

INTERNATIONAL HUMANITARIAN LAW: SHOULD IT BE REAFFIRMED, CLARIFIED OR DEVELOPED?

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INTRODUCTION

The aim of this paper is to give an overview of some concrete problems of application of international humanitarian law (IHL) and then to look towards possible future remedies. This will be done from the practice oriented, operational perspective of the International Committee of the Red Cross (ICRC).

The ICRC is mandated by States, in particular through the 1949 Geneva Conventions¹ and their 1977 Additional Protocols,² as well as the Statutes of the International Red Cross and Red Crescent Movement, to act as promoter and “guardian” of IHL. This role has many facets. It ranges from the promotion of IHL treaties, the monitoring of respect of IHL by the parties to armed conflicts, the dissemination of IHL, to preparing developments of IHL.³

For the ICRC, an institution present in almost all the “hot spots” of the world, the main challenge today is without any doubt the proper application of IHL in today’s armed conflicts. Extensive research into recent armed

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¹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 *U.N.T.S.* 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 *U.N.T.S.* 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.* 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 *U.N.T.S.* 609.

³ For a detailed description of the role of the ICRC, *see* Art. 5 of the Statutes of the International Red Cross and Red Crescent Movement, that were adopted in 1986 (and amended in 1995) by the States Parties to the 1949 Geneva Conventions and by the ICRC, National Red Cross and Red Crescent Societies and their International Federation.

conflicts has led the ICRC to conclude that, on the whole, the existing rules are adequate enough to deal with today's armed conflicts. While the main problem is therefore not a lack of rules, this does not mean that the law is perfect. Like any law, IHL is the result of careful and difficult compromises, in this case between considerations of humanity, military necessity and the need to protect the security of the State. It must be stressed that the ICRC's conclusion on the adequacy of IHL does not mean that it would in any way ignore the many challenges with regards to the application of the law, including those relating to the fight against terrorism, nor the need for IHL to evolve together with the realities of war.

Especially following the attacks of 11 September 2001, questions have been raised about whether IHL was still adequate to respond to today's challenges. The debate has taken various forms. At the beginning of 2003, the Swiss Government and the Harvard Program on Humanitarian Policy and Conflict Research organized an informal expert meeting on contemporary challenges of IHL for a group of States and independent experts, as well as the United Nations and the ICRC. The experts identified a number of topics deserving further examination and clarification. But at the same time they also strongly reaffirmed the validity of current humanitarian law and the necessity to apply it.⁴ A second meeting is planned for June 2004.

The ICRC for its part has taken a number of initiatives that will be mentioned later in this paper, with a view to reaffirm, clarify or develop IHL.

The first part of this paper will highlight some of the current challenges. It will address two aspects: First, some important general obligations under IHL will be recalled, and second, some special challenges linked to the "war on terror" will be briefly discussed.

I. CHALLENGES OF A GENERAL NATURE

The more general challenges facing IHL can be subdivided very roughly according to the following timeline: obligations in peace-time, obligations during armed conflict and obligations after the armed conflict. Even if these different phases will often overlap, these distinctions provide a useful analytical framework.

Before addressing some concrete obligations, a word should be said about the importance for States to widely ratify IHL treaties. Indeed, broad ratification of IHL treaties confirms the validity of the rule and, therefore,

⁴ The meeting took place in Ashland, Massachusetts, from 27 to 29 Jan. 2003. Background papers and a summary report of the meeting can be found at: www.ihlresearch.org.

contributes to improving compliance. A look at the list of the States parties to the main IHL treaties shows that there is still a great effort to be undertaken to promote these treaties in order to obtain – ideally – universal adherence.⁵

A. Obligations in Peace-Time

Many States have still not fully incorporated IHL treaties into their domestic law. It is not sufficient to ratify a treaty; it must also be implemented, *i.e.* integrated, at the national level. One particularly important area is the adoption of domestic law that makes it possible to prosecute grave breaches and other serious violations of IHL, based on the principle of universal jurisdiction. There is also a need to adequately protect, *inter alia*, the red cross and red crescent emblems.

The ICRC's Advisory Service on International Humanitarian Law, created pursuant to a proposal by the 26th International Conference of the Red Cross and Red Crescent in 1995, promotes national implementation and gives technical advice to States through its legal advisers based in Geneva and in several field delegations.

Practice in the last few years has shown that "National Committees on IHL" are a very successful tool for the promotion of IHL generally, and for national implementation measures in particular. There are at present more than 60 such inter-ministerial Committees.

In order to assist States, the ICRC has put many examples of national legislation on its website.⁶ In addition, it has recently set up an electronic forum open to National Committees on IHL. Its aim is to facilitate contacts between National Committees and between them and the ICRC. This forum will also allow these Committees to engage in an interactive debate.

Another important obligation even in peacetime is the dissemination and teaching of IHL, especially to the armed forces. It should be acknowledged that in recent years, States have undertaken increasing efforts in this respect. At the same time, it is also obvious that much more needs to be done. It is indeed crucial that the principles and rules of IHL are fully incorporated into military courses and training.

⁵ Number of States Parties to the major IHL treaties (as of 26 Apr. 2004): 1949 Geneva Conventions - 191 States; 1977 Additional Protocol I - 161 States; 1977 Additional Protocol II - 156 States; 1980 Convention on Certain Conventional Weapons - 94 States; 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict - 109 States; Biological Weapons Convention - 151 States; Chemical Weapons Convention - 162 States; 1997 Ottawa Convention - 141 States; 1998 Rome Statute of the International Criminal Court - 93 States.

⁶ Address of the ICRC's site on the internet: www.icrc.org.

B. Obligations During Armed Conflict

If we look at the different phases – obligations in peacetime, during armed conflict and after the conflict is over – it is clearly respect of IHL during armed conflicts that is the most important challenge. It is on this phase that States should concentrate their efforts, whether or not they are involved in an armed conflict.

