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The Role of the International Committee of the Red Cross in Stability Operations

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I. Introduction

What is the role of the International Committee of the Red Cross (ICRC) in stability operations in Iraq? In order to answer this question, it is necessary to examine the ICRC's mandate, its main activities in Iraq and the major legal challenges it faces as it conducts its activities.

II. The ICRC's Mandate

The ICRC is a neutral, impartial and independent humanitarian organization formally mandated by States party to the Geneva Conventions (GC)¹ to ensure, among other activities, assistance to, and protection of, victims of armed conflicts or other situations of violence.² Its work is firmly rooted in public international law. The Statutes of the International Red Cross and Red Crescent Movement³ and resolutions of the International Conference of the Red Cross and Red Crescent underscore the legitimacy of the ICRC's work. States have also given the ICRC the responsibility to monitor the application of international humanitarian law (IHL).⁴ As the guardian of IHL, the ICRC takes measures to ensure respect for, promote,

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reaffirm and even clarify and develop this body of law.⁵ The ICRC is also “particularly concerned about a possible erosion of IHL and takes bilateral, multilateral or public steps to promote respect for and development of the law.”⁶

In order to carry out its activities in international armed conflicts, the ICRC has been granted an explicit right to regular access to prisoners of war under Geneva Convention III (GC III)⁷ and to civilians protected by Geneva Convention IV (GC IV).⁸ The ICRC also enjoys a broad right of initiative for other humanitarian activities.⁹ In non-international armed conflict, the ICRC may offer its services to the parties to the conflict under Common Article 3 of the 1949 Geneva Conventions. In situations that have not reached the threshold of an armed conflict, the ICRC “may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary.”¹⁰

III. ICRC Activities in Iraq

The ICRC has been present in Iraq since the outbreak of the Iran-Iraq war in 1980.¹¹ During these years, it maintained a permanent presence in the country, even in March 2003 at the start of the international armed conflict between the US-led coalition and the regime of Saddam Hussein.¹²

As of this writing, the security situation in Iraq is still fragile. Some five hundred people are killed on average every month and two thousand people are wounded in indiscriminate attacks and mass explosions that occur predominantly in Baghdad, Ninewa and Diyala governorates.¹³ Security has improved, however, as compared to the situation between May 2006 and August 2007 when two thousand to three thousand civilians died each month because of the armed conflict.¹⁴ Thanks to this improvement, the ICRC has been able to expand its activities and its presence inside the country. After running a mainly remote-control operation for a few years, the ICRC delegation for Iraq has returned to direct implementation of all its activities¹⁵ and can now access large parts of the country.

ICRC delegates are based in Baghdad, Najaf, Basra, Erbil, Suleymanieh and Dohuk, and regular visits are made to offices in Khanaqin and Ramadi.¹⁶ In 2008, Iraq was the ICRC’s third-largest operation in the world, preceded only by Sudan and Somalia, representing an expenditure of US\$88.5 million. The budget remains about the same for 2009.¹⁷ More than 530 staff are based in Iraq and in Amman, Jordan, 91 of whom are expatriates.¹⁸ In the current context, priority is given to protection activities, with a particular focus on persons detained¹⁹ or interned²⁰ by the Multi-National Force–Iraq (MNF-I) in Iraq and by the Iraqi authorities.

In 2008, ICRC delegates carried out

- twenty visits in ten places of detention under the authority of the MNF-I—a total of 33,000 internees and detainees were visited and 3,500 were followed up individually;
- twenty-one visits to eight places of detention holding 9,500 detainees under the authority of the Iraqi government; and
- visits to twenty-six places of detention holding almost 3,000 detainees under the authority of the Kurdistan Regional Government.²¹

Besides visiting detainees, the ICRC helps to maintain the links between them and their families. In 2008, thousands of people deprived of their liberty were visited by the ICRC and were able to restore and maintain contact with their families by receiving visits from their families or exchanging news through Red Cross messages (RCMs) and phone calls. Almost 311,000 messages were exchanged with the support of the Iraqi Red Crescent Society. The ICRC also supported families visiting their relatives interned at Camp Bucca near Basra by covering part of their travel expenses and providing financial support for 69,600 visits to 20,550 internees. At their requests, twenty-nine detainees released from detention were repatriated to their countries of origin under the auspices of the ICRC. In addition, 805 detention certificates were issued to former detainees, enabling them to qualify for social welfare benefits. The ICRC also established a “helpline” for families in Iraq seeking information about family members in MNF-I custody. This helpline received an average of 1,800 calls a week from families who wanted to locate detained relatives or send RCMs.²²

The conflict has also resulted in widespread displacement throughout Iraq, mainly for sectarian reasons. Around 10 percent of the population has been internally displaced.²³ The ICRC provided monthly food and hygiene assistance to 98,000 internally displaced persons in 2008.²⁴

During 2009, the ICRC continues to try to determine the fate of those who went missing during the successive conflicts involving Iraq since 1980. The civilian population affected by the armed conflict is also provided with assistance. Assistance activities include providing emergency relief, support to seventeen hospitals and twelve primary health care centers, and emergency repair work on health, water and sanitation infrastructure.²⁵ The ICRC’s priority in Iraq during 2009 remains visiting detainees. Regular visits are made to more than twenty-seven thousand detainees held by the Iraqi central government, the MNF-I and the Kurdistan Regional Government.²⁶ However, this does not reflect the total number of persons currently held in the country. The ICRC will continue to assess the security conditions in Iraq in order to increase the number of places where it can visit detainees in order to support the Iraqi government in strengthening its detention systems and

meeting international standards regarding conditions of detention and treatment. In 2008, the ICRC reached oral agreements with all Iraqi ministries that have places of detention under their authority, and the ICRC is negotiating an overall agreement with the Ministry of Foreign Affairs regarding visits to all places of detention in the country.

