

The ICRC and the missing

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Conflict-related disappearances are a highly emotional issue. They involve death, love and family links, phenomena central to every culture and religion and which in this context are overshadowed by uncertainty, something more and more difficult for contemporary human beings to accept. Families, authorities and staff of humanitarian organizations are affected by those emotions, leading to attitudes which cannot be rationally explained (e.g. reticence to handle mortal remains) and which may be amplified by the increased tendency, at least in the Western world, to view problems from a psychological perspective.

Humanitarian players furthermore do not like to give bad news, yet in the large majority of cases of missing persons the news is bad. As confidence in authorities declines worldwide, ICRC staff hesitate to tell the family, without “scientific evidence”, that their missing relative is dead. They may feel as though by doing so, they themselves have taken the decision that the missing person is dead and have thus indirectly sentenced him or her to death. To keep the family informed in full transparency on how small the chance is to find their loved one alive or even dead may be perceived as a lack of compassion. We believe, however, that the ICRC should objectively evaluate what is best in the long run for the families concerned. It then must help its staff to cope with the emotional stress caused by the implementation of this policy.

Belligerents and former belligerents manipulate and exploit the missing persons issue to perpetuate hate, national or ethnic mobilization and exclusion of the “others”, to conceal the extent of a defeat and to gain or

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maintain international support against the enemy. International players, too, take advantage of the families' plight to rally support for the form of conflict-resolution they favour, or in inter-agency competition for visibility, money and influence, or to promote costly and unrealistic solutions (such as systematic identification of mortal remains through DNA testing).

Humanitarian issues and dilemmas

In many contexts the ICRC knows soon after the war that nearly all the missing are dead. It would be in the family's objective interest for it to accept this fact as early as possible and to start the mourning process. However, such acceptance implies great pain and destruction of the hope that the loved one will be found alive. Families want to believe that their lost relatives are alive and therefore try to avoid (or find reasons for doubting) all news hinting at death, and even feel anger towards the messenger rather than the message. Should a humanitarian organization like the ICRC destroy hope when it is often impossible to be absolutely certain that a missing person is dead? May the ICRC conversely perpetuate suffering, if only by omission, simply because absolute certainty does not exist? Should the ICRC leave it to the families to decide what they want? Their first choice, to cling to the hope that their loved one is alive, is not in their genuine interest if there is a high probability that the person is dead. Their second choice, to insist upon absolute proof of death, likewise prolongs their suffering in the many cases where such proof will never be available.

The ICRC wants to save lives, to protect and assist living people, to enable families to be reunited. It will therefore often work on the assumption that a missing person is alive and detained. Through their contact with ICRC staff the families will feel that their hopes are confirmed, which in turn prevents the mourning process from beginning. Many forms of support to the family may be possible independently of whether the missing person must be presumed dead or alive. Yet the information needed, the methods used and the steps to be taken vis-à-vis belligerents are fundamentally different when the search is for detainees or for mortal remains. In every situation the ICRC should therefore, in our opinion, quickly reach a well-informed internal decision as to whether it may realistically hope to find many missing persons alive — and then develop its activities accordingly. As a humanitarian organization it is, however, understandably reluctant to take such decisions. Moreover, it is difficult to define objective criteria on which such an assessment can be based. But once it is made, the elements of it (or, if that

information cannot be revealed for reasons of confidentiality or neutrality, at least the conclusion) should be shared with the families concerned.

As an organization with worldwide activities and a universal mandate, guided by principles such as humanity, impartiality and neutrality, the ICRC faces a difficult dilemma if it wants to expand its activities on behalf of missing persons and their families. The world is subject to profound deep inequalities. Public opinion and donors apply double standards to armed conflicts and their victims. May the ICRC offer certain services where the problem is highly publicized, where the families and/or authorities are demanding and funds are available, while not offering those services or even trying to mobilize public opinion, families and donors where such pressure does not exist?

Armed conflicts, human suffering and the disruption of traditional structures and values continue seemingly without end in many parts of the developing world. Families can understandably lose hope in finding their relatives alive and fatalism can set in. In developed countries, people are also more accustomed to remaining in contact through modern means of communication with relatives from whom they are geographically separated. Such differences do exist. In some contexts, the families do not complain about their uncertainty. Does this imply that the wish to clarify the fate of a relative would then be a need created by the ICRC?¹

Many past and present differences in the ICRC's approach to the missing persons problem in various countries are not based on double standards, but are due to difficulties of access, the sheer size of the problem and/or the country concerned, the complete lack of any prospects of success, and overwhelming priorities of protecting and assisting those who are alive. Some may consider it morally untenable to invest huge resources, with little chance of success, in attempts to clarify the fate of persons who can reasonably be presumed to be dead, if those same resources would save thousands of people from starving to death. Were this argument to be applied to our planet as a whole, it might reduce the priority given to the missing persons problem.

The question therefore remains whether the ICRC would be ready everywhere to deploy the same efforts and to mobilize public opinion and donors. This dilemma is particularly acute if the ICRC decides to provide more than its traditional services and to deploy new activities, which may

¹ During our interviews with ICRC staff no one tried to persuade us that disappearances are found less distressing in some non-Western cultures.

entail a considerable investment in terms of money, staff and technology. It must be prepared to explain to victims, authorities and public opinion why it chooses to offer some services in one context and not in others.

