



**28th International Conference
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**INTERNATIONAL HUMANITARIAN LAW
AND
THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS**

Report prepared by
The International Committee of the Red Cross

**28th International Conference of the Red Cross and Red Crescent
Geneva, December 2003**

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and
the Challenges of Contemporary Armed Conflicts**

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International Humanitarian Law and the Challenges of Contemporary Armed Conflicts

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Geneva, September 2003**

Executive Summary

The purpose of the ICRC's Report, entitled "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts" is to present an overview of some current challenges to international humanitarian law (IHL), to generate reflection and debate on the issues identified and to outline prospective ICRC action in clarifying and developing the law in the time ahead. While the Report was primarily written to serve as a background document for the December 2003 International Conference of the Red Cross and Red Crescent, it is hoped that it will be of interest to a wider audience as well.

The **Introduction** to the Report serves to place it in historical context and reiterates the ICRC's view that the main treaties and customary norms of international humanitarian law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into the hands of a party to an armed conflict. It underlines that the Report deals with a limited number of challenges and that it should be seen as a "snapshot" rather than as a comprehensive picture of the current legal landscape.

The **Contextual Background** attempts to, very briefly, review ongoing and recent trends in practice that affect IHL application. Apart from international, non-international and "internationalized" internal armed conflicts, a major development since the last International Conference has been the launching of a global fight against terrorism as a result of the horrific events of September 11th, 2001. The Report notes that the fight against terrorism has led to a re-examination of the balance between state security and individual protections and that, in the ICRC's view, the overriding legal and moral challenge facing the international community today is to find ways of dealing with new forms of violence while preserving existing standards of protection provided for by international law.

The section on **International Armed Conflicts and IHL** emphasizes that the existing legal framework is on the whole adequate to deal with present day international armed conflicts. It also identifies several issues which give rise to the need for possible clarification of the law given that differing interpretations of some rules generate different results in terms of protection of civilians in practice. One such issue is the notion of "Direct Participation in Hostilities under IHL", which was the subject of an expert seminar organized by the ICRC and the TMC Asser Institute in June 2003 (summarized in Annex 1 to the Report). Other issues related to the conduct of hostilities issues that the ICRC will be examining in consultation with IHL experts in the time ahead are the definition of military objectives, the principle of proportionality and precautionary measures. The concept of occupation will be the subject of further reflection as well.

Increasing the protection of persons affected by non-international armed conflicts remains a major institutional priority for the ICRC. The Report's section on **Non-international Armed Conflicts and IHL** outlines the institution's work in preparing the ICRC's Study on Customary International Humanitarian Law Applicable in Armed Conflicts. The Study shows that many rules previously applicable in international armed conflicts are now binding as a matter of customary law in non-international armed conflicts as well. It is hoped that the Study will have the beneficial effect of facilitating knowledge of and clarifying the rules applicable to non-international armed conflicts.

Acts of transnational violence and the responses generated by them have not only re-focused international attention on IHL over the past two years, but have also led to a re-examination of the adequacy of this body of law in a way not seen for several decades. One of the main IHL-related issues being currently debated is whether the fight against terrorism is a "war" in the legal sense or not. As is well known, there is no uniform answer. The Report's section on **IHL and Fight against Terrorism** outlines the different positions and provides the ICRC's current legal analysis of this issue.

Improving Compliance with IHL, which is the title of the last section of the Report, remains a permanent institutional priority for the ICRC. This section outlines the proceedings and results of a series of expert seminars on this subject organized by the ICRC in collaboration with other organizations and institutions in Cairo, Pretoria, Kuala Lumpur, Mexico City and Bruges, Belgium in the spring and summer of 2003. The aim of the seminars was to generate creative thinking and proposals on ways of operationalizing article 1 common to the four Geneva Conventions which provides that states have a duty to "respect and ensure respect" for their provisions "in all circumstances". The expert seminars provided a wealth of proposals - as outlined in Annex 3 to the Report – that will serve as the basis for future ICRC thinking and proposals in this area.

Finally, the very brief **Closing Remarks** reiterate the ICRC's view that international humanitarian law is a body of rules whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their intended purpose - which is to regulate the conduct of war and thereby alleviate the suffering caused by war.

International Humanitarian Law and the Challenges of Contemporary Armed Conflicts

Introduction

Over thirty years ago the International Committee of the Red Cross (ICRC) submitted a Report on the "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts" to the XXI International Conference of the Red Cross held in Istanbul.¹ The purpose of that Report was to identify legal issues that, in the ICRC's view, warranted a new effort to codify international humanitarian law (IHL). As is well known, almost a decade later, the texts of the two Protocols Additional to the Geneva Conventions were adopted and opened for signature and ratification. Additional Protocol I, among other things, codified rules on the conduct of hostilities, expanded the protection of certain categories of persons and included, among others, wars of national liberation within the scope of international armed conflict. Protocol II, although more ambitiously envisaged at the start, elaborated on the provisions of article 3 common to the Geneva Conventions and laid down basic safeguards that must be applied in non-international armed conflicts.

In the time since the 1969 Report was submitted, the world has witnessed dramatic changes on many fronts: political, economic and social, but the reality and, above all, the consequences of armed conflict have, sadly, not changed. Human suffering, death, disfigurement, destruction and loss of hope for the future continue to constitute, as they always have, the immediate and longer-term effects of war on societies and the individuals who make them up. In addition to international and non-international armed conflicts, the world has recently been faced with a surge in acts of transnational terrorism, reopening certain dilemmas about the relationship between state security and the protection of the individual. This phenomenon has also led to a reexamination of the adequacy of international humanitarian law in a way not experienced since the drive to complement the Geneva Conventions with the two Additional Protocols.

The purpose of the present ICRC Report is to provide an overview of some of the challenges posed by contemporary armed conflicts for international humanitarian law, stimulate further reflection, and outline prospective ICRC action. The Report is not entitled "Reaffirmation and Development of IHL", because its scope is deliberately more limited than that of the 1969 Report.

First, the ICRC believes, as will be discussed below, that the four Geneva Conventions and their Additional Protocols, as well as the range of other international IHL treaties and the norms of customary law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into

¹ "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts", Report submitted by the International Committee of the Red Cross, (Item 4 a, b and e of the Provisional Agenda of the Commission on International Humanitarian Law and Relief to Civilian Populations in the Event of Armed Conflict), XXI International Conference of the Red Cross, Istanbul, September 1969 (hereinafter "1969 Report").

the hands of a party to an armed conflict. Second, as will also be demonstrated below, some of dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. Today, the primary challenge in these areas is to either ensure clarification or further elaboration of the rules. Thirdly, international opinion - both governmental and expert, as well as public opinion - remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms. While no one can predict what the future might bring, this Report purports to be a snapshot, as seen by the ICRC, of challenges to IHL as they currently stand. Its aim is to reaffirm the proven tenets of the law and to suggest a nuanced approach to its possible clarification and development.

Lastly, and this cannot be emphasized enough by way of introduction, the present Report deals with only a limited number of challenges identified by the ICRC and should by no means be taken as a comprehensive review of all IHL-related issues that will be scrutinized at the present time or in the future. Issues related to missing persons or to weapons are not part of the outline presented below because they will be separately examined at the International Conference. It is hoped that this Report will primarily stimulate debate on questions of IHL relevance and adequacy, and on how to improve compliance with the law, and thus enable International Conference delegates to contribute to further reflection and action on the challenges outlined, or to suggest others, as the case may be.

The Report is divided into five sections: **I. Contextual Background, II. International Armed Conflicts and IHL, III. Non-International Armed Conflicts and IHL, IV. IHL and the Fight against Terrorism, V. Improving Compliance with IHL.**

I. Contextual Background

Given that other documents and presentations by International Conference delegates will aptly describe the current international political, economic and social context, as well as its impact at the national level, this very brief contextual background aims to highlight some of the main developments affecting IHL application since the previous International Conference. The outline is based on the already mentioned reality of both international and non-international armed conflicts that continue to rage around the world.

Most recently, international armed conflicts took place in Afghanistan and Iraq, leading to the establishment of a US supported government in Afghanistan and to the military occupation of Iraq. Non-international armed conflicts erupted or continued to take their human toll in Africa, Asia, Europe, and Latin America, while military occupation and violence in the Middle East remained a major focus of international concern. Many of these conflicts were eclipsed by the overriding focus of the international community on the "fight against terrorism".

While the justifications for and qualifications of some of these situations of violence may be in dispute, there can be no disagreement about the magnitude of human suffering that any armed violence causes. Where international humanitarian law is not respected, human suffering becomes all the more severe and the consequences become all the more difficult to overcome. Deliberate attacks against civilians, indiscriminate attacks, forced displacement of populations, destruction of infrastructure vital to the civilian population, use of civilians as human shields, rape and other forms of sexual violence, torture, destruction of civilian property and looting have been perpetrated by governmental forces and non-state armed groups around the globe. IHL violations have also been regularly perpetrated against

medical personnel, humanitarian workers and detainees. Non-repatriation of prisoners of war contrary to the Third Geneva Convention has, for example, been shown to be a recurring serious violation. Likewise, access to populations in need of humanitarian aid remained a constant problem, aggravating the already desperate plight of millions of people caught up in war.

New or aggravated features of contemporary violence present huge challenges in terms of protection of civilians and IHL application. Armed conflicts seem to have grown more complex and permanent peace settlements more difficult to reach. The instrumentalization of ethnic and religious differences appears to have become a permanent feature of many conflicts. New actors capable of engaging in violence have emerged. The fragmented nature of conflicts in weak or failed states gives rise to a multiplication of armed actors. The overlap between political and private aims has contributed to a blurring of the distinction between armed conflict and criminal activities. Ever more sophisticated technology is employed in the pursuance of war by those who possess it. The uncontrolled availability of large quantities and categories of weapons has also dramatically increased. Added to the confirmed trend of instrumentalization of humanitarian activities for military or political purposes, these features make the work of humanitarian organizations in these contexts particularly difficult.

As regards the impact of new technology, suffice it to say, in this brief contextual background, that technological superiority alone now enables wars in which an army need never set foot on foreign soil, yet is still able to defeat the adversary. The impact of asymmetrical warfare for the application of IHL is just beginning to be examined.