In this regard, special attention should be drawn to the obligation not only to respect, but also to “ensure respect” for IHL, as stated in Article 1 common to the 1949 Geneva Conventions⁷ and Article 1 of 1977 Additional Protocol I. A further reference should be made to Article 89 of Additional Protocol I.⁸

However, the notion of “ensuring respect” is vague and its substantive content difficult to grasp. This notion definitely needs to be clarified. This issue will be addressed in more detail in the second part of this paper.

How to apply the law in internal armed conflicts is likely to remain a major challenge in the future, especially in situations where the conflict is exacerbated by religious and ethnic components. Furthermore, particular challenges for respect of IHL are situations where State structures have disintegrated, where chains of command are disrupted; situations where there is a general break-down of law and order and where law in general has ceased to be a relevant reference.

In the recent past, a new challenge has emerged, a challenge referred to as “asymmetric warfare”, *i.e.* situations where due to the availability of high technology weapons in the hands of one of the parties to an armed conflict, there is a clear imbalance between the belligerents. This situation tends to force the adversary that is overwhelmed by the other party to the conflict to use means and methods of warfare that are prohibited under IHL. The implications of this challenge must still be fully examined, but it is likely that in future military operations, this imbalance of power will tend to increase.

Finally, it has to be recognized that all too often, violations of IHL are not due to a lack of knowledge of IHL, but rather to lack of political will to apply that law. The difficult challenge ahead of us will be how to generate political will among the parties to armed conflicts.

⁷ Common Art. 1: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

⁸ Art. 89 of 1977 Additional Protocol I: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”.

C. Obligations After the Armed Conflict

The prosecution of those suspected to have committed grave breaches of IHL is essential. It is regrettable that States have only rarely applied the principle of universal jurisdiction, although it was established through the Geneva Conventions in 1949.⁹ In the last ten years, important developments have taken place at the international level, with the creation of the ad hoc tribunals for the Former Yugoslavia and Rwanda, of the mixed tribunals for Sierra Leone and Cambodia, as well as of the International Criminal Court. As already indicated, the prosecution of war crimes at the national level is linked to the existence of appropriate domestic legislation.

States have additional obligations once the hostilities are over: prisoners of war must be released and repatriated without delay after the cessation of active hostilities.¹⁰ Likewise, civilian internees must be released after the close of hostilities and States shall endeavor to facilitate their repatriation.¹¹

II. A SPECIAL CHALLENGE: THE “WAR ON TERROR”

The use of force by groups operating trans-nationally is certainly another key challenge. What legal qualification must be given to terrorist acts committed by transnational groups – on the one hand – and to counter-terrorist activities – on the other hand? Regrettably, this debate has led to some confusion and uncertainty about IHL. This body of law has been criticized for not being adequate to deal with the “war on terror”. It has to be acknowledged that violent activities by transnational groups raise many difficult challenges – including in the legal field.

It has been asserted that terrorist attacks – including the attacks of 11 September 2001 – as well as counter-terrorist activities were part of a global “armed conflict” in the legal sense, an armed conflict that started years ago and that will continue until the end of terrorist activities. Such a conclusion would have considerable consequences in practice, especially if it is used to justify that States could theoretically strike the transnational group at any time and everywhere – without having to obtain any kind of approval, e.g. from those States on whose territories the military interventions take place.

This debate has shown that there is all too often confusion between *jus in bello* and *jus ad bellum*. This confusion is extremely regrettable, as *jus in*

⁹ *Supra* note 1. Art. 49, First Geneva Convention; Art. 50, Second Geneva Convention; Art. 129, Third Geneva Convention; Art. 146, Fourth Geneva Convention.

¹⁰ Art. 118, Third Geneva Convention.

¹¹ Art. 133 and 134, Fourth Geneva Convention.

bello (IHL) has to be separated from the question of the *jus ad bellum* (use of force). The latter is not regulated by IHL, but by the United Nations Charter. It therefore becomes problematic if the notion of armed conflict – a typical IHL notion – is employed to justify the use of force. This confusion, as well as brushing aside the traditional law enforcement paradigm, are a risky undertaking that could adversely affect international relations.

The ICRC has done considerable legal research into the question of whether the “war against terrorism” should be considered in toto as an armed conflict in the sense of IHL. For the time being, and based on its long practice of IHL throughout the world, it feels uncomfortable with the notion that the different attacks and reactions thereto are part of a worldwide armed conflict. The “war on terror” does not fit well into the existing categories of armed conflict.

First, in the ICRC’s view, terrorist and counter-terrorist activities cannot be viewed as an international armed conflict. Such a conflict can occur only between States.¹² Second, could the “war on terror” be a non-international armed conflict?¹³ This would raise a number of questions, like: when and where does the conflict take place? Who are the parties to the conflict? What is the beginning and what is the end of such conflict? In the view of the ICRC, no satisfactory answers have so far been given to these and other questions.

One fundamental requirement of IHL should be recalled here: during an armed conflict, all the parties to the conflict have the same rights and obligations. To qualify the “war on terror” as an armed conflict would give legitimacy to the transnational groups as a party to the armed conflict, with rights and obligations, an effect that is probably not intended by States. So far in the debate on the “war on terror”, those advocating that it represents an armed conflict have indeed given the impression that this balance no longer exists.

The “war on terror” can very well take the form of an armed conflict in the traditional IHL sense. The military operations that started in Afghanistan on 7 October 2001 were clearly an international armed conflict, and generally understood to be causally related to terrorism. Likewise, no one

¹² Art. 2 common to the four 1949 Geneva Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” as well as to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

¹³ Art. 3 common to the four 1949 Geneva Conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: ...”.

questioned the qualification of the more recent military campaign in Iraq as an international armed conflict, although its relationship to terrorism and counter-terrorism has been controversial.