International humanitarian law and conflict-related disappearances

One of the distinctive features of the ICRC is that its activities and mandate are based on international law, which is an expression of the experience of the international community. The main consideration of the specific rules of international humanitarian law — primarily the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto — concerning the missing and the dead is “the right of families to know the fate of their relatives”.² Each party to a conflict has an obligation to search for persons who have been reported as missing by the adverse party.³

Missing persons are either dead or alive. If they are alive, they are either detained by the enemy or free, but separated from their families by front lines or borders. In both cases they are entitled to the protection offered by international humanitarian law to the category (civilians, prisoners of war, wounded and sick, etc.) to which they belong. In addition international humanitarian law ensures that most of them do not remain considered as missing.

If a person is missing because of the usual interruption of postal services and frequent population moves in times of armed conflict, family contact should soon be restored so long as the parties to the conflict respect their obligation to facilitate the exchange of family news and the reunification of families.⁴ If persons are missing because of detention or hospitalization by the enemy, international humanitarian law prescribes that their families and authorities must be rapidly informed through three channels: notification of hospitalization, capture or arrest;⁵ transmission of capture or internment cards;⁶ and by virtue of their right to correspond with their family.⁷ Detaining authorities are also under an obligation to answer inquiries about protected persons.⁸

² Art. 32 of Protocol I.

³ Art. 33 (1) of Protocol I.

⁴ Arts 25 and 26 of the Fourth Convention.

⁵ Art. 16 of the First Convention, Art. 19 of the Second Convention, Articles 122 and 123 of the Third Convention, Arts. 136 and 140 of the Fourth Convention, and Art. 33 (2) of Protocol I.

⁶ Art. 70 of the Third Convention and Art. 106 of the Fourth Convention.

⁷ Art. 71 of the Third Convention and Art. 107 of the Fourth Convention.

⁸ Art. 122 (7) of the Third Convention and Art. 137 (1) of the Fourth Convention.

If the missing person is dead, it is more difficult to inform the family. There can be no obligation for each party to identify every dead body found. It simply has to try and collect information that helps in the identification of the dead;⁹ this includes agreeing to set up search teams.¹⁰ Existing international humanitarian law does not establish a right for families to receive the mortal remains of their relatives, either for burial or for certainty of identification. The dead must, however, be respected and given decent burial, and gravesites must be marked.¹¹ Relatives can then be given access to such gravesites and mortal remains can be returned to them under an agreement between the parties concerned, which can generally only be concluded at the end of the conflict.¹²

Besides the aforesaid specific rules, all basic rules of international humanitarian law would, if duly respected, reduce the number of missing persons. If civilians and persons *hors de combat*, i.e. those no longer able to take part in hostilities because of injury, sickness or detention, were respected and treated in conformity with international humanitarian law, and if the ICRC was given access to war victims as prescribed by international humanitarian law, few protected persons could disappear. Those who remained unaccounted for would be combatants missing in action. Their number would, however, also be reduced if their side provided them identity tags¹³ and if both sides complied with their obligation to collect and record information on the dead who fall into their hands. Compliance by belligerents with their obligation to provide answers about the fate of missing persons comes up against some particular obstacles.

Parties frequently do not want to provide such answers. Humanitarian issues are intermingled with political considerations. The demand for reciprocity, often the bane of respect for international humanitarian law, prevents the first step from being taken, and unfortunately the families (whether manipulated or not) of each side even approve in many cases of this behaviour by “their” side’s authorities.

Belligerents withhold information in order to leave the “enemy” population in ignorance and distress, to put pressure upon the enemy or to avoid criticism from their own population for losses suffered. Leaders whose power

⁹ Art. 16 of the First Convention and Art. 33 (2) of Protocol I.

¹⁰ Art. 33 (4) of Protocol I.

¹¹ Art. 17 of the First Convention and Art. 34 (1) of Protocol I.

¹² Art. 34 (2)-(4) of Protocol I.

¹³ Art. 17(3) of the Third Convention.

is based on hatred of another community have an interest in perpetuating the missing persons issue, as it will consolidate their power.

Many disappearances are the result of violations of international humanitarian law. Recent progress in ending impunity for war crimes is important to increase respect for international humanitarian law and therefore to reduce the number of missing persons. The negative side-effect is a decrease in prospects of obtaining information about the fate of missing persons through the channel provided for by international humanitarian law, i.e. from the responsible authorities, because those same authorities fear criminal prosecution. The ICRC is caught between its recognition of the importance of criminal prosecution for war crimes and the need to guarantee confidential handling of information it receives from belligerents if it wants to keep that source.¹⁴

In many cases, in particular when disappearances result from massacres of or attacks on civilians, belligerents will be genuinely unable to provide the answers requested, partly because they did not comply with their duties during the conflict. Belligerents may, however, be expected to at least have information about the location of military operations and places of burial. If they do not, they could in most cases obtain such information.

A further problem has emerged in recent years. In some regions families are not satisfied with the information they are entitled to receive under international humanitarian law. They mistrust death certificates issued by the (former) enemy and want to be given the mortal remains of their loved ones. It remains to be seen how far such attitudes are due to manipulations by authorities wanting to keep their missing persons file open in order to gain or retain international support against the (former) enemy, to international players who have created unrealistic expectations, to the reluctance of families to accept the sad truth, to their desire to see those responsible punished, or to a combination of all those elements. But possibly the emphasis of international humanitarian law on providing answers rather than the bodies of the relatives concerned does neglect some psychological factors. To start the mourning process, families need to be certain that their relative is dead.¹⁵ In the absence of mortal remains, such certainty depends on the extent to which they trust the source of information. They generally do not trust the

¹⁴ See G. Rona, "The ICRC's privilege not to testify: Confidentiality in action", *International Review of the Red Cross*, Vol. 84, No. 845, March 2002, p. 207 ff.