Increased reliance on civilians by armed forces, the outsourcing to civilians of tasks that were once in strictly military purview and the use of private security companies are also new features challenging the accepted categories of actors in armed conflict.

Another development that should be separately mentioned in terms of its impact on IHL application since the last International Conference is the emergence of transnational networks capable of inflicting enormous injury and destruction. It must be remembered that, whatever the motives, intentional and direct attacks against civilians in armed conflict - including by means of suicide actions - as well as indiscriminate attacks, are strictly prohibited under IHL. So are acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Outside of armed conflict, acts of violence aimed against civilians are crimes under international and domestic criminal laws.

The events of September 11th, 2001 in the United States have, in some quarters, affected perceptions of what constitutes war in the legal sense, a topic that will be dealt with in section IV of this Report. States' responses to acts of transnational terrorism have, at the same time, given rise to two trends that deserve to be briefly mentioned here:

1) to the erosion, in the fight against terrorism, of existing international standards of protection of the individual, including protections guaranteed by international humanitarian law, and 2) to a blurring of the distinction between *ius ad bellum* (international rules governing the right to employ force) and *ius in bello* (IHL, international rules governing the way in which armed conflict is waged):

1) The global "fight against terrorism", regardless of how that phenomenon may be characterized in the legal sense, has led to a reexamination of the balance between state security and individual protections, to the detriment of the latter. The ongoing debate on the permissibility of torture is an example. After decades of improvements in international standards governing the treatment of people deprived of liberty, discussions on whether

torture might in some situations be allowed have resurfaced, despite the fact that this abhorrent practice is a crime under IHL and other bodies of law and is prohibited in all circumstances. Extra-judicial killings and detention without application of the most basic judicial guarantees have proven to be another consequence of the fight against terrorism. Other examples could be cited as well. In the ICRC's view, the overriding legal and moral challenge presently facing the international community is to find ways of dealing with new forms of violence while preserving existing standards of protection provided by international law, including international humanitarian law.

2) International humanitarian law is applicable whenever a situation of violence reaches the level of armed conflict. The underlying causes of the armed conflict have no bearing on the application of IHL. However, alongside with a reexamination of established tenets of *ius ad bellum*, there seems also to be a questioning of the basic principle that whenever armed conflict does occur, it is governed by IHL (*ius in bello*). Invocation of the justness of the resort to armed force, particularly in the "war against terrorism", has not infrequently served as a justification for denying the applicability of the full range of international humanitarian law norms in situations where that body of rules was undoubtedly applicable.

In order to generate internal and external reflection and action on some of the challenges to international humanitarian law mentioned above, and others that will be described later in this Report, in October 2002 the ICRC established a Project to complement the ICRC Legal Division's ongoing work in this area. The Project is conceptually guided by a Head of Project and a Steering Group who report to the ICRC Directorate, enabling full institutional involvement in the decision making process. The result of the ICRC's ongoing activities, as well as some anticipated ones over the time ahead are specifically mentioned in the next sections.

II. International Armed Conflicts and IHL

International armed conflict is by far the most regulated type of conflict under IHL. Both the 1899 and 1907 Hague law rules and the Geneva Conventions (with the exception of article 3 common to the Conventions), apply to international armed conflicts and occupation, as does the first Additional Protocol to the Geneva Conventions.² Despite certain ambiguities that have led to differing interpretations - which is a characteristic of any body of law - the ICRC believes that this legal framework is on the whole adequate to deal with present day inter-state armed conflicts. The framework has, for the most part, withstood the test of time because it was drafted as a careful balance between the imperative of reducing suffering in war and military requirements.

The four Geneva Conventions of 1949 have been ratified by almost the entire community of nations (191 state parties to date) and their provisions on the protection of persons who have fallen into enemy hands reflect customary international law. The same may be said in particular of the Fourth Geneva Convention's section on occupation, which provides basic norms on the administration of occupied territory and the protection of populations under foreign occupation. Even though Additional Protocol I still lacks universal ratification (161 state parties to date), it is not disputed that most of its norms on the conduct of hostilities also reflect customary international law.

² Apart from armed conflict between states, Additional Protocol I also covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination" (article 1 (4)).

It has not been easy to determine which legal issues, among many related to international armed conflict, deserve to be examined within the ICRC 's Project and to therefore be briefly outlined in this Report. The initial choices were made based on the differing interpretations that the relevant norms give rise to in practice and, more importantly, on the consequences that such interpretations have for the protection of civilians. Among them are the notion of direct participation in hostilities under IHL, related conduct of hostilities issues, and the concept of occupation.

Direct Participation in Hostilities

Under humanitarian law applicable in international armed conflicts, civilians enjoy immunity from attack "unless and for such time as they take a direct part in hostilities".³ It is undisputed that apart from loss of immunity from attack during the time of direct participation, civilians, as opposed to combatants,⁴ may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant's or belligerent's "privilege" of not being liable to prosecution for taking up arms and are thus sometimes referred to as "unlawful" or "unprivileged" combatants or belligerents.⁵ One issue that has, especially in recent months, given rise to considerable controversy is the status and treatment of civilians who have taken a direct part in hostilities. Related to it is the meaning of what constitutes "direct" participation in hostilities, which the ICRC has begun examining with the help of legal experts.

There is currently a range of governmental and academic positions on the issue of the status and treatment of civilians who have directly participated in hostilities and have fallen into enemy hands. At one end are those – a minority – who claim that such persons are outside any international humanitarian law protection. The middle ground is represented by those who believe that "unprivileged" combatants are covered only by article 3 common to the Geneva Conventions and article 75 of Additional Protocol I (either as treaty or customary law). According to the interpretation espoused by the ICRC and others, civilians who have taken a direct part in hostilities and who fulfill the nationality criteria provided for in the Fourth Geneva Convention remain protected persons under that Convention.⁶ Those who do not fulfill the nationality criteria are at a minimum protected by the provisions of article 3 common to the Geneva Conventions and of article 75 of Additional Protocol I (either as treaty or customary law).

The ICRC does not, therefore, believe that there is a category of persons affected by or involved in international armed conflict who are outside any IHL protection or that there is a "gap" in IHL coverage between the Third and Fourth Geneva Conventions, i.e. an intermediate status into which civilians ("unprivileged belligerents") fulfilling the nationality criteria would fall. International humanitarian law provides that combatants cannot suffer penal consequences for direct participation in hostilities and that they enjoy prisoner of war

³ Additional Protocol I, article 51 (3).

⁴ Pursuant to article 43 (2) of Additional Protocol I, "Members of the armed forces of a Party to a conflict (other than medical personnel and religious chaplains covered by article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities". Pursuant to article 50 (1) of Additional Protocol I, "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether person is a civilian, that person shall be considered to be a civilian".

⁵ Both combatants and non-combatants may, however, be prosecuted both internationally and domestically for commission of war crimes.

⁶ Under article 4 (1) and (2) of the Fourth Geneva Convention: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

status upon capture. IHL does not prohibit civilians from fighting for their country,⁷ but lack of prisoner of war status implies that such persons are, among other things, not protected from prosecution under the applicable domestic laws upon capture. Direct participation in hostilities by civilians, it should be noted, is not a war crime.

Apart from having no immunity from domestic penal sanctions, civilians who take a direct part in hostilities lose immunity from attack during the period of direct participation. Civilians can also be interned by the adversary - subject to periodic review - if the security of the detaining power makes it absolutely necessary.⁸ While in detention, they can be considered as having forfeited certain rights and privileges provided for in the Fourth Geneva Convention within the limits set down by article 5 of that Convention and customary international law. In the ICRC's view, it is difficult to see what other measures should be applicable to these persons that would not run the risk of leading to unacceptable violations of human life, physical integrity and dignity prohibited by international humanitarian and human rights law.

While the ICRC therefore does not believe that there is an "intermediate" category between combatants and civilians in international armed conflict, the questions of what constitutes "direct" participation in hostilities and how the temporal aspect of participation should be defined ("for such time as they take a direct part in hostilities") are still open. In the ICRC's view - given the consequences of direct participation mentioned above and the importance of having an applicable definition that would uphold the principle of distinction - the notion of direct participation is a legal issue that merits further reflection and study, as well as an effort to arrive at proposals for clarification of the concept. This is all the more important as civilian participation in hostilities occurs in international and non-international armed conflicts.

With a view to generating debate on this topic, the ICRC organized a one-day expert seminar in The Hague on the "Notion of Direct Participation in Hostilities under IHL" in cooperation with the TMC Asser Institute. A summary report of the June 2003 seminar topics and proceedings are attached in annex to this Report (see Annex 1) and will not be repeated here. Suffice it to say that the seminar participants agreed that an effort to clarify the notion of "direct participation in hostilities" was warranted. The view was also expressed that a general legal definition of "direct participation", accompanied by a non-exhaustive list of examples, would be the desirable outcome. The question of what final form future work should result in was left for a later date. The ICRC intends to follow up on the process initiated and, with the assistance of renowned legal experts, propose substantive and procedural ways of moving forward.

Related Conduct of Hostilities Issues

The package of IHL rules on the conduct of hostilities was one of the crowning achievements of the diplomatic process that ended with the adoption of the 1977 first Additional Protocol to the Geneva Conventions. While most of these rules have garnered broad acceptance and become customary law in the intervening years, it is acknowledged that certain ambiguities in formulation have given rise to differences in interpretation, and, therefore, in their practical application. The changing face of warfare due to, among other things, constant developments in military technology has also contributed to disparate

⁷ In one instance - the *levée en masse* situation - provided for in article 4 (A) (6) of the Third Geneva Convention, the inhabitants of a non-occupied territory who spontaneously take up arms to resist the invading forces are, under certain conditions, considered combatants and are recognized as prisoners of war when they fall into the power of the enemy.

⁸ The Fourth Geneva Convention provides detailed rules for the treatment of persons who have been assigned residence or have been interned in cases where the security of the detaining or occupying power makes such a measure absolutely necessary. See Part III, Section IV of the Fourth Geneva Convention on "Regulations for the Treatment of Internees" (articles 79-141).

readings of the relevant provisions. Among them are the definition of military objectives, the principle of proportionality and the rules on precautionary measures.