Terrorism is a complex issue that must be faced with a variety of tools, depending on the results to be achieved. Experience has shown that armed conflict – and IHL – are usually not the best tool to fight terrorism, since force as such will often not lead to the most adequate solution to the problem. Among the more effective tools are international cooperation between States, *i.e.* sharing of intelligence, police and judicial cooperation; domestic law enforcement; financial investigations and freezing of assets belonging to terrorist groups; improved control of arms trade and of the proliferation of weapons of mass destruction. Finally, it has to be said that terrorism is unlikely to disappear if its root causes are not properly addressed.

Terrorist acts are foremost crimes that a series of international conventions have criminalized. The further development of international law in this field could be an important contribution to the fight against terrorism.

This question of legal qualification has, of course, implications on the legal status of those captured during the fight against terrorism. This issue will be dealt with only very briefly here.

First, there is a presumption of Prisoner of War (POW) status for combatants captured on the battlefield in an international armed conflict.¹⁴ If there is a doubt about that status, competent tribunals as foreseen in the Third Geneva Convention should come into action.¹⁵ To make a blanket determination and to disqualify from the start all captured combatants from POW status raises serious concerns. Rather, a case-by-case examination must take place if there is a doubt whether a person is a POW or not. Therefore, it would be logical to have given POW status to all combatants captured by Coalition forces in the recent war in Afghanistan,¹⁶ unless decided otherwise by competent tribunals.

Such tribunals may have had good reason to recognize POW status for members of the Taliban armed forces, but the situation may be different for members of Al Qaeda, even though one would have to take into account the

¹⁴ See Art. 45, para. 1 of 1977 Additional Protocol I: “A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Geneva Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power”.

¹⁵ Art. 5, Third Geneva Convention.

¹⁶ Art. 4, A. (1) in conjunction with Art. 4, A. (3), Third Geneva Convention.

factual situation: what was the exact relationship between Al Qaeda and the Taliban? Could acts of members of Al Qaeda be attributed to the Taliban armed forces?¹⁷

The extent of legal protection to which “unlawful combatants” are entitled has become an important issue. For the ICRC, IHL provides a comprehensive protection: a person is protected either by the Third Geneva Convention or by the Fourth Geneva Convention. And in addition to IHL, international human rights law and domestic law also provide protection to all those detained. There is no legal vacuum.

If an “unlawful combatant” – or better, “unprivileged belligerent” – is not covered by the Fourth Geneva Convention (e.g. because of his or her nationality¹⁸), there exist additional safeguards, which are common Article 3 to the Geneva Conventions and Article 75 of Additional Protocol I,¹⁹ which is regarded as reflecting customary law, including by the United States.

One further challenge of the “war on terror” is the question of how long “unlawful combatants” may be detained. As already indicated above, both the Third and the Fourth Geneva Conventions contain specific rules about release and repatriation. To detain persons that are protected under IHL not just until the end of hostilities with Afghanistan or with other countries, but until the end of the “war on terror” (that could easily be many years ahead of us), would certainly raise serious difficulties.

To come back to the more general question of how to qualify the “war on terror”, it is suggested that IHL applies to terrorism and counter-terrorism when the level of force used amounts to an armed conflict. This approach limits the scope of IHL to those situations it has been intended to regulate. Acts of terrorism and the responses thereto must therefore be qualified on a case-by-case basis.

IHL is well-equipped *vis-à-vis* terrorist activities committed in the context of an armed conflict. It prohibits all acts commonly considered as “terrorist”.

¹⁷ According to Art. 4 of the Third 1949 Geneva Convention, are entitled to prisoner of war status “members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps *forming part* of such armed forces” (para. 1), as well as “members of *other militias* and members of other volunteer corps ... belonging to a Party to the conflict ... provided that such militias or volunteer corps... fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war”.

¹⁸ Art. 4, para. 2, Fourth Geneva Convention.

¹⁹ Art. 75 of 1977 Additional Protocol I contains a detailed list of judicial guarantees.

As an example, both Additional Protocols of 1977 prohibit “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.²⁰ IHL also prohibits attacks against the civilian population, be they direct or indiscriminate.²¹ It protects goods that are indispensable to the survival of the civilian population (like food, agricultural areas, livestock, drinking water installations, irrigation works), cultural objects and places of worship, works and installations containing dangerous forces, as well as the natural environment.²² The taking of hostages is prohibited.²³ Furthermore, persons that find themselves in the hands of the enemy enjoy special protection.²⁴

If an attack is carried out by a civilian – who thus becomes an “unlawful combatant” – that person loses his/her protected status as a civilian during the time of the “direct participation” in the hostilities and becomes a legitimate military target. Also, civilians having participated directly in the hostilities can be punished for having done so. IHL is by no means an obstacle to justice, as some commentators have asserted. In fact, quite the opposite is the case.

These are difficult questions, and there is no doubt that more work has to be done on the different facets of the “war on terror”. The dialogue must continue. In the meantime, it is extremely important that persons suspected of having committed terrorist acts are not denied individual basic rights and due process of law.

Any development of IHL at present or in the future should build on existing standards and should not undermine a solid body of law that has taken more than a century to develop.

Having said this, it would seem that the solution to the legal questions around the “war on terror” has to be looked for not so much within IHL, but rather in the *jus ad bellum*, as it appears that the fundamental problem is about the recourse to force. To change the rules in that field would, however, necessitate an amendment of the UN Charter.

²⁰ Art. 51, para. 2 of 1977 Additional Protocol I and Art. 13, para. 2 of 1977 Additional Protocol II.

²¹ Arts. 48, 51 and 52 of 1977 Additional Protocol I.

²² Arts. 35, para. 3 and 53 to 56 of 1977 Additional Protocol I.

²³ Art. 3(1)(b) common to the four Geneva Conventions; Art. 34, Fourth Geneva Convention; Article 75, para. 2(c) Additional Protocol I; Art. 4, para. 2(c), Additional Protocol II.