IV. Legal Challenges Arising from Detention/Internment by a Multinational Force in a “Host” Country

The ICRC classified the situation in Iraq as an international armed conflict between March 2003 and mid-2004, when the hostilities were inter-State. After the hand-over of power from the Coalition Provisional Authority to the interim Iraqi government on June 28, 2004, following UN Security Council Resolution (UNSCR) 1546,²⁷ the legal situation changed. The hostilities became non-international in character, involving a group of States on one side, and non-State armed groups on the other.²⁸ The explicit, valid and genuine consent of the Iraqi government to the continuous presence of foreign forces in Iraq is the key element that led to this re-qualification of the conflict since it has transformed hostile armies (in the sense of Article 42 of the 1907 Hague Regulations)²⁹ into friendly armies. Despite the improvement of the security conditions in Iraq and the common perception that the armed conflict in Iraq is largely over, widespread violence and a lack of respect for human life continue to affect the Iraqi people.³⁰ Indiscriminate attacks kill or injure dozens of people every day. Because of the level of intensity of the armed confrontations and the degree of organization of the parties involved,³¹ the ICRC continues to characterize the situation in Iraq as an internationalized internal armed conflict,³² or as a multinational non-international armed conflict, governed by rules applicable to non-international armed conflicts, particularly Common Article 3 of the Geneva Conventions, the rules of customary international law applicable in non-international armed conflicts, international human rights law and Iraqi domestic law insofar as it complies with international law.³³

Detaining insurgents is one of the main activities carried out by the allied foreign forces in Iraq. Detention by a multinational force in a “host” country poses significant legal and practical challenges, which are discussed below.

Legal Basis for Detention/Internment in a Multinational Non-international Armed Conflict

There is no debate that UNSCR 1546, adopted on June 8, 2004 under Chapter VII of the UN Charter, and the exchange of letters annexed thereto provided a legal basis for internment.³⁴ This right of the MNF-I to intern, for imperative reasons of

security, was extended in UNSCRs 1637 (2005),³⁵ 1723 (2006)³⁶ and 1790 (2007),³⁷ but ended on December 31, 2008 with the expiration of UNSCR 1790. This led to significant changes in the conduct of detention operations by the MNF-I in Iraq.

On November 17, 2008 the United States and Iraq signed a security agreement on the withdrawal of US troops from Iraq and the organization of their activities during their remaining time in the country.³⁸ This agreement, which entered into effect on January 1, 2009, does not provide a legal basis for the United States to intern people, nor does it include any provision regarding the continuation of internment.

Internment is a form of deprivation of liberty that is an inevitable and lawful result of armed conflict.³⁹ The fact that Common Article 3 neither expressly mentions internment, nor elaborates on permissible grounds or process, has become a source of different positions on the legal basis for internment in a multinational non-international armed conflict. In the ICRC's view, both treaty and customary international humanitarian law⁴⁰ contain an inherent power to intern and thus may be said to provide a legal basis for internment in non-international armed conflicts. However, in the absence of any specific provision of Common Article 3 or of 1977 Additional Protocol II (GP II) on the grounds for internment or on the process to be followed, the ICRC believes that an international agreement between the multinational force and the "host" State should be concluded—or domestic law adopted—specifying grounds and process for internment in keeping with the principle of legality. It is the ICRC's understanding that neither internment nor administrative detention⁴¹ is permitted under Iraqi law. The transfer of internees to the Iraqi government to continue internment activities is therefore not an option.

It has been announced that the security agreement would be supplemented with standard operating procedures or other procedures. It is also the ICRC's view that these would not provide the multinational force sufficient legal basis for internment as they do not have the force of law. As a result, internees will have to be either released or charged under Iraqi law.

In the event that some internees are not released, but are handed over to the Iraqi authorities to be criminally prosecuted, they must be transferred in accordance with Iraqi criminal procedure. To this end, the security agreement stipulates that "[t]he United States Forces shall act in full and effective coordination with the government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant."⁴²

In addition, the security agreement stipulates that Iraqi authorities can also ask the MNF-I to arrest wanted individuals;⁴³ thus US authorities continue to detain some individuals.

Release of Persons from MNF-I Detention/Internment

Another important humanitarian and legal concern follows from the release of persons from MNF-I internment. All the detainees who are not transferred to Iraqi authorities by US authorities shall be released in a safe and orderly manner, unless otherwise requested by the government of Iraq in accordance with the security agreement.⁴⁴

Holding internees beyond the date on which they have been authorized for release cannot be justified, as it is without legal basis.⁴⁵ Given the high number of internees still present in US internment facilities, the MNF-I is facing serious logistical and security-related difficulties in carrying out this task. As a result, there are some delays in releasing internees, a problem that also partly lies with the Iraqi authorities, since they review all the files. Considering these practical constraints, the ICRC recommended avoiding unnecessary delays of releases and promptly informing each internee selected for release of the reasons for any delay in his or her release.