Military Objectives

In the conduct of military operations, only military objectives may be directly attacked. The definition of military objectives provided for in Additional Protocol I is generally considered to reflect customary international law. Under article 52 (2) of the Protocol, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

The fact that Additional Protocol I contains a general definition rather than a specific list of military objects requires parties to an armed conflict to adhere strictly to the conditions set forth in article 52: i.e. the object to be attacked must contribute effectively to the military action of the enemy and its destruction, capture or neutralization must offer a definite military advantage for the other side in the circumstances ruling at the time. Thus, the drafters wanted to exclude indirect contributions and possible advantages. Without these restrictions, the limitation of lawful attacks to "military" objectives could be too easily undermined and the principle of distinction rendered void.

The definition of military objectives, read together with the principle of distinction, the prohibition of indiscriminate attacks, the obligation to minimize civilian casualties, as well as the principle of proportionality, clearly rejects interpretations advanced formerly in doctrines of "total warfare", which included as military objectives "any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight".⁹

If the political, economic, social or psychological importance of objects becomes the determining factor - as suggested in certain military writings - the assessment of whether an object is a military objective becomes highly speculative and invites boundless interpretations. By the same token, interpretations that accept attacks on the morale of the civilian population as a means of influencing the enemy's determination to fight would lead to unlimited warfare, and could not be supported by the ICRC. The step from causing mere hardship to the civilian population, which is an inevitable consequence of all armed conflicts, to causing substantial damage to, for example, civilian infrastructure, would be very small indeed and could lead belligerents to slowly give up any form of restraint in the choice of targets.

A particular problem arises with regard to so-called dual-use objects, i.e. objects that serve both civilian and military purposes, such as airports or bridges. It should be stressed that "dual-use" is not a legal term. In the ICRC's view, the nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective. However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the principle of proportionality, i.e. if it may be expected to cause excessive incidental civilian damages or casualties, or if the methods or means of the attack are not chosen with a view to avoiding or at least minimizing incidental civilian casualties or damage.

⁹ Definition of Air Marshall Trenchard from 1928, quoted in C. Webster and N. Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, London, 1961, p. 96.

Principle of Proportionality in the Conduct of Hostilities

In order to spare civilians and civilian property as much as possible from the effects of war, international humanitarian law prohibits disproportionate attacks. A disproportionate attack is defined as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." (Additional Protocol I, article 51 (5)(b)). This definition is generally regarded as reflecting customary international law.

The text of article 51 (5) (b) of Additional Protocol I as adopted was criticized at the 1974-77 Diplomatic Conference and subsequently. The criticism was directed particularly at the imprecise wording and terminology and the difficulty in applying the balancing test required. Putting the provision into practice requires complete good faith on the part of the belligerents, as well as a desire to conform to the general principle of respect for the civilian population.

The disproportion between, on the one hand, civilian losses and damage caused and, on the other, the military advantage anticipated, raises a delicate problem: in some situations there will be no room for doubt, while in others there may be reason for hesitation. In such complex situations the interests of the civilian population should prevail. It should be kept in mind that international humanitarian law requires that constant care be taken to spare the civilian population, civilians and civilian objects. It must not be forgotten that even attacks that might be lawful, i.e. conform to the proportionality rule and other legal principles, nevertheless provoke enormous civilian suffering.

As far as the interpretation of the principle of proportionality is concerned the meaning of the term "concrete and direct military advantage" is crucial. It cannot be stressed enough that the advantage anticipated must be a military advantage, which generally consists in gaining ground or in destroying or weakening the enemy's armed forces. The expression "concrete and direct" was intended to show that the advantage concerned should be substantial and relatively immediate, and that an advantage which is hardly perceptible or which would only appear in the long term should be disregarded.

As regards civilian damage relevant for the determination of whether a particular attack violates the principle of proportionality, the question arises of what damage is pertinent for the balancing test foreseen in Additional Protocol I. For example, attacks against industrial facilities, electrical grids or telecommunication infrastructure, which may be military objectives in a particular situation, may cause incidental damage to the future life and well-being of the civilian population. Direct and indirect consequences are very likely, such as the death of patients in medical facilities, long-term disruption of electricity supplies, environmental and ecological damage due to the bombing of industrial and chemical plants and the impoverishment of large segments of the population due to the destruction of industrial installations providing income for tens of thousands of families. Similarly, large amounts of explosive remnants of war resulting from an attack, such as unexploded artillery shells, mortars, grenades and cluster submunitions, can have severe and long term consequences for the civilian population.

If the concept of military advantage were to be enlarged, it seems only logical to also consider such "knock-on effects", i.e. those effects not directly and immediately caused by the attack, but which are nevertheless the product thereof. In the ICRC's view, the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties. This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable incidental civilian casualties or damages

of such an operation, which include knock-on effects. Given the increased interconnectedness and interdependence of modern society in fields such as infrastructure, communications and information systems the question of knock-on effects becomes more and more important.

Precautionary Measures

In order to implement the restrictions and prohibitions on targeting and to minimize civilian casualties and damage, specific rules on precautions in attack must be observed. These rules are codified in article 57 of Additional Protocol I and apply to the planning of an attack, as well as to the attack itself. They largely reflect customary international law and aim at ensuring that in the conduct of military operations constant care is taken to spare civilians and civilian objects.

Several of the obligations provided for are not absolute, but depend on what is "feasible" at the time. Thus again, a certain discretion is given to those who plan or decide upon an attack. According to various interpretations given at the time of signature or ratification of Additional Protocol I and the definitions subsequently adopted in the Mines Protocol (in its original and amended version), as well as in the Incendiary Weapons Protocol to the 1980 Convention on Certain Conventional Weapons, feasible precautions are those "which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."¹⁰

In this context it is debatable what weight can be given to the understandable aim of ensuring the safety of the attacking side's armed forces ("military consideration"), when an attack is launched. It seems hardly defensible that it may serve as a justification for not taking precautionary measures at all and thereby exposing the civilian population or civilian objects to a greater risk. While under national regulations military commanders are generally obliged to protect their troops, under international humanitarian law combatants have the right to directly participate in hostilities, the corollary of which is that they may also be lawfully attacked by the adversary. Civilians, as long as they do not participate directly in hostilities, as well as civilian objects, must not be made the object of an attack. Thus, the provisions of international humanitarian law clearly emphasize the protection of civilians and civilian objects.

In the conduct of hostilities it is not only the attacking side that has obligations with a view to ensuring protection of the civilian population and civilians, but also the defending side. Generally speaking, the latter must take necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations, such as removing them from the vicinity of military objectives or avoiding the location of military objectives within or near densely populated areas to the maximum extent feasible. Under no circumstances may civilians be used to shield military objectives from attack or to shield military operations.

Given that the defending side can exercise control over its civilian population, it is sometimes suggested in scholarly writings that the defender should bear more responsibility for taking precautions. According to this view, the rules of the Additional Protocol on precautions against attacks are rather weak and the Protocol creates an imbalance that unreasonably favours the defender. However, so far no concrete proposals have been made on how the defender should increase the protection of its civilian population. It is also

¹⁰ Article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) 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. See also article 3 (10) of Protocol II as amended in 1996 and article 1 (5) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

sometimes even argued that another approach should be taken and that obligations on the attacking side should be less strict.

The ICRC could not support attempts to reduce the obligations on the attacking side. However, states must be encouraged to take measures necessary to reduce or eliminate the danger to the civilian population already in peacetime. In particular, the obligation to avoid locating military objectives within or near densely populated areas can often not be complied with in the heat of an armed conflict and should be fulfilled in peacetime.

In the ICRC's assessment, there is at present not much likelihood that the rules on military objectives, on the principle of proportionality or on precautions in attack, as well as other rules on the conduct of hostilities provided for in Additional Protocol I could be developed with a view to enhancing the protection of civilians or civilian objects. There are important writings – by both legal and military experts – as well as state practice, that in fact suggest a lowering of the level of protection envisaged by Additional Protocol I. The current challenge is therefore to assess the practical effect that existing rules have in terms of protection of civilians and civilian objects, improve the implementation of the rules, or clarify the interpretation of specific concepts on which the rules rely without disturbing the framework and legal tenets of the Additional Protocol, the aim of which is to ensure the protection of civilians.

In the time ahead the ICRC intends, on its own or in collaboration with other organizations, to initiate expert consultations in order to take stock of current doctrine and practice, and to determine whether and how a process of clarification of rules in the above mentioned areas might usefully be undertaken.

The Concept of Occupation

There is no doubt that the rules on occupation set forth in the Fourth Geneva Convention remain fully applicable in all cases of partial or total occupation of foreign territory by a High Contracting Party, whether or not the occupation meets with armed resistance.¹¹ It is acknowledged that those rules encapsulate a concept of occupation based on the experience of the Second World War and on the Hague law preceding it.¹² The rules provide for a notion of occupation based on effective control of territory and on the assumption that the occupying power can or will substitute its own authority for that of the previous government. They also imply that the occupying power intends to hold on to the territory involved, at least temporarily, and to administer it.

While cases corresponding to the traditional notion of occupation persist and new situations of the same kind have recently arisen, practice has also shown that there are situations where a more functional approach to occupation might be necessary in order to ensure the comprehensive protection of persons. An example would be when the armed forces of a state, even though not "occupying" foreign territory in the sense described above, nevertheless exercise complete and exclusive control over persons and/or facilities on that territory over a certain period of time and with a limited purpose, without supplanting any domestic authority (because such authority does not exist or is not able to exercise its powers).

Another issue deserving examination would be the protection of persons who find themselves in the hands of a party to the conflict due to military operations preceding the establishment of effective territorial control or in situations of military operations that do not result in occupation in the traditional sense. The already mentioned question of the protection

¹¹ Article 2 (1) and (2) common to the four Geneva Conventions.

¹² Hague Convention IV Regulations, article 42.

that applies to civilians who have taken a direct part in hostilities and who are captured in an area that is not considered "occupied" in the traditional sense would form part of this reflection.

An entirely separate issue is the rules applicable to multinational forces present in a territory pursuant to a United Nations mandate. While the Fourth Geneva Convention will not, generally, be applicable to peacekeeping forces, practice has shown that multinational forces do apply some of the relevant rules of the law of occupation by analogy. A small expert meeting to initially discuss some of the legal issues involved in international administration of territory will be organized by the ICRC in Geneva in December 2003.

The ICRC believes that certain practical issues linked to the notion of occupation raise a number of legal questions that deserve to be examined in the time ahead. The institution intends to pursue reflection and consultations on these topics with a view to determining whether clarification is necessary and feasible.