²⁴ Prisoners of war are protected by the Third Geneva Convention, civilians, including civilian internees, by the Fourth Geneva Convention. In non-international armed conflicts, persons captured for reasons related to the armed conflict also enjoy special protection.

III. THE FUTURE OF INTERNATIONAL HUMANITARIAN LAW

The second part of this paper deals with challenges in three very specific ways: which parts of IHL need to be either reaffirmed, clarified or developed? This is not supposed to be an exhaustive enumeration, but rather, a suggestion of examples that could provide a useful basis for discussion.

A. The Need for Reaffirmation of IHL

Generally speaking, existing IHL needs to be vigorously reaffirmed. As already indicated, IHL is not perfect, but its rules represent a careful balance between military imperatives and considerations of humanity. It is of utmost importance to reaffirm in particular the obligations that were referred to earlier. However, reaffirmation is also urgent in some more specific fields that will be enumerated below.

In the ICRC's opinion, it is for example important to strongly reaffirm the prohibition of use of poisons or infectious disease in armed conflict. This concern is based on the fact that important and rapid advances are taking place in life sciences and in particular in the field of biotechnology. These advances will benefit humanity in several ways, like the production of new vaccines, of new cures for diseases or for increasing food production. But at the same time, there is a growing risk that the same advances could be used for hostile purposes, to poison or deliberately spread disease. These concerns have increased following the attacks of 11 September 2001 and also by the failure of States to strengthen the 1972 Biological Weapons Convention²⁵ through the adoption of a compliance monitoring mechanism. The implication of the misuse of biotechnology could be devastating for humanity.

In response to its grave concerns about the capacity of misuse of new advances in biotechnology and the lack of effective controls at an international level, the ICRC launched an Appeal called "Biotechnology, Weapons and Humanity". The launch took place in Montreux (Switzerland) on 23 September 2002, coinciding with an informal meeting of government and independent experts.²⁶ The Appeal is addressed to the political and military authorities, to the scientific and medical communities and to the biotechnology and pharmaceutical industries.

²⁵ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on Their Destruction, 1972, 1015 *U.N.T.S.* 1419.

²⁶ See ICRC Summary Report of the informal meeting of government and independent experts, Montreux (Switzerland), 23-24 Sept. 2002.

The Appeal focuses on the risks, rules and responsibilities in relation to advances in biotechnology being used for poisoning or deliberate spread of disease. It describes the risks by giving concrete examples, calls for the reaffirmation, implementation and reinforcement of the 1925 Geneva Protocol²⁷ and the 1972 Biological Weapons Convention,²⁸ and calls on governments, the military, the scientific and medical communities as well as the pharmaceutical and biotechnological industries to ensure that advances in biotechnology are not diverted for use as weapons or for other hostile purposes.

In addition, the Appeal calls for a high-level political declaration, to be adopted at a ministerial level. The ICRC has invited States to participate in initial discussions to explore how the international community could adopt such a declaration. At the same time the ICRC has started to reach out to the key target groups, *i.e.* medical researchers, academic scientists, scientists working in industries, defense scientists, etc.

Another issue that in the view of the ICRC needs to be reaffirmed is the protection of cultural property in situations of armed conflict. It is important that States become Parties to the relevant instruments, in particular the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict²⁹ and its 1999 Protocol,³⁰ which further develops the Convention. Recent conflicts have shown that the protection of cultural property is crucial in the sense that through attacking cultural property, the attacker destroys the very heart of a civilization. The 50th anniversary of the 1954 Hague Convention in 2004 should be an opportunity to promote the protection of cultural property.

Concerning the need to reaffirm the validity of IHL, the 28th International Red Cross and Red Crescent Conference – that took place in Geneva from 2 to 6 December 2003 – was an important opportunity. The International Conference is a unique forum to discuss humanitarian issues. It meets every four years. The participants are the States Parties to the Geneva Conventions, the National Red Cross or Red Crescent Societies, their International Federation and the ICRC.³¹ This mixture between States and

²⁷ Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, *The Laws of Armed Conflicts* 115 (D. Schindler & J. Toman eds., 3rd ed., 1988).

²⁸ *Supra* note 25.

²⁹ 249 *U.N.T.S.* 240.

³⁰ Second Protocol to the Hague Convention on Cultural Property, 1999, 38 *I.L.M.* 769 (1999).

³¹ At the time of writing, there were 191 States Parties to the 1949 Geneva Conventions and 181 recognized National Red Cross or Red Crescent Societies.

non-State entities is certainly one of the noteworthy features of the International Conference.

The International Conference adopts resolutions that are as such not legally binding. They are nevertheless important documents that are often referred to. A good example are the Statutes of the International Red Cross and Red Crescent Movement that describe the tasks of the components of the Movement. They were adopted by consensus and have therefore become a very authoritative statement. IHL is always high on the agenda of the International Conference.

The overall theme of the last International Conference was “Protecting Human Dignity”. It was attended by more than 1700 delegates from 153 States and 176 National Red Cross or Red Crescent Societies, by the International Federation and the ICRC. There were also 64 observers. Never before had the participation been so important.

The structure of the Conference was the following: after a welcoming ceremony, there were plenary meetings and meetings in commissions. In parallel, the Drafting Committee met. At the end of every day, workshops took place that were not part of the official programme, but that allowed informal discussions. The participants also had the possibility to make individual or collective pledges. More than 360 such pledges were made, thus reinforcing the impact of the International Conference.

The 27th International Conference in 1999 had adopted a Plan of Action for the Years 2000 to 2003. This time, the Conference adopted two important documents: a Declaration highlighting the continued relevance of IHL and an Agenda for Humanitarian Action.³²

The Declaration with the title “Protecting Human Dignity” is a short text of two and a half pages. It reaffirms forcefully what “Protecting Human Dignity” actually means. This makes this document so important. The Declaration contains a clear reaffirmation of States' obligation to respect and ensure respect for humanitarian law. It calls upon the parties to an armed conflict to make all efforts to reduce incidental and prevent deliberate injury, death and suffering of civilian populations. The need to protect women and children is highlighted.