After they were released at their places of capture, some internees suffered incidents of revenge. Guidance could be drawn from Article 5(4) of GP II, which requires that necessary measures shall be taken to ensure the safety of released persons⁴⁶ in order to organize release in a safe environment. To this end, the ICRC asked US authorities to establish a system for safe release, leaving the choice of the location to be released to the greatest extent possible to the concerned internee himself/herself, based on a detailed assessment of his/her fears. The ICRC considered that such a system would address the fears generally expressed about releases at the points of capture.

Transfer of Internees and Criminal Detainees

In addition to the concerns with regard to the release of individuals, the transfer of persons between States in situations where multinational forces are detaining persons in the territory of a “host” State has given rise to a range of legal—and practical—issues, particularly the respect for the principle of *non-refoulement*.

Non-refoulement is the principle of international law that precludes a State from transferring a person within its control to another State if there are substantial grounds to believe that this person faces a risk of certain fundamental human rights violations—notably torture, other forms of ill-treatment, persecution or arbitrary deprivation of life.⁴⁷

An obligation to respect the principle of *non-refoulement* expressly appears in IHL in the context of international armed conflicts, as reflected in Article 45(4), GC IV.⁴⁸ Furthermore, broader restrictions on transfer between detaining powers can be found in Article 12(2), GC III and Article 45(3), GC IV,⁴⁹ which prohibit

transfer of persons deprived of liberty in any situation where the Geneva Conventions would not be observed by the receiving State, without limiting this prohibition to the restrictive case of *non-refoulement*.

Most pertinent to the situation in Iraq and US obligations in this context is the rule as it exists under human rights law.⁵⁰ The principle of *non-refoulement* is explicitly recognized in a number of human rights instruments, e.g., in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁵¹ While not explicitly contained in the International Covenant on Civil and Political Rights (ICCPR),⁵² it is the ICRC's understanding that the principle of *non-refoulement* constitutes a fundamental component of the absolute prohibitions of arbitrary deprivation of life and of torture, cruel, inhuman or degrading treatment provided for in Articles 6 and 7 of the ICCPR.⁵³ This interpretation is based on the view that the rights in question are of such fundamental importance that a State cannot circumvent its obligations by turning a blind eye to the risk that a person will be subjected to ill-treatment or arbitrary deprivation of life as a result of its own authorities' decision on transfer. In practical terms, these obligations require the United States to refrain from transferring to Iraqi authorities or to any other State any person in its custody who risks being subjected to torture or other forms of ill-treatment, or who faces the possibility of the imposition or execution of the death penalty following a trial that does not respect fundamental guarantees. These obligations apply not only when a person is in the territory of a State, but also extraterritorially when a person is in the power, or under the effective control, of the State's authorities.⁵⁴

One of the questions that has arisen in the context of Iraq is whether the principle of *non-refoulement* applies even though persons are transferred from one State to another without actually crossing an international border. In other words, does the principle of *non-refoulement* also apply when persons are transferred from the MNF-I to Iraqi authorities within the territory of Iraq? Both the wording of existing treaty law provisions and the rationale of the principle of *non-refoulement* are relevant in determining whether *non-refoulement* applies only to transfer across an international border or not. Article 3 of the CAT refers to *refoulement* "to another State" only. Article 45(4), GC IV refers to transfer "to a country" and Articles 12(2), GC III and 45(3), GC IV refer to transfer "by the Detaining Power to a Power which is party to the Convention." None of these formulations explicitly suggests that an international border must be crossed. In addition to the wording, the rationale for the principle of *non-refoulement* is critical to its interpretation. The idea behind the principle is to protect persons from transfers if there is a risk that some of their fundamental rights may be violated. The material question, therefore, should not be whether a transferred person crosses an international border, but whether the

individual is put at real risk of violations of his/her fundamental rights as a result of transfer to the effective control of another State. If crossing a physical border were the decisive criteria, the principle of *non-refoulement* could be easily circumvented through a simple formality. For instance, a detainee could be transferred from Guantanamo Bay to the US internment facility at Bagram in Afghanistan, and then from Bagram to the Afghan authorities. The principle of *non-refoulement* would obviously not apply to the first step of the transfer (from Guantanamo Bay to Bagram) as the detainee would remain under the control of US authorities. Requiring the physical crossing of a border in order to recognize the applicability of the principle of *non-refoulement* to the second step of this transfer would lead to the absurd conclusion that the principle of *non-refoulement* cannot apply to transfers of detainees between two States when they are carried out in two phases. Thus, the real issue is whether a person has been transferred from the control of a detaining State to the control or jurisdiction of another State, regardless of whether the individual has crossed an international border.⁵⁵

Contrary to the explicit obligation of *non-refoulement* in international armed conflicts (Article 45(4), GC IV), there is no such provision for non-international armed conflicts. Nonetheless, the humanitarian principles enshrined in Article 12(2), GC III and Article 45(3), GC IV, namely that a detaining State transferring a detainee to an ally shall ensure that the transferred detainee will be treated in accordance with the Geneva Conventions by the receiving State, should also be taken into account when foreign troops intervene on the side of the government to which they transfer their detainees.⁵⁶ In these situations of multinational non-international armed conflict, such as the current one in Iraq, the underlying logic that an individual protected by IHL should not lose his or her protection through a transfer between allies should be the same as the one governing international armed conflicts. In addition, Common Article 3 of the Geneva Conventions absolutely prohibits murder, as well as torture and other forms of ill-treatment. A State would act in contradiction of Common Article 3 when it transferred a detainee to another State if there were substantial grounds to believe that the transferred person would be ill-treated or arbitrarily deprived of life. Just as the Geneva Conventions prohibit circumvention of the protections owed to protected persons by transfer to a non-compliant State (Articles 12(2), GC III and 45(3), GC IV), IHL applicable in non-international armed conflict should not be circumvented by transferring internees to a State that will not respect its obligations under Common Article 3. Furthermore,