III. Non-International Armed Conflicts and IHL

The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Internal armed conflicts are covered by article 3 common to the Geneva Conventions, by Additional Protocol II to the Conventions adopted in 1977 (156 state parties to date), by a certain number of other treaties,¹³ as well as by customary international law. As is well known, the drafting process leading up to the second Additional Protocol envisaged a considerably more comprehensive instrument, but lack of political agreement in the final days of the 1977 Diplomatic Conference did not enable such an outcome. Additional Protocol II was, nevertheless, groundbreaking in that it was the first separate treaty setting down standards for the protection of persons and basic rules on methods of warfare applicable by both states and non-state armed groups involved in internal armed conflict.

In the more than twenty-five years since the Protocol's adoption it has become clear that, as the result of state and international practice, many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law.¹⁴ The forthcoming ICRC Study on Customary International Humanitarian Law Applicable in Armed Conflicts confirms this development.

The study was initially suggested at the January 1995 meeting of the Intergovernmental Group of Experts for the Protection of War Victims that met in Geneva, at which a series of recommendations aimed at enhancing respect for international humanitarian law were adopted. Among them was an invitation to the ICRC to prepare, with the assistance of experts, a report on customary rules of IHL applicable in international and non-international armed conflicts. In December 1995, the XXVIth International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare such a report.

¹³ E.g. 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 and its Protocols; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹⁴ For a review of current thinking on ways of improving compliance with IHL in non-international armed conflicts see pp. 24-25 of the present Report and Annex 3.

Work on the Study was carried out by the ICRC's Legal Division and over 50 national research teams who collected and analyzed practice from all regions of the world, and was supervised by a Steering Committee composed of eminent experts in the field of international humanitarian law. The Study is divided into six headings relating to the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; treatment of civilians and combatants hors de combat, and implementation. It is divided into two parts: Volume I ("Rules") contains the customary rules of IHL with a short commentary, as well as indications of trends in practice where no clear rule of customary international law has yet emerged (about 400 pages). Volume II (Practice) contains summaries of all the practice from which the rules and commentary in Volume I were inductively derived (about 4000 pages).

The Study has revealed the tremendous amount of practice in the area of international humanitarian law - from military manuals and national legislation to action by the United Nations and the International Red Cross and Red Crescent Movement. It has also confirmed the deep impact and overall acceptance of the rules of the Additional Protocols. The Study has shown that 25 years after their adoption, the essential rules of the Protocols have become part of customary international law and bind all states and all parties to all armed conflicts.

Perhaps the most striking result of the Study - and the reason a brief overview of it has been included under this section of the present Report - is the number of rules to be found that are today customary in non-international armed conflict. This is particularly true for the rules on the conduct of hostilities. The Study confirms that the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks, the principle of proportionality and the duty to take precautions in attack are all part of customary international law, regardless of the type of armed conflict involved.

The Study is not, however, limited only to conduct of hostilities. Not unexpectedly, it also shows, for example, that the duty to respect and protect medical and religious personnel and objects, as well as impartial humanitarian relief personnel and objects used for humanitarian relief operations are rules of customary international law binding in all types of armed conflicts. The same is true as regards the duty of protection of cultural property and the natural environment. The Study also specifies the rules of customary international law applicable to the treatment of persons deprived of liberty and the judicial guarantees that must be observed with respect to persons subject to criminal charges.

The Study's findings in terms of the customary law nature of certain rules regardless of the type of armed conflict involved will have the beneficial effect of facilitating knowledge of and clarifying the rules applicable in non-international armed conflicts. The specific uses it will probably be put to by others, such as use as dissemination tool, inclusion of the findings in military manuals and reliance on the Study by domestic and international courts in interpreting IHL, are beyond the scope of this Report. What can be said at this stage is that after governmental and other experts have had a chance to familiarize themselves with the Study, the ICRC will devote the necessary time and resources to making it accessible to a variety of other audiences. It will also devote itself to further legal analyses, clarification and interpretation of certain provisions of the body of law binding in non-international armed conflicts that the Study will give rise to, a process that will be taken up starting in 2004.

For all the benefits that the Study will hopefully bring, there is no doubt that its publication will in certain respects constitute the beginning of a process rather than an end. The Study will need to be periodically updated if it is to preserve its value. Much more importantly, the Study should enable a process of consolidation of international humanitarian law applicable in non-international armed conflicts.

It should be borne in mind, however, that customary law norms are rather generally formulated, and questions will inevitably arise as to how they should be interpreted in practice. The already mentioned diverging interpretations of concepts such as direct participation in hostilities, military objectives, proportionality in attack and precautionary measures that arise in international armed conflicts generate the same, if not more queries, in non-international armed conflicts. In addition, as already noted, there are areas in which the Study has found few or no rules applicable in non-international armed conflict and the question will remain of how those gaps should be filled. The ICRC will closely follow the legal and other discussions that the process of consolidation will give rise to and will propose further steps that might be necessary to assist in this process. If this means examining the feasibility of another treaty-making endeavor in the future, the ICRC will be prepared to undertake that task.

To sum up, increasing the protection of civilians and other persons affected by non-international armed conflict remains an overriding challenge that will be an ICRC priority in the time ahead.

IV. IHL and the Fight against Terrorism

The immediate aftermath of the September 11th, 2001 attacks against the United States saw the launching of what has colloquially been called the global "war against terrorism". Given that terrorism is primarily a criminal phenomenon - like drug-trafficking, against which "wars" have also been declared by states - the question is whether the "war against terrorism" is a "war" in the legal sense. To date, there is no uniform answer.¹⁵

Proponents of the view that a "war" in the legal sense is involved essentially believe that September 11th, 2001 and ensuing events confirmed the emergence of a new phenomenon, of transnational networks capable of inflicting deadly violence on targets in geographically distant states. The transnational, rather than international, nature of such networks is evidenced by the fact that their activities, which are also geographically dispersed, are not, as a rule, imputable to a specific state under the international rules on state responsibility.

According to this point of view, the law enforcement paradigm, previously applicable to the fight against terrorist acts both internationally and domestically, is no longer adequate because the already proven and potential magnitude of terrorist attacks qualifies them as acts of war. It is said that standards of evidence required in criminal proceedings would not allow the detention or trial of a majority of persons suspected of terrorist acts and that domestic judicial systems, with their detailed rules and laborious procedures, would be overwhelmed by the number of potential cases involved.

Another problem, according to this view, is that the law enforcement model is geared towards punitive, rather than preventive action. In addition, international cooperation in criminal matters, as well as practical application of the "extradite or prosecute" provisions in international treaties cannot be relied on, due to the political, bureaucratic and legal obstacles that often arise in inter-state relations.

¹⁵ By way of reminder, terrorism is not defined under international law. Work on drafting a Comprehensive Convention on Terrorism has been stalled at the United Nations for several years now.

The conclusion of proponents of the arguments outlined above is that the world is faced with a new kind of violence to which the laws of armed conflict should be applicable. According to this view, transnational violence does not fit the definition of international armed conflict because it is not waged among states, and does not correspond to the traditional understanding of non-international armed conflict, because it takes place across a wide geographic area. Thus, the law of armed conflict needs to be adapted to become the main legal tool in dealing with acts of transnational terrorism. It is claimed that, for the moment, such adaptation is taking place in practice, i.e. by means of the development of customary international humanitarian law (no treaties or other legal instruments are being proposed). Some proponents of this view argue that persons suspected of being involved in acts of terrorism constitute "enemy combatants" who may be subject to direct attack, and, once captured, may be detained until the end of active hostilities in the "war against terrorism".

The counterarguments may be, also briefly, summarized as follows: terrorism is not a new phenomenon. On the contrary, terrorist acts have been carried out both at the domestic and international levels for centuries, resulting in a series of international conventions criminalizing specific acts of terrorism and obliging states to cooperate in their prevention and punishment. The non-state, i.e. private character of this form of violence, usually pursued for ideological or political reasons rather than for private gain, has also been a regular feature of terrorism. The fact that persons or groups can now aim their violence across international borders or create transnational networks does not, in itself, justify qualifying this essentially criminal phenomenon as armed conflict.

Unfortunate confusion - pursuant to this viewpoint - has been created by the use of the term "war" to qualify the totality of activities that would be better described as a "fight against terrorism". It is evident that most of the activities being undertaken to prevent or suppress terrorist acts do not amount to, or involve, armed conflict. The anti-terrorism campaign is being waged by a multitude of means such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, diplomatic and economic pressure, financial investigations, the freezing of assets, efforts to control the proliferation of weapons of mass destruction, etc. which do not involve the use of armed force. It is further pointed out that no body of law, on its own, could ensure the complete suppression of terrorist acts because terrorism is a phenomenon that, like others, can be eradicated only if its root causes, and not just its consequences, are addressed.

Proponents of this view emphasize that international cooperation in the struggle against terrorist violence should not be abandoned, but strengthened, precisely because of the transnational character of the networks involved and because law enforcement also performs a preventive function. Most importantly, expediency in dealing with persons suspected of acts of terrorism cannot be an excuse for extra-judicial killings, for denying individuals basic rights when they are detained, or for denying them access to independent and regularly constituted courts when they are subject to criminal process. International and domestic due process standards were historically developed to avoid arbitrariness and to safeguard human life, health and dignity regardless of the heinous nature of an act that a person might be suspected of. Diluting those standards would mean setting foot on a slippery slope with no end in sight.

As already publicly stated by the ICRC on various occasions, the ICRC believes that international humanitarian law is applicable when the "fight against terrorism" amounts to, or involves, armed conflict. Such was the case in Afghanistan, a situation that was clearly governed by the rules of international humanitarian law applicable in international armed conflicts. It is doubtful, absent further factual evidence, whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense. Armed conflict of any type requires a certain intensity of violence and,

among other things, the existence of opposing parties. A party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.

The very logic underlying IHL requires identifiable parties in the above sense because this body of law – while not affecting the parties' legal status – establishes equality of rights and obligations among them under IHL (not domestic law) when they are at war. The parties' IHL rights and obligations are provided for so that both sides know the rules within which they are allowed to operate and so that they are able to rely on similar conduct by the other side. The primary beneficiary of the rules are civilians, as well as other persons who do not, or no longer take part in hostilities and whom IHL strives principally to protect.

