. However, the home country can object to a request by relatives. This veto power of the home country was deemed essential to the maintenance of war cemeteries in foreign countries. In particular, countries belonging to the British Commonwealth followed a policy of interring their soldiers in quite large war cemeteries in the country where they fell – for example, the Tyne Cot cemetery in Belgium hosting fallen soldiers from the Great War.⁹⁷ If families had an unlimited right to request exhumation and repatriation, the integrity of these cemeteries could not be ensured.⁹⁸

The return of mortal remains often takes place years after the end of hostilities, such as Indonesia's 1991 handover of the ashes of 3500 Japanese soldiers killed during the Second World War to the Japanese ambassador in Jakarta.⁹⁹ It is not uncommon for the ICRC to act as a neutral intermediary between warring parties for this purpose; to give only one example, it facilitated the handover of deceased persons between the Israeli authorities and Hezbollah in July 2008.¹⁰⁰

In non-international armed conflicts, neither a treaty nor a customary rule explicitly covers the return of mortal remains. This is a real gap in humanitarian law. The ICRC Study merely recognizes a trend towards an obligation for the parties to such conflicts to return the mortal remains and effects of the deceased.¹⁰¹ Only by recourse to general norms of IHL can an obligation to return the mortal

94 GC I, Art. 17(3), and Art. 20(2) of GC II referring to the provisions on the dead contained in GC I.

95 GC III, Art. 120(6), and GC IV, Art. 130(2).

96 AP I, Art. 34(2).

97 The Commonwealth War Graves Commission provides a description of this war cemetery. See http://www.cwgc.org/search/cemetery_details.aspx?cemetery=85900&mode=1 (last visited 21 May 2009).

98 Bothe, Partsch and Solf, above note 28, p. 179.

99 Henckaerts and Doswald-Beck, above note 15, p. 412.

100 'Hezbollah, Israel swap corpses on Lebanon border', *Reuters*, 16 July 2008, available at: http://www.reuters.com/article/homepageCrisis/idUSL16516924._CH_.2400 (last visited 21 May 2009).

101 Henckaerts and Doswald-Beck, above note 15, pp. 411–412.

remains be construed. It could accordingly be argued that not returning mortal remains to the relatives constitutes a form of collective punishment¹⁰² and violates the prohibition of cruel or inhuman treatment¹⁰³ and of outrages upon personal dignity, in particular humiliating and degrading treatment.¹⁰⁴ In Russia, for instance, a federal law forbids authorities to return the bodies of persons qualified as terrorists to their families or to inform the relatives about their place of burial. Thus the bodies of several people killed in Chechnya, who were qualified as terrorists, were not handed over to their families for burial despite pleas and persistent efforts. Russia's Constitutional Court upheld the ban on handing over bodies of persons classed as terrorists and turned down several appeals filed by relatives of the deceased.¹⁰⁵ It could be argued that this legislation and practice violate the prohibition of collective punishment since relatives – who did not themselves commit hostile acts – suffer some form of punishment if deprived of the possibility to perform funeral rites. Furthermore, the anguish caused by the lasting uncertainty as to the whereabouts of the remains and their actual treatment could constitute psychological suffering and feelings of degradation that might reach the level of inhuman treatment or qualify as an outrage upon personal dignity.

Personal effects

The parties to an international armed conflict are under an obligation to forward personal effects of deceased protected persons through the information bureau provided for in GC III¹⁰⁶ to their country of origin.¹⁰⁷ The terms 'personal effects' or 'personal valuables' have to be understood in a broad sense as including last wills, other documents of importance to the next of kin, money, and also articles of an intrinsic or sentimental value. However, weapons and other military material may be kept as war booty.¹⁰⁸

Disposal of the body

Notwithstanding how a conflict is qualified, the parties must dispose of the dead respectfully. However, only the law of international armed conflict specifies what is meant by this, specifically requiring, *inter alia*, individual burial according to the

102 AP II, Art. 4(2)(b).

103 GC I-IV, Art. 3(1), and AP II, Art. 4(1).

104 GC I-IV, Art. 3(1)(c), and AP II, Art. 4(2)(e).

105 'Court upholds ban on returning terrorists' bodies to relatives', *RIA Novosti*, 28 June 2008, available at: <http://en.rian.ru/russia/20070628/67977135.html> (last visited 21 May 2009); Sudha Ramachandran, 'The dreadful dead of terror', *Asia Times Online*, 7 July 2004, available at: http://www.atimes.com/atimes/South_Asia/FG07Df05.html (last visited 21 May 2009).

106 GC III, Art. 122.

107 GC I, Art. 16(3); GC II, Art. 19(3), GC III, Art. 122(9); GC IV, Art. 139. With regard to non-international armed conflicts, no specific obligation exists.

108 Henckaerts and Doswald-Beck, above note 15, p. 413.

deceased's religious beliefs, and the grouping of graves. The interpretative text in the ICRC Study expresses some hesitation as to whether such precise guarantees exist under the law of non-international armed conflicts, merely stating that: 'It is likely that some of these requirements also apply in non-international armed conflicts on the basis of national law'.¹⁰⁹

Respect for the body and for religious beliefs

The four Geneva Conventions prescribe that the dead must be honourably interred and that the rites of the religion to which the deceased belonged must – if possible – be respected.¹¹⁰ Given that some rites, such as those requiring the use of special ingredients or the sacrifice of an animal, might be difficult to observe in the special context of armed conflict where the death toll is usually high and resources scarce, an optional rather than a mandatory clause was enacted.¹¹¹

Individual burial and grouping of graves

The Geneva Conventions furthermore mandate the warring parties to bury the deceased – as far as circumstances permit – individually and not in collective graves.¹¹² The rationale behind these provisions is that the idea of common graves conflicts with the sentiment of respect for the dead and would also make subsequent exhumation more difficult.¹¹³ However, these interests might be overridden, for instance by public health concerns or military considerations.¹¹⁴

According to the Geneva Conventions, graves have to be grouped, if possible, according to the nationality of the deceased.¹¹⁵ The drafters' intention was to avoid hasty roadside burials and to achieve the grouping of graves in cemeteries. Besides nationality being the most obvious criterion for the grouping, it also allows the home country to pay collective tribute to its dead at a later date.¹¹⁶

Burial favoured over cremation

The provisions on the dead contained in the four Geneva Conventions strongly favour burial over cremation. Bodies can only be cremated for imperative reasons of hygiene or for motives based on the religion of the deceased.¹¹⁷ GC III and GC IV allow for cremation if this was the wish of the deceased prisoner of war or

109 *Ibid.*, p. 417.

110 GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1).

111 Pictet, above note 47, Vol. I, Art. 17, p. 179; Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III, *Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 120, p. 565.

112 GC I, Art. 17(1); GC II, Art. 20(1); GC III, Art. 120(5); GC IV, Art. 130(2).

113 Pictet, above note 47, Vol. I, Art. 17, p. 177.

114 Pictet, above note 52, Vol. IV, Art. 120, p. 507.

115 GC I, Art. 17(3), and GC III, Art. 120(4).

116 Pictet, above note 47, Vol. I, Art. 17, p. 180.

117 GC I, Art. 17(2); GC III, Art. 120(5); GC IV, Art. 130(2).

internee.¹¹⁸ The idea of a general prohibition on cremation was new when the 1949 Conventions were drafted and partly stemmed from a fear of repetition of certain criminal acts that occurred during the Second World War.¹¹⁹ The Conventions further require that if cremation is exceptionally allowed, the reasons for doing so should be stated in the death certificate or the authenticated lists of the dead.¹²⁰ This requirement helps to avoid all traces of the deceased being eradicated and the dead thus remaining unaccounted for.

Persons covered by obligations regarding human remains

Articles 16 and 17 of GC I both only apply to the dead of the adverse party. Although only the former provision specifies this, whereas the latter simply uses the term ‘the dead’, the conclusion that the persons covered by Article 17 are dead persons of the adverse party is supported by its reference to ‘the home country’.¹²¹ This scope of application is mirrored by the corresponding provisions in GC II on recording and forwarding information on the dead¹²² and on what should happen with their bodies.¹²³ The provisions of GC III under the heading ‘Death of prisoners of war’¹²⁴, however, cite persons who died while prisoners of war as the persons to whom they apply.¹²⁵ GC IV’s provisions on the dead¹²⁶ apply only to ‘internees who died while interned’ or ‘deceased internees’, i.e. protected persons¹²⁷ who were interned on the basis of Articles 41 to 43, 68, or 79 of GC IV.

In general, it can be said that the provisions on the dead contained in each of the Geneva Conventions (including those on gravesites, discussed below) apply only to a limited circle of deceased persons.¹²⁸ Protocol I aimed to fill these

118 GC III, Art. 120(5), and GC IV, Art. 130(2). GC I and GC II do not contain this further justification for cremation since they are essentially concerned with the dead picked up on the battlefield, where such a wish would be difficult to ascertain.

119 Pictet, above note 47, Vol. I, Art. 17, pp. 178–179.

120 GC I, Art. 17(2); GC II, Art. 20(2); GC III, Art. 120(5); GC IV, Art. 130(2).

121 AP I, Art. 34, also contains similar guarantees to GC I, Arts. 16 and 17, and is – according to the *travaux préparatoires* – not applicable to a state’s own nationals; see note 133 below. It should also be recalled that under the 1929 Geneva Convention, the obligations in GC I, Arts. 16 and 17, were contained in one single article and were only divided in 1949 when they were spelled out in much more detail. See Pictet, above note 47, Vol. I, Art. 17, pp. 175–176.

122 GC II, Art. 19.

123 GC II, Art. 20. With regard to disposal of the body, it should be noted that if the dead person is taken ashore, that person then comes within the ambit of GC I (GC II, Art. 20(2)).

124 GC III, Arts. 120–121.

125 For an overview on who is considered to be a prisoner of war, see GC III, Art. 4, and Pictet, above note 111, Vol. III, Art. 4, pp. 44–73. The personal scope of application of GC I has to be distinguished from that of GC III: the provisions of GC I are ‘essentially concerned with the dead picked up by the enemy on the battlefield, that is to say, with the mortal remains of combatants who have never for one moment been prisoners of war’: Pictet, above note 47, Vol. I, Art. 17, p. 175.

126 GC IV, Arts. 129–131.

127 In terms of GC IV, Art. 4.

128 The customary rules in the ICRC Study (Henckaerts and Doswald-Beck, above note 15, Rules 112–116) simply refer to ‘the dead’ and thus follow – unlike the Geneva Conventions – the broadest possible *ratione personae* concept; the only limitation that should also apply here is that death must have resulted from an armed conflict or occupation.

protection gaps.¹²⁹ Under its Article 34(1), the obligations to respect mortal remains and gravesites and to maintain and mark gravesites apply to all persons who have died for reasons related to occupation,¹³⁰ persons who have died in detention resulting from occupation or hostilities,¹³¹ and persons who are not nationals of the country in which they have died as the result of hostilities, unless they receive more favourable consideration under the Geneva Conventions or any other provision of AP I.¹³² However, the obligations laid down in AP I do not apply to a party's own nationals.¹³³

Gravesites and other locations of mortal remains

The Geneva Conventions oblige the parties to an international armed conflict to ensure that graves are respected, properly or suitably maintained and marked so that they may always be found/recognized.¹³⁴ The identical obligations contained in AP I as well as in customary law¹³⁵ are addressed to all states on whose territories gravesites exist and thus to a wider circle of states.¹³⁶ These obligations do not cease with the close of hostilities, but belong to the provisions applicable at all times.¹³⁷

It is important to note that these obligations have become customary rules, since the treaty law of non-international armed conflict is mute on the issue. This is possibly due to the fact that the performance of these obligations requires a degree of territorial control which states are usually reluctant to acknowledge non-state entities as having. However, this should not *per se* be an obstacle to

129 Sandoz, Swinarski and Zimmermann (eds), above note 27, Introduction to Part II, Section III, p. 341, para. 1134.

130 This would also cover, for instance, all those civilians who are not protected persons or not interned at the time of their death. Commentaries suggest that a direct causal link between occupation and death has to exist and that only death 'due to the special circumstances of occupation' would be encompassed. For examples, see Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, paras. 1299–1300.

131 The 'detention resulting from occupation' referred to in Article 34 of AP I is a wider concept than internment of protected persons under GC IV. If, for instance, the Occupying Power arrests and prosecutes a civilian for serious acts of sabotage, the detention would not be an internment within the meaning of GC IV; thus if such a person dies, its provisions do not apply. See Bothe, Partsch and Solf, above note 28, pp. 173 and 176.

132 In this case, death has to be a result of hostilities, such as bombardments or other attacks; however, death need not be immediate as long as a causal link is present. Sandoz, Swinarski and Zimmermann (eds), above note 27, para. 1305.

133 During the drafting of the Section containing Article 34 of AP I, there was discussion on whether it should impose obligations on a state vis-à-vis its own nationals. The working group stated in its report that these provisions do 'not impose on any High Contracting Party or Party to a conflict obligations with regard to its own nationals'. This clarification was later deleted by consensus, "because it was self-evident that the article did not apply to a Party's own nationals". *Ibid.*, Introduction to Part II, Section III, p. 342, para. 1195.

134 GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1).

135 Henckaerts and Doswald-Beck, above note 15, Rules 115 and 116.

136 AP I, Art. 34.

137 See text belonging to notes 179–193 below.

a normative development in that sense – all the more as the application of AP II is likewise conditional on territorial control.¹³⁸

Respect for and maintenance of burial places

Various provisions stipulate that graves must be respected.¹³⁹ The wording ‘to ensure respect’ indicates a positive obligation, hence active measures of protection are required. In many cases, a Graves Registration Service is mandated with ensuring respect for burial places by preventing violation of graves and sacrilege of all kinds.¹⁴⁰ While the obligation to respect gravesites aims at preventing graves from being vandalized and the peace of the dead being disturbed, the obligation to maintain gravesites points towards activities to keep and conserve locations where persons are buried. Considering that such maintenance entails financial expenditure and that relations between the deceased’s home country and the state where the graves are located are often tense, this obligation regularly gives rise to disputes. In Norway, for instance, a public debate took place in 2008 on whether the state today incurs obligations under IHL vis-à-vis combatants deceased in the Second World War and their gravesites situated on Norwegian territory. The Ministry of Culture and Church Affairs took the stance that the work carried out by the Norwegian Official Graves Registration Service, which is, *inter alia*, responsible for the administration of all war graves in Norway, would not be based on any international law.¹⁴¹

Marking of gravesites

The obligation to mark gravesites and other locations where mortal remains are situated¹⁴² is intrinsically linked to two other obligations. On the one hand, it is a concrete aspect of the broader obligation to maintain war graves. On the other hand, it is a prerequisite to guarantee access to burial places. The bearers of that obligation are free to mark the graves in the manner they see fit, as long as it is done ‘in such a way that they can always be recognized’¹⁴³ and ‘that they may always be found’.¹⁴⁴ Most commonly, plates displaying the surname, first name and date of birth of the deceased person are affixed to the graves.¹⁴⁵ In Norway, it was particularly the removal of name plates of war graves that caused concern, since without this information the dead become unaccounted for.¹⁴⁶

138 AP I, Art. 1(1).

139 GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1); AP I, Art. 34(1).

140 Pictet, above note 47, Vol. I, Art. 17, pp. 179–180. See also the section on ‘Creation of a Graves Registration Service’, text accompanying notes 174–178 below.

141 Norwegian Parliament, above note 4.

142 GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1); AP I, Art. 34(1).

143 GC IV, Art. 130.

144 GC I, Art. 17(3).

145 Pictet, above note 47, Vol. I, Art. 17, p. 180.

146 Norwegian Parliament, above note 4.

Access to places containing mortal remains

Agreements should not only be concluded to protect and maintain gravesites but also to facilitate access by relatives or representatives of Grave Registration Services.¹⁴⁷ The wording ‘facilitate access’ is nebulous, but it could encompass allowing these persons to enter the territory and granting them a visa. In addition, they should be given the necessary information on the location of the gravesites. To ensure accessibility, the parties to the agreement are required to ‘regulate the practical arrangements for such access’.¹⁴⁸

Recording and exchange of information on gravesites

The Geneva Conventions require the warring parties and states on whose territories graves are located to record not only information on the dead and the circumstances of their death, but also on their burial places. Lists showing the exact location and markings of graves together with particulars of the dead interred therein must consequently be established. Provision is also made for when, by whom, and through which channels this information must be exchanged.¹⁴⁹

Duration of obligations regarding gravesites

While the obligation applies *ratione temporis* at all times, it is less clear for how long states are obliged to maintain gravesites.¹⁵⁰ Article 34 of AP I neither specifies how long the obligation lasts nor does it provide clear guidance on how to fulfil it. Rather, it provides a procedural answer on how to deal with war graves, stipulating that as soon as circumstances and the relations between the adverse parties permit, the High Contracting Parties in whose territory graves are situated shall conclude agreements in order to protect and maintain gravesites permanently.¹⁵¹ It is in these agreements that questions pertaining to the maintenance of burial places would then be comprehensively regulated.¹⁵²

An obligation to conclude agreements on maintenance and access to gravesites is absent in the domain of non-international armed conflicts. This might be partly due to the state’s concern that non-state entities could be accorded undue recognition or status under international law if such agreements were concluded on the basis of a treaty provision. Yet these objections could be met by emphasizing the spirit behind Common Article 3(2) of the Geneva Conventions stating that the

147 AP I, Art. 34(2).

148 *Ibid.*

149 GC I, Art. 17(4); GC III, Art. 120(6); GC IV, Art. 130(3).

150 The fact that the provision on the maintenance of gravesites applies at all times does not have any bearing on how long this obligation lasts. Rather, the temporal scope of application only determines whether a certain provision is applicable as such at a given moment; see text belonging to notes 179–193 below.

151 AP I, Art. 34(2).

152 See note 6 above for an examples of such an agreement.

provision's application – and hence the conclusion of agreements – does not affect the legal status of the parties to the conflict.¹⁵³

The drafters of AP I did not ignore the fact that – despite the obligation to conclude such agreements – negotiations and reaching a consensus might not always be possible. Article 34 therefore lays down a procedure to follow if such an agreement cannot be concluded and the home country of the deceased is not willing to arrange for the maintenance of such gravesites at its own expense.¹⁵⁴ As a first step, the state where the graves are situated may offer to facilitate the return of the remains to the home country of the deceased. Where such an offer has not been accepted it may then, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves. Domestic legislation on the subject matter is extremely diverse, but it may allow for the closure and disappearance of the gravesite.¹⁵⁵

The Geneva Conventions do not explicitly state a time limit for the maintenance of gravesites. The wording of the provisions on the marking of graves – 'so that they may always be found'¹⁵⁶ and 'so as to be found at any time'¹⁵⁷ – could suggest that the obligation lasts *ad infinitum*. The commentators on the Geneva Conventions seem to hold this view when explaining that the essential point about marking is 'that it should always be possible to find the grave of any combatant'.¹⁵⁸ However, the Commentary on AP I takes a different standpoint in that it qualifies the absence of a time limit in the Geneva Conventions as an 'obvious gap', rather than interpreting the obligation as one lasting *ad infinitum* and thus beyond the existence of any humanitarian interest. The commentators therefore suggest that the system foreseen in Article 34 of the Protocol should apply not only to graves covered by that provision but also to those covered by the four Geneva Conventions.¹⁵⁹

Exhumation

The drafters of AP I, the only treaty explicitly dealing with exhumations,¹⁶⁰ sought to strike a balance between respect for graves and the recognition of legitimate grounds for exhumation. While exhumations are as a general rule strictly prohibited, they are exceptionally permitted in two situations: first, in order to return

153 AP I, Art. 4, contains a similar provision for international armed conflicts.

154 Even in the absence of an agreement, the High Contracting Party in whose territory the graves are situated is obliged to ensure permanent maintenance if the home country of the deceased is prepared to meet the costs; Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, p. 376, para. 1352.

155 AP I, Art. 34(3); Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, pp. 376–377, paras. 1347–1353.

156 GC I, Art. 17(3).

157 GC III, Art. 120(4).

158 Pictet, above note 111, Vol. III, Art. 120, p. 566.

159 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, p. 372, para. 1328.

160 AP I, Art. 34(4).

the mortal remains to the home country;¹⁶¹ and second, if they are justified by ‘overriding public necessity’. The latter category includes, *inter alia*, medical reasons or criminal investigation needs.¹⁶² The fulfilment of IHL obligations pertaining to the dead and their graves also potentially meets the necessity criterion; thus the Rapporteur of the Working Group dealing with exhumation stated: ‘Where adequate protection and maintenance was not otherwise possible – for instance, in the case of scattered and temporary graves made during a battle – exhumation for the purpose of regrouping graves in one location would be a matter of public necessity.’¹⁶³

The restrictions on exhumation as contained in Article 34(4) of Protocol I are addressed to the High Contracting Parties on whose territory graves are situated. As stated in the interpretative declaration of one delegation during the Diplomatic Conference, the provision should not, however, limit the work of Grave Registration Services: ‘Paragraph 4 of the article in no way prevents the exhumation of the remains in temporary graves at the end of an armed conflict by or on behalf of a Graves Registration Service for the purpose of providing permanent gravesites, as was done after the last two European conflicts’.¹⁶⁴

Since the drafting of that exhumation provision in the late 1970s, implementation of the obligation to prosecute serious violations of IHL has gained momentum. The establishment of numerous fact-finding commissions and international criminal tribunals at the turn of this century created a growing demand for forensic evidence, and exhumation justified by investigative necessity was thus no longer a theoretical concept. However, practice has shown that the needs of the victim’s families can easily clash with the interests of investigative or prosecuting bodies. A conflict of interest can manifest itself in two ways. On the one hand, relatives might disapprove of exhumations, given that the dead and their graves should be respected and not disturbed. On the other hand, the extent of exhumations and the degree of identification might not go far enough for relatives who have an interest in recovering the mortal remains of their loved ones. International criminal tribunals often lack the resources or political will to undertake forensic investigations aimed at identifying all the dead, and confine themselves to the evidence needed to prove specific allegations. Furthermore, the ‘personal identification’ of the dead might not be their prime concern. For a genocide charge, for instance, the ‘categorical identification’ of the dead – such as the victim’s ethnicity, religion or race – might suffice to establish that the perpetrator acted with intent to destroy a particular group.¹⁶⁵ With the growing number of forensic investigations

161 AP I, Art. 34(4)(a). This could be a return of the remains to the home country, either pursuant to an agreement under AP I, Art. 34(2)(c) or, in the absence of an agreement, in one of the two situations provided for in AP I, Art. 34(3).

162 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 34, p. 377, paras. 1355–1357.

163 *Ibid.*, Art. 34, p. 378, para. 1359.

164 *Ibid.*, Art. 34, p. 378, para. 1361.

165 Eric Stover and Rachel Shigekane, ‘The missing in the aftermath of war: When do the needs of victims’ families and international war crimes tribunals clash?’, *International Review of the Red Cross*, Vol. 84, No. 848, December 2002, pp. 845–847.

conducted, the need to develop and adhere to ethical and scientific standards for the exhumation and post-mortem examination of remains, which bring the interests of families and justice into the equation, has become apparent.¹⁶⁶

Bearers of the obligations regarding gravesites

The provisions on gravesites contained in the Geneva Conventions are addressed to the ‘Parties to the conflict’¹⁶⁷ or to the ‘detaining authorities’ or ‘Detaining Power,’ respectively.¹⁶⁸ Thus states that are not or were not a party to the conflict or a detaining power but on whose territory war graves are situated – such as the graves of German soldiers who fell in World War I and are interred in the St. Georges cemetery in Geneva, Switzerland¹⁶⁹ – do not bear the obligations towards the dead contained in the Geneva Conventions. However, Article 34 of AP I considerably enlarges the circle of addressees: its obligations are addressed to the ‘High Contracting Parties in whose territories graves and [...] other locations of the remains of persons [...] are situated’. Hence it is not necessary for the state concerned to be or have been a party to the conflict or a detaining power.¹⁷⁰ This broader *ratione personae* concept is in line with the aim pursued by Article 34 of Protocol I, namely to bridge the protection gaps left by the Geneva Conventions regime.¹⁷¹

There are constellations in which a party to conflict is not a High Contracting Party to Protocol I but is nonetheless bound by its provisions through the mechanisms foreseen in its Articles 96(2) and 96(3).¹⁷² Considering that many obligations with regard to the dead become especially relevant after the end of hostilities, these undertakings to be bound by Protocol I should be read broadly, i.e. as encompassing all situations and effects resulting from a specific conflict,

166 See e.g. the recommendations formulated in ICRC, *Operational Best Practices*, above note 44, p. 9; ICRC Report: *The Missing and Their Families*, Recommendation No. 23, pp. 31–32, available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5JAHR8/\\$File/ICRC_TheMissing_012003_EN_10.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5JAHR8/$File/ICRC_TheMissing_012003_EN_10.pdf) (last visited 21 May 2009).