[t]his provision should be interpreted in the light of the interpretation given to the parallel provisions in human rights law. If the absolute human rights law prohibition of

torture and other forms of ill-treatment precludes the transfer of a person at risk of such treatment, there is no reason why the absolute prohibition in humanitarian law should not be interpreted in the same way.⁵⁷

In any event, these existing norms of IHL applying to transfers would not preclude application of the principle of *non-refoulement* under human rights law,⁵⁸ as the rights concerned are non-derogable.

An additional problem is created by the fact that the United States has an obligation to transfer detained persons to Iraq pursuant to the security agreement.⁵⁹ Thus, the practical challenges that the application of the principle of *non-refoulement* can create must be recognized, and should not be underestimated. There are, however, solutions that respect the principle of *non-refoulement*. They include, among others, monitoring, or even joint administration, of places of detention in order to follow up on transferred persons. Moreover, respecting the principle of *non-refoulement* does not impede the transfer of thousands of persons as it only applies to those specific individuals who face a real risk that certain of their fundamental rights may be violated. In the context of transfers between multinational forces and the “host” country, practical solutions must be found that take into consideration the balance between, on the one hand, a transferring State’s security concerns and material limitations to detain persons who should normally be detained by the host country, and, on the other hand, the need to provide real protection against ill-treatment or arbitrary deprivation of life. In striking this balance, particular respect must be given to the principle of *non-refoulement*, keeping in mind the overriding humanitarian purpose of IHL.⁶⁰

In order for a person to be able to challenge his or her transfer meaningfully, a number of procedural guarantees are essential.⁶¹ If there is a risk of violations of fundamental rights, the person must not be transferred. If it is determined that there is no such risk, the transferring State must

- inform the concerned person in a timely manner of the intended transfer;
- give the person the opportunity to express any fears that he or she may have about the transfer;
- give the person the opportunity to challenge the transfer before a body that is independent from the one that made the decision to transfer;
- give the person the option to explain why he or she would be at risk in the receiving State to the independent body that reviews whether his or her fears are well founded;
- assess the existence of the risk on a case-by-case basis; and

- suspend the transfer during the independent review of whether such fears are well founded because of the irreversible harm that would be caused if the person were indeed at risk.⁶²

In the course of its visits to persons deprived of their liberty in Iraq, the ICRC conducts pre-departure interviews with certain detainees subject to transfer or release in order to be able to transmit any fears the detainees might have to the transferring authorities. It is not the ICRC's mandate to assess whether a person's fear of being transferred is well-founded. This responsibility rests with the transferring authority, which must interview the detainee as part of its own assessment of the risk for the person concerned.

In addition, the ICRC frequently lends its services to facilitate the return of detainees to their places of origin or their transfer to third States.⁶³ In this respect, each foreigner (third-country national) is met individually and asked whether he or she wants his/her State of nationality to be notified. If he or she agrees, the ICRC informs his/her embassy about his/her presence in the detention facility. Upon request, the ICRC carries out repatriation of released foreigners. In 2008, twenty-nine detainees released from MNF-I (twenty-three), central Iraqi (three) and regional Kurdish (three) custody were repatriated to their countries of origin under the auspices of the ICRC. The ICRC will not facilitate a transfer if it thinks that it would be contrary to international legal requirements. Moreover, as a matter of general policy, the ICRC only assists persons who wish to be transferred; that is, those who have given their informed consent to transfer, since it would be incompatible with its humanitarian mandate to assist in a transfer which, even if lawful, is against the will of the person concerned.⁶⁴

Post-transfer Responsibilities

Another important issue related to the transfer between allies is whether the transferring authority retains some responsibilities after the transfer.

If a transfer takes place, the responsibility for the transferred person rests with the receiving State. The sending State might, however, have a number of post-transfer responsibilities, even in cases where the transfer is carried out with full respect given to the principle of *non-refoulement*.⁶⁵ For instance, Article 12(3), GC III (prisoners of war) and Article 45(3), GC IV (protected persons) contain strong post-transfer responsibilities under which the transferring State has to assure itself that the receiving State will respect the Convention. Article 12 provides:

If that Power [to which the prisoners of war are transferred] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power,

take effective measures to correct the situation or shall request the return of the prisoners of war/protected persons. Such requests must be complied with.

Similarly, Article 45(3) provides:

If that Power [to which the protected persons are transferred] fails to carry out the provisions of the Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such requests must be complied with.