¹⁵ Marie Ireland, *Apprivoiser le deuil*, Presses du Châtelet, Paris, 2001, p. 238.

former enemy. Also, in many religions and cultures the dead body is the object of rituals which the relatives believe are necessary to ensure peace in the afterlife for those who have passed away.¹⁶

Traditional ICRC activities to address the missing persons issue

Dissemination of international humanitarian law

The rules of international humanitarian law, including those to prevent the disappearance of war victims, cannot be respected if they are not known. They must in particular be part of the normal training of every combatant so that, for example, identification of the dead after an engagement becomes a reflex action. While dissemination is the responsibility of States and of the parties to armed conflicts, the ICRC often has to initiate it by training the trainers, or even has to carry out such dissemination duties itself.

Visits to detained persons

In international armed conflicts the ICRC has the right to visit prisoners of war and civilians deprived of their freedom in their places of detention and to interview them privately.¹⁷ In non-international armed conflicts, parties are encouraged to accept an ICRC offer to make such visits.¹⁸ Once a detainee is visited, he or she is registered and enabled to inform his or her family, can therefore no longer be considered as missing and has the best chance of not going missing later. During the interview in private, ICRC delegates systematically enquire whether there are co-detainees to whom they have no access or about whom they have no information and, where appropriate as a further lead, they also collect allegations of joint capture or joint arrest. On the basis of such information they can subsequently ask the parties about the fate of other persons who have fallen into their power.

General protection of civilians affected by conflict

International humanitarian law protects civilians from attack and from arbitrary and inhumane treatment. Wherever possible, the ICRC maintains a regular presence in areas where individuals or entire communities are at

¹⁶ Philippe Ariès, *The Hour of Our Death*, Oxford University Press, New York, 1991; Louis-Vincent Thomas, *Rites de mort, pour la paix des vivants*, Fayard, Paris, 1985.

¹⁷ Respectively Art. 124 of the Third Convention and Art. 143 of the Fourth Convention.

¹⁸ Art. 3 common to the four Geneva Conventions of 1949.

risk, gathers information in the field and informs authorities or opposition leaders of unlawful acts committed against the local population. It keeps in close contact with all potential perpetrators of violence. ICRC staff take immediate steps in the field (e.g. relief operations) and draw up confidential reports over a period of time in order to bring violations of international humanitarian law to a halt and to trigger appropriate remedial action. In an emergency, and when all other possibilities have been exhausted, the ICRC may even take the initiative of evacuating particularly vulnerable individuals from a dangerous area, thus preventing their disappearance.¹⁹

The success of such activities depends upon the receptiveness of the parties to conflict, which will be non-existent where they aim to eliminate an ethnic group, and on the presence of a minimum structure of authority. In recent years, such activities have more and more frequently entailed a disproportionate risk for the lives of ICRC staff involved.

Restoring family links

The restoration of family links between victims of armed conflict is one of the most long-standing activities of the ICRC and the network of National Red Cross and Red Crescent Societies. Hostilities, front lines and security imperatives dictated by the warring parties generally lead to a breakdown in traditional means of communication and simultaneously restrict people's freedom of movement. The ICRC tries to restore contact between family members who live on opposite sides of the front line, have fled their homes, been displaced or sought refuge in another country, or have been captured or arrested on account of the conflict. Visits to detained persons enable ICRC delegates to reassure families about the fate of their relatives and, by means of the Red Cross/Red Crescent network, allow the prisoners and their families to correspond. All these activities take place both in areas directly affected by the conflict and in those receiving displaced people and refugees. They constitute a tracing service, as the distribution of family messages, for example, involves locating addressees who have fled. Because of the particular vulnerability of unaccompanied children, who are by definition considered as missing by their relatives, the ICRC undertakes specific interventions and activities on their behalf.²⁰

¹⁹ See e.g. *ICRC Annual Report 2001*, ICRC, Geneva, p. 265 (Macedonia).

²⁰ See e.g. *ICRC Annual Report 2001*, p. 82 (Congo), p. 98 (Guinea), p. 106 (Rwanda) and p. 112 (Sierra Leone).

Red Cross messages are the most frequently used medium for family news. As they are unsealed, they are in general not held up by front lines or security problems; their content can be censored by the parties to a conflict at any time. Whenever possible, other more modern means of communication such as mobile phones, radio broadcasts or the Internet are used to establish the first contact.²¹

Compilation and processing of tracing requests

When an enquirer has been unable to resume contact with a close relative through the Red Cross and Red Crescent Family News Network, the ICRC compiles a tracing request with as many details as possible about the missing person and the circumstances of his or her disappearance. This information is then cross-checked with ICRC databases. If they contain no information, two methods are used. First, in some cases ICRC staff themselves start an enquiry in the field. Second, alternatively or in addition, the requests are submitted to the responsible authorities, which are not necessarily those that could be presumed to have caused the disappearance, but those which can be presumed to have or be able to obtain information, for instance because they control the territory where the person disappeared. This latter method is used in particular in international armed conflicts. However, in many contemporary conflicts responsible authorities in this sense cannot be identified or are too unstructured for any hope that the submission of tracing requests will lead to results. Whenever it is possible to submit tracing requests, the ICRC regularly follows up and transmits to the enquirer any information it obtains from official or private sources, as long as that information is considered reliable.