In the case at hand, it is difficult to see how a loosely connected, clandestine network of cells – a characterization that is undisputed for the moment - could qualify as a "party" to the conflict. Many questions remain without answer, such as what discrete networks are at issue? What acts of terrorism perpetrated at geographically distinct points in the world can be linked to those networks? What would be the characterization of purely individual acts? In sum, more factual knowledge of who constitutes the "party" to the conflict would be necessary for further legal qualification. Questions related to the conduct of hostilities could also be posed, such as which objects would constitute military objectives in the "war against terrorism"? How is the principle of proportionality to be applied, etc?

Another aspect that should not be overlooked is that, as already mentioned, IHL implies the equality of rights and obligations of parties engaged in armed conflict. This is especially so in international armed conflict, which is the only type of conflict in which – under both treaty and customary international humanitarian law – there exists the legal status of "combatant". If a person is a "combatant", this implies that he or she, among other things, cannot be punished for having taken a direct part in hostilities and is entitled to prisoner of war status upon capture. If a person is not a "combatant", then he or she may be targeted only if and for such time as he or she takes a direct part in hostilities, which presents clear limitations for the attacker.

The principle of equality of the belligerents underlies the law of armed conflict; in other words, as a matter of law, there can be no wars in which one side has all the rights and the other has none. Applying the logic of armed conflict to the totality of the violence taking place between states and transnational networks would mean that such networks or groups must be granted equality of rights and obligations under IHL with the states fighting them, a proposition that states do not seem ready to consider.

It is submitted that, absent more factual evidence that would enable further legal analysis, acts of transnational terrorism and the responses thereto must be qualified on a case-by-case basis. In some instances the violence involved will amount to a situation covered by IHL (armed conflict in the legal sense), while in others, it will not. Just as importantly, whether armed conflict in the legal sense is involved or not, IHL does not constitute the only applicable legal framework. IHL does not - and should not be used - to exclude the operation of other relevant bodies of law, such as international human rights law, international criminal law and domestic law.

The ICRC has been engaged in a careful legal analysis of the above-mentioned and other legal dilemmas related to transnational violence and will stay engaged, keeping an open mind in terms of ways of addressing the challenges posed. Its guiding principle, as always, will be that any possible future development of the law in this area, as in others, must safeguard the existing standards of protection of persons.

The San Remo Roundtable

With a view to generating debate on some of the outstanding legal issues related to current situations of violence, including the "fight against terrorism", the ICRC and the International Institute of Humanitarian Law will devote the 27th Roundtable on Current Problems of International Humanitarian Law to "IHL and Other Legal Regimes: Interplay in Situations of Violence". The Roundtable will take place in San Remo, Italy, in September 2003. Due to various deadlines attached to the production of documents for the International Conference, a report on the proceedings of the Roundtable will be made available to delegates at the Conference itself. Annex 2 to the present Report provides the Roundtable agenda.

As indicated in the title, the primary aim of the Roundtable will be to examine the interplay of various bodies of law: IHL, international human rights law, refugee law, and international criminal law in situations of violence, and to discuss the various legal and factual criteria for legally qualifying situations of violence. Issues that will be examined include: the legal definition of international armed conflict (e.g. can situations other than those provided for in article 2 common to the Geneva Conventions be qualified as international armed conflict under customary IHL? If so, what would they be and which rules of customary law would apply?). Non-international armed conflict will also be discussed (e.g. what is the interplay of IHL and international human rights law in non-international armed conflict?).

Roundtable participants will also have an opportunity to reflect on the law applicable to so-called extraterritorial "self-help" operations, on rules applicable under different legal regimes to the detention of persons and the relationship of such rules, as well as on IHL and human rights law provisions pertaining to judicial guarantees.

Depending on the outcome of the Roundtable, and based on the relevance of some of the questions mentioned above to ongoing situations of violence, the ICRC will determine how to carry the work forward. Further expert consultations on some of the specific issues involved, with the aim of clarification of the law, are envisaged.

V. Improving Compliance with IHL

Insufficient respect for the rules of international humanitarian law has been a constant - and unfortunate - result of the lack of political will and practical ability of states and armed groups engaged in armed conflict to abide by their legal obligations. This, admittedly, is not only a problem of international humanitarian law, but may be also said to characterize other bodies of international law aimed at the protection of persons. As guardian of IHL with a special mandate under humanitarian law treaties the ICRC has, over a long period of time, developed a variety of operational and other activities aimed at improving respect for IHL both in peacetime, as well as in armed conflict. This goal will remain a permanent institutional priority.¹⁶

Over the years, states, supported by other actors, have devoted considerable effort to devising and implementing in peacetime preventive measures aimed at ensuring better respect for IHL. Dissemination of IHL generally, within academic circles and among armed forces and armed groups has been reinforced, and IHL has been increasingly incorporated

¹⁶ See, e.g. the ICRC's Annual Report for 2002.

into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted, and the necessary structures put in place to give effect to the rules contained in the relevant IHL treaties. In many states specific advisory bodies, such as National IHL Committees, have been established and IHL is increasingly being considered as part of the political agenda of governments. At the same time, by encouraging the national prosecution of war crimes and, more significantly, by the establishment of international bodies such as the ad hoc international criminal tribunals and the International Criminal Court, the international community has concentrated its efforts since the early 1990s on the repression of serious violations of international humanitarian law.¹⁷

While efforts to improve both the prevention and repression of IHL violations are fundamental and must continue, there also remains the question of how better compliance with international humanitarian law can be ensured *during* armed conflicts. Under article 1 common to the four Geneva Conventions, states undertook to "respect and ensure respect" for these conventions in all circumstances. This provision is now generally interpreted as enunciating a specific responsibility of third states not involved in armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict. In addition, article 89 of Additional Protocol I provides for the possibility of actions of the contracting parties in cooperation with the United Nations in situations of serious violations of the Geneva Conventions and of Additional Protocol I. While these provisions have been invoked from time to time, this has not been done consistently. It is evident, however, that the role and influence of third states, as well as of international organizations - be they universal or regional - are crucial for improving compliance with international humanitarian law.

In 2003, the ICRC, in cooperation with other institutions and organizations,¹⁸ organized a series of regional expert seminars to examine that issue. Regional seminars have been held in Cairo, Pretoria, Kuala Lumpur, Mexico City, and Bruges, Belgium. Participants included government experts, parliamentarians, academics, members of regional bodies or non-governmental organizations, and representatives of National Societies of the Red Cross and Red Crescent. The general subject of all the seminars was "Improving Compliance with International Humanitarian Law". The goal was to focus, in particular, on ways in which article 1 common to the Geneva Conventions, i.e. states' obligation to "ensure respect" for international humanitarian law could be operationalized and how the potential of article 89 of Additional Protocol I could be better utilized. Emphasis was also placed on the specific problem of improving compliance with international humanitarian law by parties to non-international armed conflicts.

It was anticipated that the debates would generate creative thinking about existing or new procedures and possibly new mechanisms of IHL supervision that could have a concrete impact on respect for the law. A summary report outlining the results of the five seminars held to date is attached as annex 3 to the present Report.

Given the wide range of the debates and the wealth of ideas and proposals that were made by expert seminar participants, this section will attempt only to highlight a few general points:

¹⁷ See, e.g. the ICRC's Advisory Service Biannual Report for 2000-2001.

¹⁸ The regional expert seminars were organized by the ICRC in collaboration with the Egyptian National Commission for International Humanitarian Law (Cairo), the Ministry of Foreign Affairs of the Government of the Republic of South Africa (Pretoria), the Ministry of Foreign Affairs of Mexico (Mexico City), and the College of Europe (Bruges).

Scope and Obligation to "Ensure Respect" for IHL

Discussions throughout the seminars reaffirmed the importance and relevance of IHL in the contemporary contexts of armed conflict. In both the expert presentations and in the debates it was emphasized that the common article 1 obligation provided for in the four Geneva Conventions means that states must neither encourage a party to an armed conflict to violate IHL, nor take action that would assist in such violations. Participants illustrated this negative obligation by referring to the prohibited action of, for example, transferring arms or selling weapons to a state that is known to use such arms or weapons to commit violations of IHL. In this regard, reference was made to the International Law Commission Draft Articles on State Responsibility (article 16), which attributes responsibility to a state that knowingly aids or assists another state in the commission of an internationally wrongful act.

Seminar participants also acknowledged a positive obligation on states not involved in an armed conflict to take action against states that are violating IHL, in particular to use their influence to stop the violations. It was generally agreed that this forms a legal obligation under common article 1. It was not considered 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 IHL violations. Possible measures a state may consider taking against violators of IHL include scrutiny of sales of arms, denial of over-flight rights, freezing of assets, and requiring compliance with IHL as a condition for receiving inter-governmental aid or development assistance.

The state obligation to "respect and ensure respect" for the Geneva Conventions, contained in common Article 1, was confirmed as applicable to both international and non-international armed conflicts.

Existing IHL Mechanisms and Bodies

Participants in all the regional seminars commended the ICRC for its initiatives concerning compliance with international humanitarian law, noting its great reputation for independence and impartiality and the prestige that has resulted from the success of its endeavours. ICRC activities in the promotion of IHL treaties and implementation, its protection and assistance work, its monitoring of compliance with IHL, and the ICRC's contributions to the development of international humanitarian law were specifically mentioned. Participants were of the view that the ICRC's mandate should be reinforced, in particular as regards access to victims of armed conflicts.

Regarding other existing IHL mechanisms, most seminar participants agreed that, in principle, they were not defective. While some fine-tuning might be possible and necessary, the major problem is the lack of political will by states to seize them, and in particular, the fact that the triggering of most existing IHL mechanisms depends on the consent of the parties to a conflict. Absence of political will was also considered to be a result of lack of financial means and other practical conditions, as well a lack of knowledge about the mechanisms' potential. The need to remedy the lack of specific knowledge on existing mechanisms among influential opinion makers was seen as particularly urgent, and participants pointed to a need to identify those who must be informed and influenced in this regard: public authorities, intellectuals, the media and civil society.

There was unanimous agreement that existing IHL implementation mechanisms suffer from a lack of use and from a lack of effectiveness, although it was also noted that lack of use in practice makes it impossible to properly evaluate the efficiency of the various IHL mechanisms. From agreement on lack of use and lack of effectiveness, however, the participants at the seminars were considerably divided as to what should be the proper

response. Although many participants submitted ideas for new mechanisms, others forcefully voiced a preference for focusing efforts on the reform or re-invigoration of existing mechanisms, declaring that only through use of the mechanisms will they be able to prove their effectiveness.