167 See e.g. GC I, Art. 17, and GC II, Art. 20.

168 See e.g. GC III, Art. 120, and GC IV, Art. 130. It should be noted that neutral countries can also be detaining powers; thus Soviet soldiers captured in 1982 by opposition movements in Afghanistan were interned in Switzerland. See Marco Sassöli, ‘Internment’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition available at: www.mpepil.com (last visited 30 January 2009).

169 See Volksbund Deutsche Kriegsgräberfürsorge e.V. (German Graves Registration Service) at: <http://www.volksbund.de/kgs/land.asp?kga=&land=99078> (last visited 20 May 2009).

170 Henckaerts and Doswald-Beck, above note 15, Rules 112–114 and 116 are addressed only to the ‘parties to the conflict’; whereas Rule 115 (‘The dead must be disposed of in a respectful manner and their graves respected and properly maintained.’) is not – it could therefore be held to apply to all states on whose territory graves are situated.

171 Sandoz, Swinarski and Zimmermann (eds), above note 27, Introduction to Part II, Section III, p. 341, para. 1134.

172 The authority representing the people of Nagorno-Karabakh, for instance, undertook to apply the Geneva Conventions and Additional Protocol I in relation to the armed conflict with Azerbaijan.

otherwise equality in terms of obligations between High Contracting Parties and parties to conflict accepting and applying the Protocol would be impaired.¹⁷³

Creation of a Graves Registration Service

The Geneva Conventions entrust various obligations pertaining to the dead and their graves to so-called 'Official Graves Registration Services'.¹⁷⁴ In addition, AP I mentions them as endowed with certain privileges.¹⁷⁵ Graves Registration Services are assigned functions both within the actual theatre of war (e.g. identification of the dead) and beyond the end of hostilities (e.g. maintenance of war cemeteries). Because of the importance of those functions, it is mandatory to establish Graves Registration Services as soon as hostilities break out.¹⁷⁶ However, the respective IHL treaties do not specify how these services must be organized in practice and leave this to the respective state's discretion. Their activities can be carried out by government agencies: in France and Italy, for example, special ministerial departments were created; in the United States, Congress in 1923 established the American Battle Monuments Commission, which is an agency of the Executive Branch of the Federal Government.¹⁷⁷ However, it is also possible to entrust these tasks to a private body. Germany opted for this solution and the *Volksbund Deutsche Kriegsgräberfürsorge e.V.* was mandated with, *inter alia*, the maintenance of war cemeteries.¹⁷⁸

Provisions on the dead and their gravesites: applicable at all times ?

Practice has shown that it is often disputed when and under which circumstances IHL norms on the dead and their gravesites are applicable. States are especially reluctant to accept the idea that the obligations – for instance, to identify deceased combatants – not only apply during an armed conflict, but may persist in times of peace.¹⁷⁹ Generally, the temporal scope of application of international

173 This interpretation seems to be supported by the text in the ICRC Commentary on AP I, Art. 32, stating that the right of families to know the fate of their relatives encompasses giving the families an opportunity to remember their dead in the place where their remains lie, providing access to the gravesites and marking them (i.e. obligations pertaining to the dead that are also relevant after the conflict has ended). The Commentary continues by explaining that the 'Parties to the conflict' and the 'High Contracting Parties' are mentioned separately because some parties to the conflict may not be Contracting Parties and yet be bound by the Protocol through Article 96(2) and (3) of Protocol I: Sandoz, Swinarski and Zimmermann (eds), above note 27, p. 343, para. 1196; p. 344, para. 1206; p. 346, para. 1216.

174 See e.g. GC I, Art. 17(3); GC III, Art. 120(6).

175 AP I, Art. 34(2)(a) states that agreements should be concluded in order to facilitate access to the gravesites by representatives of Official Graves Registration Services.

176 See e.g. wording of GC I, Art. 17(3); Pictet, above note 47, Art. 17, p. 181.

177 For a description of its mandate and activities see: <http://www.abmc.gov/commission/index.php> (last visited 20 May 2009).

178 Michael Bothe, 'War graves', in Rudolf Bernhardt (ed), *Encyclopedia of International Public Law*, Vol. 2, North-Holland Elsevier, Amsterdam, 1995, p. 1374.

179 This was the case in Norway in 2008: see text belonging to notes 4 and 141.

humanitarian law¹⁸⁰ is identical to the material one¹⁸¹ (i.e. from the beginning of an armed conflict or occupation and until the close of military operations, the termination of occupation, or in either case until protected persons are released or re-established).¹⁸² However, the introductory sentence of Article 3 of AP I reads '[w]ithout prejudice to the provisions which are applicable at all times...'. Hence some IHL provisions not only apply during an armed conflict or a situation of occupation, but also in peacetime.¹⁸³

The ICRC Commentary sheds some light on the question of which provisions are meant to apply at all times¹⁸⁴ and divides them into various categories: final provisions; provisions which apply¹⁸⁵ or may apply¹⁸⁶ as soon as Protocol I enters into force; those giving grounds for taking preparatory measures;¹⁸⁷ and provisions whose application in relation to a conflict may continue beyond the termination of that conflict. In this last category are listed, *inter alia*, the provisions on missing and dead persons (AP I, Arts. 33 and 34), reunion of dispersed families (AP I, Art. 74), repression of breaches of Protocol I (AP I, Art. 85) and mutual assistance in criminal matters (AP I, Art. 88).¹⁸⁸ These latter provisions have a common feature in that they regulate phenomena which originate in or result from an armed conflict or occupation, but whose effects extend beyond the end of those situations. It follows that the rules regulating or remedying these effects must be applicable beyond the end of the armed conflict or occupation.

Common Article 2 of the Geneva Conventions also refers to 'provisions which shall be implemented in peacetime'. Both the *travaux préparatoires* and the ICRC Commentary are silent as to which provisions these are. However, by consulting the records of the Diplomatic Conference on Protocol I, thus by putting the cart before the horse, it can be seen that the rationale behind the temporal scope of application of provisions of the said Protocol and the Geneva Conventions is the same.¹⁸⁹ It therefore seems justified to apply the same kind of provisions at all times.

180 The temporal scope of application of the Geneva Conventions is laid down in GC I, Arts. 2 and 5; GC II, Art. 2; GC III, Arts. 2 and 5; and GC IV, Arts. 2 and 6. However, the wording of AP I, Art. 3(a) – 'the Conventions and this Protocol shall apply...' – indicates that the temporal scope of application rule of Protocol I also governs the Geneva Conventions and replaces their relevant provisions.

181 AP I, Art. 1(3) and (4), referring to Article 2 common to GC I-IV.

182 For the beginning of application see AP I, Art. 3(a), referring to AP I, Art. 1, which in turn refers to Article 2 common to GC I-IV; for the end of application see AP I, Art. 3(b).

183 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 3, p. 66, paras. 145–146.

184 The ICRC draft of Protocol I with commentary provides a list of provisions applicable at all times: *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, ICRC, Geneva, October 1973, p. 10. Since draft Protocol I did not contain any provisions on the missing or the dead (they were only introduced at a later stage of the drafting process), the gravesite provisions could not possibly be included in this list.

185 e.g. AP I, Art. 83, on dissemination.

186 e.g. AP I, Art. 7, on meetings.

187 e.g. AP I, Art. 58, on precautions against the effects of attacks.

188 Sandoz, Swinarski and Zimmermann (eds), above note 27, Art. 3, p. 66, para. 149.

189 The ICRC draft provision on AP I's temporal scope of application differed from the text retained in Article 3, and was only later changed into the present wording. It read 'In addition to the provisions applicable in peace time, the present Protocol shall apply...' *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*, ICRC, Geneva, October 1973, p. 9. With regard to this

A further point to be noted is that the gravesite provision of AP I,¹⁹⁰ which is applicable at all times, is linked to GC IV, as it states that: ‘gravesites [...] shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention’. Given this technical linkage between the two provisions, but also the fact that they contain the same core ideas, not only Article 34 of AP I on mortal remains but also the provisions of the Geneva Conventions on the dead belong to the category of provisions that are applicable at all times.

The situation in non-international armed conflicts, however, appears to be different. Since Common Article 3 applies only to situations reaching the threshold of a non-international armed conflict, and not to internal disturbances or tensions,¹⁹¹ it can be held that it is *a fortiori* not applicable in times of peace. The same can be said of Article 8 of AP II, as the existence of an armed conflict meeting the criteria of Article 1(1) thereof is required for the Protocol to apply; there is moreover the clear stipulation that the Protocol ‘shall not apply to situations of internal disturbances and tensions’.¹⁹² Nor does it contain a clause allowing for provisions that are applicable at all times. So Article 8 of AP II does not seem to apply beyond the termination of an armed conflict either.¹⁹³

The applicable body of law: past or present IHL rules?

The issue: persisting facts – evolving legal rules

Legal questions with regard to mortal remains or war cemeteries arise not only when a person dies or when the gravesite is built, but often decades later. For example, many European countries now face the question of how to deal correctly with graves where people who died during the two world wars are interred. Do these gravesites have to be maintained, or can a conflicting construction project be given priority?¹⁹⁴ Can a war memorial be removed or transferred because it is perceived by part of the population as a thorn in their side?¹⁹⁵ Or can collective

wording, an ICRC delegate at the Conference stated that: ‘in using the expression “in peacetime”, the ICRC had based itself on the terminology of the Geneva Conventions.’ – *Official Records of the Diplomatic Conference of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, ICRC, CDDH/I/SR.10, Vol. VIII, p. 74.

¹⁹⁰ AP I, Art. 34(1).

¹⁹¹ ICRC, ‘How is the term “armed conflict” defined in international humanitarian law?’, Opinion Paper, March 2008, p. 3, available at: [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (last visited 21 May 2009).

¹⁹² AP II, Art. 1(2).

¹⁹³ Against this textual interpretation of the treaty, the teleological argument could be made that several provisions of AP II (e.g. Article 19 entitled ‘Dissemination’) are clearly meant to apply at all times. However, this reading is not supported by the wording of the Protocol’s scope of application rules.

¹⁹⁴ Olga Bondaruk, ‘Ukraine Jews want graves building halted’, *Associated Press*, 23 July 2008, available at: <http://abcnews.go.com/International/wireStory?id=5433924> (last visited 20 May 2009).

¹⁹⁵ ‘Estonia removes Soviet memorial’, *BBC News*, 27 April 2007, available at: <http://news.bbc.co.uk/2/hi/europe/6598269.stm> (last visited 20 May 2009).

graves containing soldiers' remains be excavated to allow for individual burial?¹⁹⁶ Given that these fact patterns comprise elements of past and present times (i.e. are of a continuing nature) and that IHL evolves over time, the question is whether these juridical facts have to be assessed in the light of past or present IHL norms.¹⁹⁷

The approach: the doctrine of intertemporal law

The doctrine of intertemporal law provides an answer to the question of whether to apply, for example, the IHL rules which were in force at the time a gravesite was constructed, or those in force when, for instance, the financing of the maintenance of a war cemetery is disputed. Arbitrator Huber defined intertemporal law in the *Island of Palmas* case before the Permanent Court of Arbitration as 'the rules determining which of successive legal systems is to be applied' or as 'the question which of different legal systems prevailing at successive periods is to be applied in a particular case'.¹⁹⁸ He further stated that according to intertemporal law, 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law as in force at the time when a dispute in regard to it arises or falls to be settled'.¹⁹⁹ The principle of non-retroactivity is one facet of this broader rule²⁰⁰ and is laid down in Article 28 of the Vienna Convention on the Law of Treaties²⁰¹ in the following terms: 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.' Hence intertemporal law dictates that legal rules *contemporaneous* with the acts control their legal significance.²⁰²

The solution: the law of today applies to facts of a continuing nature

In order to apply the criterion of contemporaneity, the nature of facts relating to mortal remains and gravesites must be determined, i.e. whether these are

196 'Australian, British WWI remains to be reburied', *Agence France Presse*, 1 August 2008, available at: <http://www.brisbanetimes.com.au/news/world/australian-british-wwi-remains-to-be-reburied/2008/08/01/1217097470597.html> (last visited 20 May 2009).

197 During the First and Second World Wars, for instance, the four Geneva Conventions of 1949 were not yet in force and there were only fragmentary regulations for dealing with the dead and their gravesites, e.g. in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the 1907 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, and the 1929 Convention relative to the Treatment of Prisoners of War.

198 Permanent Court of Arbitration, *Island of Palmas Case (United States of America v. The Netherlands)*, Award of the Tribunal, 4 April 1928, p. 15, available at: <http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf> (last visited 20 May 2009).

199 *Ibid.*, p. 14.

200 Frédéric Dopagne, 'Article 28 – Convention de Vienne de 1969', in Olivier Corten and Pierre Klein (eds), *Commentaire article par article des Conventions de Vienne de 1969 et 1986 sur le droit des traités*, Vol. 1, Bruylant, Brussels, 2006, pp. 1165 and 1174.

201 Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

202 Anthony D'Amato, 'International law: Intertemporal problems', in Rudolf Bernhardt (ed), *Encyclopedia of International Public Law*, Vol. 2, North-Holland Elsevier, Amsterdam, 1995, p. 1235.

past/completed or present/continuing facts. While international humanitarian law as in force today can be applied to present and continuing facts, this is not the case for events of yesterday, i.e. for any act taking place or any situation that ceased to exist before a specific IHL provision entered into force.

Most situations involving mortal remains or gravesites cannot be qualified as completed or isolated acts lying in the past. Rather, they are of a continuing or even present nature. Their ongoing nature is reflected by the very core provision on the subject matter, which stipulates that gravesites have to be respected and maintained.²⁰³ Both obligations can only be fulfilled by continued activity and are suggestive of a situation persisting over time. The continuing nature of these facts is also reflected by the wording of various gravesite provisions, such as Article 17(3) of GC I stipulating that ‘graves are [...] marked so that they may always be found’. Obligations ensuring that the dead are accounted for – such as the registration, forwarding, and keeping of information on the dead and their burial places²⁰⁴ – also do not cease at a given moment but persist over time. Other obligations can be dormant and may only materialize long after death, such as those pertaining to exhumation, identification or return of mortal remains.²⁰⁵ Given that the facts dealt with are of a continuing or present nature, the principle of intertemporal law, which requires contemporaneity between fact and law, dictates that the IHL in force today be applied.

The appraisal: applying today’s law – the least problematic approach in practice

Application of the IHL body of law as in force today to current legal questions pertaining to human remains and war cemeteries – rather than the law as in force when the person died or the grave was constructed – also seems reasonable from a purely practical point of view. In many cases the information available on the dead or their graves is very poor and it would be difficult to establish the exact time when death occurred or the grave was built. This may be due to the fact that the person was buried in the turmoil of war, or to the low documentation standards prevailing several decades ago or in a war-torn country, or also because the information is purposely withheld, as in the case of a mass grave built to conceal traces of a crime.

Application of the law as in force at the time of death or burial would furthermore lead to a fragmented legal regime, since a fact pattern often comprises elements attributable to different points of time in the past. It is for instance not uncommon for soldiers who died in the First and Second World Wars to be buried at the same war cemetery, as at the Suresnes American Cemetery and Memorial in

203 E.g. GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1); AP I, Art. 34(1), (2b) and (3); see also Henckaerts and Doswald-Beck, above note 15, Rule 115.

204 E.g. Henckaerts and Doswald-Beck, *ibid.*, Rule 116.

205 E.g. AP I, Art. 34(3) and (4).

France, which now shelters the remains of US dead of both wars.²⁰⁶ Often graves are constructed in a provisional way during a battle and (sometimes decades) later relocated and/or transformed into a more permanent structure. For instance, four provisional burial sites in Belgium – Henri-Chapelle, Fosse, Overrepen and Neuville-en-Condroz – were later replaced by the war cemetery in Lommel, which is the largest military cemetery in Western Europe for German soldiers who died in the Second World War.²⁰⁷ Applying the IHL rules as in force today enables the situation to be taken into account as it has evolved with the passage of time, and with all the features it displays today. The situation is thereby governed by one and the same set of rules.

Finally, the difficulties pertain not only to the establishment of the facts but also to the determination of the law as in force several decades or a century ago. This holds especially true with regard to customary international law, and also to situations where one state succeeded another, for instance through secession, annexation or decolonization.

Conclusion

The substantive provisions of international humanitarian law on the dead and their gravesites applicable in international armed conflicts are quite comprehensive and regulate most of the issues relating to people who have died in armed conflict. Moreover, these provisions apply not only during but also after an armed conflict or occupation. Although they are comprehensive in terms of content and application at all times, there are nonetheless protection gaps in the four Geneva Conventions, resulting first and foremost from their limited personal scope of application (mostly confined to protected persons). In addition, under the Conventions only a narrowly defined category of states (i.e. parties to conflict and detaining powers) bear specific obligations pertaining to the dead. In Protocol I, the provisions on ‘missing and dead persons’ were designed to bridge the protection gaps left by the humanitarian law regime adopted in the aftermath of the Second World War. This treaty not only extends the circle of persons protected by IHL but also places obligations on states that have neither been a party to the conflict concerned nor a detaining power. Although Protocol I has not yet been universally ratified, its core ideas and those of the Geneva Conventions have been consolidated in customary international law and are thus applicable to every state.

With regard to non-international armed conflicts, only very few specific substantive norms on the dead and their graves exist. However, all parties to such a

206 For a description of the Suresnes American Cemetery and Memorial provided by the American Battle Monuments Commissions, see <http://www.abmc.gov/cemeteries/cemeteries/su.php> (last visited 20 May 2009).

207 *The Volksbund Deutsche Kriegsgräberfürsorge e.V.* (German Graves Registration Service) provides more information about gravesites of German war dead in Belgium and elsewhere: <http://www.volksbund.de/kgs/land.asp?land=99009> (last visited 20 May 2009).

conflict are bound by general IHL obligations – such as the prohibition of outrages upon personal dignity, cruel and inhuman treatment, and collective punishment – which also confer protection on the dead person and his or her relatives. Moreover, except for the obligation to facilitate the return of the remains and personal effects of the deceased, the customary rules as identified by the ICRC apply not only to international but also to non-international armed conflicts.

Finally, it must be stressed that while international humanitarian law is an important body of law protecting the deceased and their next of kin, it is not the only one. International human rights law – despite the absence of specific rules on the dead – contains general rules which could also be effective in protecting the human dignity of the deceased and safeguarding the rights and needs of their relatives.

Facilitating humanitarian assistance in international humanitarian and human rights law

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Abstract

In 2008, 260 humanitarian aid workers were killed or injured in violent attacks. Such attacks and other restrictions substantially limit the ability of humanitarian aid agencies to provide assistance to those in need, meaning that millions of people around the world are denied the basic food, water, shelter and sanitation necessary for survival. Using the humanitarian crises in Darfur and Somalia as examples, this paper considers the legal obligation of state and non-state actors to consent to and facilitate humanitarian assistance. It is shown that the Geneva Conventions and their Additional Protocols, as well as customary international law, require that states consent to and facilitate humanitarian assistance which is impartial in character and conducted without adverse distinction, where failure to do so may lead to starvation or otherwise threaten the survival of a civilian population. This paper considers whether this obligation has been further expanded by the development of customary international law in recent years, as well as by international human rights law, to the point that states now have an obligation to accept and to facilitate humanitarian assistance in both international and non-international armed conflicts, even where the

* The views expressed in this paper are those of the author and do not necessarily represent the views of World Vision.

denial of such assistance does not necessarily threaten the survival of a civilian population.

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The environment in which humanitarian agencies and their staff provide assistance to populations affected by armed conflict and natural disaster has changed in significant and concerning ways over the past decade. The majority of conflicts taking place in the world today are non-international in character, with national and/or multinational forces fighting a variety of armed groups, often with significant asymmetry between the parties.¹ Characteristics of contemporary armed conflicts include the deliberate targeting of civilians, large scale population displacement, grave violations of international humanitarian and human rights law, the targeting of international humanitarian personnel, and restrictions on humanitarian access to civilians.² Recent decades have also seen a significant increase in the number of people in need of humanitarian assistance in the aftermath of natural disaster,³ with similar restrictions imposed upon humanitarian access. In 2004, the UN General Assembly estimated that more than 10 million people in 20 countries affected by complex emergencies (including both natural disasters and conflict situations) were inaccessible to humanitarian agencies.⁴ For many of these people, restrictions on humanitarian assistance mean restrictions on the basic food, water, sanitation and shelter necessary for survival.

This paper considers the legal obligation of state and non-state actors to provide an environment in which humanitarian organizations can effectively and safely deliver humanitarian assistance to populations in need. As an illustration of the restrictions imposed on the provision of humanitarian assistance, the paper begins with a brief description of the humanitarian crises in Darfur and Somalia. In both cases, the scale of human suffering is enormous, and yet the ability of the international community to deliver humanitarian assistance is severely restricted. The Geneva Conventions and their Additional Protocols, and customary international law as reflected in the International Committee of the Red Cross (ICRC) 2005 study on the rules of customary international law,⁵ require that states consent to humanitarian assistance where failure to do so would risk causing starvation or otherwise threaten the survival of a civilian population. This paper considers whether this obligation has been further expanded by the development of customary international law in recent years, to the point that states now have an

1 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2007/643, 2007, p. 2.

2 *Ibid.*, p. 6.

3 UN Office for the Co-ordination of Humanitarian Affairs, *Natural Disaster Bulletin No. 8*, October 2007, p. 1.

4 *Strengthening the Co-ordination of Emergency Humanitarian Assistance of the United Nations: Report of the Secretary-General*, UN GAOR, 59th sess., UN Doc. A/59/93-E/2004/74 (2004), p. 11.

5 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, ICRC/Cambridge University Press, Geneva/Cambridge, 2005, pp. 105, 193.

obligation to accept and to facilitate humanitarian assistance – which is impartial in character and conducted without adverse distinction – in both international and non-international armed conflicts, whether or not the denial of such assistance threatens the survival of a civilian population. Finally, it is shown that the provision of humanitarian assistance is further protected by international human rights law, which requires states to use the maximum of their available resources – including offers of international humanitarian assistance – to meet their minimum core obligations with regards to, *inter alia*, the rights to an adequate standard of living and to the highest attainable standard of health. While this paper focuses primarily on the protection of humanitarian assistance in conflict and post-conflict situations, the discussion regarding international human rights law – and the crisis facing the provision of humanitarian assistance in general – is equally applicable in the aftermath of natural disaster.

Restricted humanitarian assistance: Darfur and Somalia

One of the most concerning manifestations of the deteriorating environment for the provision of humanitarian assistance in recent years has been a rapid decline in the security of humanitarian staff. A recent study by the Humanitarian Policy Group (HPG) found that 260 humanitarian aid workers were killed, injured or seriously injured in violent attacks in 2008 – the highest toll in the twelve years that such incidents have been tracked by the HPG.⁶ The study found that the average annual number of attacks was almost three times higher than the annual average for the preceding nine years, and that relative rates of attacks against aid workers (number of attacks per aid workers in the field) had also increased by 61%.⁷ Three-quarters of the attacks in 2008 took place in just six countries, with the highest number of attacks occurring in Sudan (Darfur), Afghanistan and Somalia. The study found that the spike over the past three years was attributable to the surge in violence in these three most dangerous countries.⁸

The following discussion considers the restrictions placed on humanitarian assistance in Darfur and Somalia. A brief outline of the conflicts is provided (with a focus on the nature of the parties to the conflict), followed by a description of the particular ways in which the delivery of humanitarian assistance is restricted in each case.

6 Abby Stoddard, Adele Harmer and Victoria DiDomenico, *Providing Aid in Insecure Environments: 2009 Update*, HPG Humanitarian Policy Brief No. 34, Overseas Development Institute, April 2009, p. 1, available at <http://www.odi.org.uk/resources/download/3250.pdf> (last visited 3 June 2009).

