

## REPORTS AND DOCUMENTS

# Strengthening Legal Protection for Victims of Armed Conflicts

## The ICRC Study on the Current State of International Humanitarian Law



**Address by Dr. Jakob Kellenberger, President of the International Committee of the Red Cross, 21 September 2010**

On the 12th of August last year, I had the opportunity of sharing with you some observations on the state of international humanitarian law. The sixtieth anniversary of the Geneva Conventions was an opportune moment, not only to look back at the progress that had been made since 1949, but also to assess the challenges before us, at present and in the future. On that occasion, I said that the nature of armed conflict, its causes and consequences, had evolved over the years and that the international community must expect and prepare itself for new protection needs for victims of armed conflict.

During the course of my address last year, I announced that the ICRC was about to complete an internal research study, two years in the making. The study had two main aims: identifying and understanding, more precisely and clearly, the humanitarian problems arising from armed conflict and devising possible legal solutions to them in terms of legal development or clarification. The research paid particular attention to non-international armed conflicts, but was not exclusively focused on such conflicts.

More than thirty issues of concern were analysed. In each case, the ICRC first assessed the actual humanitarian needs, drawing on its own experience and that of other organizations. Then it evaluated the responses provided by humanitarian law to these issues, with a view to identifying gaps or weaknesses in the law.

Our meeting today is a follow-up to the announcement last year of the impending completion of the study; its purpose is to give you an overview of the main conclusions of the study. This is also an occasion to open a broad dialogue on

developing new approaches for providing tangible legal protection to victims of armed conflict.

The study concluded that, with regard to most of the issues it examined, humanitarian law remains, on the whole, a suitable framework for regulating the conduct of parties to armed conflicts, international and non-international. Treaty and customary law have developed over the years: gaps have been filled in and ambiguities clarified. Recent experience has demonstrated the enduring relevance and adequacy of humanitarian law in preserving human life and dignity during armed conflict. What is required in most cases – to improve the situation of persons affected by armed conflict – is greater compliance with the existing legal framework, not the adoption of new rules. One can say with some certainty that if all the parties concerned showed perfect regard for humanitarian law, most of the humanitarian issues before us would not exist. All attempts to strengthen humanitarian law should, therefore, build on the existing legal framework. There is no need to discuss rules whose adequacy is long established.

In this regard, it bears reminding that strengthening the legal framework applicable to armed conflict also requires that other relevant legal regimes – besides humanitarian law – be taken into consideration. It is essential that any development or clarification of humanitarian law avoids all unnecessary overlapping with existing rules of human rights law. Any risk of undermining these rules must be avoided. However one essential fact must always be kept in mind: humanitarian law has to be respected in all circumstances whereas derogation from some provisions of human rights law is permitted during emergencies. The codification of humanitarian law may therefore help to prevent legal gaps in practice.

However, the study also showed that humanitarian law does not always respond fully to actual humanitarian needs. Some challenges that exist – in protecting persons and objects during armed conflict – are the result of gaps or weaknesses in the existing legal framework, which requires further development or clarification.

More precisely, the ICRC concluded that humanitarian law must develop new responses in four main areas.

The first involves **protection for persons deprived of liberty**, especially in situations of non-international armed conflict. The ICRC visits hundreds of thousands of detainees every year and this gives the organization a unique view of the legal and practical problems associated with deprivation of liberty. It is quite true that in some cases the lack of adequate infrastructure and resources hampers the establishment of a proper detention regime; but the dearth of legal norms applicable in non-international armed conflict is just as significant an obstacle to safeguarding the life, health and dignity of those who have been detained.

It goes without saying that poor material conditions of detention may, and often do, have direct and irreversible consequences for the physical and mental health of detainees. Lack of adequate food, water, clothing, sanitation and accommodation, and of access to medical care when needed are among the most common problems associated with detention. Because of their specific protection needs, some categories of person – women or children, for instance – may be at

greater risk than others. Yet, while international armed conflicts are governed by detailed binding rules on conditions of detention, non-international armed conflicts are not, especially those conflicts that are not covered by Additional Protocol II and therefore regulated only by Article 3 common to the four Geneva Conventions.