While the principle of tracing missing persons is well established, the decision when and whether tracing requests are accepted in a given conflict depends upon many factors, not all of which are objective. It admittedly also depends upon personal preferences and — sometimes contradictory — decisions of those in charge in the field and at headquarters in Geneva.

In some conflicts tracing requests are accepted during the ongoing conflict, and in others only when active hostilities have ended and the prisoners have been released and repatriated. In some situations, tracing requests are refused when there is no current or subsequent prospect of submitting

²¹ See e.g. *ICRC Annual Report 1995*, p. 179 ff. (former Yugoslavia); *ICRC Annual Report 2000*, p. 115 ff. (East Timor); *ICRC Annual Report 2001*, p. 255 (Albania).

them to authorities willing to process them or to engage in field tracing. In others, requests are systematically collected even if the way to obtain answers can only be discerned later. The latter solution enables the ICRC to gauge the scale of the problem, to collect a considerable number of tracing requests which exerts pressure on the authorities, and to gather useful information (*inter alia* for protection purposes) which would otherwise be lost. Once requests are submitted, a serious follow-up is essential. Sometimes requests carefully collected by ICRC staff on one side are submitted without enthusiasm by those representing the ICRC on the other side. On several occasions we had the impression that the submission is made merely “for the record”.

Systematize and develop ICRC activities to forestall disappearances

In an effort to mainstream its concern for the missing persons problem, the ICRC could expand many traditional activities taking into account the missing persons issue. Some practices described in this chapter, which we found to have been applied in some contexts,²² could be applied everywhere. A few new responses can also be envisaged.

Dissemination

In ICRC dissemination activities additional emphasis could be placed on sensitizing those who bear weapons, hold people in detention or are in positions of authority to the plight of families uncertain about the fate of their relatives. They must learn that easy measures which in no way hinder military success, such as systematic registration of persons captured, arrested or detained and systematic identification of mortal remains, are prescribed by international humanitarian law and can in most cases prevent much suffering. While dissemination normally consists of spreading knowledge of the humane measures that must be taken vis-à-vis an actual or potential enemy, dissemination of those rules also concerns measures to be taken by a belligerent for the benefit of its own soldiers. ICRC dissemination materials should systematically contain sections about the missing and the dead and explain what the ICRC can — and cannot — do to solve this problem. Dissemination could even lower the unrealistic expectations placed by families in ICRC activities in this field.

²² ICRC practice in a recent conflict is described in Thierry Schreyer, “L’action de l’Agence centrale de recherches du CICR dans les Balkans durant la crise des réfugiés kosovars”, *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 49-65.

Support for practical preventive measures

To effectively reduce the number of missing persons in wartime, all States must take practical measures in advance, i.e. in peacetime. In particular, they must provide all combatants with identity tags. They might wish to register the personal data of members of their armed forces, which may assist in a later identification of mortal remains. They should in particular establish National Information Bureaux.²³

To carry out all these practical measures, the ICRC could offer advice and training and serve as a forum to exchange experience between government authorities, e.g. between armed forces of developed and developing countries. In the aftermath of a conflict, ICRC advice can be given for the adoption of specific legislation to address the missing persons issue.

Preventive diplomatic representations at the outbreak of hostilities

At the outset of each conflict, the ICRC contacts the belligerents orally and in writing to remind them of their obligations under international humanitarian law and to offer its services. As far as we could find out, most such representations have until now recalled the obligation to register and give notification of any protected persons in their hands, but the need to wear identity tags was not mentioned. The specific obligations to identify mortal remains or to answer enquiries about missing persons appear only in memoranda addressed to the parties at the end of hostilities. It would, however, be important to remind belligerents of the missing persons issue from the very beginning of every conflict. Reminders of the corresponding obligations should also be included in confidential or solemn appeals to third States to persuade belligerents to respect international humanitarian law, in accordance with their obligation to “ensure respect” as laid down in Article 1 common to the four Geneva Conventions.²⁴

Collecting allegations while visiting detainees of death before capture

At least in conflicts where a large number of missing persons can be expected, the ICRC should take advantage of its visits to captured combatants

²³ For details, see Marco Sassòli, “The National Information Bureau in aid of the victims of armed conflicts”, *International Review of the Red Cross*, No. 763, January/February 1987, pp. 6-24.

²⁴ See Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 67-88.

and — if applicable — to civilians detained in connection with the conflict to enquire about the identity of people whose death they witnessed before their own capture or arrest and about events and places in which people were killed. When memories are still fresh, such information is easier to collect. It may be psychologically inappropriate to ask such questions during the first visit, when the persons visited are still in urgent need of protection and may not yet sufficiently understand and trust the ICRC. Later, however, such an enquiry should be the rule. The input required may in some contexts appear disproportionate to the number of missing persons. But any such proportionality analysis is possible only when the conflict has gone on for some time, whereas the collection of data should, for maximum efficiency, start at the very beginning. It might be feared that the detaining authorities could consider such questions as espionage. The reasons for them, their purpose and use could, however, be explained openly and frankly to the authorities.

Registration of civilians at risk

In the course of its activities to protect civilians affected by conflict, the ICRC sometimes concludes that a particular group of people, e.g. dispersed members of ethnic minorities, may be at risk of disappearing. Their systematic registration might, if made known, increase their chance of being respected by belligerents. On the other hand such singling out might place them in even greater jeopardy.