Among existing mechanisms discussed, the International Fact Finding Commission, provided for in article 90 of Additional Protocol I, was considered by participants to have the most potential. The great advantages of the International Fact Finding Commission are that it already exists, that it has detailed rules of procedure and that it is available at any time. Participants noted that current limitations, such as the restriction of the International Fact Finding Commission competence to international armed conflict may be remedied with the consent of the parties concerned. In the same way its procedures may be modified on a consensual basis. It was also suggested that the International Fact Finding Commission might offer its "good offices", as foreseen in article 90, to work with the parties to an armed conflict towards reconciliation and an attitude of respect for IHL.

Regarding existing supervision mechanisms or bodies of other branches of international law, it was generally agreed that existing human rights bodies - and in particular the regional bodies - have been useful in their consideration of IHL. However, given their lack of express competence to examine issues of IHL and the potential risk of obscuring the distinctions between the two bodies of law, some participants cautioned against actively encouraging this growing practice. A detailed summary of the discussions in this regard is contained in annex 3.

New IHL Supervision Mechanisms: Pro et Contra

In general, participants who supported the idea of establishing new IHL supervision mechanisms agreed that, in order to remedy the weaknesses of existing mechanisms, any new supervision mechanism potentially adopted by states should be neutral and impartial, should be constituted in a way that would enable it to operate effectively, should be able to act without the consent of the parties in question (i.e. have mandatory powers), and should take costs and administrative burdens on states into account. Among participants there was, however, some recognition that the general international atmosphere at present is not conducive to the establishment of new mechanisms. Thus, many participants advocated for a gradual process, beginning with the creation and use of ad hoc or regional mechanisms, that might earn trust and garner support over time, potentially leading to the creation of a new permanent universal mechanism.

Some of the new mechanisms suggested were a system of either ad hoc or periodic reporting and the institution of an individual complaints mechanism, either independently or as part of an IHL Commission (see proposal below). Many questions were left unanswered, however, concerning the political and legal feasibility of an individual complaints mechanism, its procedures, subject-matter jurisdiction, the issue of the exhaustion of local remedies, and its impact on ensuring compliance during an armed conflict.

The idea was also put forward of creating a "Diplomatic Forum", that would be composed of a committee of states or a committee of IHL experts, similar to the UN Commission on Human Rights and its Sub-commission on the Promotion and Protection of Human Rights. According to participants, many of the above-mentioned mechanisms could be placed within an IHL Commission or an Office of a High Commissioner for IHL that would be created as "treaty body" to the Geneva Conventions and the Additional Protocols. Its functions could include examination of reports, the examination of individual complaints, issuance of general observations, etc. A detailed account of the various proposals on this and other mechanisms is contained in annex 3.

Participants who endorsed resort to existing mechanisms, rather than the creation of new ones, held strongly to the opinion that more mechanisms would not necessarily lead to more effectiveness. Some voiced concerns about a potential danger of fragmentation that could result from a proliferation of IHL compliance mechanisms and advocated for safeguarding the universality of IHL. They pointed to the existing low level of enthusiasm for current mechanisms on the part of states parties to the Geneva Conventions and the Additional Protocols and warned that, although a laudable long-term goal, it would not be realistic in the current international climate to contemplate the introduction of new bodies. The risk of duplicating the tasks effectively fulfilled by the ICRC was also mentioned. Proponents of this position called upon all to focus on the improvement of existing mechanisms, as well as for their adaptation to deal with situations of non-international armed conflict. Part of the revitalization of existing mechanisms might be to give them functions considered desirable in potential new mechanisms and to thus strengthen the mandates of existing mechanisms.

Improving Compliance in Non-International Armed Conflicts

Discussions at the regional expert seminars confirmed that improving compliance with IHL in non-international armed conflicts remains a challenging task. Among the general obstacles mentioned were that states often deny the applicability of IHL out of a reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. It was emphasized that foreign interference in many internal armed conflicts also creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. In addition, armed groups lack sufficient incentive to abide by IHL given that implementation of their legal obligations under this body of law is usually of little help to them in avoiding punishment under domestic law.

Better accountability by states and armed groups for IHL obligations can be achieved by, among other things, encouraging special agreements between states and armed groups, such as those envisaged under common article 3 of the Geneva Conventions. It was also suggested that armed groups be encouraged to issue and deposit unilateral declarations of their commitment to comply with IHL, as well as to adopt internal codes of conduct on respect for IHL. Third party involvement in the form of "good offices" and other diplomatic initiatives were considered useful. The participants stressed that dissemination of IHL both before and after the outbreak of armed conflict remains an essential method of ensuring better respect for IHL by all involved, including members of armed groups.

The fact that armed groups usually enjoy no immunity from domestic criminal prosecution for mere participation in hostilities (even if they respect IHL), remains an important disincentive in practice for better IHL compliance by such groups. Participants expressed the view that granting immunity from prosecution for mere participation in hostilities by means of amnesties, or by introducing a system of mandatory amnesties, as well as by the granting of some form of combatant immunity might be ways of providing armed groups with an incentive to comply with IHL. Reduction of criminal punishments under domestic law in cases of compliance by armed groups with IHL was suggested, as were other incentives. Needless to say, it was underlined that there can be no amnesties or other forms of immunity from criminal process for members of armed groups suspected of having committed war crimes.

It was suggested that the ICRC undertake to prepare a study of practice in non-international armed conflicts with a view to identifying situations in which something similar to combatant status was granted to armed groups and to summarize the "lessons learned". It

was thought that such a study should also focus on the motives that led armed groups to respect IHL when they did so.¹⁹

It was noted that, apart from the ICRC's role referred to in article 3 common to the Geneva Conventions, none of the existing IHL supervision mechanisms are expressly mandated to address situations of non-international armed conflict and that mechanisms of other bodies of law (the UN Commission on Human Rights or the Inter-American Commission on Human Rights), were undertaking that role. Most participants welcomed the fact that the International Fact-Finding Commission, established under article 90 of Additional Protocol I, has expressed a willingness to be seized in situations of non-international armed conflict as well.

The participants also put forward ideas, such as the establishment of a pool composed of respected statespersons who could be called on to intervene in situations of non-international armed conflict, as a way of encouraging better compliance with IHL by the respective parties.

Finally, the experts felt that the ICRC initiative to address these questions was both timely and appropriate. The ICRC was encouraged to continue consultations in order to further refine the proposals made at the regional seminars with a view to ensuring improvements in compliance with IHL by all actors to armed conflicts.

Having in mind that an analysis of the proceedings of the regional expert seminar process has not been completed as of this writing, it would be premature to offer any general conclusions. The one comment that should, perhaps, be made is that seminar participants often mentioned the lack of political will by states - and armed groups - as the main impediment to better compliance with IHL. While the ICRC's follow up to the seminar process will be determined once a full analysis of the meetings is available, it must be underlined that even the best rules cannot compensate for lack of will in ensuring respect for the law. This well-known problem is not inherent to international humanitarian law but, as mentioned at the beginning, also, unfortunately, characterizes other bodies of international law.

Closing Remarks

The present Report attempted to highlight several challenges to international humanitarian law posed by contemporary armed conflicts, to outline the ICRC's position on most of them, and to provide information on intended ICRC activities in addressing those challenges in the time ahead. In the ICRC's view, the overall picture that emerges is one of a well-established and mature body of law whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their initial purpose - which is to regulate the conduct of war and thereby alleviate the suffering caused by war. The implementation and development of international humanitarian law has, over time, contributed to saving countless lives, to protecting human integrity, health and dignity and to raising consciousness about the basic principles on which our common civilization is founded.

¹⁹ A study that is currently being completed by the ICRC in fact addresses, among other things, the issue of motivation for IHL application mentioned above.

International humanitarian law is an edifice, based on age-old experience, which is designed to balance the competing considerations of humanity and military necessity. In the ICRC's view this body of law continues, on the whole, to adequately deal with today's conflict environment. International humanitarian law has proven to be flexible in the past and will further evolve taking into account the new realities of warfare. The ICRC's role in that process will, as always, be to ensure that developments in international humanitarian law and its practical application preserve existing standards on the protection of persons. To the maximum extent possible, the ICRC will continue to work to improve those protections.

ANNEX 1

Summary report

Direct Participation in Hostilities under International Humanitarian Law

Introduction

On June 2, 2003 the International Committee of the Red Cross - jointly with the TMC Asser Institute - organized a one-day informal expert seminar entitled "Direct Participation in Hostilities under International Humanitarian Law". Hosted by the TMC Asser Institute in The Hague, the meeting brought together almost 50 IHL and military experts from a range of geographic and professional backgrounds, as well as representatives of the ICRC and the TMC Asser Institute (the seminar agenda is attached to this report).

Prior to the meeting, the participants received a comprehensive background paper providing an overview of the outstanding legal issues related to direct participation in hostilities under IHL, as well as of the different positions currently taken in scholarly writing or state practice with respect to each of the topics on the agenda.¹ The background paper also included a preliminary list of questions for each topic intended to facilitate reflection prior to the meeting, which was envisaged as a brainstorming session. In addition to the topical queries, the participants were also specifically asked to share their views on three general questions:

1. Would it be useful and necessary to clarify the notion of "direct participation in hostilities" under international humanitarian law?
2. If so, what type of clarification would be most useful, i.e. a general legal definition or some other approach?
3. How should work on clarification of the concept of "direct participation", if found useful and necessary, be carried forward?

This aim of this report is to provide a summary of the debates and results of the informal expert seminar. For the sake of clarity, it will follow the order of the meeting and present: I) an overview of the applicable law, II) current challenges to the notion of "direct participation in hostilities", III) the legal consequences of a "direct participation", and IV) future steps.

¹ The background paper, drafted by Jean-François Quéguiner, was written in a personal capacity and did not express, nor did it intend to express, the institutional position of either the International Committee of the Red Cross or of the TMC Asser Institute on any of the issues examined.