7 *Ibid.*

8 *Ibid.*

Background to the conflicts

The conflict in Darfur

The current conflict in Darfur broke out in 2003, when rebel groups scaled up their attacks on Sudanese police and military targets, and the government responded with a counter-insurgency operation, employing militias drawn from Arab tribes now commonly referred to as the Janjaweed.⁹ The term ‘Janjaweed’ is described by the International Commission of Inquiry on Darfur (‘the Commission of Inquiry’) as ‘a generic term to describe Arab militia acting under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions’.¹⁰ The rebel movement in the early stages of the conflict consisted of two major groups, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement.¹¹

In May 2006 the Government of Sudan and a faction of the SLM/A entered into the Darfur Peace Agreement (DPA), which provided, among other things, for power sharing, wealth sharing and disarmament of the Janjaweed militia and rebel forces.¹² However, the agreement was opposed by two of the three rebel delegations involved in the peace negotiations, and failed to curb the violence.¹³ The period following the signing of the DPA saw increasing fragmentation amongst rebel groups, and by 2008 there were more than 20 domestic armed groups operating in Darfur.¹⁴ In November 2008 the Panel of Experts on the Sudan (‘Panel of Experts’) reported that the parties to the conflict were ‘no longer easy to delineate’,¹⁵ and that most of the rebel groups were ‘small splinter factions with limited military presence or political influence’,¹⁶ with a ‘lack [of] clear command and possess[ing] only a limited number of vehicles and weapons’.¹⁷

In spite of a rapidly deteriorating human security situation, the international community struggled to define an entry point for intervention in Darfur, and until mid-2007 it was left to the African Union (AU) to monitor the ceasefire agreement, provide a secure environment for the delivery of humanitarian relief and (within capacity) protect civilians.¹⁸

9 Report of the High-Level Mission on the Situation of Human Rights in Darfur pursuant to Human Rights Council Decision S-4/101, UN HRC, 4th sess., prov. agenda item 2, UN Doc. A/HRC/4/80 (2007).

10 International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur pursuant to the United Nations Secretary General pursuant to Security Council Resolution 1564 of 18 September 2004*, January 2005, p. 31.

11 *Ibid.* p. 22.

12 International Crisis Group, *Darfur’s Fragile Peace Agreement*, Africa Briefing No. 39, June 2006, p. 2.

13 International Crisis Group, *Darfur’s New Security Reality*, Africa Report No. 134, November 2007, p. 1.

14 Panel of Experts on the Sudan, *Report of the Panel of Experts Established Pursuant to Resolution 1591 (2005) Concerning the Sudan*, UN Doc. S/2008/647 (2008), p. 13.

15 *Ibid.*, p. 16.

16 *Ibid.*, p. 51.

17 *Ibid.*, p. 53.

18 The initial authorization for the deployment of the African Union (AU) mission in Darfur was set out in the *Communiqué of the Solemn Launching of the 10th Meeting of the Peace and Security Council*, AU Peace and Security Council, 10th meeting, AU Doc. PSC/AHG/Comm (X) (2004). The Darfur Peace

However, the AU was constrained from the outset by a lack of financial and human resources, and failed to provide meaningful protection to civilians in Darfur.¹⁹ In July 2007, the Government of Sudan consented to the deployment of a hybrid UN/AU mission (UNAMID), authorized by the Security Council to, *inter alia*, contribute to the restoration of security for the safe provision of humanitarian assistance, facilitate humanitarian access and contribute to the protection of civilians under imminent threat of physical violence.²⁰ The initial UNAMID deployment took place in January 2008, but the mission faced the same problems of resources and capacity that had plagued the AU mission.²¹ In 2008, the Panel of Experts reported that 'ten months into its deployment, the new force has continued to be attacked in the same way as its predecessor and has proven so far to be incapable of defending itself or the civilian population of Darfur'.²²

The conflict in Somalia

Somalia has been without a functional national government since 1991. In 2004, international negotiations led by the Intergovernmental Authority on Development culminated in the signing of the Transitional Federal Charter, which established the Transitional Federal Government (TFG) as a 'decentralised system of administration based on federalism'.²³ The TFG was beset with problems from its inception – crippled by internal power struggles, challenged by Islamic opposition groups and seen by most Somalis as illegitimate.²⁴ 2006 saw a significant increase in civil strife in Somalia, with the Union of Islamic Courts (UIC) increasing their authority throughout the country. In December 2006, Ethiopian forces intervened in defence of the TFG and overthrew the UIC in much of South Central Somalia, but their successes were undermined by the inability of the TFG to consolidate its authority, and by the rise to power of the UIC's militant wing, Al-Shabab.²⁵

Agreement stipulated additional responsibilities for AMIS, and in June 2006 the AU's Military Staff Committee recommended that AMIS's mandate be reviewed to include the 'protection of civilians, including women and children, under imminent threat within capabilities and resources': *Report of the Chairperson of the Commission on the Situation in Darfur*, AU AU Peace and Security Council, 58th meeting, AU Doc. PSC/MIN/2 (LVIII) (2006), para. 33(b). The 'additional tasks and the new mandate' were approved by the AU Peace and Security Council in June 2006.

19 Panel of Experts on the Sudan, above note 14, p. 17.

20 *Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur*, UN Doc. S/2007/307/Rev.1 (2007), paras 54–5. The Chapter VII authorization for the deployment of UNAMID is found in *Resolution on Sudan*, SC Res. 1769, UN SCOR, 5727th meeting, UN Doc. S/Res./1769 (2007), para. 15(a). Resolution 1769 also stipulates that the mandate of UNAMID shall be as set out in the report of the Secretary General and the Chairperson of the African Union Commission of 5 June 2007.

21 Panel of Experts on the Sudan, above note 14, p. 85.

22 *Ibid.*, p. 3.

23 Transitional Federal Charter of the Somali Republic (2004), Art. 11(1).

24 International Crisis Group, *Somalia: To Move Beyond the Failed State*, Africa Report No. 147, 23 December 2008, p. 2.

25 *Ibid.*, p. 1.

In October 2007, a collection of former representatives of the UIC, members of parliament and members of the Somali diaspora established the Alliance for the Re-liberation of Somalia (ARS), which in June 2008 entered into peace negotiations with the TFG. The peace talks led to the signing of a ceasefire agreement ('the Djibouti Agreement'), which provided for the cessation of armed confrontation, the withdrawal of Ethiopian troops and the deployment of a multinational stabilization force.²⁶ The Djibouti Agreement was opposed by all groups with substantial control over territory in Somalia, however, and succeeded only in escalating the violence.²⁷ Further peace negotiations in late 2008 led to an agreement between the ARS and the TFG to establish a government of national unity,²⁸ but the agreement has done little to increase support for the TFG, or to enhance its capacity to challenge armed opposition groups.²⁹ In early 2009, the Ethiopians withdrew their forces from Somalia, enabling Al-Shabab to further expand its territorial control.³⁰ The TFG currently retains control of just 'a few city blocks' in Mogadishu.³¹ A takeover by Islamic opposition groups of the entire south of the country is widely seen as almost inevitable.³²

The AU Mission in Somalia (AMISOM) is mandated by the UN Security Council to take all necessary measures to, *inter alia*, provide protection to the Transitional Federal Institutions, provide security for key infrastructure, and contribute to the creation of the necessary security conditions for the provision of humanitarian assistance.³³ The AMISOM deployment has never reached full capacity, however, due in part to the reluctance of AU member states to send their troops into a situation where leaders of the insurgency are calling upon their groups to target peacekeepers.³⁴ At the end of 2008, AMISOM had just 3450 troops

26 Agreement between the Transitional Federal Government of Somalia and the Alliance for the Re-liberation of Somalia, opened for signature 9 June 2008, entered into force 18 August 2008 ('Djibouti Agreement').

27 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. i.

28 See Integrated Regional Information Network (IRIN), 'Somalia: Power-sharing Deal Reached in Djibouti as TFG Split Widens' (Press Release, 26 November 2008), available at www.alertnet.org/thenews/newsdesk/IRIN/2910ccff0cea26e0d2e02359eb47540.htm (last visited 1 March 2008).

29 Michael Weinstein, 'Somalia: Situation Brief No. 3: Analysis', *Garoweonline*, 14 April 2009, available at www.garoweonline.com/artman2/publish/Analysis/Somalia_Situation_Brief_3_Analysis.shtml (last visited 15 April 2009).

30 Mohammed Ibrahim and Alan Cowell, 'Islamists Overrun Somalia City as Ethiopians Leave', *New York Times*, 26 January 2009, p. A6.

31 *Ibid.*

32 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. i.

33 The AU mission in Somalia took place initially pursuant to the Communiqué of the AU Peace and Security Council, January 2007, for the purpose of contributing to the initial stabilization phase in Somalia. The mission was then formally endorsed by the UN Security Council under Chapter VII of the UN Charter in *Resolution on Somalia*, SC Res. 1744, UN SCOR, 5633th meeting, UN Doc. S/Res./1744 (2007). The mission was extended in August 2007 in *Resolution on Somalia*, SC Res. 1772, UN SCOR, 5732nd meeting, UN Doc. S/Res./1772 (2007), and then again in February 2008 (*Resolution on Somalia*, SC Res. 1801, UN SCOR, 4842nd meeting, UN Doc. S/Res./1801 (2008)) and January 2009 (*Resolution on Somalia*, SC Res. 1863, UN SCOR, 6068th meeting, UN Doc. S/Res./1863 (2009)).

34 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. 20.

in Somalia, with capacity to secure only the airport, seaport and a road junction in Mogadishu.³⁵

Restrictions on humanitarian assistance

Restricted humanitarian assistance in Darfur

The restrictions placed on humanitarian assistance in Darfur came to a head in March 2009, when the Government of Sudan expelled 13 international NGOs and revoked the licences of three national NGOs operating in Darfur. The expulsion came shortly after the International Criminal Court issued an arrest warrant for Sudanese President Omar Al-Bashir, charged with war crimes and crimes against humanity. Throughout Northern Sudan (including Darfur), 7610 aid workers were affected by the expulsions.³⁶

Restrictions on humanitarian assistance are not new to Darfur. Prior to the expulsions Darfur had been described as one of the most difficult and frustrating places to work in the world, with humanitarian access severely curtailed by general insecurity, targeted attacks on humanitarian personnel and their assets, and the harassment of (and bureaucratic restrictions imposed upon) humanitarian organizations and their staff.³⁷

Targeted attacks against humanitarian personnel in Darfur – including physical and sexual assaults, hijackings and abductions – increased dramatically in the years leading up to the expulsions. In November 2008, Under-Secretary-General for Humanitarian Affairs John Holmes reported that attacks on humanitarians had reached ‘unprecedented levels,’³⁸ with 11 staff killed, 189 staff abducted, 261 vehicles hijacked, 172 assaults on humanitarian premises and 35 ambushes and lootings of convoys in 2008 alone.³⁹ Holmes noted that in most cases it was the rebel movements that appeared to be responsible for the attacks,⁴⁰ but as one well-known Darfur commentator pointed out, ‘assaults on ... humanitarians, their vehicles, compounds, and equipment must be understood for what they are: actions that are the clear responsibility of the Khartoum regime ... [i]n areas

35 UN Secretary General, *Report of the Secretary General on the Situation in Somalia*, UN Doc. S/2008/709 (2008) p. 7.

36 Sara Pantuliano, Susanne Jaspars and Deepayan Basu Ray, *Where to Now? Agency Expulsions in Sudan: Consequences and Next Steps*, ALNAP/HPG Lessons Paper, Overseas Development Institute, March 2009, p. 3, available at <http://www.odi.org.uk/resources/download/3198.pdf> (last visited 3 June 2009).

37 Office of Deputy Special Representative of the UN Secretary-General for Sudan; UN Resident and Humanitarian Co-ordinator, ‘Darfur Humanitarian Profile No 33’, October 2008.

38 John Holmes, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, ‘Briefing to the Security Council on the situation in Chad and Sudan’, 3 December 2008, available at www.reliefweb.int/rw/rwb.nsf/db900SID/EDIS-7LYTBD?OpenDocument (last visited 23 January 2008).

39 UN Office for the Co-ordination of Humanitarian Affairs, ‘UN Humanitarian Chief Calls for Continued Co-operation in Sudan’, Press Release, 30 November 2008, available at www.reliefweb.int/rw/rwb.nsf/db900SID/RMOI-7LVMUD?OpenDocument&RSS20=02-P (last visited 24 January 2008).

40 *Ibid.*

controlled by Khartoum nothing happens that is not implicitly or explicitly sanctioned by the regime.⁴¹

Humanitarian assistance in Darfur is complicated by a complex array of bureaucratic restrictions. In a statement issued in 2006, the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) listed the following issues as particularly affecting the ability of humanitarian agencies to carry out their work: a complicated and lengthy visa regime; the requirement for humanitarian workers to obtain permits for travel between states within Darfur and sometimes for travel to particular areas within states; and excessive delays in the processing of travel permits and visas (including exit visas).⁴² The cumbersome visa and travel permit regime means that it can take months for staff to obtain an initial visa for work in Sudan, and that even after arrival in Sudan, staff can be held up in Khartoum prior to obtaining authorization to travel to Darfur. Once in Darfur, many staff are prevented from carrying out their work due to an inability to obtain travel permits, and delays in processing visas mean that staff are often not free to return home when they wish to do so.

On a number of occasions prior to the 2009 expulsions, agencies and their staff perceived to be not following the rules had been ordered to leave. The Norwegian Refugee Council, responsible for the co-ordination of humanitarian assistance in Kalma camp – the largest camp for Internally Displaced Persons (IDPs) in Darfur – was instructed in early 2006 to cease all operations in Darfur.⁴³ At around the same time, a Sudanese NGO was ordered to cease operations on grounds of unspecified violations of the Humanitarian Aid Commission Act.⁴⁴ In November 2007, the head of OCHA in South Darfur was expelled for unspecified violations of the ‘rules of humanitarian action.’⁴⁵

The recent expulsions have left an estimated 1.1 million people without food, 1.5 million without healthcare and more than a million without drinking water.⁴⁶ Initial estimates indicate that the UN and the Government of Sudan might

41 Eric Reeves, ‘Humanitarian Efforts in Darfur Face Escalating War by Khartoum’, 28 October 2008, available at www.sudanreeves.org/Article227.html (last visited 20 January 2008).

42 UN Office for the Co-ordination of Humanitarian Affairs, ‘Fact Sheet on Access Restrictions in Darfur and Other Areas of Sudan’, 20 April 2006, available at www.ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1004494 (last visited 20 January 2008).

43 *Ibid.*

44 Amnesty International, ‘Sudan: Continuing Blockade of Humanitarian Aid’, Public Statement, AI Index AFR 54/010/2006 (Public), 4 April 2006, available at www.asiapacific.amnesty.org/library/Index/ENGAFR540102006?open&of=ENG-393 (last visited 26 January 2009). The Humanitarian Aid Commission Act 1995 was promulgated by President Omer el-Bashir in 2005, and in February 2006 was replaced by the Organisation of Humanitarian and Voluntary Work Act 2006. Both Acts have been heavily criticized by humanitarian and human rights organizations as imposing undue restrictions on the ability of humanitarian organizations to operate in Sudan.

45 Patrick Worsnip, ‘South Darfur Authorities Expel UN Aid Official: UN’, Reuters, 7 November 2007, available at www.reuters.com/article/worldNews/idUSN0757142620071107 (last visited 25 January 2008).

46 IRIN, *Sudan: We Will Fill the Gaps, Government Insists*, Press Release, 10 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83398 (last visited 15 April 2009).

be able to cover 20–30% of the shortfall.⁴⁷ The Government of Sudan has said that the remaining gaps will be filled by national organizations, but the UN and international NGOs have expressed doubt as to the capacity of national organizations to take on the large and complex programmes managed by the expelled agencies.⁴⁸ Shortly after the expulsion, Holmes said that ‘we do not, as the UN system, the NGOs do not ... and the [Sudanese] government does not have the capacity to replace all the activities that have been going on, certainly not on any short or medium term basis.’⁴⁹ The expulsions are feared to have particularly severe consequences for water supply in many of the IDP camps, including in Kalma camp, where 63,000 people depended on Oxfam Great Britain (one of the expellees) for water.⁵⁰ In the immediate aftermath of the expulsions, the UN’s World Food Program (WFP) distributed two months’ worth of food in areas formerly covered by the expelled NGOs,⁵¹ but an assessment conducted by UN and Sudanese government officials warned that ‘by the beginning of May, as the hunger gap approaches, ... unless WFP has found partners able to take on the mammoth distribution task, these people will not receive their rations.’⁵² Just one month after the expulsion, Oxfam Great Britain’s international programs director said that:

‘we have already been told that water pumps in some Darfur camps have stopped pumping, and there are growing fears about the potential for outbreaks of disease in the rainy season ... The expulsion is already affecting the lives of hundreds of thousands of the very poorest and most vulnerable Sudanese people.’⁵³

Restricted humanitarian assistance in Somalia

Somalia has been described as the most dangerous place in the world to be an aid worker.⁵⁴ The Somalia NGO Safety and Preparedness Support Program reported that in 2008 there were a total of 146 incidents directly involving humanitarian agencies or their personnel, with 36 humanitarian staff killed, 17 injured and 28

47 Pantuliano, Jaspars and Ray, above note 36, p. 3.

48 IRIN, *Sudan: Lost Aid Expertise Hard to Replace – UN*, Press Release, 25 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83635 (last visited 15 April 2009).

49 IRIN, *Sudan: We Will Fill the Gaps, Government Insists*, above note 46.

50 Pantuliano, Jaspars and Ray, above note 36, p. 4.

51 IRIN, *Sudan: Hungry People are Desperate People*, Press Release, 23 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83587 (last visited 15 April 2009).

52 IRIN, *Sudan: Lost Aid Expertise Hard to Replace – UN*, above note 48.

53 IRIN, *Sudan: Oxfam Appeals against Expulsion*, Press Release, 15 April 2009, available at www.irinnews.org/report.aspx?ReportId=83933 (last visited 16 April 2009).

54 UN News Centre, *Somalia Now World’s Most Dangerous Place for Aid Workers, Says UN Official*, Press Release, 24 April 2007, available at www.un.org/apps/news/story.asp?NewsID=22334&Cr=somalia&Cr1 (last visited 24 January 2008).

abducted.⁵⁵ A World Vision security assessment report carried out in December 2008 reported that:

‘[t]hreats against humanitarian workers, once overt and understandable ... have been gradually, but consistently replaced over the past twenty-four months by more covert threats which now deliberately ... target both international and local humanitarian staff. These include staff intimidation, staff detention and interrogation, staff kidnapping, staff assassination, listed death threats and improvised explosive device targeting.’⁵⁶

The ability of humanitarian agencies to carry out activities is further restricted by illegal checkpoints, roadblocks and extortion by local authorities and armed groups. In August 2008, the UN reported that there were at least 325 roadblocks throughout Somalia, most of them staffed by the TFG or clan militia, and almost all of them demanding payment of fees or protection money.⁵⁷ As in the case of Darfur, agencies are vulnerable to orders to withdraw – although in Somalia it is not so much a case of being seen not to follow the rules, but of being seen to be associated with a group other than the one exercising control in the area. In October 2008, Al-Shabab issued a statement ordering two aid agencies to cease operations in areas in South Central Somalia under Al-Shabab control. One of the agencies had been supporting health facilities, supplementary feeding centres and out-patient therapeutic programmes, benefiting approximately 30,000 people.⁵⁸

Humanitarian personnel in Somalia are targeted by all parties to the conflict, and in many cases the identities and the affiliations of the perpetrators are unclear. As in Darfur, humanitarian assistance is restricted by general insecurity and random violence, with the possibility of aid workers being caught in the wrong place at the wrong time. However, according to a study conducted by Amnesty International (AI) into the killing of aid workers and members of Somali civil society organizations in 2008, the majority of the victims were killed in targeted attacks.⁵⁹ AI found that the majority of the killings were attributable to members of armed opposition groups, including Al-Shabab and the ARS.⁶⁰ Primary motivations for the attacks included financial gain, and a desire on the part of opposition groups to eliminate people seen to be acting as spies for the TFG or for the Ethiopian military.⁶¹ A third possible motive is the desire on the part of armed

55 Somalia NGO Security Preparedness and Support Program, *Somalia Report*, No. 50/08, December 2008.

56 RMI Somalia, *Report on Review of World Vision Operational Procedures in Somalia*, World Vision Somalia, 2008, p. 6.

57 Amnesty International, *Fatal Insecurity: Attacks on Aid Workers and Rights Defenders in Somalia*, AI Index AFR 52/016/2008, 6 November 2008, p. 17.

58 UN Office for the Coordination of Humanitarian Affairs, *Somalia: Situation Report No. 50*, 19 December 2008.

59 Amnesty International, *Fatal Insecurity*, above note 57, p. 14.

60 Amnesty International, *Millions at Risk in Somalia as Attacks on Aid Workers Escalate*, Press Release, 6 November 2008, available at www.amnesty.org/en/news-and-updates/report/millions-risk-somalia-attacks-aid-workers-escalate-20081106 (last visited 24 January 2008).

61 Amnesty International, *Fatal Insecurity*, above note 57.

groups seeking to expand their territorial control to undermine the authority of groups currently in control of particular areas – by exposing the latter's inability to provide adequate security.

The general level of insecurity, combined with targeted attacks on humanitarian agencies and their personnel, severely restricts the delivery of humanitarian assistance in a country in which 3.25 million people – 43% of the population – require humanitarian assistance.⁶² In a joint statement in October 2008, 52 NGOs operating in Somalia said that national and international agencies were 'prevented from responding effectively to the needs of ordinary Somalis because of violence and severely limited access,' and that South and Central Somalia was 'almost entirely off limits to international staff of aid agencies.'⁶³ A number of agencies have been forced to suspend programmes and evacuate staff, and the consequent disruption to emergency food, shelter and essential medical services has been one of the leading factors contributing to widespread malnutrition and death from starvation or preventable disease.⁶⁴

The legal framework for the protection of humanitarian assistance

The provision of humanitarian assistance is protected to varying degrees by international humanitarian and human rights law. International humanitarian law applies in times of armed conflict, and sets out the rights of civilians affected by conflict as well as the obligations of parties to the conflict. International human rights law applies in times of peace as well as in times of war,⁶⁵ and imposes obligations on states party to international human rights instruments to respect, protect and fulfil the rights of those within their territory or subject to their jurisdiction. The following discussion considers the regulation of humanitarian assistance under each of these legal regimes.

Humanitarian assistance in international humanitarian law

The rules of international humanitarian law applicable to the protection of humanitarian assistance in armed conflict vary depending on the nature of the conflict in question, the nature of the parties to the conflict, and the question of who has control over territory. In the case of international armed conflicts (including

62 *Statement by 52 NGOs Working in Somalia on the Rapidly Deteriorating Humanitarian Crisis in the Country*, 6 October 2008, available at www.somali-civilsociety.org/index.php?option=com_content&task=view&id=125&Itemid=1 (last visited 20 January 2008).

63 *Ibid.*

64 Amnesty International, *Fatal Insecurity*, above note 57.

65 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 105(2)(E); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, p. 116.

military occupation), the provision of humanitarian assistance is regulated by the Fourth Geneva Convention and Protocol I. The obligations set out in these instruments will be discussed below, but suffice to say here that the legal protection of humanitarian assistance enshrined within these instruments is robust, and many of the relevant provisions are seen as representing customary international law. In the case of non-international armed conflicts, humanitarian assistance is regulated by Common Article 3 of the Geneva Conventions and Protocol II.