Use of data collected during assistance activities

Beneficiaries of ICRC assistance programmes or medical services are frequently registered, though their personal data is only rarely included. Such information could, however, be collected and kept, enabling it to be used at a later stage if the beneficiaries disappear.

Systematic collection of information on events and persons during conflicts

In most cases, the fate of a missing person who has not been found alive can be clarified only by assembling a mosaic of information on events and persons during the conflict. Although belligerents should possess such data, they are often unwilling to provide it. Some people might therefore suggest that during an armed conflict the ICRC should systematically collect information — in addition to that it collects anyway for protection purposes —

on events (such as battles, bombardments, massacres) which may later help in clarifying the fate of persons who went missing during those events. It is not easy, however, to do so, and may require considerable resources for a questionable result. Much wartime information is propaganda. The ICRC would thus be left with a lot of information that it cannot use, and belligerents may get the impression that the ICRC is spying on them.

Use of personal data obtained through the exchange of family news

In several contexts, senders and addressees of messages exchanged through the Family News Network have been systematically registered in ICRC databases so that subsequent tracing requests can be cross-checked with those data. This practice could be generalized. However, while this is relatively easy in the case of detained persons, it can be complex in that of civilians and may initially delay the restoration of family links. The reality of a conflict, the geography of the countries concerned or the logistical difficulties involved in registering millions of messages without delaying their delivery can make it practically impossible.

Systematic collection of tracing requests from the start of conflicts

From the start of a conflict, tracing requests should be collected from families who have not been able to contact a relative through the Family News Network. When no tracing requests or only very few are submitted by families, the ICRC should try to understand why and not simply assume that there is no need for tracing. The families may be afraid to contact the ICRC or do not know that it deals with that problem.

Admittedly, in the case of soldiers missing in action, families will generally not have the necessary information to substantiate their tracing requests. Some ICRC staff also contend that most of the information contained in such requests would be useless, that most of the persons sought reappear during the conflict and that to collect it would be a waste of time and energy which could be used for more urgent activities; that in some contexts, moreover, if the ICRC asked detailed questions about recently disappeared persons the safety of its staff could be threatened. While we recognize that genuine fears for staff safety, objective working conditions and other overwhelming priorities justify an exception to the systematic collection of tracing requests, all those involved should be aware that such a choice subsequently results in additional human suffering.

The inclusion of *ante-mortem* data, which could otherwise be lost, in tracing requests is a possibility. The advantage is that the enquirer remembers more details a short time after the disappearance. But questions of that nature may give families the impression that for the ICRC the missing person is already dead. The collection of such information should therefore be limited to *ante-mortem* data which may be easily lost and which does not obviously point to the possibility that the person concerned is dead.

Support to families of missing persons

When persons disappear, their families are affected too and have rights under international humanitarian law. The ICRC's first objective is to give them an answer about the fate of the missing relative. In some situations, however, it also tries to support the family in other ways before an answer can be provided. This is possible only where the ICRC is allowed to have direct contact with the families, a right on which it should always insist.

The starting point for any services to be offered to families is a genuine dialogue with them. Before a dialogue can begin, the ICRC has to decide with whom to speak. It is easier to listen to a few representatives than to the wives and mothers of the missing, who understandably are deeply distressed and are unable to cope with their new situation. Representatives, on the other hand, may be politically manipulated and influenced at least by the fact that they have found a new livelihood and purpose thanks to the missing persons issue, whereas those they represent have to overcome its traumatic effects. The mechanisms of democracy and accountability within family associations are difficult to monitor, yet the creation of such associations should be encouraged, if only because solidarity among the victims is an important therapy — especially if it evolves from the bottom up and not from the top down. In our view the ICRC should, however, avoid channelling its contacts with families exclusively through associations, in particular if the latter receive financial support from it. The ICRC's tracing activities give it a unique opportunity to establish direct relations with the families.

In a genuine dialogue the ICRC should inform the families, let them know the prospects and advise them with regard to their wishes, not simply register their answers. But is it acceptable for a humanitarian organization to take the paternalistic decision, after a genuine dialogue, that what the families really do want is not in their best interest? The answer to this question raises fundamental ethical questions and goes beyond the scope of our study.

If the ICRC systematically collects tracing requests, it must avoid being perceived, both by families and by the parties, as being “in charge of

the missing” to such an extent that the parties feel relieved of their responsibilities and the families have false expectations. It would therefore be advisable to keep families who file tracing requests regularly informed about the legal provisions applicable, the ICRC’s tracing methods, the channels used, the role of the ICRC in relation to other organizations and to family associations, the authorities’ receptiveness and the chances of success. This very often means dampening the families’ hopes. The families may express anger during such meetings, but this should not be sufficient reason to discontinue them if they help the families in their mourning process. In conformity with international humanitarian law the reply to the tracing request itself, especially if it is a death certificate, should be given by the relevant authorities.

Families of missing persons have particular psychological, material and administrative needs. Programmes to meet those needs have been developed by the ICRC only in certain contexts and mainly to ease pressure from families, authorities or other international players. In our opinion, the provision of certain services to families of missing persons is justified only to help cope with the specific problems created by the uncertainty about their relative’s fate. Even then they should not delay the return to normal life and integration into the larger group of war survivors.