I. Overview of the Applicable Law

The first meeting session focused on the law applicable to "direct participation" in hostilities. Participants highlighted that the determination of the status and protection of civilians directly participating in hostilities has been a constant concern throughout the history of the codification of international humanitarian law. They felt it was important to keep in mind the original meaning of this notion, as well as its historical roots, in order to ensure coherence of approach; they noted, consequently, that the discussions should not be confined to the terms used only in the 1977 Additional Protocols to the Geneva Conventions, but should also include the historical development of relevant treaty provisions and the evolution of customary law on the issue.

Based on this historical perspective, the participants considered what difference, if any, there was between the notions of "active" and "direct" participation in hostilities. Although the phrase "active part in the hostilities" used in article 3 common to the Geneva Conventions has evolved into "direct participation in hostilities" in the text of the 1977 Additional Protocols, the Commentary to Additional Protocol I (confirmed by the jurisprudence of the International Criminal Tribunal for the Rwanda) considered these two legal formulations to be synonymous.² The Preparatory Committee for the Establishment of an International Criminal Court, on the other hand, seemed to consider these two notions as distinct, at least in the specific context of the recruitment of children. The Preparatory Committee stated that: "*The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat*".

Some seminar participants were of the view that the dichotomy between "active" and "direct" participation could serve as a basis for distinguishing between two groups of civilians: those increasingly contributing to military support operations, and "pure" civilians, such as children, who must be protected under all circumstances and be totally divorced from any activities linked to military operations. Civilians belonging to the first group could be considered to be actively participating in hostilities and therefore be subject to the specific legal regime provided for in the Additional Protocols, such as loss of immunity from attack. This proposal did not meet with unanimous approval. Certain participants felt that a distinction between the two categories would be difficult to implement in an armed conflict situation. In addition, it was said that treating certain civilians as more "civilian" than others could eventually undermine the general protection afforded to civilians as such.³

The discussion then turned to identifying specific acts that could be deemed to fall within the notion of "direct participation" in hostilities. There was general agreement that civilians attacking or trying to capture members of the enemy's armed forces or their weapons, equipment or positions, or laying mines or sabotaging lines of military communication should be considered to be directly participating in hostilities. Along the same lines, no opposition was expressed to the view that intelligence gathering for military purposes would, under certain circumstances, also constitute direct participation in hostilities. Similarly, there were no objections to the proposition that civilians working in depots and canteens providing food and clothing for the armed forces or in factories producing weapons platforms should, in principle, not be considered to be directly participating in hostilities. Further examples were cited.

² ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, Decision of 2 September 1998, § 629.

³ For the sake of convenience, this document will only use the term "direct" participation in hostilities, rather than the term "active" participation. This choice was made for purely practical reasons and should not be viewed as prejudicing any of the positions expressed.

There were intense debates, however, on the qualification of a number of ambiguous situations, such as a civilian driving an ammunition truck in a combat zone. This example was cited throughout the discussions, because it was considered symptomatic of the many and complex issues generated by the notion of "direct participation" in hostilities. Although participants agreed that the truck itself was clearly a military objective, there was no agreement on the lawfulness of directly attacking the driver. Some participants felt that the driver could not be directly targeted and that the legality of any attack on the truck, causing injury to the civilian driver, should be considered under the principle of proportionality. Others deemed that the civilian driver had forfeited his or her protection from attack for the time he or she was thus participating in hostilities and could be targeted if no other means to stop the delivery of the ammunition were available. One expert was of the view that the driver had lost his or her immunity from attack for good and could therefore be lawfully targeted even at home.

Other ambiguous situations were also discussed. Some experts noted that possession of arms could not constitute "direct participation in hostilities" on its own because international humanitarian law allowed certain categories of non-combatants to carry weapons (e.g. personnel belonging to medical units and establishments). Others pointed out that carrying an arm could, nevertheless, be relevant in certain circumstances, as demonstrated by the interpretation of the notion of "hostile intent" in the rules of engagement of several armed forces.

To list only a few of the other unclear situations that were also mentioned, it was noted that the bombing of radio or television stations - implying that these sites have a certain strategic value - led to the troubling question of whether the role played by journalists in the course of hostilities and/or their activities could, under certain circumstances, be considered "direct participation in hostilities". Along the same lines, the status of political authorities was classified as potentially problematic given that they were generally civilians (unless also members of the armed forces), but that some of their activities could be considered as directly or indirectly contributing to the hostilities. Another example given was the status of a "voluntary" human shield. Participants concluded that more work was necessary in order to determine the exact legal qualification of the above-mentioned truck driver, as well as that of other individuals involved in ambiguous situations.

In the view of the participants, future work on clarifying the notion of direct participation in hostilities should be aimed at formulating a general definition of direct participation, accompanied by a non-exhaustive list of examples. Although an overwhelming majority supported the idea of drafting a non-exhaustive list, most also felt strongly that such an exercise should not be an end in itself. Any potential list should be used to identify criteria implementable on the battlefield and as an illustration of the general definition.

In order to compile such a list, it was suggested that the first step be identification of acts considered unambiguous at either end of the spectrum of participation (acts constituting direct participation on the one hand and those definitely not falling within that notion on the other), and to extract from such a list abstract criteria on the basis of which an act could be classified as falling into one or the other category. Secondly, it was suggested that the general definition then be refined by testing ambiguous cases against it.

Regardless of the method ultimately chosen to clarify the notion of "direct participation", the content of the debates revealed that participants considered three basic criteria as essential to prospective work. According to almost all of the participants, a process of clarification should:

- (a) ensure respect for the basic rules of international humanitarian law, in particular the general principle of distinction, which must not be undermined under any circumstances;
- (b) take into account practical aspects regarding the implementation of the notion of direct participation, including the means available for determining whether a civilian is directly participating in hostilities;
- (c) make sure that any prospective definition be compatible with, *inter alia*, the rules of international criminal law, in order to ensure its applicability in all the relevant legal regimes.

While accepting that any definition of direct participation in international armed conflicts would have an important function in determining direct participation in non-international armed conflicts, some experts noted that the definition of the notion should not necessarily be identical in both contexts. They underlined the particular importance of domestic, as well as human rights law, in non-international armed conflicts.

II. Current Challenges: Does the Law Correspond to Reality?

The second session was devoted to the notion of "direct participation in hostilities" in the context of contemporary armed conflicts. There was agreement that the recent evolution in strategic theories and military practice had clearly had an impact on the meaning of "direct participation". It was noted, for example, that the progressive disappearance of the battlefield in the traditional sense as the result of new methods of warfare rendered inoperative definitions based on a person's geographic proximity to a combat zone. Another related illustration given was the increased reliance of some countries on technologically advanced means of combat often resulting in asymmetric warfare.

One expert explained how a number of factors - notably the dependence of modern armies on technology combined with decreasing military budgets and the relative cost-efficiency of private companies - had led some countries to outsource some of their military activities. Contracts for the sale of arms, for example, are no longer limited to the simple purchase of a weapon but often, even during an armed conflict, include the maintenance and functioning of the system by the civilian employees of the seller. Such agreements raise legitimate questions regarding the status of the employees involved.

While civilians have always supported the armed forces in some form, new developments have placed civilian employees of those forces in positions vital to the success of combat operations. The civilian truck driver mentioned in the first session was thus, in further discussions, replaced with the civilian computer expert sitting in a remote location and participating in an integrated military operation by, for example, compiling and interpreting computer data, including for the purpose of verifying the military nature of a potential target. This, and other examples provoked numerous observations and gave rise to a clear divergence of views. As in the first session, the discussion revolved around the relative meanings given to combatants and civilians:

- One group of participants attempted to sub-categorize the different types of civilians that could be considered legitimate targets. Some suggested that being affiliated to a military structure could, for example, be a sufficient reason for being considered a legitimate target of attack. Other experts, however, deemed this "organic" criterion insufficient and noted that this approach would result in aberrations, such as treating the residents of a military college as legitimate targets. Although the notion of "quasi-combatant" was unanimously rejected, a "functional" approach, dependent on the type of activity undertaken by the civilian was proposed, but finally also refuted as not

practical. Some participants felt that distinguishing between a weapons-system employee and a cook providing food to the armed forces when all were wearing uniforms would prove difficult.

- A second school of thought opposed the creation of sub-categories of civilians that could be targeted. Repeating the doubts voiced in the first session in regards to creating a dichotomy between civilians, it was asserted that the establishment of intermediary groups would negatively affect the implementation of the principle of distinction. Noting the danger in applying the same criteria to a civilian weapon-system contractor and to the case of already mentioned civilian truck driver, participants emphasized that similar discussions had already taken place during the negotiations of Additional Protocol I and that this debate had been resolved by relying on the defined notion of "armed forces". They, therefore, concluded that it was not necessary to create new legal categories. One expert noted, however, that relying exclusively on the notion of (being a member of the) armed forces would not solve all issues, as this concept embraced multiple legal sub-categories and was, in addition, only relevant in the context of international armed conflicts.
- Finally, some experts were of the view that the notion of civilians who accompany the armed forces without being a member thereof - set down in Article 4(A) § 4 of the Third Geneva Convention - could possibly provide a solution to this difficult issue.

In this context, the notion of Computer Network Attack (CNA) - tentatively defined as operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves⁴ - was briefly discussed. No objections were raised to the idea that a CNA could amount to an armed attack even though it did not imply the use of kinetic force. It was stressed that the determining factor was the effective or potential consequences of an attack and not the means or methods used.

There was no opposition either to the hypothesis that a CNA would be subject to IHL if it were either part of a "classic" conflict or a cyber war in which injury, damage or destruction were intended or foreseeable and reached a sufficient level of intensity to be qualified as an "attack". Finally, noting that most computer operators are civilians, participants emphasized that the crucial question remained the status of the individual conducting a CNA. The proposition that an attempt to neutralize an enemy network via a CNA could be considered "direct participation in hostilities" was not called into question.

Another current challenge to the notion of "direct participation in hostilities" briefly mentioned at the seminar arises from the fight against terrorism. The debate focused on whether the use of force against transnational non-state actors could qualify as armed conflict (international or non-international). One participant asserted that although operations by non-state actors (such as September 11th, 2001) could be considered as armed attack, they could not qualify as armed conflict. This participant noted that existing international humanitarian law treaties did not govern the relationship between states and transnational non-state actors, adding that law-enforcement rules could be applied, but were not always appropriate to the particular situation.