As stated by the *Commentary* on GC III, the States “adopted a system of subsidiary responsibility, subject to certain specific conditions.”⁶⁶ The *Commentary* adds that “[t]he general conditions of internment stipulated in the Convention must be respected: quarters, food, hygiene. . . . If the receiving Power fails to carry out these provisions in any ‘important’ respect, the responsibility of the transferring Power is again involved.”⁶⁷

There is no equivalent provision for post-transfer responsibilities in non-international armed conflicts. A situation in which a person captured in a non-international armed conflict would be transferred between different States was probably not considered in 1949 when the Conventions were drafted. Now, however, in a multinational non-international armed conflict like the one in Iraq, the protection needs of a transferee can be very similar to—or probably even greater than—those envisaged in GC III and GC IV in circumstances such as when an Iraqi detainee is transferred from the MNF-I to his/her State of nationality. While in international armed conflict the general assumption is that a repatriated protected person is not at risk in his/her country of nationality, in non-international armed conflict the situation is different because the transferred person may have been fighting against the authorities of his/her country of nationality and therefore may face reprisals. Thus, the considerations of Articles 12(3), GC III and 45(3), GC IV should also be taken into account in transfers between allied powers in the context of multinational non-international armed conflicts in order to ensure that transferred persons are protected from violations of IHL.⁶⁸

Such post-transfer responsibilities would also correspond to States’ obligation to ensure respect for IHL as provided for in Common Article 1 of the Geneva Conventions.⁶⁹ This duty entails a responsibility for all States to take feasible and appropriate measures to ensure that the rules of IHL are respected by the parties to an armed conflict.⁷⁰ It is a commitment to promote compliance with IHL.⁷¹ Transferring States, in particular, have greater means to ensure respect in contexts where they have a strong diplomatic and military presence in the receiving State, as is the

case with the United States in Iraq. They can engage in a dialogue on the treatment of detainees and undertake other measures, such as post-transfer follow-up or capacity building at the different levels of the chain of custody, to ensure that the receiving State abides by its obligations.

Judicial Guarantees

An additional legal challenge for the MNF-I stems from the disrupted Iraqi judicial system.⁷² US authorities continue to give custodial support to Iraqi authorities, thus effectively retaining control over some criminal detainees on behalf of Iraqi authorities, including those arrested in 2009.⁷³ US authorities must therefore ensure that such custody complies with the requirements of Iraqi national legislation and internationally recognized standards, particularly judicial guarantees.

To this end, US authorities should use their influence to ensure that

- all persons arrested in 2009 benefit from safeguards under Iraqi law (e.g., the requirements for arrest warrants, detention orders and appearances before a judge within 24 hours), provided these safeguards are in compliance with internationally recognized standards;
- information obtained by US forces without observing the safeguards provided for in Iraqi criminal law, in particular in those instances where the person is without legal assistance, is not transmitted to the Iraqi authorities; and
- the time spent in MNF-I internment is deducted from the sentences imposed by Iraqi courts if the reasons for criminal imprisonment are based on facts that led to the internment.⁷⁴

Given the concerns about the capacity of an already overstretched Iraqi judicial system to efficiently and promptly absorb such an important new caseload of detainees, the influence exercised by the United States and the support provided to Iraqi authorities are crucial to ensuring those authorities have the ability to train correctional staff to meet international standards.⁷⁵ In addition, this US support should ensure that basic judicial guarantees are respected so that persons transferred to the Iraqi criminal system can benefit from fair trials.

V. Conclusion

Despite significant security and political improvements, conditions in Iraq are volatile and unpredictable, and security remains one of the ICRC's first concerns. Even if its operations in Iraq remain driven by security constraints, the ICRC wants to continue to maintain a sufficient level of activities to identify and address the needs of the most vulnerable people in the country:

The recent experience of the ICRC in Iraq . . . made a difference to the lives of many hundreds of thousands of Iraqis. Maintaining a presence and proximity on the ground, taking action wherever possible, not only allows [the ICRC] to carry out humanitarian work but also serves as a basis for increasing [its] knowledge and understanding of a complex situation and keeping track of humanitarian needs. . . . A presence on the ground provides opportunities for humanitarian dialogue, on which a positive perception and consequent acceptance often heavily depend. Such a presence on a broader scale also enables a balanced stance to be maintained among the various communities by addressing their needs, however different they may be from one place to another.⁷⁶

If its presence on the ground is crucial to enabling the ICRC to protect and assist persons covered by IHL, in accordance with its international mandate and its own commitment to do so, the relevance and the credibility of the ICRC also come from its operational approach. Through its neutral, impartial and independent humanitarian action,⁷⁷ i.e., remaining distinct from political interests and not taking sides, the ICRC can better reach those persons in need and act on their behalf. In a polarized world, such an approach may also reduce tension and contribute to the stability of a devastated country like Iraq. In 2007, Toni Pfanner stated:

Perhaps one way back to a stable Iraq, one that would serve equally the needs of its entire people, is through the unanimous acceptance of impartial humanitarian action. Such action, which makes no distinction between victims, could foster reconciliation and serve to counter the pernicious idea that human lives must inevitably be sacrificed—an idea that will only further encourage hatred and then more hatred, revenge followed by more revenge.⁷⁸

Today, some two years later, that statement still shows the best way forward.

The ICRC is also confronted with complex legal issues arising from detention activities in Iraq. These legal challenges are numerous, and the ICRC's role is to help the various parties to the armed conflict abide by their obligations under IHL. Rules protect. The purpose of ICRC activities in this area is precisely to ensure that the rules laid down by IHL are respected so that violations are prevented. As Professor Sandoz indicated,

Surely respect for every human being, and compassion for those who suffer, are values on which the future of the world must be built. By defending these values even in war, the guardian of international humanitarian law is also combating the feelings of helplessness and fear that make peoples indifferent to each other and drive them into isolation.⁷⁹

Adherence to the law enhances security and facilitates national reconciliation and a return to peace, which are the likely long-term goals of most parties to non-international armed conflicts.⁸⁰ In this sense, it can be also said that the ICRC contributes to the stabilization of Iraq, as well as of any other place in the world where the ICRC works for the faithful application of IHL. Respect for IHL protects people, their well-being and their dignity. Apart from the importance of respecting the fundamental values embodied in IHL to protect human beings, respecting those values in times of armed conflict can also facilitate the resumption of dialogue between the parties to the conflict and ultimately the restoration of peace. It is of utmost importance that all those involved in the Iraqi conflict recognize that compliance with the law is also a necessary component of a broader political process that could one day lead to the end of the tragedy in Iraq.