The Declaration recalls that IHL is applicable to all situations of armed conflict and foreign occupation. It vigorously condemns all acts or threats of violence aimed at spreading terror among the civilian population. Furthermore, it stresses that all detainees must be treated with humanity and that all persons alleged to have committed crimes must be granted due process of law and fair trial. The Declaration also firmly states that

³² These documents can be found on the ICRC's website at: www.icrc.org.

humanitarian workers must be respected and protected in all circumstances. Their independence from political and military actors must be reaffirmed.

Finally, the Declaration commits the participants to reduce the risks and effects of disasters on vulnerable populations, as well as to reduce their vulnerability to disease due to stigma and discrimination, particularly that faced by people living with and affected by HIV/AIDS.

Whereas the Declaration is held in a rather general way, the Agenda for Humanitarian Action is very focused and deals with concrete issues. It comprises an introduction, 4 General Objectives, 15 Final Goals and 64 Proposed Actions. In this paper, only some highlights about aspects of IHL will be provided.

The first two General Objectives deal with humanitarian law: the first General Objective is about missing persons, whereas the second Objective deals with weapons.

The title of the first General Objective is “Respect and restore the dignity of persons missing as a result of armed conflicts or other situations of armed violence and of their families”. This objective is based on the observations and recommendations of an international conference that the ICRC had organized in Geneva in February 2003. The Agenda for Humanitarian Action covers a broad range of activities linked to missing persons, starting with the prevention of persons becoming missing. The Agenda then recalls that Article 32 of Additional Protocol of 1977 refers to the right of families to know the fate of their relatives.

In addition, the following topics are covered by the Agenda: the management of information and process files on missing persons; the management of human remains and information about the dead; the support of families of missing persons; and an encouragement of organized armed groups to resolve the problem of missing persons, assist their families and prevent persons from becoming missing.

The title of the second General Objective is “Strengthen the protection of civilians in all situations from the indiscriminate use and effects of weapons and the protection of combatants from unnecessary suffering and prohibited weapons through controls on weapons development, proliferation and use”. The following issues are dealt with in this General Objective:

- *End the suffering caused by antipersonnel mines*: States, in partnership with the components of the Movement, will provide assistance for the care, rehabilitation, social and economic reintegration of war wounded, including mine victims, as well as for mine-awareness and clearance programmes. States will also pursue the ultimate goal of the eventual global elimination of antipersonnel mines. They are encouraged to consider adhering to the Ottawa Convention. States parties to the Convention should develop in time for the First Review Conference that

will take place in Nairobi, national programmes for clearance, stockpile destruction, mine awareness and victim assistance consistent with the Convention's deadlines. The Agenda also reaffirms the ICRC's lead role in the implementation of the Movement Strategy on Landmines. National Societies, in partnership with the ICRC and States, will maintain mine action among their priorities and develop their capacity in this regard.

- *Minimize suffering from weapons that may be extremely injurious or have indiscriminate effects:* the Agenda warmly welcomes the adoption of a new Protocol on "Explosive Remnants of War" to the 1980 Convention on Certain Conventional Weapons, and encourages States to consider its ratification as soon as possible. States are encouraged to adhere to the 1980 Convention and to the extension of the Convention's scope of application to non-international armed conflict that occurred in 2001. States are also encouraged to consider measures to minimize the risk of explosive ordnance becoming explosive remnants of war and to reduce the human costs of mines other than anti-personnel mines. In addition, States will rigorously apply the rules on distinction, proportionality and precautions in attack, in order to minimize civilian deaths and injuries resulting from certain munitions, including sub-munitions.
- *Reduce the human suffering resulting from the uncontrolled availability and misuse of weapons:* States should take concrete steps to strengthen controls on arms and ammunition. In particular, States should urgently enhance efforts to prevent the uncontrolled availability and misuse of small arms and light weapons. They should make respect for humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed. States, with the support of the ICRC and National Societies, should ensure that armed, police and security forces receive systematic training in international humanitarian law and human rights law, in particular concerning the responsible use of weapons.
- *Protect humanity from poisoning and the deliberate spread of disease:* States Parties to the 1972 Biological Weapons Convention are encouraged to continue their efforts to reduce the threat posed by biological weapons. They are invited to work with the ICRC to develop a ministerial-level declaration that would support efforts in the framework of the 1972 Biological Weapons Convention, on preventing the hostile use of biological agents as called for in the ICRC Appeal on Biotechnology, Weapons and Humanity. States are encouraged to consider becoming party to the 1925 Geneva Protocol, the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. They are called upon to monitor closely advances in the field of the life sciences, taking practical action to effectively control

biological agents that could be put to hostile use, and to improve international cooperation.

- *Ensure the legality of new weapons under international law*: States are urged to establish review procedures to determine the legality of new weapons, means and methods of warfare, in accordance with Article 36 of Additional Protocol I of 1977. Reviews should involve a multidisciplinary approach, including military, legal, environmental and health-related considerations. States are encouraged to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar.

The titles of the third and fourth General Objectives are “Minimize the impact of disasters through implementation of disaster risk reduction measures and improving preparedness and response mechanisms” and “Reduce the increased vulnerability to diseases arising from stigma and discrimination and from the lack of access to comprehensive prevention, care and treatment”.

This Agenda for Humanitarian Action is the continuation of the Plan of Action that was adopted by the 27th International Conference in 1999.

The ICRC has submitted to the 28th International Conference a report “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts” containing its analysis of some major challenges in the field of international humanitarian law.³³ This report provides the ICRC’s analysis on the following topics: IHL applicable in international armed conflicts, IHL applicable in non-international armed conflicts, IHL and the fight against terrorism, and how to improve compliance with IHL. Many of the comments made in this paper also appear in that report.