The conflict in Somalia, despite the involvement of Ethiopian forces until early 2009, has generally been regarded as a non-international armed conflict: the Ethiopian forces were viewed internationally as acting in coalition with the TFG, and as such the conflict was not one that pitted the armed forces of one state against the armed forces of another.⁶⁶ The conflict in Darfur has also been regarded as a non-international armed conflict, although there are – increasingly – elements that could potentially support a classification of the conflict as international in character.⁶⁷ In 2008, the Panel of Experts on Sudan noted that the Darfur conflict had expanded into the wider region, and that the governments of both the Sudan and Chad were engaged in a ‘well-established practice of supplying arms, ammunition, vehicles and training to the armed groups opposing each other.’⁶⁸ The Panel concluded that ‘it is undeniable that a proxy war is being carried out by the Sudan and Chad through non-state actors in and around Darfur’.⁶⁹

The circumstances in which a *prima facie* internal armed conflict may come to be regarded as international in character were considered by the International Criminal Tribunal for Yugoslavia (ICTY) in the case of *Prosecutor v. Tadic*.⁷⁰ It was said in this case that a conflict could be considered international if paramilitary units ‘belong to’ a State other than the one against which they are fighting.⁷¹ As for the meaning of ‘belongs to’, it was held that ‘control over [irregular combatants] by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance to [those combatants] *vis-a-vis* that Party to the conflict’ was required.⁷² Whether the conflict in Darfur could be regarded as international in character would thus depend on the extent of control exercised by the governments of Sudan and Chad over armed opposition groups operating in each other’s territory and fighting against government forces. While the Government of Sudan has accused Chad of providing supplies and equipment to rebel forces operating in Darfur,⁷³ it is unlikely that the rebel forces

66 Human Rights Watch, *So Much to Fear: War Crimes and the Devastation of Somalia*, December 2008, pp. 26–27, available at <http://www.hrw.org/en/reports/2008/12/08/so-much-fear-0> (last visited 2 June 2009).

67 Program on Humanitarian Policy and Conflict Research, *IHL Resource Page: Darfur 2007*, available at www.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=844 (last visited 7 February 2008).

68 Panel of Experts on the Sudan, above note 14, p. 49.

69 *Ibid.*, p. 3.

70 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999.

71 *Ibid.*, para. 92.

72 *Ibid.*, para. 94.

73 See Andrew Heavens, ‘Sudan and Chad Accuse Each Other of Helping Rebels’, *International Herald Tribune*, 29 January 2009.

could be regarded as being within the control of Chad for the purposes of classifying the conflict as international in character. The conflicts in both Somalia and Darfur are therefore governed by the legal regimes regulating non-international armed conflicts, although it is conceivable that in the future the conflict in Darfur may come to be regarded as falling within the scope of the law of international armed conflict. The protection of humanitarian assistance in both international and non-international armed conflicts is described below.

Humanitarian assistance in international armed conflicts

The Fourth Geneva Convention provides that when protected persons do not benefit from the activities of a Protecting Power, the Detaining Power shall request a neutral state or organization to carry out the functions of the Protecting Power, or if this cannot be arranged, 'shall request or shall accept ... the offer of the services of a humanitarian organisation ... to assume the humanitarian functions performed by the protecting powers.'⁷⁴ Humanitarian organizations are to be granted 'all facilities' for the purpose of providing humanitarian assistance.⁷⁵ In short, states have a duty to request and to facilitate the delivery of humanitarian assistance to persons not of their nationality but within their effective control.⁷⁶

The above provisions relating to protected persons are of limited relevance to today's threats to humanitarian assistance, because only in a small minority of conflicts can it be said that one state has effective control over the territory of another. Article 23 of the Fourth Geneva Convention, however, applies more broadly to 'the whole of the populations of the countries in conflict',⁷⁷ and obliges each party to allow the free passage of 'all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another high contracting party', as well as 'essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.'⁷⁸

Protocol I is even more explicit in its protection of humanitarian assistance, providing that:

'If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with [food and supplies essential to survival] ... relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be

⁷⁴ GC IV, Art. 11.

⁷⁵ GC IV, Art. 30.

⁷⁶ ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 579, where the ICTY held, regarding the definition of a protected person, that this 'is not restricted to situations in which the individual civilian is physically in the hands of a Party or Occupying Power', but that rather, persons will be considered to be in the hands of a party if they are 'in territory effectively occupied by a party to the conflict'.

⁷⁷ GC IV, Art. 13.

⁷⁸ GC IV, Art. 23.

undertaken, subject to the agreement of the Parties concerned in such relief actions.⁷⁹

The Protocol goes on to state that relief personnel must be protected and assisted to the fullest extent practicable, although the participation of such personnel is subject to the approval of the party in whose territory that relief is being carried out. Only in the case of imperative military necessity may the activities of relief personnel be limited or their movements temporarily restricted.⁸⁰

In short, in the case of international armed conflict, there is a strong foundation in international law on which humanitarian actors can rely to demand that humanitarian assistance be facilitated. Unfortunately this is of limited application to today's conflicts, the vast majority of which (including the current conflicts in Somalia and Darfur, as has been shown above) are non-international in character.⁸¹

Common Article 2(2) of the Geneva Conventions provides that the laws of armed conflict 'shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party'. In the case of occupied territories, the Fourth Geneva Convention provides that '[i]f the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes ... and ... facilitate them by all the means at its disposal.'⁸² The ICRC notes that the obligation to facilitate relief schemes is 'unconditional', and that occupying authorities must 'co-operate wholeheartedly in the rapid and scrupulous execution of these schemes.'⁸³ In short, occupying powers must not only consent to but must seek out and actively facilitate humanitarian assistance.

There is some support for the proposition that where the requirements set out in the Hague Regulations are met (effective control on the part of the occupying power and lack of consent on the part of the sovereign state),⁸⁴ the law of occupation may apply even in circumstances 'other than a state of war or armed conflict between or among High Contracting parties' – that is, in both international and non-international armed conflicts (and, potentially, in times of peace).⁸⁵ The possibility has significance for the protection of humanitarian assistance in Darfur and Somalia, for it could mean that the full suite of occupiers'

79 AP I, Art. 70(1).

80 API, Art. 71.

81 Human Security Centre, *The Human Security Report 2005: War and Peace in the 21st Century*, Oxford University Press, Oxford, 2005, p. 34.

82 GC IV, Art. 59.

83 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, International Committee of the Red Cross, Geneva, 1958, p. 320.

84 Hague Regulations Concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, Art. 42: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

85 See, for example, Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, International Humanitarian Law Series, Vol. 2, Martinus Nijhoff Publishers, 1999, p. 151; Adam Roberts, 'What is a Military Occupation', *British Yearbook of International Law*, Vol. 55, 1985, p. 253.

obligations concerning the provision of humanitarian assistance could be said to apply to armed opposition groups who control vast amounts of territory throughout Darfur and Somalia without the sovereign state's consent. However, this approach has not been supported by the International Court of Justice (ICJ), which held that Article 2(2) of the Geneva Conventions ought to be read as meaning that where an international armed conflict exists, the Conventions may also apply 'in any territory occupied in the course of the conflict by one of the contracting parties'.⁸⁶

Humanitarian assistance in non-international armed conflicts

Humanitarian assistance in non-international armed conflicts is protected by Common Article 3 of the Geneva Conventions and by Protocol II, as well as by customary international law. Non-international armed conflict is not defined by Common Article 3, but has been defined by the ICTY as 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.⁸⁷ The situations in both Somalia and Darfur fall within this definition, and in both cases the required level of intensity is well-established.⁸⁸

Common Article 3 of the Geneva Conventions sets out minimum standards of humanity binding upon parties to a non-international armed conflict: persons not taking part in hostilities shall be treated humanely, violence to life and outrages upon personal dignity shall be prohibited, and the wounded and sick shall be cared for. It is arguable that this encompasses an obligation to consent to and facilitate humanitarian assistance, where failure to do so would threaten the survival of a civilian population (under the prohibition on 'violence to life').⁸⁹ Article 3(2) provides that 'an impartial humanitarian body may offer its services to the Parties to the conflict' – but does not oblige the state on whose territory the humanitarian crisis is taking place to accept the offer.

Protocol II provides more explicit protection for humanitarian assistance in non-international armed conflicts, although it has a higher threshold of application than Common Article 3.⁹⁰ Article 18 provides that:

'If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief

86 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, above note 66, para. 95.

87 ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

88 For Somalia, see Human Rights Watch, above note 66, pp. 26–27. In the case of Darfur, the International Commission of Inquiry said that: 'the requirements of (i) existence of organised armed groups fighting against the central authorities; (ii) control by rebels over part of the territory; and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict ... are met' – International Commission of Inquiry on Darfur, above note 10, p. 26.

89 Ruth Abrial Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 519–520.

90 See AP II, Art. 1.

actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.’

Underlying this provision is the principle of subsidiarity – that is, ‘that States are primarily responsible for organising relief’, and that ‘relief societies ... are called upon to play an auxiliary role by assisting the authorities in their task’.⁹¹ In other words, as recently affirmed by Rohan Perera of the International Law Commission, ‘humanitarian assistance should be a subsidiary action which is never taken unilaterally’.⁹²

There is an obvious tension here between the words ‘shall be undertaken’ and ‘subject to the consent of’ – that is, the requirement for a humanitarian agency to obtain authorization from the state concerned and the obligation on the part of the state to grant it. In its commentary on the Additional Protocols, the ICRC notes that ‘the fact that consent is required does not mean that the decision is left to the discretion of the parties,’ and that ‘if the survival of the population is threatened and a humanitarian organisation fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place.’⁹³ The ICRC goes on to state that refusing relief without proper grounds would be tantamount to violating Article 14 of Protocol II prohibiting the use of starvation as a method of combat.⁹⁴ At a minimum, then, Article 18 (read with Article 14) encompasses an obligation on the part of states to accept humanitarian relief if the situation is such that to refuse relief might lead to starvation or otherwise threaten the survival of a civilian population. Except in these circumstances, a strict reading of Article 18 does not suggest the existence of an obligation on the part of a state to accept or facilitate humanitarian relief.

Somalia is not a party to Protocol II; thus humanitarian assistance in Somalia is protected only by the minimum standards set out in Common Article 3. Sudan is a party to Protocol II; humanitarian assistance in Darfur is thus protected by Common Article 3 and Article 18, provided it can be shown that armed groups within the control of the state are in conflict with other armed groups which, under responsible command, exercise control over territory sufficient to carry out sustained and concerted military operations and to implement Protocol II.⁹⁵

In 2008, the Panel of Experts on Sudan noted that the majority of Darfur’s rebel splinter groups lacked clear command and control structures.⁹⁶ Nevertheless, in light of the finding of the Commission of Inquiry that since 2003 the rebel

91 Yves Sandoz *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987, p. 1477.

92 Rohan Perera, *Statement at the 60th Session of the International Law Commission*, Geneva, 18 July 2008, available at www.lankamission.org/content/view/579/ (last visited 28 May 2008).

93 Sandoz *et al.*, above note 91, p. 1479.

94 *Ibid.*

95 In terms of APII, Art. 1.

96 Panel of Experts on the Sudan, above note 14, p. 53.

groups have exercised *de facto* control over some areas of Darfur,⁹⁷ it is probable that at least the major rebel groups could be regarded as possessing sufficient command and control for the conflict to fall within the scope of Protocol II. With regards to the Janjaweed militia, the findings by the Commission of Inquiry of ‘clear links between the State and militias’,⁹⁸ and that the Janjaweed received weapons and ammunition from senior civilian authorities and the Government’s own armed forces,⁹⁹ suggest that the Janjaweed could almost certainly be regarded as ‘within the overall control’ of the state – thus satisfying the threshold criteria for the application of Protocol II. Thus the parties to the conflict in Darfur are at a minimum bound by Common Article 3 of the Geneva Conventions, and insofar as the conflict comprises organized armed groups in conflict with the armed forces of the state, also by Protocol II. In both cases, as has been shown above, the obligation to consent to and facilitate humanitarian assistance is limited to situations in which the failure to do so may threaten the survival of a civilian population.

In addition to Common Article 3 and Protocol II, the regulation of humanitarian assistance in non-international armed is also covered by customary international law. Specifically, the obligation to respect and protect humanitarian relief personnel and objects, and the obligation to allow and facilitate the rapid and unimpeded passage of humanitarian relief which is impartial in character and conducted without any adverse distinction (subject to the state’s right of control) are regarded by the ICRC as rules of customary international law applying in all conflicts.¹⁰⁰ With regards to the obligation to respect and protect humanitarian relief personnel, the ICRC stated in its 2005 study on the rules of customary international humanitarian law that this obligation is a ‘corollary of the prohibition of starvation, ... as well as the rule that the wounded and sick must be collected and cared for’, because the security of humanitarian relief personnel and objects is an ‘indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation.’¹⁰¹

As to the issue of consent to humanitarian assistance, the ICRC study notes that:

‘consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.’¹⁰²

This then takes us back to much the same position as Protocol II (as interpreted by the ICRC) – that is, that states are obliged to consent to humanitarian

97 International Commission of Inquiry on Darfur, above note 10, p. 26.

98 *Ibid.*, p. 33.

99 *Ibid.*, p. 36.

100 Henckaerts and Doswald-Beck, above note 5, pp. 105, 193.

101 *Ibid.*, p. 105.

102 *Ibid.*, p. 197.

relief if the situation is such that withholding consent might lead to starvation or otherwise threaten the survival of the population.

The following discussion considers whether the legal regulation of humanitarian assistance has been further strengthened by international consensus in recent years – as reflected in state practice, General Assembly and Security Council resolutions – such that customary international law now encompasses an obligation to consent to and facilitate humanitarian assistance, regardless of whether the denial of that assistance may threaten a civilian population with starvation.

For a legal principle to acquire the status of customary international law, it has traditionally been required that there be a consistent and general practice among states of adherence to the rule, and that there be evidence that the practice has been carried out in the belief that the practice is obligatory (the principle of *opinio juris*).¹⁰³ Following the decision of the ICJ in the case of *Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua*'), evidence of *opinio juris* may be gleaned from treaties as well as from non-binding instruments such as declarations and General Assembly resolutions.¹⁰⁴ The ICJ affirmed in that case that 'the effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution'.¹⁰⁵

If *opinio juris* may indeed be inferred from the acceptance of General Assembly resolutions and non-binding declarations, can it be argued that there is sufficient evidence to support the existence of a new rule of customary international law requiring states to consent to and facilitate humanitarian assistance, whether or not the denial of such assistance may threaten a civilian population with starvation?

In 1991 the General Assembly established the following 'guiding principles' for the co-ordination of humanitarian assistance:

3. The sovereignty ... of States must be fully respected ... humanitarian assistance should be provided with the consent of the affected country ...
4. Each State has the responsibility first and foremost to take care of the victims of ... emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, co-ordination, and implementation of humanitarian assistance within its territory.
6. States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance ...¹⁰⁶

103 ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), Judgment, ICJ Reports 1969, para. 77.

104 ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, para. 188.

105 *Ibid.* The ICJ regarded the parties' acceptance of the resolutions and declarations as evidence of *opinio juris* sufficient to support the existence of a rule of customary international law.

106 *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 46/182 (1991), Annex.

These guiding principles have been ‘recalled’ in successive General Assembly resolutions on the co-ordination of humanitarian assistance and the safety and security of humanitarian personnel. It is interesting to note, however, that with the exception of Resolution 51/194 (1996),¹⁰⁷ the need for consent on the part of the concerned state has not been explicitly reaffirmed. The resolutions repeatedly condemn acts and failures to act which prevent humanitarian personnel from discharging their humanitarian functions, and call upon states and other parties to co-operate with humanitarian agencies and to ensure the safe and unhindered access of humanitarian personnel and the delivery of supplies and equipment.¹⁰⁸ It is possible to surmise that while the General Assembly has not gone so far as to reverse the requirement that consent on the part of the host state be obtained, the requirement of consent has diminished in importance relative to the other competing principles espoused in 1991 (the responsibility of the state to protect victims, and the importance of facilitating the work of humanitarian organizations).

The Security Council has taken a somewhat stronger approach to the obligation on the part of states to facilitate humanitarian assistance – in non-international as well as international armed conflicts. In 1996, the Security Council passed a succession of resolutions on Liberia, condemning attacks on international organizations and agencies delivering humanitarian assistance, and demanding ‘the freedom of movement of ... international organisations and the safe delivery of humanitarian assistance.’¹⁰⁹ In more recent years, the Security Council has passed resolutions demanding complete and unhindered humanitarian access and assistance in Somalia,¹¹⁰ stressing the importance of ensuring safe and unhindered access of humanitarian workers in Afghanistan,¹¹¹ calling upon all parties in Sudan to ‘support, protect and facilitate all humanitarian operations and personnel’,¹¹² and in the case of Iraq, urging ‘all those concerned as set forth in international

107 *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 51/194 (1996).

108 See, e.g., *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 47/168 (1992) (‘stressing the need for adequate protection of personnel involved in humanitarian operations, in accordance with relevant norms and principles of international law’); *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 51/194 (1996) (emphasizing ‘the urgent need to ensure, respect and promote international humanitarian law, principles and norms, the safety of humanitarian personnel and the need for States whose populations are in need of humanitarian assistance to facilitate the work of humanitarian organisations in implementing humanitarian assistance’) and *Resolution on the Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*, GA Res. 62/95 (2007) (calling upon ‘all States and parties in complex humanitarian emergencies ..., in countries in which humanitarian personnel are operating, ... to cooperate fully with ... humanitarian agencies ... to ensure the safe and unhindered access of humanitarian personnel as well as delivery of supplies and equipment’).

109 *Resolution on Liberia*, SC Res. 104 (1996); *Resolution on Liberia*, SC Res. 1059 (1996); *Resolution on Liberia*, SC Res. 1071 (1996); *Resolution on Liberia*, SC Res. 1083 (1996).

110 *Resolution on Somalia*, SC Res. 1744 (2007); *Resolution on Somalia*, SC Res. 1772 (2007); *Resolution on Somalia*, SC Res. 1801 (2008); *Resolution on Somalia*, SC Res. 1814 (2008); *Resolution on Somalia*, SC Res. 1844 (2008); *Resolution on Somalia*, SC Res. 1863 (2009); *Resolution on Somalia*, SC Res. 1872 (2009).

111 *Resolution on Afghanistan*, SC Res. 1806 (2008); *Resolution on Afghanistan*, SC Res. 1868 (2009).

112 *Resolution on Sudan*, SC Res. 1870 (2009).

humanitarian law ... to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations'.¹¹³ While the resolutions continue to reaffirm the sovereignty and territorial integrity of the state concerned, the Security Council nevertheless seems to have taken the position that consent is not an absolute requirement for the carrying out of humanitarian relief, and that the states concerned are obliged to do all within their power to facilitate such relief. The demand for unhindered humanitarian access has not explicitly been limited to situations in which the denial of such assistance would lead to starvation or otherwise threaten the survival of the civilian population.

Can it be said, then, that the General Assembly and Security Council resolutions, together with the conduct of states and other official statements,¹¹⁴ provide evidence of a rule of customary international law requiring states to facilitate humanitarian assistance, whether or not such refusal would lead to starvation or otherwise threaten the survival of a civilian population? It is certainly reasonable to argue that the adoption by states of successive resolutions demanding humanitarian access (and in the case of Iraq, impliedly recognizing that full and unimpeded access by humanitarian personnel is required by international humanitarian law)¹¹⁵ represents the *opinio juris* necessary to support such a claim.

More difficult, however, is the requirement that the conduct of states be in conformity with the alleged rule. States that have been the subject of resolutions calling for the safe and unimpeded delivery of humanitarian assistance have been less than consistent in their adherence. The parties, movements and factions in Somalia have not taken all measures necessary to facilitate the provision of humanitarian assistance following recent Security Council resolutions; humanitarian access to populations in need of assistance in Afghanistan has been anything but safe and unhindered since the passing of resolutions in 2008–2009; and the humanitarian agencies expelled from Darfur in early 2009 have not been granted permission to recommence operations. However, non-compliance is not necessarily detrimental to a claim that a rule has the status of customary international law.¹¹⁶ In *Nicaragua*, the ICJ held that:

'[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should

¹¹³ *Resolution on Iraq*, SC Res. 1770 (2007).

¹¹⁴ The ICRC study notes that the obligation to allow the free passage of relief supplies has also been included in military manuals and other official statements and practice applicable to both international and non-international armed conflict – see Henckaerts and Doswald-Beck, above note 5, p. 195 (citing the military manuals of Columbia, Germany, Italy and Kenya, and referring to official statements made by Germany, Nigeria, US and Yugoslavia).

¹¹⁵ *Resolution on Iraq*, SC Res. 1770 (2007).

¹¹⁶ See Theodor Meron, 'Revival of Customary Humanitarian Law', *American Journal of International Law*, Vol. 99, No. 4, October 2005, p. 817.

generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹¹⁷

With regard to the obligation to ‘allow and facilitate rapid and unimpeded passage of humanitarian relief ... subject to [the host state’s] right of control’, the ICRC study found that ‘contrary practice has generally been condemned with respect to both international and non-international armed conflicts’.¹¹⁸ International condemnation of contrary practice has continued in recent years, as illustrated by the Security Council resolutions referred to above, and explicitly in Resolution 1844 on Somalia, in which the Security Council imposed sanctions on, *inter alia*, individuals and entities ‘designated by [the Security Council] as ... obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia’.¹¹⁹ Thus it is reasonable to assert that the obstruction of humanitarian assistance – whether or not this has threatened the survival of a civilian population – has generally been regarded as a violation of international humanitarian law.

It may be argued, then, that there is sufficient *opinio juris* and state practice to support the claim that there is an obligation in customary international law to consent to and facilitate humanitarian assistance, in both international and non-international armed conflicts, whether or not the denial of that assistance may lead to starvation or otherwise threaten the survival of a civilian population.

Humanitarian assistance in international human rights law

The parallel application of human rights and humanitarian law has been reflected in multiple resolutions of the Security Council, the Commission on Human Rights and the Human Rights Council, all urging parties to conflicts to respect, promote and comply with their obligations under both human rights and international humanitarian law.¹²⁰ The ICJ has also affirmed that human rights provisions continue to apply in times of armed conflict unless a party has lawfully derogated from them on the grounds of national emergency.¹²¹

It was not until the ICJ’s *Wall* case in 2004, however, that the application of human rights law in times of armed conflict was explicitly recognized as encompassing the obligations of governments with regards to economic, social and cultural rights. The ICJ declared in that case that Israel’s construction of a security

117 ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, above note 104, para. 186.

118 Henckaerts and Doswald-Beck, above note 5, p. 195.

119 *Resolution on Somalia*, SC Res. 1844 (2008).

120 See Rebecca Barber, ‘Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law’, *International Journal of Refugee Law*, Vol. 20, No. 3, October 2008, pp. 436–7 for a list of resolutions of the Security Council, Commission on Human Rights and the Human Rights Council reaffirming the parallel application of international human rights and humanitarian law in times of armed conflict.

121 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 65.

barrier in the Occupied Palestinian Territories constituted a breach of its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the obligation to respect the right to an adequate standard of living. The Court held that Israel was not entitled to derogate from the provisions of the ICESCR, because ‘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 found in Article 4 of the International Covenant on Civil and Political Rights’ (ICCPR).¹²² Thus in situations of armed conflict, states are bound to abide by the entire suite of their obligations under international human rights law, including with respect to economic, social and cultural rights.

International human rights law contains a number of provisions relevant to the protection of humanitarian assistance. The ICCPR and the African Charter on Human and Peoples’ Rights (‘African Charter’) protect the right to life,¹²³ while the Convention on the Rights of the Child (CRC) protects the child’s right to life and provides that states shall ensure to the maximum extent possible the survival and development of the child.¹²⁴ The Committee on Civil and Political Rights has said that the right to life ‘cannot properly be understood in a restrictive manner’, and that the protection of the right requires states to ‘adopt positive measures.’¹²⁵ States party to these conventions (Sudan and Somalia are both party to the ICCPR and the African Charter, and Sudan is also a party to the CRC) thus have an obligation to accept, and probably also to actively facilitate, humanitarian relief if the situation is such that not doing so might threaten the survival of those within their territory or subject to their jurisdiction. This is comparable to the obligation under Article 18 of Protocol II and customary international humanitarian law that states must consent to humanitarian relief if withholding consent might lead to starvation or otherwise threaten the survival of the population.

The provisions in the ICESCR (to which both Sudan and Somalia are party) and in the African Charter relating to economic, social and cultural rights provide – arguably – a more expansive protection of humanitarian assistance. The ICESCR recognizes ‘the right of everyone to an adequate standard of living ... including adequate food, clothing and housing’,¹²⁶ and the right to freedom from hunger.¹²⁷ Both the ICESCR and the African Charter also recognize the right to enjoy the highest attainable standard of physical and mental health.¹²⁸

¹²² *Ibid.*, para. 106.