The ICRC must decide whether it wants to establish and run support programmes itself or orientate families towards other organizations or government authorities. Such a choice is obviously only possible where alternatives exist, where programmes can be established or where governmental authorities can be encouraged or supported to create them. The question whether the ICRC sees its action as subsidiary or not to what others do goes beyond the missing persons issue. It carries implications for interpretation of the ICRC’s mandate, its visibility, fundraising and comparative advantages in terms of costs and know-how. To encourage and support government action instead of the ICRC taking such action itself may contribute to sustainable development and good governance, while enabling local authorities to set their priorities and be accountable for those policy decisions.

If the families so wish and the belligerents agree but need a neutral intermediary, the ICRC could facilitate the handover of mortal remains to the families.

Field tracing

In several contexts, the ICRC has done more than submit cases of missing persons to the authorities and cross-check them with data it had already

collected. Such field tracing, sometimes called “active tracing”, is the only solution where no sufficiently structured authority exists. It consists of corroborating and supplementing a tracing request and possibly finding the reply by going to the places mentioned in the request, visiting and interviewing possible witnesses and following up on any new information received during this process. In some situations this merely enables a more serious file to be submitted to the authorities, while in others it leads to clarification of the fate of the person concerned.

Initiatives such as publishing the names of all missing persons in catalogues and on the Internet, publishing and distributing a book with photographs of personal belongings found with mortal remains, or systematically searching through the judicial files of international criminal tribunals for information about the identity of confirmed victims, may have had a positive impact on the families by showing them that they are not forgotten.²⁵ They may also have helped to highlight the ICRC’s activities and relieved the organization from some pressure by the families. The results in terms of cases of missing persons resolved for their families were, however, well nigh zero.

Active searches for individual persons are conditioned by access to the field for ICRC staff, which is sometimes denied by authorities and sometimes impossible for security reasons. They involve considerable resources and police-like methods of enquiry, for which the ICRC may lack the necessary know-how and which may be detrimental to its image. As many disappearances result from violations of international humanitarian law, active tracing may also jeopardize the security of ICRC staff. During a conflict, it may furthermore put the missing person and anyone providing information at risk. If at all possible, such searches should be made, but in cooperation with other international and local humanitarian and human rights organizations, wherever this is acceptable to the local authorities.

Follow-up to allegations of hidden detention

One principle of the ICRC’s traditional visits to persons detained in connection with a conflict is to gain access to all such persons. It therefore follows up any allegation of detention it deems reliable. Such efforts may result in finding a missing person alive. Sometimes the ICRC has organized surprise visits to alleged places of detention although it doubted that the

²⁵ See *ICRC Annual Report 1996*, p. 173 ff.

allegations were justified. This was seen as an effort to succour the families. In our view, such well-meant action is counter-productive for the families and could reignite mutual distrust between former belligerents and populations. It could also strengthen the families' belief that their relatives are alive and impedes the necessary start of a mourning process. The relevant authorities may in addition use the surprise visits as an alibi for not providing answers to tracing requests.

Collection of information on the dead and transfers of mortal remains

At least in international conflicts, the ICRC seeks to obtain information on the dead from the warring parties. It sometimes does so in other situations as well. As a neutral intermediary, the ICRC is at times involved in the evacuation of mortal remains from the battlefield to hospitals where families can identify and recover them, or in the transfer of mortal remains across borders or front lines to return them to the families either directly or via the authorities. It might also take part in the interment of mortal remains not returned to families. In such circumstances all information on the dead should whenever possible be collected and duly managed. However, this is not always the case. The ICRC should also insist that mortal remains transferred under its auspices to authorities be identified by the latter and handed over to the relatives concerned.

Exhumations and forensic identification

In some cases an answer can only be obtained by means of exhumations and forensic identification. Exhumations also enable the mortal remains to be recovered and given a decent (re)burial. Forensic identification may lead to greater certainty about the relative's fate than other methods, although in many contexts, including those in developed countries, families have no doubt about the accuracy of answers provided by the ICRC.

The wish expressed by families in some contexts to be given their relatives' mortal remains may be due to manipulation by parties (hoping that answers from their former enemies which may relieve the latter of their responsibilities will not be available) or by international players; it may correspond to a cultural or emotional need, or to a desire for a higher degree of certainty or to delay the bad news. Many families will, however, never be able to receive the mortal remains, and even fewer families will benefit from the luxury of a forensic identification confirmed by DNA analysis.

In exceptional circumstances only, the ICRC has hired forensic specialists to identify mortal remains.²⁶ Should the ICRC itself be systematically involved in exhumations and forensic identification? If it refuses, invoking the considerable doubts which exist as to whether the majority of families will be able to obtain a result through this process, it may be perceived as promoting an institutional agenda in favour of the traditional services it provides and not being responsive to the families' wishes. If it does become involved, it may thereby give its endorsement to a process which has not yet shown convincing results and appear to be in competition with other international players.

Under international humanitarian law exhumations are the responsibility of the (former) belligerents, and they should not be relieved of their responsibilities. Except in areas administered by international entities, the parties' consent and cooperation will in any event be necessary for exhumations. Only government authorities can provide the necessary permits and security for exhumations, allow the collection of full *ante-mortem* information, decide on the disposal of mortal remains, and draw the delicate distinction between forensic information useful for identification and that useful for prosecution purposes. In many parts of the world, and in particular during ongoing conflicts, the authorities have not allowed the ICRC to collect such sensitive information. The advantage for the ICRC of carrying out exhumations and identification would be that it could become a reference organization for exhumation issues and be able to ensure that exhumations lead whenever possible to identification. Unlike other humanitarian players, it currently has no particular know-how in this field. It can, however, acquire that knowledge. Some would add that if the ICRC wants to be the lead agency for missing persons issues, it also has to be the reference for exhumations and forensic identification.