Another significant issue of humanitarian concern is the insufficient protection provided for internees, persons detained for security reasons during non-international armed conflict. Internment is widely practised, as a means of exercising control over certain persons without bringing criminal charges against them. There are simply no procedural safeguards in treaties of humanitarian law to deal with this during non-international armed conflicts. The consequences for internees are these: they may be subjected to long periods of internment without being properly informed of the reasons for which they have been deprived of their liberty, and there is no process available to them for challenging the lawfulness of their internment or for securing their release when such internment is not or no longer justifiable. The ICRC's experience confirms that not knowing the reasons for internment or its duration is one of the main sources of suffering for internees and their families.

Another serious issue of concern is the risks to which detainees are exposed when they are transferred from one authority to another, either during or after the transfer. In certain instances, such persons have endured serious violations of their rights: persecution, torture, forced disappearance, and even murder. Yet, the legal guidance available to detaining authorities in such situations is insufficient. There is an immediate need for a set of workable substantive and procedural rules for protecting the integrity and dignity of those who find themselves in these circumstances.

It is also crucial to ensure that detainees have access to visits by an independent and neutral body such as the ICRC. Such visits help those in authority identify problems and also serve as a basis for dialogue on improving the treatment of detainees and their material conditions of detention. The right to visit persons deprived of liberty is recognized under the law governing international armed conflicts; but, despite the fact that nowadays the capture and detention of the vast majority of detainees takes place during non-international conflict, no such right exists in the law governing that kind of armed conflict.

The ICRC believes, mainly on the basis of these considerations, that there is an urgent need to explore new legal ways for dealing exhaustively with the subject of protection for persons deprived of liberty during non-international armed conflict.

**Implementation of humanitarian law and reparation for victims of violations** is another area in which legal development is urgently required. Insufficient respect for applicable rules is the principal cause of suffering during armed conflicts. In recent years the emphasis has been on developing criminal law procedures to prosecute and punish those who have committed serious violations of humanitarian law; but appropriate means for halting and redressing violations when they occur are still lacking.

Most of the mechanisms provided under humanitarian law have proved to be insufficient so far. Procedures for the supervision of belligerent parties in international armed conflicts have not or have almost never been used in practice, usually for lack of consent from the parties to the conflicts. As regards non-international armed conflicts, such procedures simply do not exist.

Instead, monitoring activities in armed conflicts were made possible because of mechanisms developed outside the ambit of humanitarian law: for instance, within the framework of the UN Security Council, the UN Human Rights Council or regional human rights systems. The main advantage of these mechanisms is that, usually, they can be used without obtaining the consent of parties to conflicts. They also apply to all forms of armed conflict, international and non-international. However, these mechanisms, too, have their limitations. For instance, some of them focus on the conduct of States and do not address the responsibilities of non-governmental parties. In addition, some of them are legally obliged to apply human rights law; and this makes it difficult for them to take into account the pertinent provisions of humanitarian law when dealing with situations of armed conflict. Lastly, it has not always been possible to ensure the cooperation of parties to conflicts in conducting monitoring procedures.

Therefore, while an increase in regard for humanitarian law, by all parties to armed conflicts, is urgently needed, the current system of implementation offers only ineffectual or partial solutions. Clearly, what is required is a system that is capable of meeting the needs of victims.

Linked with the issue of implementation, reparation for victims of violations of humanitarian law is another crucial issue. Reparation is essential for victims, to overcome the deeply distressing experiences they have had to endure and to take up their lives once again. Reparation should be adapted to the circumstances and needs of the victims. It does not necessarily imply financial compensation: other forms of reparation include restitution, rehabilitation, 'satisfaction,' and the guarantee that the violations will not be repeated.

The third area of concern in which humanitarian law has to be reinforced is **protection of the natural environment**. The serious harm done to the natural environment during a number of armed conflicts has only added to the vulnerability of those affected by the fighting. The environment is intrinsically valuable; but human beings also depend on it, for their livelihood and well-being. The natural environment plays a vital role in ensuring the survival of present and future generations.