¹²³ International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, entered into force 23 March 1976, Art. 6; African Charter of Human and Peoples’ Rights (African Charter), opened for signature 27 June 1981, entered into force 21 October 1986.

¹²⁴ Convention on the Rights of the Child (CRC), opened for signature 20 November 1989, entered into force 2 September 1990, Art. 6.

¹²⁵ Committee on Civil and Political Rights, *General Comment No. 6: The Right to Life (Article 6 of the Covenant)*, CCPR, 60th sess., UN Doc. HRI/Gen/1/Rev.7 (1982), para. 5.

¹²⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, entered into force 3 January 1976, Art. 11(1).

¹²⁷ ICESCR Art. 11(2).

¹²⁸ ICESCR Art. 12; African Charter, Art 16.

Unlike the ICCPR, the CRC and most of the provisions in the African Charter, which impose immediate obligations on states parties to ensure full realization of the rights enshrined in the respective covenants, the ICESCR provides for progressive realization of rights to the maximum of a state's available resources.¹²⁹ Art 2(1) of the ICESCR obliges states to:

'take steps, individually and through international assistance and co-operation, ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means ...'

The reference in Article 16 of the African Charter to the 'best attainable' state of physical and mental health implies that this obligation should be interpreted in similar terms.¹³⁰

However, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that while the ICESCR allows generally for the progressive realization of rights, states parties are under an immediate obligation to ensure the satisfaction of 'minimum essential levels' of each of the rights enshrined in the Covenant:

'[t]hus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... [and] must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'¹³¹

The phrase 'to the maximum of its available resources' refers to the resources existing within a state as well as to 'those available from the international community through international co-operation and assistance.'¹³² Thus, where a state party to the ICESCR fails to provide essential foodstuffs, essential primary health care, basic shelter and housing or basic education, that state will be considered to be in breach of its obligations unless it can demonstrate that it has made every effort to use all resources at its disposal – including international assistance – in an effort to satisfy its obligations. The minimum core obligations arising from the right to adequate food and to water are discussed below as an illustration of the

129 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)*, UN ESCOR, Comm. Economic, Social and Cultural Rights, 5th sess., Annex 3, UN Doc. E/1991/23 (1990), para. 1.

130 Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 23, May 2001, p. 327, at p. 349.

131 CESCR, *General Comment No. 3*, above note 129.

132 *Ibid.*, para. 13.

importance of state obligations with regards to economic, social and cultural rights for the protection of humanitarian assistance.

The right to adequate food 'is realized when every man, woman and child ... has physical and economic access at all times to adequate food or means for its procurement'.¹³³ While it is recognized that the right to food must be realized progressively, the CESCR has affirmed that states have a 'core obligation to take the necessary action to mitigate and alleviate hunger ... even in times of natural or other disasters'.¹³⁴ To satisfy this core obligation, governments must ensure that everyone within their jurisdiction has 'access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger'.¹³⁵ In determining whether the actions or omissions of a government amount to a violation of the right to food, the CESCR notes that:

'it is important to distinguish the inability from the unwillingness of a State party to comply. ... A State claiming that it is unable to carry out its obligation ... has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.'¹³⁶

Actions such as the hijacking of food convoys, demands for extortion, the holding up in customs of food intended for distribution to the civilian population, or any other form of harassment or restriction imposed on international agencies engaged in food or nutrition programmes – insofar as those actions can be attributed to the government – represent clear violations of the minimum core obligations as regards the right to food. Moreover, where a population does not have access to the minimum essential food to ensure its freedom from hunger, such as is the case in both Somalia and Darfur (one in six children in Somalia are acutely malnourished;¹³⁷ just less than one in six children in Darfur are malnourished¹³⁸), the government concerned may be considered to be in breach of its obligations unless it can demonstrate that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of food.

The human right to water has also been recognized by the CESCR as falling within the protection offered by Article 11(1) of the ICESCR, because 'the right to water clearly falls within the category of guarantees essential for securing an

133 CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UN ESCOR, CESCR, 20th sess., UN Doc. E/C.12/1999/5 (1999), para. 6.

134 *Ibid.*, para. 6.

135 *Ibid.*, para. 14.

136 *Ibid.*, para. 17.

137 Food Security Analysis Unit Somalia, *Food Security & Nutrition: Special Brief – Post Deyr '08/09 Analysis*, 11 February 2009, p. 11, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7P6GW3-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7P6GW3-full_report.pdf/$File/full_report.pdf) (last visited 3 June 2009).

138 UN News Centre, *New UN Survey Reveals Alarming Malnutrition Rates Among Darfur's Children*, Press Release, 28 December 2007, available at www.un.org/apps/news/story.asp?NewsID=25178&Cr=sudan&Cr1 (last visited 24 February 2009).

adequate standard of living.¹³⁹ The right to water means the right to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’¹⁴⁰ As with the right to food, it is recognized that realization of the right to water is subject to a state’s available resources, and as such, the right may be realized progressively.¹⁴¹ Nevertheless, the CESCR has identified a number of minimum core obligations with regard to water that are of immediate effect,¹⁴² noting that these are ‘non-derogable’, and that as such, non-compliance (for example on the basis of lack of available resources) cannot be justified.¹⁴³

As with the right to food, the CESCR has noted that in determining whether there has been a violation of the right to water, it is relevant to distinguish between the inability and unwillingness of a state to comply with its obligations.¹⁴⁴ Where a state is unable to provide sufficient, safe, acceptable, physically accessible and affordable water, it will be considered to be in violation of its obligations unless it can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.¹⁴⁵ If any ‘deliberately retrogressive measures’ are taken to restrict the right to water, states will have the burden of proving that such measures are ‘duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.’¹⁴⁶ Again, any sort of attacks, harassment or restrictions imposed on humanitarian agencies or personnel engaged in the provision of water to people whose rights to water are not yet fully realized – insofar as that conduct can be attributed to a state party to ICESCR – constitute a violation of that state’s obligation to take steps to achieve progressively the full realization of the right to water.

It can thus be said that international human rights law, and particularly the protections of economic, social and cultural rights enshrined in the ICESCR, provides a more substantive protection of humanitarian assistance than does international humanitarian law, in situations where the restrictions to humanitarian assistance are attributable to state parties to ICESCR (where humanitarian assistance is obstructed by non-state actors, the applicability of international human rights law is more uncertain). States parties to ICESCR are bound to use the maximum of their available resources, including international assistance, to progressively realize the right to an adequate standard of living and to the highest attainable standard of health, and are bound to ensure – immediately – the prescribed minimum essential levels of those rights. States must move as

139 CESCR, *General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN ESCOR, CESCR, 29th sess., Agenda Item 3, UN Doc. E/C.12/2002/1 (2002), para. 3.

140 *Ibid.*, para. 2.

141 *Ibid.*, para. 17.

142 These include: the obligation to ensure access to the minimum essential amount of water sufficient and safe for personal and domestic use to prevent disease; the obligation to ensure physical access to facilities or services that provide sufficient, safe and regular water, at a reasonable distance and without prohibitive waiting times; and the obligation to ensure access to adequate sanitation. *Ibid.*, para. 37.

143 *Ibid.*, para. 40.

144 *Ibid.*, para. 41.

145 *Ibid.*

146 *Ibid.*, para. 19.

‘expeditiously and effectively as possible’ towards the realization of the rights,¹⁴⁷ must justify any deliberately retrogressive measures,¹⁴⁸ and in the event of a *prima facie* violation, must prove that they made every effort to use all available resources to satisfy their obligations.¹⁴⁹ The obligations apply in international and non-international armed conflicts as well as in times of peace, and cannot be derogated from on the basis of armed conflict or public emergency.¹⁵⁰

Conclusion

In 2001, the International Commission on Intervention and State Sovereignty (ICISS), in a study commissioned by the Canadian government, wrote that state sovereignty carries with it a responsibility ‘for the functions of protecting the safety and lives of citizens and promotion of their welfare’.¹⁵¹ The ICISS called this the ‘responsibility to protect’ – the minimum substance of which is ‘the provision of life-supporting protection and assistance to populations at risk’.¹⁵² While it is a responsibility that lies first and foremost with the state, the international community has a ‘residual responsibility’ to protect – ‘activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the perpetrator of crimes or atrocities’.¹⁵³ The ICISS said that in situations of large-scale loss of life or ethnic cleansing, ‘the principle of non-intervention yields to the international responsibility to protect’, such that military intervention may be warranted.¹⁵⁴ The ‘responsibility to protect’ has subsequently been endorsed by the General Assembly and the Security Council,¹⁵⁵ and has frequently been referred to as an emerging norm of customary international law.¹⁵⁶

The focus of this paper has been the legal framework for the protection of humanitarian assistance, rather than the question of whether and in what circumstances the international community may forcibly intervene in another

147 CESCR, *General Comment No. 3*, above note 129, para. 9.

148 *Ibid.*

149 CESCR, *General Comment No. 12*, above note 133, para. 17; CESCR, *General Comment No. 15*, above note 139, para. 41; CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN ESCOR, Comm. Economic, Social and Cultural Rights, 22nd sess., UN Doc. E/C.12/2000/4 (2000), para. 47.

150 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 65, para. 106.

151 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, p. 13.

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 *World Summit Outcome*, GA Res. 60/1 (2005); *Resolution on Protection of Civilians in Armed Conflicts*, SC Res. 1674 (2006).

156 e.g. ICISS, above note 151, p. 15 (referring to the responsibility to protect as an ‘emerging guiding principle’); UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004, para. 202, available at <http://www.un.org/secureworld/report2.pdf> (last visited 3 June 2009), endorsing the ‘collective international responsibility to protect’ as an emerging norm.

state for the purposes of delivering such assistance. The discussions around the 'responsibility to protect' have focused on situations of massive human rights violations – specifically situations of genocide, war crimes, ethnic cleansing or crimes against humanity – and on the criteria that must be satisfied in order to justify military intervention for humanitarian protection purposes. Nevertheless, the degree of support for 'responsibility to protect' – and most importantly, for the underlying principle that sovereignty implies responsibility – has considerably strengthened the claim that customary international law recognizes an obligation on the part of states to consent to and actively facilitate humanitarian assistance. It is an obligation that is recognized, as has been shown above, in customary international humanitarian law as well as in international human rights law – which recognizes *inter alia* the obligation of states to use the maximum of their available resources, including international assistance, to ensure the realization of the economic, social and cultural rights of all those within their territory. It is an obligation reflected in the recognition that state sovereignty encompasses a responsibility to safeguard and promote the welfare of a population, including where necessary through the active facilitation of international humanitarian assistance.

REPORTS AND DOCUMENTS

International Committee of the Red Cross: Prevention policy

(Adopted by the Assembly of the ICRC on

18 September 2008)

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Introduction

Together with *protection*, *assistance* and *cooperation*, *prevention* is a central component of the ICRC's work. It constitutes one of the four *approaches* that the ICRC has devised for reaching its overall and fundamental goal of ensuring respect for the lives, dignity and physical and mental well-being of persons affected by armed conflict and other situations of violence.¹

In line with its mission statement,² the ICRC endeavours to prevent suffering, in particular by “promoting and strengthening international humanitarian law and universal humanitarian principles”. This is also a key element of the mandate confirmed and conferred upon the ICRC by States and the International Red Cross and Red Crescent Movement. The Statutes of the Movement specifically entrust the ICRC with the responsibility to work for the faithful application of international humanitarian law, for its understanding, dissemination and development, as well as for maintaining and disseminating the Fundamental Principles.³ This work has been undertaken by the ICRC since its inception.

Given the complex environment in which the ICRC operates, as well as the growth, diversification and specialization of the organization, it is necessary to adopt a policy for prevention, including a common understanding of what it encompasses, which principles should guide it and how it should be implemented. Such a policy will enhance the understanding and effectiveness of the ICRC's prevention approach and activities. More generally, it contributes to the ICRC's ambitions to remain the standard-setting organization in the field of international humanitarian law, to continue to promote its identity as an exclusively humanitarian, impartial, neutral and independent organization and to remain a reliable,

predictable and coherent institution whose work is underpinned by a strong culture of accountability and focused on the results and impact of its work.⁴

This policy document is organized as follows:

- Section I defines the notion of prevention as understood within the ICRC;
- Section II explains how the ICRC seeks to foster an environment that is conducive to respect for life and dignity and for the ICRC's work;
- Section III outlines the guiding principles that enable the ICRC to ensure the relevance, efficiency and impact of its prevention approach;
- Section IV lists the criteria that have to be assessed when deciding whether to engage in prevention activities;
- and Section V outlines different considerations for developing strategies for prevention activities.

1. Definition of prevention

Prevention literally means “the action of stopping something from happening or arising”.⁵ At the most general level, all ICRC activities aim to prevent human suffering caused by armed conflict and other situations of violence. Therefore, working “to prevent” humanitarian problems is a perspective common to the institution's different domains of activity.⁶ However, within the ICRC, “prevention” has also become associated with a particular *approach* to humanitarian problems, as distinct from the organization's protection, assistance, and cooperation approaches.⁷

Pursuant to its prevention approach, the ICRC seeks to prevent human suffering by fostering an environment conducive to: (1) respect for the life and dignity of persons affected by armed conflict and other situations of violence; and (2) respect for the ICRC's work. This approach entails taking action to prevent suffering by influencing those who can determine – directly or indirectly – the fate

1 ICRC Policy, “The ICRC: Its mission and work”, 2008.

2 The ICRC mission statement explicitly covers “armed conflicts and other situations of violence”.

3 Art. 5(2), Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, amended in 1995 and 2006. See also, Res. 21, “Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts”, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 7 June 1977, which was adopted in the framework of negotiations on the Additional Protocols. Numerous resolutions adopted during the International Conference further elaborate upon the ICRC's responsibility.

4 ICRC Strategy 2007–2010, “Committed to meeting new challenges through action”.

5 Oxford Dictionary of English, Second Edition, Oxford University Press, 2006.

6 See Jean-Luc Blondel, “The role of the ICRC in preventing armed conflict: its possibilities and limitations, *International Review of the Red Cross*, Vol. 83, No. 844, December 2001, pp. 923–945. Blondel indicates that all ICRC activities contribute to three different objectives, albeit in varying degrees: (1) a normative and educative objective; (2) a corrective and curative objective and (3) a forward-looking and preventive objective. *Ibid.*, p. 936.

7 “The ICRC: its mission and work”, *supra* note 1.

of people affected and generally implies a medium- or long-term perspective. It encompasses efforts to communicate, develop, clarify, as well as to promote the implementation of international humanitarian law and other relevant bodies of law, as well as efforts to facilitate acceptance of the ICRC's work.⁸

This policy presents the ICRC's prevention approach and the different activities that comprise it.⁹ Particular activities fall within the ICRC's prevention approach provided they aim to foster an environment conducive to respect for the life and dignity of persons affected by armed conflict and other situations of violence and for the ICRC's work. Thus, protection, assistance and cooperation activities may all be part of this approach.¹⁰ Similarly, prevention activities may also contribute to the ICRC's protection, assistance and cooperation approaches.¹¹ Although prevention activities may contribute to preventing armed conflict or to preventing its resurgence, this aspect of the organization's work falls outside the scope of this policy.¹²

2. Environment-building

The ICRC's prevention approach follows a particular logic, based on an understanding of why people behave the way they do and how to influence them. Behaviour is shaped in part by specific environmental factors. Acting upon these factors may thus have an effect on behaviour. Clarifying the characteristics of "an environment conducive to respect" is a necessary step. As the ICRC shares responsibility in this domain with other actors, it must also recognise its limits.

2.1. Underlying logic of prevention

As humanitarian problems are in part a product of their environment, the ICRC needs to understand the complex environmental factors influencing the likelihood

⁸ *Ibid.*

⁹ Approaches are distinct from activities or programmes. They are defined according to the specific aim which they pursue. *Ibid.*

¹⁰ For example, a prevention approach that aims to limit or put a stop to the use of cluster munitions and thus to the suffering caused by their use may include a range of activities: promoting the adoption of a new treaty (prevention activity); preparing reports about the consequences of cluster munitions on people not or no longer participating in the fighting (protection activity); compiling descriptions of the wounds caused by cluster munitions based on the ICRC's first-hand medical experience (assistance activity); and organising a seminar for National Societies to strengthen the Movement's public communication on the issue of cluster munitions (cooperation activity). At the same time, certain protection, assistance and cooperation activities which have a broad preventive character (e.g., vaccination campaigns, prison visits, strengthening the capacity of National Societies in the field of restoring family links), do not fall within the scope of the present policy.

¹¹ For example, a protection approach that aims to put a stop to and prevent the recurrence of sexual violence may include promoting the enactment of domestic legislation prohibiting sexual violence (prevention activity). This prevention activity may concurrently fall within a prevention approach.

¹² See Blondel, *supra* note 6. See also "Fundamental Guidelines for the Contribution of the Red Cross and Red Crescent Movement to a True Peace in the World", adopted by the Second World Red Cross and Red Crescent Conference on Peace, Aaland – Stockholm, 2–7 September, 1984.

that life and dignity or its own work may be affected.¹³ These environmental factors relate, in particular, to context-specific and deeply interconnected political, cultural, social and economic characteristics.¹⁴ Once it understands these factors, the ICRC can determine how best to act upon them.

Recognizing the limitations involved in influencing individual behaviour (e.g. the behaviour of an individual arms carrier or a prison guard) and the limitations of related efforts, the organization sets out to establish the conditions that would make the environment in which humanitarian problems arise more “conducive to respect”. To do this, the ICRC works with those actors that have a significant capacity to influence the structures or systems (e.g. legislation, military doctrine and training, disciplinary and penal sanctions) associated with the actual or potential humanitarian problem identified. These actors include: political authorities and parties, the judiciary, arms carriers, National Societies, the media, the private sector, religious groups, academic circles, non-governmental organizations (NGOs) and international organizations. Such actors may have a positive (or negative) impact on the lives and dignity of persons affected by armed conflict and other situations of violence, and they may be in a position to facilitate (or hamper) the ICRC’s access to concerned populations. Influencing them requires identifying key individuals who – because of their power or hierarchical position – have the capacity to bring about the intended change.

The focus on influencing structures and systems explains why the ICRC’s prevention approach generally spans a medium- to long-term timeframe. Provided the ICRC’s prevention work is successful, it is likely to have a wide and long-term impact on the lives and dignity of people affected by armed conflict and other situations of violence.

Two broad assumptions underlie the ICRC’s prevention approach:

- Behaviour is more effectively changed by modifying the environmental conditions that influence it than by directly trying to alter people’s opinions, attitudes or outlook;¹⁵

13 Estimating the likelihood does not necessarily require measuring it precisely. When confronted with highly complex humanitarian problems, the most realistic and viable option may be to resort to approximations (e.g. low, high, very high likelihood) comparisons (i.e. less or more probable) or judgments based on past experience.

14 The ICRC’s *Roots of Behaviour in War* study highlighted the main environmental factors that influence the behaviour of arms carriers and lead them either to respect or to violate IHL in a given situation. It stressed, in particular, the role played by manhood and culture (pp. 18–25), ethnicity and the sense of belonging to a group (pp. 46–49), military training, orders and sanctions (pp. 50–54, 68–86), the phenomenon of progressive moral disengagement under the pressure of dehumanisation and justifications (pp. 88–94) and the influence of “bystanders” (pp. 65–66). J.J. Frésard, *The Roots of Behaviour in War, A Survey of the Literature*, Geneva, ICRC, 2004. See also D. Muñoz-Rojas, J.J. Frésard, *The Roots of Behaviour in War, Understanding and Preventing IHL Violations*, Geneva, ICRC, 2004.

15 This was one of the main conclusions of the ICRC’s *Roots of Behaviour in War* study and is consistent with findings by social scientists and prevention experts as well as with lessons learned by other organizations. See J.J. Frésard, *ibid.*, pp. 98–112, D. Muñoz-Rojas, J.J. Frésard, *ibid.*, pp. 11–16. See also A. Bandura, *Social Foundations of Thought and Action, A Social Cognitive Theory*, Prentice Hall Inc., New Jersey, 1986, pp. 1–46, R. Moran, C. De Moura Castro, *Street-children and the Inter-American*

- Prevention is a continuing process over the medium to long term that is worth launching early and is potentially more effective and efficient than taking action after negative humanitarian consequences have already occurred.

These assumptions are based on solid operational experience, research and lessons learnt through reviews and evaluations. The ICRC must nevertheless regularly assess their relevance and validity in the different contexts in which it operates in order to improve the effectiveness of its prevention approach.

2.2. Goals pursued

An environment conducive to respect for life and dignity and the ICRC's work would include the following conditions:

- clear and comprehensive international law (international humanitarian law and other fundamental rules that protect persons in situations of violence) that adequately addresses contemporary humanitarian problems, universally accepted and, in case of treaties, ratified;
- national legislation and administrative measures incorporating the law;
- national and international mechanisms permitting violations of the law to be sanctioned, and providing reparation for victims;
- arms carriers' commitment and capacity (e.g. structure, resources, effective chain of command) to respect the law and the ICRC's work, in particular through integration of the law into doctrine, education, training and sanctions systems;
- appropriate knowledge, understanding and acceptance of the law and of the ICRC by government officials, academics, members of civil society, the media and the general public;
- public discourse void of language aimed at dehumanizing ethnic, racial, religious or political groups or discriminating on the basis of gender/sex; and
- alternatives to risk-taking behaviour available to vulnerable populations (i.e. populations at risk).

2.3. Recognizing Limits

Fostering an environment conducive to respect is a responsibility that is shared with a variety of actors. Although States play a key role in this respect, the ICRC must also take into account the role of armed groups and of other actors exerting significant influence. The chances of success of the ICRC's endeavours crucially depend on these different actors' commitment and capacity to assume their responsibilities. The ICRC's specific mandate and competences further define the organization's capacity to contribute to fostering these favourable environmental

conditions. In addition, the ICRC has to set priorities based on the principles guiding its prevention approach and establish partnerships with other actors, in particular with National Societies.

3. Guiding principles

The following principles guide the ICRC's prevention approach and cover all activities which fall within it. They are interrelated and must all be taken into account when developing and implementing a prevention approach. They ensure that the ICRC's work in this area is relevant and efficient and that it generates impact.

3.1. Contextualization

Concrete realities on the ground shape the ICRC's prevention approach. A prevention response should be developed in light of the particular humanitarian problems anticipated or encountered and in line with an analysis of the specific environmental factors making the occurrence of such problems more or less likely.

This analysis must take into account the interplay among the global, regional and local levels of the environment.¹⁶ In certain contexts, the environmental factors involved may be essentially local. In others, regional or global factors may play a significant role (e.g. global and/or regional implications of some conflicts). In addition, the prevalence across countries of some specific humanitarian problems may also give them regional or global relevance (e.g. urban violence, cluster munitions, the missing and their families, women and war, child soldiers, challenges to neutral and independent humanitarian action). Such problems may become regional or global humanitarian issues.

The increased mutual influences among the global, regional and local levels – facilitated by the development of information technology and exchanges of knowledge and ideas fostered by globalization – are particularly relevant for the ICRC's prevention approach. For example, challenges to international humanitarian law, ICRC neutrality or the Red Cross emblem in a given context may influence perceptions, policies and behaviour in other parts of the world.

Based on its analysis of the humanitarian problem across different levels of the environment, the ICRC adapts its response. At the local level, it develops a context-specific and problem-focused approach. At the global and regional levels, it pursues a cross-contextual prevention approach. Some humanitarian problems may merit a response at the local level only. Other problems may not require a particular effort at the local level, but may warrant a global or regional response. For others, a response may be justified at all three levels.

¹⁶ In this sense “local” covers the community level up to country-level.

3.2. Multi-dimensional

In light of the often complex environmental factors that contribute to humanitarian problems, the prevention approach as designed by the ICRC should reflect their multi-dimensional nature. Focusing on only one environmental level or one actor may have a limited effect on the lives and dignity of people affected by armed conflict or other situations of violence. In order to enhance its impact, the ICRC may need to engage – simultaneously or successively – a variety of publics (i.e. stakeholders) situated at different levels of the environment. The choice of publics will be guided by the contextual analysis of the particular humanitarian problem at issue. Therefore, activities may have to be developed not only in countries experiencing armed conflict or other situations of violence but also in countries at peace.