B. The Need for Clarification of IHL

There are a number of domains where there exist rules of great significance, but that are formulated only in a very general way. This can make it difficult to apply the rule. There may be cases where the law should be further developed in response to such situations. However, this may often not be the most appropriate reaction (risk of difficult and lengthy negotiations, uncertainty about the outcome, possibility that the result undermines existing standards, etc.).

To try to clarify a provision can be more promising, but also raises questions, in particular concerning the concrete form a clarification should

³³ This report is available in English, French and Spanish on the ICRC’s website (www.icrc.org).

take. In some cases, clarification could also lead at a later stage to a normative development. Some examples will be given here, where attempts for clarification are being made.

The basic concepts underlying the rules concerning the conduct of hostilities – in particular the rules on targeting – are phrased in a rather general way and tend to be therefore difficult to apply. The ICRC does not see a need to change the rules, which have kept their relevance since they were incorporated into the 1977 Additional Protocols. However, to clarify the provisions about the definition of a “military objective”, the principle of “proportionality” and the “precautions” to be taken in an attack would render these rules more operational.³⁴ Such clarification would assist the belligerents in their concrete implementation. It would therefore be very useful if a consensus on the interpretation of these notions could be found. Particular attention could be given to “high-tech” warfare as well as asymmetric warfare. The ICRC plans to conduct consultations in order to clarify if it would be useful to work on these concepts.

Another example is the notion of “direct participation in hostilities”³⁵ that was discussed beginning of June 2003 in The Hague, during a meeting jointly organized by the ICRC and the Asser Institute with the participation of renowned IHL experts. This seminar showed the need for clarification of this important concept – especially having in mind the debate about “unlawful combatants”. The ICRC will continue to work on this important topic in 2004.

In addition, at the beginning of 2004, the Harvard Program on Humanitarian Policy and Conflict Research launched an important initiative on “Air and Missile Warfare”. Its aim is to clarify and to restate the applicable law and to draft a Manual similar to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which was adopted in June 1994.

The ICRC is also promoting and clarifying mechanisms of IHL implementation. In 2003, it organized five regional expert meetings on how to improve compliance with IHL, with the active participation of government representatives, academics, National Red Cross and Red Crescent Societies and other organizations. These meetings took place in Cairo, Pretoria, Kuala Lumpur, Mexico City and Bruges between April and September 2003.³⁶

³⁴ Arts. 52, para. 2 ; 51, para. 5 ; and Art. 57 of 1977 Additional Protocol I.

³⁵ Art. 51, para. 3, 1977 Additional Protocol I, Art. 13, para. 3, 1977 Additional Protocol II.

³⁶ An analysis of these five regional meetings can be found in Annex 3 to the report submitted by the ICRC to the 28th International Red Cross and Red Crescent Conference (Dec. 2003). See note 33 *supra*.

In particular, the ICRC wanted to make common Article 1 to the Geneva Conventions more operational. What does “ensure respect” mean concretely? What can be expected from States? The regional expert meetings have generated many ideas about how to improve compliance with IHL. During these meetings compliance by organized armed groups was also high on the agenda.

The participants in the regional meetings regretted that existing IHL mechanisms suffer from a lack of use. The International Fact-Finding Commission was considered to have a very promising potential.³⁷ The participants were, however, divided on the question of whether new mechanisms should be created, although some interesting proposals were made (e.g. periodic reporting, individual complaints mechanism, IHL Commission). Participants in all the regional seminars commended the ICRC for its work, including its multi-faceted role as promoter and “guardian” of IHL. It was even proposed that the role of the ICRC should be strengthened, more particularly in non-international armed conflicts.

Concerning common Article 1, the participants in these regional meetings first acknowledged that there was a negative obligation not to encourage a party to a conflict to violate IHL, nor to assist in such violations. It was also recognized that States not involved in an armed conflict had a positive obligation to take action – unilaterally or collectively – against parties to an armed conflict that were committing violations. This would not entail an obligation to obtain specific results, but rather an obligation to take all appropriate measures with a view to ending violations. Concrete examples of possible measures were discussed, such as diplomatic pressure, public denunciation, renouncing exports of weapons that are or could be used to commit violations of IHL, sanctions, coercive measures, including lawful reprisals or acts of retortion.³⁸

The ICRC plans to continue its work on compliance mechanisms in the time ahead.

Furthermore, the ICRC organized in September 2003 – together with the International Institute of Humanitarian Law – that year’s San Remo Round

³⁷ Art. 90 of 1977 Additional Protocol I. The Commission shall be competent to enquire into grave breaches or other serious violations of the 1949 Geneva Conventions or Additional Protocol I and to facilitate, through its good offices, the restoration of an attitude of respect for those treaties.

³⁸ For a detailed description of the regional meetings, *see* ICRC report to the 28th International Red Cross and Red Crescent Conference, “International Humanitarian Law and The Challenges of Contemporary Armed Conflicts”, Annex 3 (available at: www.icrc.org).

Table on the theme: “International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence”. This event has helped to clarify which legal regime applies in a given situation, in particular IHL and Human Rights Law. This question is particularly relevant with regard to terrorist and counter-terrorist activities.³⁹

In December 2003, the ICRC convened an expert meeting to discuss issues linked to multinational forces. When does IHL apply to them? Is it the law of international armed conflict or internal armed conflicts? Does the law of occupation apply to them? *De jure* or *de facto*?

More generally, the ICRC plans to look into some aspects of the question of occupation, having in mind, in particular, the recent armed conflicts in Afghanistan and Iraq. Besides situations of occupation in the traditional sense, there may be a need to develop a more functional approach in order to ensure the comprehensive protection of persons. The existing rules on occupation are based on effective control of a territory and on the premise that the occupying power will administer the territory. However, practice has shown that there can be situations where a belligerent exercises control only to a limited extent or where persons are captured in territory that is not occupied in the traditional sense.