However, the law protecting the environment during armed conflict is not always clear; nor is it sufficiently developed. For instance, treaty law does not contain a specific requirement to protect and preserve the environment in hostilities during non-international armed conflict. It is true that customary international law contains certain pertinent provisions: for instance, the obligation not to attack the natural environment unless it is a military objective or the prohibition of attacks that may cause disproportionate incidental damage to the environment. However, to improve protection for the environment during armed

conflict, the precise scope and implications of these rules of customary law have to be worked out in greater detail.

There is also an urgent need to find better ways of addressing the immediate and long-term consequences of damage to the environment. The destruction of power stations, chemical plants and other industries, and of drains and sewers – even merely creating rubble – may result in serious contamination of water sources, arable land and the air, thus affecting entire populations. A new system should therefore be established to ensure that the areas affected are rapidly and effectively cleaned; this should include the development of international cooperation schemes.

Preventive action is also needed: for instance, studying the possibility of designating areas of great ecological importance as demilitarized zones before the commencement of armed conflict, or at least at its outset. Such zones may include areas containing unique ecosystems or endangered species.

The **protection of internally displaced persons** is the fourth area in which humanitarian law should be strengthened. Providing adequate protection for displaced persons is one of the most daunting tasks in humanitarian work; and the ICRC's long experience bears this out. Even so, specific legal protection continues to be deficient in this regard. It must be said, however, that the adoption in 1998 of the *Guiding Principles on Internal Displacement* was a significant step in fortifying the international legal framework for protecting internally displaced persons. The codification and development of some elements of this instrument would certainly help to increase its impact.

Having left their homes and land, internally displaced persons may be without the means to earn their livelihoods. They may be isolated and living in unsafe areas. They may become victims of violence: forcible recruitment into fighting forces, rape, and even murder. They may become separated from their families. Those who fled without documents attesting to their civil status may find it difficult to gain access to social services or to move freely within the country. Therefore legal development is necessary to ensure certain things: for instance, that family unity is preserved or that internally displaced persons have access to the documents they need in order to enjoy their rights.

The plight of internally displaced persons can be sharply worsened if their displacement is long-term and they are unable either to return to their homes or places of habitual residence or to find another lasting solution. Their property may have been destroyed or taken over by others, their land may be occupied or made unusable by the hostilities, and there may be reprisals against them if they return. Integration into the community where they have found refuge might also be an issue. Yet current international treaty law lacks the necessary provisions to deal with all these matters. Therefore, humanitarian law should develop measures that enable internally displaced persons to return to their homes or places of residence in satisfactory conditions.

This study conducted by the ICRC is just one of many steps that have to be taken until effective practical solutions are provided. Given the nature of its mandate, the ICRC is determined to take all necessary measures to ensure that this

initiative achieves positive results. However, the ICRC is also aware that this cannot be done without further cooperation and support. Ultimately, only States can influence the evolution of international law.

The ICRC would like to open a dialogue with States and other interested parties on the conclusions contained in the study and on any follow-up to it.

Comments or suggestions on this initiative, in terms of substance and process, will be gratefully received. We are particularly interested in knowing to what extent others agree with our reading of the daunting humanitarian issues before us and the related challenges for humanitarian law.

In order to foster this dialogue, the ICRC also intends to engage, in coming months, in bilateral discussions with a group of States. The ICRC will also stand ready to enter into dialogue with all States wishing to do so. On the basis of these consultations, it will then decide whether it will propose initiatives for strengthening the legal framework applicable to armed conflict and how to proceed.

States will be informed of the result of this process. In this regard, the International Conference of the Red Cross and Red Crescent next November will be an important step.

This endeavour may seem to be excessively ambitious. There are indeed numerous obstacles in our way. However, the suffering caused by armed conflict requires us to be ambitious. How else are we to ensure that humanitarian law will continue to respond effectively to the needs of those affected by armed conflict? Past experiences have convinced me that the obstacles before us can be overcome if there is a political will to do so. It is the ICRC's hope that States will make common cause, for the sake of the victims of armed conflict.