Forensic identification must be based on *ante-mortem* data. The ICRC could collect such data, as it is in contact with the families. When it has no control over the use of those data, it may prefer the entity in charge of identification to collect them and simply put that entity in contact with the families. If DNA matching is appropriate and necessary for forensic identification, the ICRC could be in charge of obtaining or organizing the collection of DNA samples from the families. In view of the present controversies

²⁶ See e.g. *ICRC Annual Report 1996*, p. 175, and *ICRC Annual Report 1997*, p. 187 (former Yugoslavia).

on whether and how DNA matching may be used in forensic identification, the ICRC may not wish to endorse this method in the eyes of the families before being sure that the necessary political will, financial means and technical conditions for a successful matching for most of them are present.

When a forensic identification is made, the forensic expert knows the cause of death. If it was an ICRC forensic expert, the evidence would be lost for a possible trial.²⁷ In our opinion the ICRC should, in situations entailing criminal prosecution, mainly make sure that the need to identify mortal remains on behalf of the families concerned is taken into account.

The ICRC, as a neutral intermediary in humanitarian matters, could facilitate joint exhumations by the parties; these have shown the best results in terms of numbers of persons identified. With the necessary expertise, the ICRC could advise and train government officials in the most suitable methods and offer an agreed framework to other entities willing to engage in exhumations, including international tribunals. In both roles, the ICRC could also ensure that the families, whose presence is necessary for traditional identification methods to work, are treated appropriately before, during and after exhumations, and that their interests with regard to individual identification, procedural information and the mortal remains themselves are respected.

In terms of general advocacy, the ICRC might wish to promote the establishment of good practices for exhumations and identifications, which could take the form of an international agreement or resolution, in order to ensure that basic rules and humanitarian needs are respected.²⁸ Such a document would provide (former) belligerents with a legal and technical framework for joint exhumations and avoid discussions about the standards applicable.

Ensuring that the missing persons problem is taken into account in conflict settlements

When peace or other settlements are negotiated by the parties to a conflict, often with a strong involvement of international players, the ICRC should continue to advocate the inclusion in them of provisions on the missing and the dead, together with realistic implementing mechanisms. In every case,

²⁷ See Rona, *op.cit.* (note 14).

²⁸ The ICRC has already recommended that an international network of forensic scientists be established to work on behalf of missing persons. See *The Missing: ICRC Report (Summary of the conclusions arising from events held prior to the international conference of governmental and non-governmental experts)*, 19-21 February 2003, p. 65.

the role of the ICRC in clarifying the fate of persons unaccounted for should be recognized in such arrangements; where appropriate, it should also be recognized as a neutral intermediary in this field between the former warring parties. Each party could pledge to cooperate with it to clarify the matter, but the ICRC must be careful to avoid being drawn as a witness into political disputes between the parties about their respect for post-conflict arrangements, e.g. if it is expected to submit regular reports on their compliance. Such compulsory reporting to peace implementation mechanisms or international bodies is not only contrary to the traditional confidential, bilateral and cooperation-oriented approach of the ICRC, but experience also shows that it does not enhance the readiness of parties to genuinely cooperate and instead leads to sterile and politicized mutual accusations and negative consequences for other ICRC activities.

Multilateral or tripartite mechanisms

Multilateral or tripartite mechanisms have been used, mainly after hostilities have ceased, to deal with conflict-related disappearances. Often they have been created as part of an overall agreement on humanitarian issues at the end of hostilities.²⁹

Advantages

By distinguishing for procedural purposes between alleged hidden prisoners and ICRC-registered prisoners, such mechanisms have enabled the latter to be rapidly released and repatriated. They have ensured that the humanitarian problem of missing persons is dealt with separately from political issues. They can provide warring parties with a forum to discuss humanitarian matters and thus contribute to the restoration of peace. They prevent bilateral deals between the parties which might not take the interests of the war victims into account. In suggesting that such mechanisms be set up, the ICRC ensures that it keeps a certain control over the handling of the missing persons issue.

Recent experience has shown, however, that hardly any individual cases of missing persons are resolved via such mechanisms. As long as the former belligerents still regard each other as enemies, and as long as the wartime rulers remain in power, the transparency vis-à-vis the former enemy implied by such mechanisms favours politicization used by parties to continue the war, while

²⁹ See *ICRC Annual Report 1991*, p. 102 (after the 1990-91 Gulf War) and *ICRC Annual Report 1997*, p. 185 ff. (following the Dayton-Paris Agreement).

endless procedural debates conceal their unwillingness to provide information. Once the mechanism is established, it becomes quasi-permanent, as neither the parties nor the ICRC dare be responsible for its formal termination even if several years pass without any tangible results in terms of cases of missing persons resolved.

Role of the ICRC

The role of the ICRC in such a mechanism has to be clear from the start. It may be a neutral intermediary, the advocate of the war victims, the operational arm, or all these things. The first function corresponds to its traditional role and may be compatible with the second. There may, however, be conflicting interests between the ICRC as a neutral intermediary and chairing such a mechanism, and that of the ICRC as an operational agency. In order to preserve the independence of the ICRC and to avoid acting contrary to the war victims' interests, its operational role should not be subject to the mechanism's authority. The parties should understand that the ICRC simultaneously continues to perform its traditional role in issues concerning missing persons. The ICRC should also ensure that it is able at any time to quit a mechanism which no longer yields results.