Notes

1. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War art. 10, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter GC IV]. The Geneva Conventions are universally ratified (194 States parties).

2. Statutes of the International Red Cross and Red Crescent Movement art. 5(2)(d), Oct. 31, 1986, as amended, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$File/Statutes-EN-A5.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf) [hereinafter Statutes of the Movement].

3. These Statutes were adopted during the 25th International Conference of the Movement that States parties to the Geneva Conventions attended as full members.

4. Statutes of the Movement, *supra* note 2, art. 5(2)(c).

5. See Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, Dec. 31, 1998, <http://www.icrc.org/web/eng/siteeng0.nsf/html/about-the-icrc-311298>.

6. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 7 (2009), *available at* [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0963/\\$File/ICRC_002_0963.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0963/$File/ICRC_002_0963.PDF).

7. Convention Relative to the Treatment of Prisoners of War art. 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 244 [hereinafter GC III].

8. GC IV, *supra* note 1, arts. 76, 143.

9. See, e.g., GC IV, *supra* note 1, art. 10; GC III, *supra* note 7, art. 9. Similar provisions appear in Article 9 of the two first Geneva Conventions.

10. Statutes of the Movement, *supra* note 2, art. 5(3) (which grants the ICRC a very broad statutory right of initiative).

11. Karl Mattli & Jörg Gasser, *A Neutral, Impartial and Independent Approach: Key to ICRC's Acceptance in Iraq*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 153, 167 (2008), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p153/\\$File/irrc-869_Mattli.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p153/$File/irrc-869_Mattli.pdf); INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2008, at 342 (2009), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_annual_report_2008?OpenDocument.

12. However, it should not be forgotten that the repeated US and UK airstrikes in the air exclusion zone of southern Iraq, which resumed in September 1996 after three years of interruption, already constituted an international armed conflict.

13. ICRC Field Newsletter, Iraq: Civilians without Protection 1 (Aug. 13, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-newsletter-120809>.

14. Iraq Body Count, Documented Civilian Deaths from Violence: Monthly Table, <http://www.iraqbodycount.org/database/> (last visited Sept. 4, 2009). Despite their limitations, the figures in the Iraq Body Count database are sufficient. Beth Osborne Daponte, *Wartime Estimates of Iraqi Civilian Casualties*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 943, 957 (2007), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-868-p943/\\$File/irrc-868_Daponte.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-868-p943/$File/irrc-868_Daponte.pdf).

15. Direct implementation entails on-site ICRC supervision and often on-site ICRC involvement, at least in certain project phases, such as evaluation and assessment. The ICRC only applies the remote-control procedure to types of projects that meet strict technical and financial risk criteria and are well known from previous interventions, thus enabling the organization to draw on its firsthand experience in the project decision-making process. The remote-control model is based on the mobilization of an extensive network of competent local contractors and consultants, working in close collaboration with ICRC engineers. The key to the success of the remote-control model is based on the following factors:

- highly experienced, motivated and committed ICRC Iraqi employees;
- strong collaboration with and ownership by the relevant local authorities;
- an extensive network of local contractors/consultants throughout the country; and
- strong control mechanisms, whereby separate entities are involved in needs assessment and project design, implementation, monitoring and evaluation.

Mattli & Gasser, *supra* note 11, at 162.

16. ICRC setup at the time of this writing (September 2009).

17. INTERNATIONAL COMMITTEE OF THE RED CROSS, OVERVIEW OF OPERATIONS 2009, at 49 (2008), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/appeals-overview-181108/\\$File/2009_OverviewOperations.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/appeals-overview-181108/$File/2009_OverviewOperations.pdf).

18. ICRC, The ICRC in Iraq, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq?opendocument#Operational%20update> (last accessed Sept. 14, 2009).

19. “Detained person” or “detainee” is used in this article to cover all persons deprived of their liberty for reasons related to the armed conflict in Iraq regardless of any specific legal basis. Thus, it includes persons who have taken a direct part in hostilities and who have fallen into the power of the adversary party, as well as those detained on criminal charges or for security reasons, provided that there is a link between the armed conflict and their deprivation of liberty.

20. An “interned person” or an “internee” is generally deprived of liberty following an order by the executive authorities when no specific criminal charge is brought against the individual concerned. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 875 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC Commentary]. For the sake of simplification, the terms “detained person” and “detainee” are sometimes used in this article in a generic sense to cover also “interned persons” or “internees,” *id.*

21. International Committee of the Red Cross, The International Committee of the Red Cross in Iraq: 2008 Facts and Figures 2, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/iraq-newsletter-311209/\\$File/2008-iraq-eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/iraq-newsletter-311209/$File/2008-iraq-eng.pdf) (last visited Sept. 14, 2009) [hereinafter Iraq 2008 Facts and Figures].

22. *Id.*

23. Internal Displacement Monitoring Centre, Challenges of Forced Displacement within Iraq (Dec. 31, 2008), <http://www.internal-displacement.org/countries/iraq>.