Future work on clarification of IHL will benefit from the ICRC study on customary IHL. The ICRC was asked to conduct this study by the 26th International Red Cross and Red Crescent Conference in 1995. Work was carried out by the ICRC’s Legal Division and almost 50 national research teams, supervised by a Steering Group. In addition, government and academic experts of great reputation have contributed to the study. The study, which has revealed the great amount of practice in the area of IHL, will be useful *inter alia* for the teaching of IHL, the drafting of military manuals, as well as for international and domestic courts.

The study – to be published in 2004 – will be particularly useful for non-international armed conflicts. Maybe the most important result of the study is the fact that many rules of the 1977 Additional Protocol I relating to the conduct of hostilities also apply to internal armed conflicts on a customary law basis. Furthermore States not Parties to certain IHL treaties will be bound by their customary rules. The ICRC intends to update the study as needed.

It is hoped that the study, through the clarification and extension of the applicability of IHL rules, will ultimately improve the protection of war victims in the field.

³⁹ See ICRC report of the Round Table at: www.icrc.org (under Humanitarian Law, Reaffirmation and Development).

Another issue where some clarification is needed in the ICRC's view is related to chemical weapons. Both the 1925 Geneva Protocol and the 1993 Chemical Weapons Convention prohibit the use of toxic chemicals, including incapacitating agents. However, the 1993 Chemical Weapons Convention permits the use of chemical agents for law enforcement. This could lead to the proliferation of incapacitating agents for law enforcement and could eventually undermine the existing prohibition of the use of such agents in warfare. It is therefore important that States clarify the meaning of the Convention's law enforcement exemption.

The important role of national and international tribunals in the interpretation and clarification of IHL should also be mentioned here.

C. The Need for Development of IHL

Finally, should IHL be further developed? Should a complete revision of the Geneva Conventions or their Additional Protocols take place, or should rules be developed only in certain domains? For its part, the ICRC believes that a complete overhaul of the basic IHL treaties is neither necessary, nor realistic. To open up the Geneva Convention could easily mean opening a Pandora's box, with very uncertain results at the end of the day. There would even be a real risk that the existing standards could be undermined. In any event, it would seem that the current international climate does not allow major normative developments.

However, the ICRC is of the opinion that there is space for developments in certain specific areas of IHL. In that respect, it is useful to review briefly some developments in the last ten years or so. The record is quite impressive when one looks at the list of adopted treaties, which are testimony of a very dynamic development:

- 1993: Chemical Weapons Convention;⁴⁰
- 1995: Prohibition of Blinding Laser Weapons (Protocol IV to the 1980 Convention on Certain Conventional Weapons - CCW);⁴¹
- 1996: Amendment to Protocol II to CCW;
- 1997: Ottawa Convention prohibiting anti-personnel mines;⁴²

⁴⁰ Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical Weapons and on their Destruction, 1993, 32 *I.L.M.* 800 (1993).

⁴¹ Protocol IV on Blinding Laser Weapons, 1995, Annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 35 *I.L.M.* 1218 (1996).

- 1998: Rome Statute of the International Criminal Court;⁴³
- 1999: Protocol on the protection of cultural property;⁴⁴
- 2000: Strengthening the protection of children in armed conflict;
- 2001: Extension of scope of the CCW to non-international armed conflicts;
- 2003: New Protocol to the 1980 Convention on “Explosive Remnants of War” (Protocol V).

One very good example of successful work in the field of development of IHL is the question of “explosive remnants of war”, which are a serious consequence of modern armed conflict. Explosive remnants of war are the unexploded and abandoned ordnance that remain after the end of active hostilities. In September 2000, the ICRC launched an initiative to reduce the human suffering caused by these weapons at an expert meeting held in Nyon, Switzerland.⁴⁵ Following discussions at the 2001 Review Conference, CCW States Parties agreed to establish a Group of Governmental Experts to negotiate a new instrument on explosive remnants of war.

The negotiations came to a fruitful conclusion when the States Parties to the 1980 Convention on Certain Conventional Weapons⁴⁶ on 28 November 2003 adopted – by consensus – a “Protocol on Explosive Remnants of War”. This Protocol – Protocol V to the CCW – is an important development of IHL. It is the first multilateral agreement to address the generic problems of unexploded or abandoned ordnance. While the existing treaties have focused on specific weapons, Protocol V applies to all explosive ordnance not covered by earlier instruments.

The new Convention requires each party to an armed conflict to:

- Clear the explosive remnants of war in territory it controls after the end of active hostilities;
- Provide technical, material and financial assistance to facilitate the removal of unexploded or abandoned ordnance in areas it does not control resulting from its operations. This assistance can be provided

⁴² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, 36 *I.L.M.* 1507 (1997).

⁴³ 37 *I.L.M.* 999 (1998).

⁴⁴ *Supra* note 30.

⁴⁵ See ICRC Report of the “Expert Meeting on Explosive Remnants of War”, Nyon (Switzerland), 18-19 Sept. 2000; and the ICRC report “Cluster Bombs and Landmines in Kosovo”, Geneva, 2001.

⁴⁶ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, *The Laws of Armed Conflicts*, *supra* note 27, at 179.

directly to the party in control of the territory or through a third party such as the United Nations, NGOs or other organizations;

- Record information on the explosive ordnance employed by its armed forces and to share that information with organizations engaged in the clearance of explosive remnants of war or conducting programmes to warn civilians of the dangers of these devices;
- Provide warnings to civilians of the dangers in specific areas;
- The Protocol also creates future meetings of States Parties in which States with explosive remnants of war predating the entry into force of the Protocol can seek and receive assistance to help them address the problem.

The obligations to provide technical and material assistance to facilitate the clearance of explosive remnants of war in territory a party does not control and to record and share information on the explosive ordnance used during an armed conflict are of particular importance. Implemented correctly, these obligations can make an important contribution to the rapid removal of explosive remnants of war, the establishment of risk education programmes and the provision of warnings to civilians. The adoption of these rules reflects recognition by the international community that the parties to an armed conflict cannot ignore the post-conflict effects of the weapons they use and that they must take measures before, during and after a conflict to reduce the impact on the civilian population.