For example, a prevention approach aimed at promoting respect for international humanitarian law and other relevant bodies of law in multinational military operations might include a range of activities:¹⁷

- identifying and analysing the humanitarian problems encountered;
- consulting with legal and military experts to clarify the applicable law;
- obtaining the commitment of troop-contributing countries to respect the law;
- encouraging arms carriers from troop-contributing countries to integrate the relevant law into their doctrine, education, training and sanctions systems;
- promoting national implementation of the law in troop-contributing countries and in the countries of deployment;
- giving pre-deployment briefings;
- sustaining a dialogue with arms carriers in the countries of deployment;
- communicating the ICRC's positions on the operations to the media; and
- discussing challenges to the Movement's impartial, neutral and independent humanitarian action with the International Federation and National Societies.

The advantages of working with multiple actors across different levels of the environment must be weighed against the complexity and cost of doing so. Some of these activities also show the importance of starting prevention work in anticipation of potential humanitarian problems.

3.3. Coherence

To increase the likelihood of making a difference for people affected by armed conflict and other situations of violence, the ICRC must achieve coherence at the operational level in the following domains:

- *within each prevention activity*, i.e. through the elaboration of specific guidelines and the provision of training and support to field activities by relevant ICRC services at headquarters;

17 Some of these activities may fall concurrently within another ICRC approach.

- *within an ICRC delegation's and/or a given region's prevention approach*, i.e. the synergies among prevention activities and between them and the protection, assistance and cooperation activities of a delegation or region that fall within the prevention approach must be identified, taken advantage of and built upon;¹⁸
- *across geographical and organizational levels*, i.e. global, regional and local prevention efforts must be consistent, complementary and mutually reinforcing (e.g. coherent approaches towards the armed forces of a particular country and towards a multinational force in which that country participates); and
- *among prevention, protection, assistance and cooperation approaches*, in order to ensure a consistent, unified ICRC response to a given humanitarian problem based on a joint problem analysis (e.g. response to IDPs, women and sexual violence, civilians and the effects of landmines). Capitalizing on synergies between different approaches strengthens the cohesiveness of the ICRC's work. In this regard, the relationship between the prevention and protection approaches is particularly close, with prevention efforts feeding into protection efforts and vice versa.

Achieving coherence requires effective coordination between different experts and organizational levels, from problem analysis to implementation and evaluation.

3.4. Results-oriented

States and the Movement have formally confirmed the ICRC's responsibility to strengthen and promote international humanitarian law and the Fundamental Principles. As a result, it must build and maintain the necessary competences to this end. However, the human and financial resources at its disposal are not unlimited. If the ICRC wants to fulfil its obligations and ambitions regarding accountability (i.e. to report to stakeholders about the intended and effective use of resources and on the achievement of results), it must set clear priorities and develop context-specific responses.¹⁹ There is indeed a certain tension between fulfilling mandated or statutory responsibilities and the necessity to make a significant difference for the people affected by armed conflict and other situations of violence. Striking a careful balance between the two is required.

The mid- to long-term character of prevention and its focus on influencing a multiplicity of environmental factors pose significant challenges in terms of accountability. Determining which objectives the ICRC realistically can achieve with each public in a given context is essential. The quality of the logic underlying the ICRC's prevention approach and activities is crucial for setting realistic

18 In the field, this process takes place within each ICRC delegation. At Headquarters, it materializes through regional coordination teams and other forums that bring together different expertise.

19 Accountability goes beyond the implementation of activities and implies the possibility of attributing results to the organization.

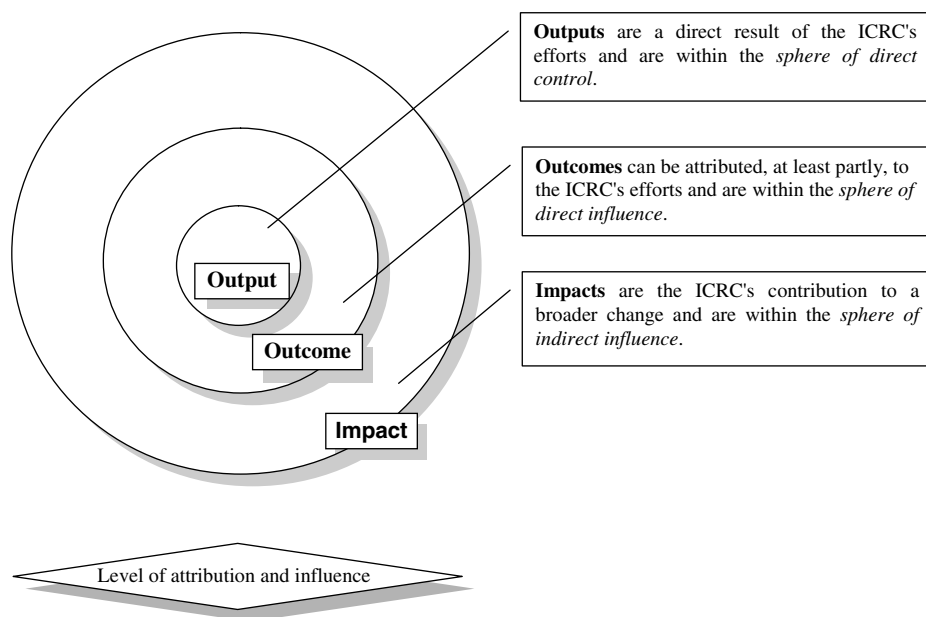


Figure: Spheres of influence.

objectives, as well as for monitoring and evaluation.²⁰ The criteria guiding the implementation of the ICRC's prevention activities addressing arms carriers, universities and youth are illustrative. They emphasize fostering a positive attitude towards the ICRC, other components of the Movement and the law (acceptance), obtaining the commitment of key stakeholders in this respect (ownership) and strengthening their capacity to assume their responsibilities over time (sustainability). Acceptance and ownership are generally preconditions for sustainability.

Three levels of results are usually identified within the ICRC: specific objectives (outputs), general objectives (outcomes) and humanitarian desired impact (impact or goal). These three levels are related to receding spheres of influence and to the decreasing possibility to attribute their achievement to the ICRC's prevention approach.

The further out from the centre of the concentric circles a particular result is, the weaker the level of ICRC control and the weaker the possibility of attributing the result to its prevention approach. The ICRC can only be held accountable for the achievement of those results that are within its spheres of influence, i.e. those conditions in its operating environment it sets out to foster.

20 This is usually clarified in related policy or guidelines documents.

4. Deciding on engagement²¹

Regardless of the approach being pursued, the decision to engage in prevention activities should be based on the assessment of three specific criteria, all of which must be met.

- *There must be an actual or potential humanitarian problem (at the global, regional or local level).* In the case of actual problems, the ICRC's prevention activities aim at avoiding or reducing their recurrence by acting on associated structural factors. Prevention activities also imply the necessity to try to predict and anticipate the occurrence of certain humanitarian problems. Grounded on evidence-based predictions related to its risk analysis, the ICRC may engage in prevention activities long before a certain humanitarian problem has arisen.
- *The problem must fall within the ICRC's mandate.* The ICRC's specific mandate in the area of international humanitarian law and the related expectations of key actors must be considered. The ICRC's statutory right of initiative is also relevant, as are specific resolutions, declarations or pledges from the International Conference. The ICRC's policy documents clarifying the organization's role in situations not amounting to armed conflict must be taken into consideration as well.
- *The prevention activity must have a potential added value within the framework of the organization's overall response to the problem at issue.* The ICRC must assess the relevance and possible added value of its prevention response to the particular humanitarian problem. This requires identifying possible synergies with other ICRC approaches and the search for complementarity with activities of other actors. It also requires considering the ICRC's specific competences and available human resources. The further away a particular humanitarian problem and the ICRC's response to it are from its core mandate, the greater the necessity for the organization to assess the added value of its prevention activities.

In addition to deciding whether to engage, the ICRC needs to determine the extent of its engagement in prevention activities. Its effort can be proactive but can also remain reactive. This decision is guided by balancing a number of additional considerations:

- *Likelihood, severity and scope of the humanitarian problem.* Assessing the actual or potential humanitarian problem in relation to the environment in which it has arisen or may arise is essential in determining the extent to which the organization engages in prevention activities.²² The decision will be based on the balance between the likelihood of the problem at issue and its severity and scope.

21 In this context, engagement implies a certain level of investment (e.g. engaging human and financial resources, defining objectives, devising tailor-made responses, planning for a mid- to long-term strategy).

22 There are tools at the ICRC's disposal to facilitate its understanding of the humanitarian problem in context (e.g. stakeholder mapping). The organization's environment-scanning efforts strengthen its analysis at each organizational level.

- *Opportunities.* Prevention activities may also seize on particular opportunities at the global, regional or local level. These opportunities can emerge in countries in conflict or at peace. They are generated by a concurrence of events and usually build on increased attention from international organizations, States and civil society to a specific humanitarian problem (e.g. the circumstances that led the ICRC to strengthen its efforts related to anti-personnel mines and cluster munitions).
- *Geopolitical importance.* The regional or global influence of specific stakeholders in a particular country in the political, military, economic or cultural fields (e.g. shaping military doctrines in other countries, contribution to multinational military operations, political or legal leadership in certain domains) may justify putting an emphasis on prevention activities there.

5. Strategies for prevention activities

The ICRC develops different strategies for prevention activities, as a function of the humanitarian problem at issue, the approach that such activities comprise and the particular objective being pursued. These considerations determine the focus, scope and time-frame of prevention activities. They also orient the choice of modes of action and the decision to establish partnerships. Monitoring and evaluation support the organization in taking stock of its performance and in improving the effectiveness of its prevention endeavours.

5.1. Identifying priority publics

Prevention activities require the ICRC to analyse the impact that different actors are having or could have on the particular problem anticipated or encountered. It also takes into account the mutual influences existing between these stakeholders. This context-specific analysis should reveal the most relevant publics for the ICRC and allow it to tailor its strategy accordingly.

The capacity of key stakeholders to influence the structures or systems associated with the humanitarian problem and their commitment to do so are crucial for the success of prevention activities. In particular, the assessment of key actors' capacity and commitment will determine the problem- and context-specific combination of prevention activities, the objectives pursued and the relevant mix of modes of action.

The ICRC seeks to develop and maintain a dialogue with national and international political authorities, as well as with state and non-state arms carriers, as publics that have a direct impact on the fate of victims.²³ The ICRC also works

23 The category of political authorities covers international authorities such as the UN, regional, and supra-regional organizations, national authorities at the various levels (including all branches of government), and other political actors such as political opposition groups and traditional leaders. The category of

with those publics that have an indirect influence on the fate of victims, i.e. those that can be important vectors for influencing political authorities and arms carriers. Under this logic, the ICRC focuses on mobilizing regional and/or global players (e.g. political authorities and arms carriers) that have an influence on local actors, as well as certain elements of civil society, including NGOs, academic circles, religious groups, the private sector, National Societies and the media.

There is a forward-looking perspective to the ICRC's environment-building efforts. The organization also works with those that could in the future exert an influence on the fate of victims – hence its efforts to promote international humanitarian law and other relevant bodies of law, as well as humanitarian principles and ideals to young people and university students.

5.2. Combining activities to reach objectives

Each prevention activity has a specific focus and scope (e.g. the ratification or implementation of specific treaties, the integration of international humanitarian law into military doctrine or into the university curriculum). Taken separately, each such activity may have a limited influence on the environmental conditions bringing about a given humanitarian problem, whether actual or potential. Taken together, however, they contribute to fostering an environment conducive to respect for life and dignity and for the ICRC's work. It is therefore crucial that activities are combined in a coherent, overall strategy spanning the relevant levels of the environment and that synergies with protection, assistance and cooperation activities are identified and built upon.

The decision to pursue a certain objective through a particular set of activities will depend on the analysis of the humanitarian problem at issue. Over the years, the ICRC has developed three different sets of prevention activities pursuing different goals: prevention-development, prevention-dissemination and prevention-implementation. These three categories respond to different logics.

- One set of activities focuses on the development of international humanitarian law and other rules of international law applicable in armed conflict or in other situations of violence. This work aims to strengthen the legal protection afforded to persons affected by armed conflict or other situations of violence. It generally has a global dimension but may also have a regional dimension. In addition to the preparation of new treaty law, this work may also entail a variety of other activities such as the identification of customary rules of international humanitarian law, the clarification of legal notions and the development of guidelines for their interpretation in line with current legal and operational realities (e.g. clarification of the notion of direct participation in hostilities), and activities aimed at defending the integrity of the law (e.g. international humanitarian law and terrorism).

arms carriers includes military and armed forces, police and security forces, non-state armed groups, as well as private military companies and private security companies.

- Another set of activities aims at fostering understanding and acceptance of the ICRC's work and/or international humanitarian law and other relevant bodies of law. These activities are required wherever the ICRC conducts or wishes to develop operations. Within protection and assistance approaches, they play a particularly important role (e.g. supporting the organization in guaranteeing security and access to victims of armed conflict and other situations of violence). While dissemination of the applicable law and of the ICRC's impartial, neutral and independent humanitarian action remains central, the organization has increasingly emphasized the importance of developing a two-way communication: listening to stakeholders' opinions and concerns and taking these into account when promoting the ICRC and/or the law. The ICRC also endeavours to engage certain publics, as appropriate, as vectors for the delivery of key humanitarian messages. These activities generally have a shorter lifespan than other prevention activities. However, the necessity of establishing trust with individual stakeholders through lasting working relationships has also been recognized.
- A third set of activities focuses on developing and strengthening the environmental conditions allowing respect for international humanitarian law and other relevant bodies of law. This is usually done through the incorporation of the applicable law into the relevant structures or systems (e.g. national legislation; military doctrine, education, training and sanctions systems; curricula of universities or secondary schools). These activities entail providing support to those in a position to bring about integration and establish or develop the means and mechanisms to that end. This top-down approach presupposes a certain degree of organization within the public targeted as well as the capacity and will to respect the law. It poses significant challenges in relation to armed groups, although these may be partly overcome by adapting the approach to their structures. Commitment – if not present at the outset – needs to be secured early if these activities are to have a lasting effect.

The design of activities includes viable entry and exit strategies, i.e. a starting point and an end. When objectives have been realized, the ICRC concludes related activities or transforms them in line with new objectives. When objectives are not being met, the ICRC considers interrupting activities or transforming them in line with new objectives.

5.3. Developing partnerships

The ICRC alone is limited in what it can achieve in fostering an environment conducive to respect for life and dignity and for the ICRC's work. To enhance the impact and chances of success of its prevention activities, the organization devises prevention strategies based on the utility and feasibility of developing partnerships with key actors.

Whenever appropriate, the ICRC seeks to develop partnerships, in line with the particular objectives it has set. Such partnerships can be established with a

variety of actors including States, international and regional organizations, National Red Cross and Red Crescent Societies and their International Federation, academic institutions, nongovernmental organizations and civil society. The nature of these partnerships can vary from loose, often event- or theme-based cooperative arrangements to more formal, long-term strategic associations.

The ICRC prioritizes partnerships with National Societies. Within the Movement, National Societies are tasked with promoting international humanitarian law and assisting their governments in this respect.²⁴ The Seville Agreement confirms the ICRC's lead role in promoting international humanitarian law and in providing support to National Societies in matters falling within its statutory core competencies.²⁵ It is thus the ICRC's responsibility, viewed as a long-term commitment, to help build up the local capacity of the National Societies in the area of prevention.

When developing strategies for prevention activities that include a partnership dimension, the ICRC examines the following considerations:

- role of National Societies as preferred partners;
- added-value and impact of partnerships;
- chances of success, including setting good examples and possible multiplier effects in other States;
- capacity and commitment of the partner organization;
- partnerships must not jeopardize the ICRC's impartial, neutral and independent humanitarian action;
- durability of the relationship; and
- physical proximity of the partner organization and possibility of meaningful long-term follow-up.

5.4. Combining appropriate modes of action

Selecting the appropriate mix of modes of action for prevention activities is an important strategic consideration for the ICRC. The choice will depend on the analysis of stakeholders' influences, commitment and capacity, as well as on

24 Art. 3(2), Statutes of the International Red Cross and Red Crescent Movement. Article 3(2) further provides: "They disseminate the principles and ideals of the Movement and assist those governments which also disseminate them. They also cooperate with their governments to ensure respect for international humanitarian law and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols."

25 Seville Agreement, Council of Delegates, Seville, 25–27 November 1997, Article 7.2.2 provides that "The ICRC shall contribute to the development of the National Societies in the following matters, in coordination with the Federation:

...

- b) support of the National Societies' programmes for disseminating knowledge of international humanitarian law and the Fundamental Principles;
- c) involvement of the National Societies in measures taken to promote international humanitarian law and ensure its implementation;
- d) preparation of the National Societies for their activities in the event of conflict ..."

considerations related to the ICRC's security and acceptance. For the ICRC, the preferred modes of action for prevention activities are persuasion, mobilization and support.²⁶ In the context of prevention activities, persuasion entails convincing relevant actors to take action to prevent suffering and to respect the ICRC's work. Mobilization involves raising a third party's awareness of and interest in the humanitarian problem at issue in an effort to influence those responsible to prevent suffering and to respect the ICRC's work. Support entails cooperating with stakeholders to develop, maintain or strengthen their capacity to prevent suffering and to respect the ICRC's work. In the context of prevention, the ICRC uses substitution on a limited basis.²⁷ The organization may occasionally resort to substitution to kick start other modes of action. However, this should be limited in time as the long-term use of substitution may indicate a lack of ownership and may thus have a limited impact. Denunciation is generally not an appropriate mode of action for prevention activities.²⁸

5.5. Monitoring and evaluating results

Monitoring and evaluation are an essential component of any ICRC prevention strategy. Indeed, the focus of the ICRC's prevention approach on achieving medium- to long-term structural change requires the consistent and professional application of result-based management techniques. In order to take stock of its performance in this field, orient its decision-making and report to stakeholders as appropriate, the ICRC places particular emphasis on monitoring and evaluating its prevention activities.

Monitoring is an integral part of ICRC prevention activities. It allows the organization to regularly assess progress, or lack thereof, in the achievement of results (mainly outputs and, where feasible and appropriate, outcomes) and to adjust its strategies accordingly. This is particularly important given the complex and changing nature of the environment. Indicators providing simple and reliable quantitative and/or qualitative information must be set to measure progress towards results.

The information provided by monitoring is useful for the daily management of ICRC prevention activities, but provides limited analytical depth. In particular, monitoring alone does not allow for assessing the extent to which progress towards results can be attributed to the ICRC or to other environmental factors or actors. It must therefore be complemented by ad hoc or periodic reviews and evaluations. Their scope and depth will vary according to circumstances, needs and

26 The ICRC has identified modes of action related to raising awareness of responsibility (persuasion, mobilization and denunciation), support and direct provision of services (substitution). "The ICRC: its mission and work", *supra* note 1.

27 Substitution entails taking action in the place of the target public to create an environment conducive for respect (e.g. directly teaching IHL to academic circles).

28 However, the possibility that the ICRC may resort to public condemnation under certain circumstances may itself contribute to the organization's prevention effort.

available resources. Their conclusions should inform strategic and operational decision-making, improve the effectiveness of the ICRC's prevention activities through organizational learning and support accountability and transparency through the provision of in-depth information to key stakeholders.

Both result-based management functions are closely linked. On the one hand, without the information provided by monitoring, reviews and evaluations would be less able to deliver relevant and comprehensive findings and recommendations. On the other hand, lessons learnt through reviews and evaluations feed into decision-making and may help refine monitoring tools.

REPORTS AND DOCUMENTS

ICRC operational security: staff safety in armed conflict and internal violence

Patrick Brugger*

Abstract

Humanitarian work, especially in conflict areas, has become more dangerous and every humanitarian organization is affected by serious security problems, constituting a threat to their staff and hampering much-needed activities on behalf of the victims of armed conflicts and other situations of collective armed violence. The article outlines the general approach of the ICRC to security issues and describes the pillars of the security policy it has adopted in the field to protect its operational staff.

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It seems that the world is a riskier place to be an aid worker.¹ Although violence against aid workers was on the decline after 1996, it rose again in 2003–2005, and no improvement is in sight. The general security environment has clearly deteriorated in certain contexts, such as Afghanistan, Pakistan, Algeria, Chad, Somalia, Lebanon, Yemen, Palestine and Sudan². Armed conflicts are also tending to become more polarized and radicalized. Humanitarian agencies and their staff face a high risk of being rejected (perceived in some contexts as aligned with the government or the opposition group) or instrumentalized (humanitarian action is seen as one of the means employed to win the support of the population).

There are several reasons for this: the blurring of lines between political, military and humanitarian action, casting in doubt neutral and independent humanitarian action³ and reducing the scope for humanitarian action; the various consequences of the ‘global war on terror’ and the change of identity and

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internationalization of certain armed groups;⁴ the increase in asymmetric wars waged by highly developed armed forces against unequal adversaries;⁵ the regionalization of conflicts and banditry; or some stakeholders' negative perception of humanitarian action. These trends are worrying and support the feeling that humanitarian work, especially in conflict areas, has become more dangerous.

Although not unknown to the ICRC, violence has become more specifically targeted against aid workers and some evidence shows that a growing number of such attacks are politically motivated,⁶ compared with targeting for economic gain (threats, robberies, car looting, hold-ups for theft). Nevertheless, the latter incidents are still in the majority and are usually analysed as being resource-related, meaning that 'what we have' is a greater risk than 'who we are'. Targeted political threats or violent acts such as ambushes, direct attacks or hostage-takings, however, have a far greater impact, as they demonstrate the unwillingness of a party to conflict to accept a humanitarian organization. Whereas the number of ICRC personnel working in the field and the volume of operations conducted by the organization have constantly increased in recent years,⁷ the annual number of security incidents affecting the ICRC remained

- 1 A joint report from the Overseas Development Institute, UK, and the Center on International Cooperation at New York University, USA, collates data on violence against aid workers and analyses how perceptions of increased risk have shaped new security measures and programming approaches. Since 1997 the number of major acts of violence (killings, kidnappings and armed attacks resulting in serious injury) committed against aid workers has more than quadrupled. Overall, there were 792 reported acts of major violence against aid workers from 1997 to 2008, involving 1618 victims and resulting in 711 fatalities. Violence is most prevalent in Sudan (Darfur), Afghanistan and Somalia, which together accounted for more than 60% of incidents. Most aid worker victims are deliberately targeted for political and/or economic purposes, rather than being randomly exposed to violence. See Abby Stoddard, Adele Harmer and Victoria DiDomenico, 'Providing Aid in Insecure Environments: 2009 Update', Humanitarian Policy Group, Policy Brief No. 34, April 2009, available at http://www.cic.nyu.edu/Lead%20Page%20PDF/HPG_2009%20.pdf (visited 20 April 2009).
- 2 In Darfur in 2006 and 2007, there were about 30 security incidents per year involving the ICRC (out of a total of 100 ICRC security incidents on average worldwide each year), fewer than other organizations considering the greater exposure of the ICRC in terms of field trips, travel by road rather than air, and geographical coverage.
- 3 See Pierre Krähenbühl, 'The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 505–514.
- 4 International and transnational groups often affiliated to Al Qaeda, e.g. the Groupe salafiste pour la Prédication et le Combat (Salafist Group for Call and Combat – GSPC) becoming *Al Qaïda au Magreb islamique* (Al Qaeda in the Islamic Maghreb – AQMI), or Al Qaeda in the Arabic Peninsula.
- 5 See Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.
- 6 E.g. on UNHCR, Algiers, December 2007 (the attack led to formation of an Independent Panel on Safety and Security, under Lakhdar Brahimi – see The Independent Panel on Safety and Security of UN Personnel and Premises Worldwide, *Towards a Culture of Security and Accountability: Report of the Independent Panel on Safety and Security of UN Personnel and Premises Worldwide*, 9 June 2008, available at http://www.humansecuritygateway.info/documents/UN_panelonsafety_9Jun08.pdf (visited 21 April 2009)); on MSF-NL in Somalia, January 2008; on the children's NGO Plan International in Pakistan, February 2008; on the International Rescue Committee in Afghanistan, August 2008.
- 7 Currently the ICRC maintains a permanent presence in over 60 countries and conducts operations in about 80 with 12,473 employees, 1542 expatriates and 10,931 national staff.

stable.⁸ The hostage-taking of three ICRC staff members in the Philippines on 15 January 2009 was a reminder that serious security incidents can happen in any conflict area.⁹

These developments have prompted the ICRC to focus even more on the safety and security of its personnel and field activities. The following is an outline of its general approach to security.