24. Iraq 2008 Facts and Figures, *supra* note 21, at 5.

25. International Committee of the Red Cross, Operational Update: Iraq—Indiscriminate Attacks Take Heavy Toll on Civilians (Aug. 15, 2009), <http://www.icrc.org/Web/eng/siteeng0.nsf/html/iraq-update-150909> [hereinafter Indiscriminate Attacks Take Heavy Toll].

26. News Release 09/57, International Committee of the Red Cross, Iraq: Civilians Still Facing Hardship Every Day (Mar. 19, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-news-190309?opendocument>.

27. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

28. ICRC, Iraq post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority, Aug. 5, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/63kkj8?opendocument>.

29. Regulations Respecting the Laws and Customs of War on Land, Annex to Convention No. IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 69 (“Territory is considered occupied when it is actually placed under the authority of the hostile army”).

30. Indiscriminate Attacks Take Heavy Toll, *supra* note 25.

31. International Committee of the Red Cross, Opinion Paper, How is the Term “Armed Conflict” Defined in International Humanitarian Law? (Mar. 2008), [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).

32. For a more detailed analysis of internationalized internal armed conflicts to which the law of non-international armed conflict applies, see Hans-Peter Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145, 147 (1983); Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 INTERNATIONAL REVIEW OF THE RED CROSS 255 (1982); Michael Bothe, *Völkerrechtliche Aspekte des Angola-Konflikts*, 37 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 572, 590–91 (1977), available at http://www.hjil.de/37_1977/37_1977_3_4_a_572_603.pdf; Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE STUDY OF CUSTOMARY INTERNATIONAL LAW 77, 89–94 (Elizabeth Wilmshurst & Susan C. Breau eds., 2007); Sylvain Vit , *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 69, 85–87 (2009), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-873-p69/\\$File/irrc-873-Vite.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-873-p69/$File/irrc-873-Vite.pdf).

33. For a more detailed analysis on the classification of the Iraqi conflict, see Knut D rmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN YEARBOOK OF INTERNATIONAL LAW 293, 307–14 (2004).

34. S.C. Res. 1546, *supra* note 27, ¶ 10 (“Decides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism” (emphasis in original)).

35. S.C. Res. 1637, ¶ 1, U.N. Doc. S/RES/1637 (Nov. 11, 2005) (“Notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and, having regard to

the letters annexed to this resolution, *reaffirms* the authorization for the multinational force as set forth in resolution 1546 (2004) and *decides* to extend the mandate of the multinational force as set forth in that resolution until 31 December 2006” (emphasis in original)).

36. S.C. Res. 1723, ¶ 1, U.N. Doc. S/RES/1723 (Nov. 28, 2006) (“Notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and *reaffirms* the authorization for the multinational force as set forth in resolution 1546 (2004) and *decides* to extend the mandate of the multinational force as set forth in that resolution until 31 December 2007, taking into consideration the Iraqi Prime Minister’s letter dated 11 November 2006 and the United States Secretary of State’s letter dated 17 November 2006” (emphasis in original)).

37. S.C. Res. 1790, ¶ 1, U.N. Doc. S/RES/1790 (Dec. 18, 2007) (“Notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and *reaffirms* the authorization for the multinational force as set forth in resolution 1546 (2004) and *decides* to extend the mandate as set forth in that resolution until 31 December 2008, taking into consideration the Iraqi Prime Minister’s letter dated 7 December 2007, including all of the objectives highlighted therein, and the United States Secretary of State’s letter dated 10 December 2007” (emphasis in original)).

38. Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf [hereinafter Security Agreement].

39. See GC IV, *supra* note 1, arts. 41(1), 78(1). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5, 6, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 483.

40. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW vol. I, 344–52 (2 volumes: Vol. I, Rules; Vol. II, Practice (2 Parts)) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

41. The terms “internment” and “administrative detention” are used interchangeably, although the former is the term used in situations of armed conflict whereas the latter is the term used in situations outside armed conflict.

42. Security Agreement, *supra* note 38, art. 22(4).

43. *Id.*, art. 22(3).

44. *Id.*, art. 22(4).

45. See Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375, 382 (2005), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/\\$File/irrc_858_Pejic.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/$File/irrc_858_Pejic.pdf).

46. Release should not take place if it proves impossible to take the necessary measures to ensure the safety of the persons concerned. It is not indicated for how long such conditions of safety should be envisaged. It *seems* reasonable to suppose that this should be until the released persons have reached an area where they are no longer considered as enemies or otherwise until they are back home, as the case may be.

ICRC Commentary, *supra* note 20, at 1393–94 (emphasis added).

47. An extensive analysis of the principle of *non-refoulement* can be found in Emanuela Chiara Gillard, *There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 703 (2008), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p703/\\$File/irrc-871-Gillard.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p703/$File/irrc-871-Gillard.pdf). See also Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in

REFUGEE PROTECTION IN INTERNATIONAL LAW 87 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003), available at <http://www.unhcr.org/4a1ba1aa6.html>.

48. GC IV, *supra* note 1, art. 45(4), stipulates that “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”

49. GC III, *supra* note 7, art. 12(2) (“[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody”). This provision is mirrored in Article 45(3) of GC IV, *supra* note 1.

50. For an analysis of the application of the principle of *non-refoulement* under human rights law, see Gillard, *supra* note 47, at 708–10, 716–23; Cordula Droege, *Transfers of Detainees: Legal Framework, Non-refoulement and Contemporary Challenges*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 669, 671–73 (2008), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p669/\\$File/irrc-871-Droege2.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-871-p669/$File/irrc-871-Droege2.pdf).

51. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

52. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

53. See U.N. Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No. 20, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* 31, ¶ 9, U.N. Doc. HRI/GEN/1/Rev. 1 (July 28, 1994); U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004) [hereinafter General Comment 31]. For case law concerning member States of the Council of Europe, see the European Court of Human Rights judgments since *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91 (1989), reprinted in 28 INTERNATIONAL LEGAL MATERIALS 1063.

54. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108–11 (July 9), reprinted in 43 INTERNATIONAL LEGAL MATERIALS 1009 (2004); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 119 (Dec. 19); U.N. Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 15, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); U.N. Human Rights Committee, Communication No. 52/1979 *López Burgos v. Uruguay*, Views of the Human Rights Committee, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981); General Comment No. 31, *supra* note 53, ¶ 10.

55. Droege, *supra* note 50, at 677, 683; Gillard, *supra* note 47, at 712–15.

56. Droege, *supra* note 50, at 675.

57. *Id.*

58. *Id.* at 671–73; Gillard, *supra* note 47, at 708–10, 716–23.

59. Security Agreement, *supra* note 38, art. 22.

60. Droege, *supra* note 50, at 701.

61. The procedural dimension is especially emphasized in *Lauterpacht & Bethlehem*, *supra* note 47, ¶¶ 159 *et seq.*

62. Droege, *supra* note 50, at 679–80; Gillard, *supra* note 47, at 738.

63. See, e.g., Indiscriminate Attacks Take Heavy Toll, *supra* note 25.

64. Droege, *supra* note 50, at 680–81.

65. For an analysis of responsibilities following a transfer in violation of the principle of *non-refoulement*, see Gillard, *supra* note 47, at 738–40.

66. COMMENTARY III ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 137 (Jean Pictet ed., 1960) [hereinafter Commentary III].

67. *Id.* at 138.

68. See Droege, *supra* note 50, at 698.

69. See International Committee of the Red Cross, *Summary Report: Improving Compliance with International Humanitarian Law—ICRC Expert Seminars*, in INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS annex 3 at 46, 48–49 (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf) (The ICRC, in cooperation with other institutions and organizations, organized a series of regional expert seminars on the topic “Improving Compliance with International Humanitarian Law” as part of the preparation for the 28th International Conference of the Red Cross and Red Crescent. Regarding Common Article 1, seminar participants confirmed that it entails an obligation, both on States party to an armed conflict and on third States not involved in an ongoing armed conflict. In addition to a clear legal obligation on States to “respect and ensure respect” for international humanitarian law within their own domestic contexts, third States are bound by a negative legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations. Furthermore, third States have a positive obligation to take appropriate action—unilaterally or collectively—against parties to a conflict who are violating international humanitarian law. All participants affirmed that this positive action is at minimum a moral responsibility and that States have the right to take such measures, with the majority of participants agreeing that it constitutes a legal obligation under Common Article 1. This is not to be construed as an obligation to reach a specific result, but rather an “obligation of means” on States to take all appropriate measures possible, in an attempt to end international humanitarian law violations).

70. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2003), reprinted in 86 INTERNATIONAL REVIEW OF THE RED CROSS 213, 237–39 (2004).

71. See intervention by Mr. Pilloud from the ICRC at the 1949 Diplomatic Conference. II-B Final Record of the Diplomatic Conference of Geneva of 1949, at 39. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 129 (2d ed. 1958); Commentary III, *supra* note 66, at 18.

72. See Eric Stover, Miranda Sissons, Phuong Pham & Patrick Vinck, *Justice on Hold: Accountability and Social Reconstruction in Iraq*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 5 (2008), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p5/\\$File/irrc-869_Stover.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p5/$File/irrc-869_Stover.pdf).

73. See Security Agreement, *supra* note 38, art. 22.

74. Internment/administrative detention is a measure of control aimed at dealing with persons who pose a real threat to State security, currently or in the future, in situations of armed conflict, or to State security or public order in non-conflict situations; it is not a measure that is meant to replace criminal proceedings. . . . Unless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power,

bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined.

Pejic, *supra* note 45, at 381.

75. [There are] many problems afflicting Iraq's legal system. They include the large number of detainees that has resulted from the surge of US and Iraqi military operations, allegations of the use of torture to extract confessions and concerns about the impartiality of some court officials. This state of affairs hardly bodes well for the promotion of national reconciliation in Iraq. Nor is it conducive to the development of an independent, transparent and accessible judicial system, which is a key component of social reconstruction.

Stover, Sissons, Pham & Vinck, *supra* note 72, at 27.

76. Mattli & Gasser, *supra* note 11, at 168.

77. For a more detailed analysis of the ICRC's neutral, impartial and independent humanitarian action, see Pierre Krähenbühl, *The ICRC's Approach to Contemporary Security Challenges: A Future for Independent and Neutral Humanitarian Action*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 505 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66CM82/\\$File/irrc_855_Krahenbuhl.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66CM82/$File/irrc_855_Krahenbuhl.pdf).

78. Toni Pfanner, *Editorial*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 779, 783 (2007), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/review-868-p779>.

79. Sandoz, *supra* note 5.

80. See MICHELLE MACK & JELENA PEJIC, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 31 (2008), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0923/\\$File/ICRC_002_0923.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0923/$File/ICRC_002_0923.PDF).