The new Protocol has of course several limitations. However, qualifications like “where feasible” were necessary if an agreement was to be concluded by consensus. These qualifications are in part compensated by the Protocol’s vast material scope of application.

In addition to concluding the new Protocol, States Parties agreed that the Group of Governmental Experts would continue its work on anti-vehicle mines and cluster sub-munitions in 2004. New rules on anti-vehicle mines are widely viewed as the next issue where the Group should focus its efforts.

Work will also continue on cluster-bomb and other sub-munitions. Areas of work include technical features to prevent these weapons from becoming explosive remnants of war as well as proposals to strengthen the regulations on their use in armed conflict, such as the ICRC proposal for a prohibition on the use of sub-munitions against any military objective located in a populated area. Such a rule would strengthen the restrictions on targeting contained in the 1977 Additional Protocol I.⁴⁷

⁴⁷ Arts. 48 and following of 1977 Additional Protocol I.

The Group of Governmental Experts has met in March 2004 and will meet again in July and November 2004 in Geneva. A meeting of States Parties to the 1980 CCW will be held on 18 and 19 November 2004.

One area that would certainly need further analysis with a view to possible development is the rules that apply in non-international armed conflicts. Those rules are quite rudimentary, at least in treaty form. To put it in a provocative way: has time come to have a fresh look at the feasibility of a normative development? Such a development would at last narrow down the differences between the law of international and of non-international armed conflict. What was impossible in 1977, would it be possible today? Could the study on customary IHL give some momentum to such an idea? The ICRC for its part has not planned any initiative going in that direction. However, if the general mood were favorable to a normative development, the ICRC would be pleased to carry the idea forward, together with governmental and other experts. In the past, the ICRC has actively contributed to the development of IHL by organizing expert meetings and submitting draft proposals.

The extension of the scope of application of the CCW to non-international armed conflicts, in 2001, was relatively easy. A few years before that, the Statute of the International Criminal Court also contributed to narrowing the difference in treatment between international and internal armed conflicts. These examples seem to indicate that today's atmosphere is quite different from the one that prevailed during the diplomatic conference from 1974 to 1977 that adopted the 1977 Additional Protocols.

One particular issue that the ICRC has been discussing during its regional expert meetings is whether organized armed groups could be given incentives to respect IHL.⁴⁸ Could this aspect be included in the discussion of a possible new instrument?

Speaking about non-international armed conflicts, the issue of missing persons should be briefly mentioned. If a new instrument was to be developed on internal conflicts, it would be important to include rules related to missing persons – or rather rules that could help prevent persons from

⁴⁸ Under IHL armed groups have the same rights and obligations as the State. However, under domestic law members of organized armed groups can be punished for the mere fact of having participated in the hostilities, even if they have fully respected their IHL obligations. Incentives could include amnesties for the participation in hostilities (but not for violations of IHL), mitigation of punishment, or combatant immunity by analogy with international armed conflicts.

becoming missing.⁴⁹ Indeed, many of the existing rules apply formally only in international armed conflicts.

Finally, how not to mention the project of a new Third Protocol to the 1949 Geneva Conventions on a new emblem”? This emblem would be at the disposal of those States and National Societies that have difficulties with the present red cross or red crescent emblems. In the year 2000, a draft Protocol was elaborated. It offers a solution in the form of a simple, easily recognizable emblem without any religious, political or cultural connotations. Its name has not yet been decided, although the name “Red Crystal” has been proposed. Given the situation in the Middle East, this project could not then be completed.

The 28th International Conference of the Red Cross and Red Crescent in December 2003 adopted a resolution on this question. In fact, this resolution adopts another resolution that had been adopted before by the Council of Delegates, in which the International Red Cross and Red Crescent Movement reiterated its commitment to achieve, with the support of States, a comprehensive and lasting solution to the question of the emblem. The basis for such a solution would be the draft Third Protocol mentioned above. The resolution also requests the Standing Commission to continue to give high priority to securing, as soon as circumstances permit, a comprehensive and lasting solution. The Standing Commission has set up a Working Group to continue work on the emblem issue.

There is broad agreement that, for the time being, the circumstances in the Middle East do not permit the resumption of the process that was interrupted in autumn 2000.

CONCLUSION

Existing IHL on the whole adequately responds to the challenges of protection generated by today’s armed conflicts. It represents a careful balance between military imperatives and the protection of human dignity. It is therefore important to vigorously reaffirm the existing principles and rules of IHL, in peacetime, during armed conflict and after the armed conflict is over.

However, it is at the same time necessary to work on the clarification of certain concepts and provisions in order to make them workable in practice. There are also specific domains where it is desirable that the law be developed, as has already occurred in several respects in the past few years.

⁴⁹ For concrete proposals, *see* “International Conference of Governmental and Non-Governmental Experts, Geneva, 19-21 February 2003”, Conference Acts. This international conference was organized by the ICRC.

When developing the law, great care should be taken not to weaken existing standards of protection.

The “war on terror” represents a particularly difficult challenge. Terrorism is a complex issue where IHL can only play a limited role. Other tools like domestic law enforcement and cooperation between States are usually much better suited to reach the desired results. It must be determined which law applies in a given situation. IHL applies when the fight against terrorism amounts to an armed conflict.

IHL itself clearly prohibits acts of terrorism when committed during an armed conflict. Those committing violations of IHL must be punished. “Unlawful combatants” enjoy the protection of IHL, even though they can be punished for the mere participation in the hostilities. Persons in the hands of the adversary must be treated humanely, which includes due process of law, and benefit from the universally recognized judicial guarantees.

Finally, a clear distinction must be made between *jus ad bellum* and *jus in bello*. To develop the former – through an amendment of the UN Charter – could represent an important contribution to the fight against terrorism. This would help avoid invoking IHL to justify the use of force.