Issues and approaches

The ICRC strives at all times to reconcile its operational goal of standing by the conflict victims and vulnerable persons with its responsibility towards its personnel. It must therefore weigh every operation and its humanitarian impact against the risks involved. The ICRC aims to be predictable and transparent and to say what it does and do what it says. To preserve its capacity to operate by using a mode of action that is understood and shared, it builds up a network of contacts with all parties to a conflict. The players that must be mobilized for an operation to run smoothly have become more diverse and more numerous, and some of them can be hard or impossible to reach.

In an increasingly interconnected world, the requirements of political independence and neutrality are predicated on how well the ICRC can analyse, mobilize and communicate, as well as on its understanding of how others view its independence at the local, regional and global levels. In all circumstances, it must be mindful of how it is perceived, of the image projected by its work, and the private and professional conduct of its staff.

It is the responsibility of the people directing ICRC field operations to manage security. The ICRC makes no distinction between security management and the conduct of operations. Its approach to security is akin to that of 'risk management', the emphasis obviously being on prevention before the fact. This is supplemented with after-the-fact 'incident management', through which the ICRC learns from experience and adopts 'best practices'. Although local, regional and global risks are interrelated, the ICRC's security management model is based on decentralized initiative, decision-making and responsibility for field security: the head of delegation decides on and implements the measures required by the general environment and the context in which the delegation works. The security and stress unit plays an advisory role.¹⁰

The field staff exercise this extensive autonomy within a clearly defined institutional framework that has three components: the ICRC's mandate, its principles and its security concept. In the field, each delegation assesses its security

8 Security incidents are internally defined as 'events that may constitute a threat to the physical or mental integrity of ICRC staff and that may have implications for operational matters'.

9 All three have now been released.

10 In the areas of operational support, training, situation monitoring and security policy.

environment in light of the current situation and on the basis of the organization's frame of reference, the 'pillars of security'. In addition, present-day security management involves developing methods to increase awareness of and preparedness for dangers originating outside a given context but nevertheless potentially threatening for the ICRC. In situations in which the ICRC is responsible for directing and co-ordinating a joint operation of the International Red Cross and Red Crescent Movement under the Seville Agreement, it is in charge of establishing, managing and maintaining a security framework for Movement components operating within a co-ordinated Movement approach.¹¹

Facing security risks

In view of the nature of its mission, the ICRC has chosen to make insecurity a given in defining its operational policy. Assessing risks and threats is an integral step in the process of establishing operational strategy. Danger is a part of every delegate's routine; it is often characteristic of the working environment and determines operational choices. The risks inherent in carrying out the ICRC's mandate vary, depending on the theatre of operations.

The field security concept covers both conflict situations and banditry or crime. Indeed, it is often difficult to distinguish clearly between the two.

The definition of risk

Risk has three cumulative components:

- the danger (or 'threat') as such, defined by its nature (theft, abduction, shelling, etc.);
- the possibility that the dangerous event will occur over time (imminent, long-term or permanent risk);
- the adverse consequences (human, operational or material).

The ICRC's policy is to reduce the risk to the lowest possible level without being able to eliminate it. It is this residual unavoidable risk that underlies the ICRC's approach to security matters, and staff members have to agree to accept that degree of risk.

A certain level of risk is considered acceptable only if it is justified by the humanitarian impact of the operation. A balance must always be struck between

11 Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement (hereinafter Seville Agreement), Seville, 26 November 1997, Art. 6.1.2(A)(c) provides that in situations where the ICRC is acting as lead agency, it has the specific responsibility 'to define and ensure the application of any measure which may prove necessary to guarantee, to the greatest extent possible, the physical safety of personnel engaged in relief operations in the field'.

the risk an action entails and its anticipated effect. It is important to assess the effects of operational activities in terms of quality rather than quantity, and regularly to ask the question whether the impact of a planned activity is worth the risk it involves. If the answer is 'no', the operation should in principle be suspended, postponed or discontinued.

Even in situations fraught with danger, ICRC staff must never take unconsidered risks or try to get between parties during active hostilities. They can work properly and effectively only if there is at least a temporary truce or the fighting has eased off. The level of risk goes up when delegates are foolhardy, count too heavily on luck, or consider danger to be banal, routine or a challenge to be met. On the other hand, security measures that are inappropriate, exaggerated or not reviewed – perhaps once valid but now needlessly prolonged – can paralyse an operation or result in decisions comprising additional risk factors.

As a rule, security measures are aimed at:

- preventing serious incidents by eliminating the possibility of them occurring (the idea here is to remove potential targets, for example by avoiding cash transfers, making sure that expatriates stay out of no-go areas, or prohibiting travel by road where there may be landmines);
- reducing risk by means of deterrents such as perimeter protection, alarms and guards, or by precautionary measures (image, attitude, discretion) that promote respect for the ICRC's activities, staff and property;
- limiting the consequences of an incident if it nevertheless occurs (medical evacuations, insurance, etc.).

The ICRC's seven pillars of security

Security is predicated on what the ICRC does, how it is perceived and accepted, how its individual staff members conduct themselves, and on the organization's ability to listen, to talk and communicate with all those involved in a situation of armed conflict or internal violence, and to project an unchanging and coherent image of itself.

The seven pillars described below are the principles on which the ICRC has based its 'security culture' in the field.¹² The first is exclusive to the ICRC, while the others are adopted by most organizations or multinational corporations to protect their staff. The importance assigned to each of them will vary according to the type of threat encountered.

12 See also by Philippe Dind, 'Security in ICRC field operations', *International Review of the Red Cross*, Vol. 323, 1998, pp. 335–345.

Acceptance of the ICRC

Acceptance is the main pillar, the vital component in the ICRC's field security concept; acceptance of the ICRC is fundamental and indispensable in situations of armed conflict and internal violence.

To be able to operate, the ICRC must first ensure that it is accepted by the parties to a conflict. They will accept its presence and working procedures if they understand its role as an exclusively humanitarian (independent and impartial) organization and the purpose of its activities, and if a relationship of trust has been established. The ICRC has no means of exerting pressure to impose its activities. Persuasion, influence and credibility are its only weapons.

It is crucial to ensure that the ICRC is accepted at least by all those who influence the course of events. However, the fragmentation of society has led to the rise of players such as warlords, transnational terrorist or mafia networks, armed resistance groups, mercenaries and paramilitary forces, whose degree of acceptance of the ICRC is hard to assess.

In order to be able to contact all the various parties during a conflict situation, the ICRC seeks to establish channels of communication to those likely to misunderstand or reject its work. It may be difficult or impossible to have direct access to certain extremists; such alternative channels are therefore a necessary additional means of reinforcing a sound, widespread and diversified networking process.

Within the framework of its integrated operational and mobilization strategies, the ICRC gains acceptance by the relevance of its operational choices, through dialogue, negotiation and communication, by projecting a coherent image and by spreading knowledge of international humanitarian law and the Fundamental Principles of the International Red Cross and Red Crescent Movement at all levels.

In many situations, there are two further means of reinforcing acceptance: promotion of the ICRC's activities with a view to making them easier to understand, and media campaigns to spread information about those activities. These means should not be employed unless they lead to greater acceptance. Acceptance is built up over time through action and dialogue; in the meantime, some degree of fragility and vulnerability is inevitable. Public communication approaches and messages must be conceived and developed within an integrated strategy that takes account of the security parameters applying to local, regional and global communication.

Another factor conducive to acceptance is the expatriates' understanding of the culture in which they are working. If they are familiar with the local language, values and socio-cultural customs and rules, they can act in a manner consistent with their environment. This insight is essential if they are to be able to adjust to different situations and help make the ICRC an accepted part of the environment, to contribute to the way in which a particular society functions without having to become part of it. Poor understanding of the context and inappropriate private or professional conduct can place the acceptance and work of the ICRC at risk.

Identification

Once its special role has been accepted, the ICRC must be uniquely identifiable. Identification is based on the use of the red cross, red crescent or red crystal emblem. To distinguish itself from other humanitarian agencies, the ICRC uses a logo consisting of a red cross surrounded by two concentric black circles between which appear the words 'Comité international Genève'. ICRC vehicles and buildings are marked with a protective sign or logo of appropriate size; flags are used in sensitive situations as they attract special attention. Care must be taken, however, not to overuse these means.¹³

The emblem *per se* is not enough to protect the ICRC. At all times, the attitude and behaviour of each and every ICRC delegate has a positive or negative influence on how the organization is perceived by the local people and the parties to the conflict, and on the credibility and legitimacy of the emblem.

To supplement the ICRC's visual identification and ensure it remains an open book, the buildings and means of transport it uses and its employees' movements in the field are communicated to all parties to the conflict. Because modern methods of warfare make it possible to destroy a target long before visual contact has been established, notification is the only effective form of protection. This is particularly important for the use of ICRC aircraft during an armed conflict in which long-range artillery is employed; here notification is an essential precaution, as is the compulsory filing of a flight plan and field mission form.

Political tension of a previously unknown kind will sometimes lead the delegation to redefine the operation's level of visibility in order to lower exposure to risks. Where there are problems of banditry or criminality, it is best to act with discretion and keep a low profile. The head of delegation may suggest that exceptions be made to the principle of identification (when the level of acceptance is insufficient). In exceptional circumstances, the ICRC may decide not to use its emblem. It may also provisionally decide to use another protective device recognized by the Geneva Conventions or their Additional Protocols.¹⁴

Information

Information is a fundamental element of security. The security goal of internal fact-gathering and sharing of information is to make the ICRC better-known, to enhance its understanding of the environment in which it works and of the players which are part of it. Using reliable internal information, the ICRC can anticipate

13 On the use of the emblem, see Habib Slim, 'Protection of the red cross and red crescent emblems and the repression of misuse', *International Review of the Red Cross*, No. 272, 1989, pp. 420–437.

14 For questions and answers about the adoption of an additional emblem, see <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/emblem-questions-answers-281005?opendocument> (visited on 25 March 2009).

events and react appropriately as situations evolve or when dangers arise during field trips. Internal information should therefore flow in all directions – from senior delegation staff downwards and vice versa, between headquarters and the field, between delegations, and between ICRC colleagues and outside contacts.

All field personnel, whether expatriates or field officers, must acquire the conditioned reflex to collect and pass on information on security matters, whether relating to the past or the present situation or to emergent trends. Their attitude is crucial: they must show empathy, be good listeners, and be attentive to cultural aspects and information. Field personnel must be especially alert to any signs or hints that the security situation is deteriorating; they must be careful not to take such developments for granted, so as not to unconsciously raise their threshold of tolerance to danger.

Internal information must be monitored; this is the job of the head of delegation, of the person designated by him and ultimately of every delegation staff member. Care must be taken never to try to obtain military information, and never to pass on to unauthorized persons any information obtained thanks to the ICRC's specific role and the confidence its policy of discretion has earned it.

All security incidents must be analysed in terms of the facts and circumstances so as to establish to what extent, if any, the delegates' conduct was a contributory factor. They must be described in detail in a written report so that the delegation can take steps to prevent recurrences or to forestall more serious incidents.

The head of delegation is responsible for circulating general information and organizing exchanges of information both within the delegation and among locally hired staff, National Society personnel participating in an operation directed and co-ordinated by the ICRC and seconded staff (including drivers and aircraft and ships' crews), who are not only entitled to be kept abreast of developments but are also a very important source of news about local developments and changes in the overall operational environment. The head of delegation must ensure that the families of ICRC expatriates are likewise kept informed, and are notified of all relevant security decisions.

The head of delegation must also promote the regional exchange of information with neighbouring delegations. Local armed conflicts, the parties involved and their impact in political, military, economic and humanitarian terms do not stop at a country's borders.

In the exchange of security information between the ICRC and other organizations and entities, it is essential to adopt an attitude that is as open as possible. If there is one area in which the ICRC wants to learn as much as it can and hence to exchange information, it is security – though with all due caution when the information is sensitive or confidential. The ICRC also analyses incidents involving other organizations in order to draw lessons from them.

Similarly, headquarters passes on to the field any incoming information that could affect security: a global threat, developments in the political situation, possible reactions to ongoing negotiations, information obtained from other humanitarian organizations, changes in the military situation, and in particular the

roles played by neighbouring countries or others further afield and by the major international organizations.

Security regulations

The security regulations for expatriate staff are drawn up under the authority of the head of delegation and are thus specific to each country. Based on the analysis of the situation, they lay down appropriate rules and procedures designed to take account of the dangers and risks. They must be regularly reviewed and scaled up or down as the situation changes. A copy of the regulations is signed by the individual ICRC staff members on arrival in the field or when they take up their duties; they are briefed at the same time. If the regulations undergo a major overhaul, they must be signed anew.

The head of delegation is responsible for ensuring compliance with the regulations; violations are penalized and, if serious, can result in the staff member's return to headquarters or dismissal. The regulations must leave everyone room to manoeuvre: they do not absolve staff from responsibility for their behaviour and for those affected by their decisions.

The regulations should be as brief as possible, but comprehensive. They must cover all points, but say only what is essential for the greatest impact. They must be continuously reviewed in light of the situation and must cover both preventive action and reactions to incidents.

The ICRC recommends that security regulations be drawn up for delegation employees as required by the specific context. Such regulations must also be signed by every employee concerned. The personnel of Participating National Societies (PNS) working in situations in which the ICRC is directing and co-ordinating a Movement operation are subject to the same security regulations as ICRC expatriate staff.¹⁵ The host country's National Society (the 'Operating National Society') that is implementing a particular ICRC objective is also subject to the ICRC's security regulations.

Personality

The safety of the ICRC's field activities depends to a large extent on the personal attributes of each staff member. In dangerous or threatening situations or in other difficult circumstances, the security of several individuals may depend on one person's reactions, attitude and ability to gauge a situation, in particular when that person is a hierarchical superior. The quality of a staff member is determined by the person's character and level of resilience. Staff members must be professionally competent and believe in the organization's mission, because they understand and accept it. They must also display a number of fundamental traits, in particular a sense of responsibility (towards themselves and others) and solidarity. Each

¹⁵ Seville Agreement, above note 11, Art. 6.1.2(A)(c).

delegation draws up a document setting out the rules of conduct that are appropriate in the local context; those rules apply to every ICRC expatriate staff member and delegation employee.

Staff members who stay in good mental and physical shape, who try to combat fatigue and nervous tension and to recognize their own limits show a sense of responsibility. Their conduct implies a degree of self-discipline aimed at maintaining a healthy lifestyle, in particular by eating properly and getting enough sleep and time off, rather than resorting to alcohol and medicines. The use of drugs and other substances banned under national legislation is prohibited. Despite their efforts to keep to a healthy routine, some staff members nevertheless experience fear, despair or premonitions of death. It is important to recognize these feelings and to talk about them openly with colleagues or a supervisor, with a view to preventing risky behaviour. In the face of danger, such reactions are common; they can play a useful role in alerting us to and regulating stress, just as they can precipitate inappropriate behaviour. If they are acknowledged and discussed, they can be monitored and soon dissipate. If they are ignored or suppressed, they lead to the taking of unnecessary risks. It is therefore the responsibility of each staff member, and of his or her superiors in particular, to foster a climate of trust in the delegation so that staff do not hesitate to express their fears and feelings.

In this connection, solidarity is of fundamental importance. Everyone's resilience varies according to the circumstances and their individual perceptions and sensitivities; staff must therefore be supportive of and listen to each other in the delegations and during field operations. Talking over one's concerns and emotions openly, in a spirit of tolerance, is ultimately always the best way to strengthen team spirit, maintain personal well-being and encourage an individual sense of responsibility.

Telecommunication

Effective telecommunication equipment and networks are a key component of security in the field. However, the equipment alone is no guarantee of safety. In the long run, security comes down to establishing and reviewing telecommunication procedures, regularly training staff to apply them and ensuring that they are strictly enforced.

Today's humanitarian practitioners, including the ICRC, can choose from a wide range of technological telecommunication aids: HF and VHF radio systems, fixed and mobile telephones, satellites and computer networks. Used in a combination adapted to both the geographical¹⁶ and political¹⁷ context, these

16 'Geographical' refers to the physical environment in which the ICRC works (mountains, town, countryside, flatland, etc.).

17 'Political' refers to the following factors: licences delivered by the authorities, import of material, conflict context (banditry, belligerents' use of technology, etc.).

systems are a sure means of meeting security needs. They play an important role in transmitting information and notifications, monitoring and checking movements in the field, alerting others to deteriorating situations, and dealing with any crisis that may arise.

The means made available are geared to the specific situation, in terms of both quality and quantity:

- modern, reliable equipment, which can be operated independently of the local infrastructure and is serviced by the ICRC;
- ICRC staff on site to set up and develop a system that is appropriate in the geographical and political situation;
- clear procedures that are adapted to the operational context;
- round-the-clock radio monitoring, if circumstances require;
- user training, facilitated by the greatest possible level of standardization.

Protective measures

Protective measures are used to strengthen the other pillars of security. They include any step or measure taken to increase the security of ICRC staff, buildings, infrastructure and operations. Such measures may be active (e.g. guards) or passive (e.g. reinforced buildings), but none of these measures is an absolute guarantee of security should the situation worsen. The ICRC is accustomed to deteriorating situations, each of which has its own specific characteristics. Some things, however, hold true for any high-risk situation, of which there are basically two kinds:

- (a) Indiscriminate attacks: in such situations, the ICRC's special status is not an effective means of protection. For preventive purposes, the delegation is situated with a careful eye to its neighbours (far from official buildings and military premises), in buildings that are not in an exposed position and that are solidly built. Passive protective measures are introduced, essentially anti-blast protection for windows (3M), safe areas, sandbag barricades and bomb shelters;
- (b) Crime/banditry: in such situations, ICRC expatriate staff are in the same position as other foreigners living in the country. The means by which they can be identified (the emblem) and notifications no longer afford protection. Vulnerability becomes a risk factor: delegations must make sure they are hard targets by adopting traditional protective measures such as physical barriers (doors, fences, and perimeter walls), motion detectors, alarm systems, guards, etc. They must maintain a discreet presence, reducing their visibility (no logos, unmarked vehicles) and the predictability of ICRC movements (irregular hours, different routes). In order to increase vigilance and frustrate the plans of potential attackers, surveillance and counter-surveillance measures can be used to detect whether the ICRC is being observed in any way.

There might be situations¹⁸ in which human lives may be saved only by accepting an armed escort, because refusing such an escort would lead to the paralysis of humanitarian activities and consequently the possibility that the victims would die. In such cases, the principle of humanity requires the components of the Movement to thoroughly assess the situation, attempt to find the best solution and, in certain circumstances, accept changes to their normal operating procedures.

However, the use of armed escorts may affect the image of the entire Movement, now and in the future. It may risk impairing acceptance of the emblem and the future possibility of access and action by other components of the Movement in that area. In other words, armed protection may help to get one aid convoy through but eventually jeopardize the operation as a whole. Armed protection can therefore only very exceptionally be used.¹⁹

Implementation of the field security concept

Roles and responsibilities

The field

ICRC security hinges on the total collective and joint responsibility assumed at every level of the operational hierarchy, ranging from the Director of Operations, who has the authority to commit the ICRC to a new theatre of operations,²⁰ to staff members who must decide on their own whether or not to continue a field mission in the face of an unexpected risk. This shared responsibility is a fundamental part of the security concept, for the ICRC considers that it has a major stake in the safety of its personnel.

The head of delegation plays a key role in deciding on the direction the delegation's operations should take, their conduct and management. It is at his or her level that initiatives are taken and responsibility is placed for defining the operation and its objectives and implementing the strategies. He or she bears primary responsibility for analysing the situation, incorporating operational and security parameters, establishing the relevant indicators and monitoring changes in them. He or she is also required to:

- see to it that the security arrangements are coherent and based on the seven pillars of security (in particular ensuring that the ICRC is accepted at the political and operational levels) and adjust those arrangements whenever necessary;

¹⁸ Situations where banditry prevails.

¹⁹ See 'Report on the use of armed protection for humanitarian assistance', extract from a working paper submitted jointly by the ICRC and the International Federation, Council of Delegates, Geneva, 1–2 December 1995, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jneg?opendocument> (visited on 25 March 2009).

²⁰ Within the framework established by the Assembly Council.

- ensure that expatriates invest the necessary time and effort to gain some insight into the situation and the local culture;
- be willing to particularly listen to delegation employees and consult local sources, including the Operating National Society;
- anticipate the dangers, determine the risks by keeping abreast of developments and circulating information;
- draw up security regulations, safety procedures and rules of conduct, ensure compliance with them, and punish violations;
- combat the development of a nonchalant attitude to danger and react if something happens;
- manage staff members' stress;
- make sure plans are made for emergency situations and evacuations;
- provide training, supervision and control.

The head of delegation can delegate day-to-day security management, but in no case may he or she delegate his or her primary responsibility for security.

Headquarters

If heads of delegation need information they cannot obtain on the spot, they turn to neighbouring delegations and ICRC headquarters (operational meetings, regions, security unit), who help to analyse the situation, especially from the regional and global points of view, and provide the information needed for a more penetrating analysis of the local context.

The Director of Operations bears ultimate overall responsibility for the conduct and management of field operations. The Director-General and the President are regularly informed of changes in operational contexts and are mobilized or asked to intercede formally where institutional decisions are concerned.

Voluntary service and availability

The ICRC's expatriate and locally hired staff are employed on the basis of their clearly expressed willingness to accept an inevitable degree of risk. The organization can therefore ask all staff to work in any theatre of operations. The place of assignment is decided on the basis of needs, constraints and the availability of staff.

There may be cases, however, in which expatriates have very definite reasons for refusing certain postings. The ICRC will accept such reservations provided they are an exception; otherwise the whole principle of the staff member's continued employment may be called into question. To remain effective, the ICRC must be able to count on the willingness of all its personnel to go anywhere and do any type of work. In principle, no especially dangerous postings or periods are assigned to 'volunteers'.

The ICRC must be forthright when describing to its staff the especially high risks they may encounter in certain contexts. It may decide to limit

assignments in the presence of specific risks and for specific reasons, e.g. the delegate's sex, nationality, etc.

The level of risk must be the same for everyone, whether the employee is an expatriate under contract or has been seconded to the organization (including drivers and the crew of aircraft and ships), a delegation employee or a member of a Participating or Operating National Society engaged in an ICRC operation.

In particular, delegation employees must not be sent on missions deemed too risky for delegates, unless their nationality, sex, language, ethnic origin or field knowledge is a decisive additional security factor. Likewise, expatriates are to be preferred to national employees for missions where their status as foreigners is a security factor. Delegation employees may be subject to political pressure where expatriates are not. The confidential information to which they are privy may be a risk factor in their case, and as a rule they cannot be evacuated or benefit from legal protection under the headquarters agreement, as expatriates can.

Training

For the ICRC, training is a key vector of security. It therefore prioritizes efforts in that regard, the aim being to inculcate a permanent awareness of risks, to ensure consistency of security measures and to provide each individual with the necessary knowledge and skills.

Security training is intended for expatriate and delegation employees alike. It is geared to the general context and the specific risks each person faces, and is adapted to their actual tasks and duties. Training takes place at headquarters and in the delegations and involves self-learning. The ultimate goal is to improve security arrangements, while drawing each participant's attention to the limits of the ICRC's mandate, so as to prevent staff from taking risks that would overstep those limits (e.g. by intervening in fighting or being present on front lines). The ICRC makes sure that National Society staff participating in Movement operations directed and co-ordinated by it receive security training from their National Societies.

Exceptional situations

The field security concept is the frame of reference for security matters. It applies to all operational situations. In exceptional circumstances,²¹ the ICRC may nevertheless consider waiving the applicability of one of the pillars of security. In such circumstances, the Directorate of Operations should draw up a specific set of parameters for action in that operation, to be submitted for decision and approval to the Directorate and the President. At the same time the ICRC will pursue its efforts to restore the applicability of the entire frame of reference, with a view

21 For instance, in Iraq in 2004–2008 at the height of the conflict, following several serious security incidents in 2003.

to reinforcing the acceptance of its staff and work by all parties to the conflict, including those not directly involved.