Tasks

Such mechanisms have been used in practice to submit requests for information to the parties and to receive their answers. We cannot help wondering why a party should be more willing to provide answers in the presence of the former enemy, which may immediately exploit them, than bilaterally to the ICRC. To build up a minimum of mutual trust, the parties should perhaps have an obligation to explain how they search for answers. A more promising role for such a mechanism may be to centralize information on cases on which two or more sides have information to provide. The idea that technical sub-groups should discuss events where people went missing was equally promising, but did not lead to results in practice. Lastly, such a mechanism could serve as a forum to negotiate and plan joint exhumations. To go even further, the most promising task in our opinion is to discuss policy instead of answering individual tracing requests.

Involvement of other players

The involvement of other international players can exert additional pressure on the (former) belligerents to address missing persons issues. The

disadvantage is that it often makes negotiations even more complex in that it enables (former) belligerents to exploit the competition between international players and allows the latter to boost their institutional agenda. In our view, coordination between international humanitarian and political players is crucial, but should not take place in the presence of the (former) belligerents.

To involve families' representatives in the deliberations of such mechanisms allows them to feel a part of the process and helps to ensure that their needs are taken into account. But meetings will inevitably become highly emotional, making compromises more difficult. Furthermore, experience shows that families' representatives do not use such a forum to put pressure on "their" side to provide answers to the families of the opposite side.

However, if the mechanism is a genuine forum to negotiate and plan joint exhumations or support for the families, it is appropriate to invite — on an *ad hoc* basis — experts, families' representatives or national or international players involved.

Overall assessment

The best mechanism cannot replace the political will of the parties to resolve cases of missing persons and to cooperate for that purpose. While a certain amount of positive thinking is indispensable for a humanitarian player, the ICRC should thoroughly evaluate the parties' willingness to cooperate with each other before suggesting the establishment of tripartite mechanisms. Experience seems to show that the simple fact of working together in such a mechanism is not sufficient to create the necessary political will. To test that will it may sometimes be possible to insist that some well-documented cases be resolved by each party before the mechanism is set up. It is, however, not sure that the best documented cases are the easiest to resolve.

The need for uniform operational guidelines

Outside its traditional activities, the ICRC has no general operational procedures systematically applied worldwide to address the missing persons problem. Whether the additional activities described above are undertaken seems to depend on the possibility of accomplishing them successfully, the amount of public and family pressure, the availability of staff not needed for activities considered as a priority and the sensitivity of the decision-makers concerned.

These findings corroborate the decision already taken by the ICRC to draw up uniform operational guidelines. Such guidelines will ensure that ICRC activities in this field are more transparent and credible for families, belligerents and other humanitarian players. They will in turn oblige the ICRC to make sure that it has the means to apply them equally to similar situations around the world and to sensitize the international community accordingly. Their content will have to be incorporated in the training of ICRC staff at all levels. They will facilitate better coordination between ICRC delegations on both sides of a conflict. They cannot be expected to be uniformly applied worldwide, as the context of armed conflicts varies. But all decision-makers could be expected to give reasons for applying a different policy.

Such guidelines may make the missing persons problem look as though it should be dealt with separately from other ICRC activities, whereas the concern for missing persons should on the contrary be integrated, mainstreamed, into all other activities. Basic procedural, staff management and communication requirements make it necessary, however, to formulate the new, more systematic policy initially as new guidelines, stressing the need for mainstreaming. Over the years, those guidelines will then become part of ICRC policies for visits to detainees, dissemination, assistance, the restoration of family links, etc., and — hopefully — of operational reality worldwide.

The fundamental policy decision which should be the basis of such guidelines is that the missing persons problem should no longer be dealt with only when hostilities have ended, other protection activities have decreased and all known prisoners have been released and repatriated, but in parallel with other problems before, during and after a conflict. This does not necessarily imply that all measures suggested in this study must always be implemented simultaneously. Frequently, a certain sequence appears to be more appropriate. But the missing persons issue is a steadily growing long-term problem which can best be tackled by immediate action. This new policy would in no way prevent the ICRC from continuing to insist on the need to address cases of missing persons separately from those of prisoners registered by or otherwise known to it. Indeed, such a strict separation is necessary to avoid ICRC access to prisoners and their release and repatriation being delayed by belligerents, for reasons or claims of reciprocity, until the fate of missing persons is clarified.

Résumé

Le CICR et les personnes portées disparues

Marco Sassòli et Marie-Louise Tougas

Cet article décrit les problèmes et les dilemmes humanitaires auxquels est confronté le CICR dans le cas des personnes portées disparues pendant et après un conflit armé. Il donne un bref aperçu des règles pertinentes du droit international humanitaire et souligne que le respect des obligations juridiques permet tant de prévenir les disparitions et la séparation, que d'alléger les souffrances des familles des disparus. Respecter le droit serait la meilleure pratique en ce qui concerne les disparitions liées à un conflit armé. Faire mieux connaître le droit international humanitaire, coopérer avec les belligérants, les aider à respecter leurs obligations et agir en qualité d'intermédiaire neutre pour faciliter le respect du droit, telles sont les principales fonctions du CICR en la matière. Souvent, les belligérants ne respectent pas leurs obligations, parfois, ils les dénaturent. L'institution est donc fréquemment appelée à se substituer à eux pour remplir les obligations qui leur incombent. L'article donne des exemples pratiques et propose que les activités du CICR en faveur des personnes portées disparues soient systématisées et développées.