When deciding to act thus, the ICRC takes several factors into account: the urgency of the situation, the number of lives at stake, the absence or presence of other aid agencies and their ability to function, the impact of its operation, and its unique, specific mandate for protection and detention-related activities. Where security conditions have seriously deteriorated, the ICRC makes sure that the staff posted there have expressly confirmed their willingness to remain on a voluntary basis.

Experience has shown that such situations can last, even though they should remain exceptions. The special course of action devised to cope with them must therefore be the subject of a formal *ad hoc* decision and regularly reassessed, so as not to undermine the coherence of the security concept as a whole.

Conclusion

The ever-changing context in which war is waged has heightened the pressure on humanitarian endeavour, its principles and those engaged in it. Security in the field depends on coherence between the mandate, principles and action. Constant care must be taken to decide which operational modes will enable the ICRC to maintain its capacity for universal action in aid of the victims of armed conflicts and situations of violence. The balance between the operation's impact and the risks involved must also be constantly reassessed.

The ICRC has chosen to make lack of security a permanent consideration in its operational policy: it takes every possible step to reduce risk to a minimum, without being entirely able to eliminate it. Security management is decentralized and is the responsibility of the operational hierarchy at every level and across the board. It is supported and reinforced by the circulation and exchange of information locally, regionally and globally, and between headquarters and the field.

BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

Arms – books

Gasparini, Giovanni and Ronzitti, Natalino (eds.). *The tenth anniversary of the CWC's entry into force: achievements and problems*. Roma: Istituto Affari Internazionali, December 2007, 128 pp.

Graduate Institute of International and Development Studies. *Small Arms Survey 2008: Risk and Resilience*. Cambridge: Cambridge University Press, 2008, 312 pp.

ICRC. *Mine Action 2008: Special Report*. Geneva: ICRC, April 2009, 37 pp.

International Institute of Humanitarian Law. *The proliferation of weapons of mass destruction and international humanitarian law: current challenges, effective responses*. Sanremo, Italy: International Institute of Humanitarian Law, November 2007, 55 pp.

Johnson, Rebecca. *Unfinished business: the negotiation of the CTBT and the end of nuclear testing*. New York, Geneva: United Nations Publications, 2009, 363 pp.

Koppe, Erik. *The use of nuclear weapons and the protection of the environment during international armed conflict*. Portland, USA: Hart Publishing, 2008, 447 pp.

Arms – articles

Jurek, Matthias. 'White phosphorus: an outlawed weapon?', *Humanitäres Völkerrecht*, vol. 21 (2008), pp. 251–257.

Biography – articles

Ryfman, Philippe. 'Gustave Moynier, pionnier méconnu de l'action humanitaire et du droit international humanitaire', *Questions internationales*, no. 36 (March–April 2009), pp. 113–119.

Children – books

Layson, Annelex Hofstra; with Viola, Herman J. *Lost childhood: my life in a Japanese prison camp during World War II*. Washington DC: National Geographic, 2008, 111 pp.

Risser, Gary. *Children caught in conflicts: the impact of armed conflict on children in Southeast Asia*. Bangkok: Asian research center for migration, March 2007, 169 pp.
UNICEF. *The state of the world's children 2009: maternal and newborn health*. Geneva: December 2008, 158 pp.

Children – articles

Crane, David M. 'Prosecuting children in times of conflict: the West African experience', *Human Rights Brief*, vol. 15 (Spring/Summer 2008), pp. 11–15.
Francis, David J. "Paper protection" mechanisms: child soldiers and the international protection of children in Africa's conflict zones', *Journal of Modern African Studies*, vol. 45, no. 2 (2007), pp. 207–231.
Webster, Timothy. 'Babes with arms: international law and child soldiers', *George Washington International Law Review*, vol. 39, no. 2 (2007), pp. 228–254.

Conflict, violence and security – books

Chaliand, Gérard. 'Le nouvel art de la guerre: essai'. Paris: l'Archipel, 2008, 159 pp.
Handel, Michael I. *Masters of War: Classical Strategic Thought*, 3rd rev. and expanded edn. London; New York: Routledge, 2007, 482 pp.
Heintze, Hans-Joachim and Fath-Lihic, Annette (Hrsg) *Kriegsbegründungen: wie Gewaltanwendung und Opfer gerechtfertigt werden sollten*. Berlin: Berliner Wissenschafts-Verlag, Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht; Band 59, 2008, 107 pp.
Jordan, David et al. *Understanding modern warfare*. Cambridge: Cambridge University Press, 2008, 371 pp.
Lang, Anthony F. Jr and Beattie, Amanda Russell (eds.). *War, torture and terrorism: rethinking the rules of international security*. London; New York: Routledge, 2009, 213 pp.
Nye, Joseph S. *Understanding international conflicts: an introduction to theory and history*, 7th edn. New York: Pearson: Longman, Longman classics in political science, 2009, 302 pp.
Schröfl, Josef, Cox, Sean Michael and Pankratz, Thomas (eds.). *Winning the asymmetric war: political, social and military responses*. Frankfurt am Main: P. Lang, 2009, 366 pp.
Singer, P. W. *Wired for war: the robotics revolution and conflict in the twenty-first century*. New York: The Penguin Press, 2009, 499 pp.

Conflict, violence and security – articles

Sparrow, Robert. 'Killer Robots', *Journal of Applied Philosophy*, vol. 24, no. 1 (2007), pp. 62–77.

‘War, peace and progress’, *Third World Quarterly: Journal of Emerging Areas*, vol. 30, no. 1 (2009), 270 pp.

Detention – books

Gourevitch, Philip and Morris, Errol. *Standard operating procedure: a war story*. London: Picador, 2008, 286 pp.

Greenberg, Karen. *The least worst place: Guantanamo’s first 100 days*. New York: Oxford University Press, 2009, 260 pp.

Khan, Mahvish Rukhsana. *My Guantanamo diary: the detainees and the stories they told me*. New York: Public Affairs, 2008, 302 pp.

Detention – articles

Davidson, Tyler et al. ‘Security detention’. Cleveland: Case Western Reserve University, 2009. *Case Western Reserve Journal of International Law*, vol. 40, no. 3, pp. 315–650.

Frakt, David J.R. ‘Closing argument at Guantanamo: the torture of Mohammed Jawad’, *Harvard Human Rights Journal*, vol. 22, issue 1 (Winter 2009), pp. 1–23.

Oswald, Bruce ‘Ossie’. ‘Accountability for the treatment of civilian detainees during military operations: developing principled practice’, *New Zealand Yearbook of International Law*, vol. 5 (2007–2008), pp. 131–162.

Geopolitics – books

Bataillon, Gilles. *Enquête sur une guérilla: Nicaragua (1982–2007)*. Paris: Ed. du Félin, 2009, 330 pp.

Beuret, Jean-Eudes and Fino, Daniel. *Aide au développement et conflit armé au Burundi: pourquoi rester, comment agir?* Genève: Institut de hautes études internationales et du développement; Paris: Karthala, 2009, 168 pp.

Gottesman, Evan. *Cambodia after the Khmer Rouge: inside the politics of nation building*. New Haven; London: Yale University Press, 2004, 428 pp.

Makinsky Michel and Vinatier, Laurent. *L’Azerbaïdjan: au centre d’enjeux globaux*. Paris: L’Harmattan, 2008, 273 pp.

Prunier, Gérard. *From genocide to continental war: the ‘Congolese’ conflict and the crisis of contemporary Africa*. London: Hurst, 2009, 529 pp.

Health – books

ICRC, Universidad Don Bosco, Deutsche Gesellschaft für Technische Zusammenarbeit. *Exercises for lower-limb amputees: gait training*. Geneva: ICRC, September 2008, 72 pp. + 1 CD-ROM.

- ICRC. *HIV/AIDS field guide: a planning and practice guide to integrating HIV/AIDS into the ICRC's health work*. Geneva: ICRC, November 2008, 111 pp.
- International Federation of Red Cross and Red Crescent Societies. *World disasters report 2008: focus on HIV and AIDS*. Geneva: Federation, 2009, 248 pp.
- Orbinski, James. *An imperfect offering: dispatches from the medical frontline*. London: Rider Books, 2008, 431 pp.
- William, S., Gunn, A. and Masellis, Michele (eds.). *Concepts and practice of humanitarian medicine*. New York: Springer, 2008, 324 pp.

Human rights – articles

- Larsen, Kjetil Mujezinovic. ‘“Territorial non-application” of the European convention on human rights’, *Nordic Journal of International Law*, vol. 78, no. 1 (2009), pp. 73–93.
- Leach, Philip. ‘The Chechen conflict: analysing the oversight of the European court of human rights’, *European Human Rights Law Review*, no. 6 (2008), pp. 732–761.
- McCarthy, Conor. ‘Human rights and the laws of war under the American convention on human rights’, *European Human Rights Law Review*, no. 6 (2008), pp. 762–780.

Humanitarian aid – books

- Foley, Conor. *The thin blue line: how humanitarianism went to war*. London; Brooklyn: Verso, 2008, 266 pp.
- Maxwell, Daniel et al. *Emergency food security interventions*. In *Good Practice Review*, no. 10. London: Overseas Development Institute, December 2008, 146 pp.
- Meharg, Sarah Jane (ed.). *Helping hands and loaded arms: navigating the military and humanitarian space*. Clementsport, Canada: The Canadian Peacekeeping Press, 2007, 231 pp.
- Morton, Katherine et al. *Humanitarianism and civil-military relations in a post-9/11 world*. Canberra: The Australian National University, March 2009, 45 pp.
- Moyo, Dambisa. *Dead aid: why aid is not working and how there is another way for Africa*. London: Allen Lane, 2009, 188 pp.
- Schneider-Enk, Michaela. *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten: die Sicherheit des Hilfspersonals und die ‚neuen‘ Konflikte*. Hamburg: Kovac, 2008, 272 pp.
- Tomasini, Rolando and Van Wassenhove, Luk. *Humanitarian Logistics*. New York: Palgrave Macmillan, 2009, 178 pp.
- Verlage, Christopher. *Responsibility to protect: ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit*. – Tübingen: Mohr Siebeck, 2009, 433 pp.
- Walker, Peter and Maxwell, Daniel. *Shaping the humanitarian world*. London; New York: Routledge, 2009, 177 pp.

Wilson, Richard Ashby and Brown, Richard D. (eds.). *Humanitarianism and suffering: the mobilization of empathy*. New York: Cambridge University Press, 2009, 318 pp.

ICRC – books

Dempfer, Robert. *Das Rote Kreuz: von Helden im Rampenlicht und diskreten Helfern*. Wien: Deuticke, 2009, 317 pp.

International Committee of the Red Cross, International Federation of Red Cross and Red Crescent Societies. *Handbook of the International Red Cross and Red Crescent Movement: international humanitarian law: statutes and regulations: main policies of the International Red Cross and Red Crescent Movement: selected resolutions of the International Conference of the Red Cross and Red Crescent, the Council of Delegates and the General Assembly of the Federation*, 14th edn. Geneva: ICRC: Federation, 2008, 1281 pp.

Siperco, Andrei. *Comitetul international al Crucci Rosii si România 1944–1947: prizonieri de razboi si internati civili germani, unguri si austrieci American Jewish joint distribution Committee si ajutorarea evreilor*. Bucuresti: Oscar Print, 2009, 255 pp.

ICRC – articles

de Maio, Jacques. ‘L’action de la Croix-Rouge internationale’, *Les nouvelles d’Afghanistan*, no. 124 (février 2009), pp. 3–6.

Sayapin, Sergey. ‘The International Committee of the Red Cross and international human rights law’, *Human Rights Law Review*, vol. 9, no. 1 (2009), pp. 95–126.

International criminal law – books

Cassese, Antonio (ed.-in-chief). *The Oxford companion to international criminal justice*. New York: Oxford University Press, 2009, 1008 pp.

Hassel, Katrin. *Kriegsverbrechen vor Gericht: die Kriegsverbrecherprozesse vor Militärgerichten in der britischen Besatzungszone unter dem Royal Warrant vom 18. Juni 1945 (1945–1949)*. Baden-Baden: Nomos, 2009, 342 pp.

Mahler, Jonathan. *The challenge: Hamdan v. Rumsfeld and the fight over presidential power*. New York: Farrar: Straus: Giroux, 2008, 334 pp.

May, Larry. *Agression and crimes against peace*, Philosophical and legal aspects of war and conflict series. Cambridge: Cambridge University Press, 2008, 356 pp.

Ratner, Steven R., Abrams, Jason S. and Bischoff, James L. *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 3rd edn. Oxford; New York; Athens: Oxford University Press, 2009, 483 pp.

Sadat, Leila Nadya and Scharf, Michael P. (eds.). *The theory and practice of international criminal law: essays in honor of M. Cherif Bassiouni*. Leiden: Martinus Nijhoff, 2008. 448 p.
Slye, Ronald C. and Van Schaack, Beth. *International criminal law*. New York: Aspen Publishers, 2009, 354 pp.

International criminal law – articles

Cassese, Antonio. 'The Italian Court of cassation misapprehends the notion of war crimes: the Lozano case', *Journal of International Criminal Justice*, vol. 6, no. 5 (November 2008), pp. 1077–1089.
Clapham, Andrew. 'Extending international criminal law beyond the individual to corporations and armed opposition groups', *Journal of International Criminal Justice*, vol. 6, no. 5 (November 2008), pp. 899–926.
Schabas, William A., Bothe, Michael et al., 10 Jahre Rom-Statut: IStGH' ('The Rome Statute (ICC): 10 years'), *Die Friedens-Warte: Journal of International Peace and Organization*; Bd. 83, H. 4. Berlin: Berliner Wissenschaftsverlag (2008), pp. 11–113.

International humanitarian law. Generalities – articles

Jin, Xu. 'The evolution of international laws of war', *Chinese Journal of International Politics*, vol. 2 (21 October 2008), pp. 171–203.
Ronen, Yaël. 'Avoid or compensate? Liability for incidental injury to civilians inflicted during armed conflict', *Vanderbilt Journal of Transnational Law*, vol. 42, no. 1 (2009), pp. 181–225.
Schimmelpenninck van der Oije, P.J.C. 'International humanitarian law from a field perspective: case study: Nepal', *Yearbook of International Humanitarian Law*, vol. 9 (2008), pp. 394–417.
The Hebrew University Faculty of Law, Jerusalem. 'Special issue: parallel applicability of international humanitarian law and international human rights law', *Israel Law Review*, vol. 40 (2007), pp. 307–660.
The Hebrew University Faculty of Law, Jerusalem. 'The morality and law of war', *Israel Law Review*, vol. 40, no. 3 (2007), pp. 671–851.
Venturini, Gabriella. 'Fattori di crisi ed elementi di sviluppo del diritto internazionale umanitario alla luce dei conflitti recenti'. *Comunicazioni e Studi*, vol. 23 (2007), pp. 445–480.
Ward, Christopher. 'Distinction: the application of the additional protocols in the theatre of war', *Asia-Pacific Yearbook of International Humanitarian Law*, vol. 2 (2006), pp. 36–45.

International humanitarian law – Generalities – books

Ishoy, Rikke. *Handbook on the practical use of international humanitarian law*, 2nd edn rev. Kobenhavn: Danish Red Cross, 16 October 2008, 142 pp.

International peace operations and international humanitarian law: contributions presented at the seminar on 'international peace operations and international humanitarian law', Rome, 27 March 2008, organized by the International Institute of Humanitarian Law, Sanremo, in co-operation with Centro alti studi per la difesa, Rome and Società italiana per l'organizzazione internazionale, Roma. Sanremo: International Institute of Humanitarian Law, 2008, 120 pp.

Wills, Siobhán. *Protecting civilians: the obligation of peacekeepers*. Oxford: Oxford University Press, 2009, 296 pp.

International humanitarian law – Codification – books

den Beer Poortugael, D. J. H. N. *De bijdrage van Nederland aan de codificatie van het moderne humanitaire recht 1800–1914*. Amsterdam: Van Rosmalen & Schenk, 2009, 239 pp.

International humanitarian law – Combatants and armed forces – articles

Balmond, Louis. 'Observations sur le document de Montreux relatif aux obligations juridiques internationales pertinentes et aux bonnes pratiques pour les États concernant les activités des sociétés militaires privées', *Revue générale de droit international public*, T. 113, no. 1 (2009), pp. 113–124.

Corn, Geoffrey S. 'Unarmed but how dangerous? Civilian augmentees, the law of armed conflict, and the search for a more effective test for permissible civilian battlefield functions' *Journal of National Security Law and Policy*, vol. 2, no. 2 (2008), pp. 257–295.

O'Connell, Mary Ellen. 'Combatants and the combat zone', *University of Richmond Law Review*, vol. 43, no. 1 (March 2009), pp. 845–863.

International humanitarian law – Conduct of hostilities – articles

Lyall, Rewi. 'Voluntary human shields, direct participation in hostilities and the international humanitarian law obligations of states', *Melbourne Journal of International Law*, vol. 9, issue 2 (May 2008), p. 21.

Melzer, Nils. 'Targeted killing or less harmful means?: Israel's High Court judgment on targeted killing and the restrictive function of military necessity', *Yearbook of International Humanitarian Law*, vol. 9 (2008), pp. 87–113.

Sperotto, Federico. 'Targeted killings in response to security threats: warfare and humanitarian issues', *Global Jurist*, vol. 8, issue 3, art. 10 (2008), pp. 1–32.

Stephens, Dale and Lewis, Angeline. 'The targeting of civilian contractors in armed conflict' *Yearbook of International Humanitarian Law*, vol. 9 (2008), pp. 25–64.

Ziolkowski, Katharina. ‚Computernetzwerkoperationen und die Zusatzprotokolle zu den Genfer Abkommen: zum „virtuellen Raum“ des Internet und dem Schutzstandard der vor 30 Jahren in Kraft getretenen Protokolle‘, *Humanitäres Völkerrecht*, vol. 21 (2008), pp. 202–213.

International humanitarian law – Implementation – articles

Dehn, John C. ‘The Hamdan case and the application of a municipal offence: the common law origins of “murder in violation of the law of war”’, *Journal of International Criminal Justice*, vol. 7, no. 1 (2009), pp. 63–82.

International humanitarian law – Military occupation – books

Dinstein, Yoram. *The international law of belligerent occupation*. Cambridge: Cambridge University Press, 2009, 303 pp.

International humanitarian law – Military occupation – articles

Ben-Naftali, Orna and Zamir, Noam. ‘Whose “conduct unbecoming”? The shooting of a handcuffed, blindfolded Palestinian demonstrator’, *Journal of International Criminal Justice*, vol. 7, no. 1 (2009), pp. 155–175.

Dennis, Michael J. and Surena, Andre M. ‘Application of the international covenant on civil and political rights in times of armed conflict and military occupation: the gap between legal theory and state practice’, *European Human Rights Law Review*, issue 6 (2008), pp. 714–731.

Evans, Mark. ‘Balancing peace, justice and sovereignty in *jus post bellum*: the case of “just occupation”’, *Millennium: Journal of International Studies*, vol. 36, no. 3 (2008), pp. 533–554.

The Hebrew University Faculty of Law, Jerusalem. ‘Forty years after 1967: reappraising the role and limits of the legal discourse on occupation in the Israeli-Palestinian context’, *Israel Law Review*, vol. 41, no. 1 and 2 (2008), 393 pp.

Media – books

Couselo, Gonzalo Jar. *La protección de los periodistas en caso de conflicto armado*. Valencia: Tirant lo Blanch, 2007, 414 pp.

Soderlund, Walter C. et al. *Humanitarian crises and intervention: reassessing the impact of mass media*. Sterling, Virginie: Kumarian Press, 2008, 335 pp.

Natural disasters – books

Harper, Erica. *International law and standards applicable in natural disaster situations*. Rome: International Development Law Organization, 2009, 255 pp.

NGOs – articles

de Currea-Lugo, Victor. ‘Cómo hacer “advocacy” y no morir en el intento: una mirada desde las ONG humanitarias’, *Anuario de acción humanitaria y derechos humanos (Yearbook on humanitarian action and human rights)*, 2008, pp. 73–85.

Prisoners of war – books

Catherine, Jean-Claude (ed.). *La captivité des prisonniers de guerre (1939–1945): histoire, art et mémoire. Pour une approche européenne*. Rennes: Presses universitaires de Rennes, 2008, 239 pp.

Krammer, Arnold. *Prisoners of war: a reference handbook*. Westport, Connecticut; London: Praeger Security International, 2008, 192 pp.

Psychology – articles

Boisseaux, Humbert and Vallet, Dominique. ‘Le temps de la libération des otages: une épreuve périlleuse’, *Revue francophone du stress et du trauma*, T. 9, no. 1 (Février 2009), pp. 13–18.

Danzi, Patricia. ‘Crises et émotions vues à travers le prisme du CICR’, *Service sanitaire et coordonné*, vol. 26, no. 1 (2008), pp. 53–56.

Refugees, migrations – books

Pantuliano, Sara et al.; Humanitarian Policy Group, Canadian International Development Agency. *The long road home: opportunities and obstacles to the reintegration of IDPs and refugees returning to Southern Sudan and the three areas: report of phase II: conflict, urbanisation and land*. London: Overseas Development Institute, September 2008, 84 pp.

Pécoud, Antoine and de Guchteneire, Paul (eds.). *Migration without borders: essays on the free movement of people*. Paris: Unesco Publishing; New York: Berghahn, 2007, 294 pp.

Refugees, migrations – articles

Anteby-Yemini, Lisa. 'Migrations africaines et nouveaux enjeux de la frontière israélo-égyptienne', *Cultures et conflits: sociologie politique de l'International*, no. 72 (2008), pp. 77–99.

Cohen, Roberta et al. 'Ten years of the guiding principles on internal displacement', *Forced Migration Review*, 10. Oxford: Refugee Studies Centre, December 2008, 39 pp.

Religion – books

Meriboute, Zidane; transl. by John King. *Islam's fateful path: the critical choices facing modern Muslims*. London; New York: I.B. Tauris, 2009, 246 pp.

Millet-Devalle, Anne-Sophie (ed.). *Religions et droit international humanitaire: Nice 18–19 juin 2007*. Paris: Pedone, 2008, 218 pp.

Popovski, Vesselin, Reichberg, Gregory M. and Turner, Nicholas (eds.). *World religions and norms of war*. Tokyo; New York; Paris: United Nations University Press, 2009, 335 pp.

Religion – articles

L'islam en Syrie. In *Maghreb-Machrek*, 198. Paris: Choiseul, Hiver 2008–2009, 89 pp.

Vanhullebusch, Matthias. 'General principles of Islamic law of war: a reassessment', *Yearbook of Islamic and Middle Eastern Law* (2006–2007), pp. 37–56.

Terrorism – books

Devji, Faisal. *The terrorist in search of humanity: militant Islam and global politics*. London: Hurst, 2008, 229 pp.

Fernández-Sánchez, Pablo Antonio (ed.). *International legal dimension of terrorism*, International humanitarian law series, vol. 23. Leiden; Boston: Martinus Nijhoff, 2009, 512 pp.

Plaw, Avery. *Targeting terrorists: a licence to kill?* Aldershot, UK: Ashgate, 2008, 294 pp.

Terrorism – articles

Sayapin, Sergey V. 'The spread of terror among the civilian population: a war crime?', *Asia-Pacific Yearbook of International Humanitarian Law*, vol. 2 (2007), pp. 196–225.

Torture – books

Association for the Prevention of Torture, Center for Justice and International Law. *Torture in international law: a guide to jurisprudence*. Geneva: APT; Washington: CEJIL, 2008, 198 pp.

United Nations, international organizations – books

Shaygan, Farideh; préf. par Djamchid Momtaz; avant-propos de Paul Tavernier. *La compatibilité des sanctions économiques du conseil de sécurité avec les droits de l'homme et le droit international humanitaire*. Bruxelles: Bruylant, 2008, 686 pp.

Zwanenburg, Marten. *Toward a more mature ESDP: responsibility for violations of international humanitarian law by EU crisis management operations*. The Hague: T.M.C. Asser Press, October 2007, pp. 395–415.

Women – articles

Masters, Cristina. 'Femina sacra: the "war on/of terror", women and the feminine', *Security Dialogue*, vol. 47, no. 1 (February 2009), pp. 29–49.