According to the same expert, the lacuna in legal regulation in relation to the "war against terrorism" could potentially be filled by reference to the underdeveloped law of self-defense. This proposition was met with the objection that self-defense was a *ius ad bellum* concept and not a criterion relevant to the conduct of hostilities. In sum, the few seminar

⁴ For a definition of CNA and relevant references, see SCHMITT, M., "Wired warfare: Computer network attack and *jus in bello*", *IRRC*, June 2002, Vol. 84 (846), p. 367 (and note 5).

interventions that made explicit reference to the fight against terrorism essentially recapped the main lines of the debate on this topic that have emerged since September 11th, 2001.

The distinction between direct participation in hostilities and individual self-defense was also raised in the debate. All the experts who spoke on the subject stressed that individual civilians using a proportionate amount of force in response to an unlawful and imminent attack against themselves or their property should not be considered as directly participating in hostilities.

III. Legal Consequences of Direct Participation in Hostilities

The third session examined the legal consequences of direct participation in hostilities with a particular focus on three issues: 1) loss of immunity from attack, 2) the legal regime applicable in case of capture and, 3) lack of immunity from prosecution.

1) *Loss of Immunity from Attack (Targeting)*

Having in mind that combatants have the right to directly participate in hostilities and do not, consequently, enjoy immunity from attack, the question was asked whether an attack on individual members of the armed forces while they were on leave, holiday or on assigned duties unrelated to the armed conflict would be lawful. The experts tended to agree that, since members of the armed forces are entitled to take up arms any time, they could consequently be targeted in all the circumstances mentioned above, and in addition, when they are sleeping. Certain participants, however, nuanced this affirmation by recalling that the principle of "least harm" prohibited attacks on persons if less lethal alternatives were available.

The situation, however, was viewed as more complex as regards civilians - generically labeled "unlawful combatants" or "unprivileged belligerents" - who take a direct part in hostilities. According to articles 51 § 3 of Additional Protocol I and 13 § 3 of Additional Protocol II, civilians lose their immunity from attack, but only "for such time" as their direct participation lasts. How to determine the duration of direct participation provoked considerable debate at the seminar. In this respect, some participants emphasized that the planning phases of a military operation should be included in the definition of an armed attack. The majority of the participants focused, however, on issues arising from the "revolving door" interpretation, under which civilians can reclaim the benefit of immunity from attack as soon as they have dropped their arms.

Some experts said that the notion of combatant should be defined broadly to include civilians participating in hostilities in order to avoid the possibility of an individual moving from combat operations to civilian status depending on the activities conducted by him or her at a particular time. They felt that whether "lawful" or "unlawful", such individuals should be deemed combatants and could therefore always be a legitimate target of attack. This view was strongly contested by others, who emphasized that such an interpretation would undermine the protection provided to civilians by the principle of distinction. They further added that such an interpretation could not be defended by the invocation of military necessity, because individuals could be neutralized - through arrest for example - from the moment they have dropped their arms.

The debate also covered the so-called "membership approach" to armed groups, generating very divergent positions among participants. It was generally acknowledged that, even in international armed conflicts, persons who are not members of the armed forces within the meaning of Article 43 of Additional Protocol I may, nevertheless, belong to an

armed group using military force on a regular basis. The question was therefore asked whether belonging to a group directly participating in hostilities could be deemed a sufficient criterion for loss of immunity from attack. According to many of the experts, such an approach could not be justified either on the basis of the plain language of the Geneva Conventions or of Additional Protocol I, nor on the legislative history of the relevant provisions.

The situation was less clear in the context of a non-international armed conflict. In the absence of a definition of "combatant" or of "armed forces", some experts underscored that there were additional legal arguments and practical justifications that could be used to sustain a collective approach in this context. They suggested that, for example, membership in a military organization could result in loss of immunity from attack as long as the organization functioned like a military unit. A few of the experts, who did not support the membership approach, suggested that an alternative might be to rely on the common law notion of "conspiracy". This idea was not further elaborated; one expert simply further noted that this notion could be extremely broad in scope.⁵

The experts agreed that combatants could undertake lawful attacks involving the use of military force in the context of an armed conflict and that in other situations - including internal disturbances and tensions - traditional law-enforcement rules governed the use of lethal force, including that used in personal self-defense. Some participants did, however, highlight that standards regulating the use of force in situations of occupation differed from those applicable in situations of internal violence. They noted that the precise moment when the level of hostilities might trigger the application of conduct of hostilities rules in a situation of occupation was unclear and that - according to the spirit of the Fourth Geneva Convention at least - occupying powers were generally supposed to ensure security by means of law-enforcement measures (arrest, internment and trial for criminal offences). In that respect, one expert wondered whether new rules would be necessary, since the law of occupation had been drafted for transitional periods while practice demonstrated that such situations could last for decades.

2) Legal Regime Applicable upon Capture

The legal regime applicable to the capture and detention of civilians who have taken a direct part in hostilities raised some difficult questions, in particular regarding the scope of application of the Fourth Geneva Convention. Some experts – basing themselves *inter alia* on the *travaux préparatoires* of the Fourth Convention and a literal interpretation of Articles 50 § 1 and 45 § 3 of Additional Protocol I - were of the view that persons who do not fall within the scope of the Third Geneva Convention were necessarily protected by the Fourth Convention (provided the nationality criteria of Article 4 of GC IV were met). According to those experts, possible civilian engagement in violence (as saboteurs, for example) is implicitly acknowledged in certain provisions of the Fourth Geneva Convention, including articles 5 and 68. Others, however, contested this interpretation, arguing that civilians directly participating in hostilities constituted a *de facto* "intermediate" category covered by neither of the two above-mentioned Conventions.

⁵ The notion of conspiracy can be defined as "a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful"; cf. BLACK'S Law Dictionary, West Publishing Co., St. Paul, Sixth Edition, 1990, p. 309. On the basis of jurisprudence adopted by United States courts, the Dictionary further notes (p. 310) that "a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose".

But, even those who denied the applicability of the Fourth Geneva Convention to civilians directly participating in hostilities recognized that no individual could be left without protection. There was general agreement that Article 75 of Additional Protocol I, at a minimum, covered individuals captured in the context of an international armed conflict. In addition, many were of the view that any person, whether captured in an international or a non-international armed conflict or in any other situation, was protected by non-derogable human rights. In this respect, it was noted that if the *lex specialis* rule could be construed as regulating the interplay between human rights law and international humanitarian law in the context of the conduct of hostilities, this was not the case regarding the law applicable to the protection of an individual in enemy hands.

The question of the relationship between human rights law and international humanitarian law was also mentioned in the specific context of internment of civilians. None of the experts challenged the fact that internment could be one of the legal and practical consequences of direct participation in hostilities by civilians. Nor was it contested that such a measure could only be taken if absolutely necessitated by state security, and if security could not be guaranteed by the application of less rigorous means.

The discussion, however, did not focus on the nature of the activities that would be considered so prejudicial to the external or internal security of a state as to justify deprivation of liberty, but rather on the scope of rights in internment. Some participants suggested that the provisions of article 5 of the Fourth Geneva Convention could not be read today as if there had been no development in human rights law since the adoption of the four Conventions over 50 years ago. It was thus noted the right of *habeas corpus*⁶ remained fully applicable during detention and internment, as was the case with right of all interned persons to access to a lawyer, to family and medical personnel within days of internment.

Some experts also underlined that there was a presumption of POW status in case of doubt about the status of a person who had taken part in hostilities in international armed conflict. They added that any decision on this issue should not depend on statements of an executive power, but should be made by a competent tribunal within the meaning of Article 5 of the Third Geneva Convention.

3) Lack of Immunity From Prosecution

Under international humanitarian law combatants in international armed conflict cannot suffer penal consequences for having directly participated in hostilities - or for lawful acts of war they may have committed during such participation - and they benefit from POW status in case of capture. The seminar participants agreed that even though it was not a violation of international humanitarian law for a civilian to fight for his or her country, the lack of combatant or POW status implied that the person was not protected from prosecution under the relevant national laws. No one contested that direct participation in hostilities by a civilian could not be considered war crime.⁷

Some experts added that prosecution for an act of hostility conducted by a civilian not benefiting from combatant or POW status should be clearly grounded in national law, as required by the non-derogable principle of legality found in several human rights treaties and in international humanitarian law. Even those who questioned the non-derogable character of

⁶ The right of *habeas corpus* in general is defined as "a variety of writs (...) having for their object to bring a party before a court or judge". In common usage, and in the specific context mentioned above, these words are used to mean the *habeas corpus ad subjiciendum* defined as "a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained". The purpose of this writ is to test the legality of the detention or imprisonment and not whether the person detained is guilty or innocent. For the definition cf. BLACK'S Law Dictionary, *ibid.*, p. 709.

⁷ The term "war crime" - sometimes used in domestic law in a generic sense to qualify any violation of international humanitarian law - is restricted here to its modern meaning, i.e. a serious violation of international humanitarian law leading to the possible application of the principle of universal jurisdiction.

this right nevertheless acknowledged that a civilian captured after direct participation in hostilities enjoyed the benefit of basic judicial guarantees provided notably by customary international law.

Finally, some experts recalled that even though civilians directly participating in hostilities could be prosecuted under domestic law regardless of whether they had respected the laws of armed conflict, the practice of granting amnesty to individuals who had taken up arms has emerged, notably through peace treaties.⁸ It was suggested that granting the broadest possible amnesty at the end of active hostilities could serve as an effective incentive to encourage civilians who took a direct part in hostilities to respect and ensure respect for international humanitarian law. Along the same lines, an expert also proposed *de lege ferenda* that parties to an armed conflict should refrain from pronouncing death sentences against civilians who had directly participated in hostilities, provided they had respected the basic norms of international humanitarian law.

IV. The Future of the Notion of "Direct Participation in Hostilities": Would Clarification be Useful?

The fourth session was devoted to a discussion on the need or feasibility of embarking on a process of clarification of the notion of "direct participation in hostilities" and, if there was agreement on that point, on how work should be taken forward.

The common view was that the notion of "direct participation in hostilities" did not lend itself to a new normative codification but that further research, aimed at more precisely delineating the content of this notion and its legal consequences, would be extremely useful. The experts were unanimous about the need for a follow-up meeting and provided ideas on the course to be pursued. Some experts suggested that the ICRC engage in *soft law* development, while others proposed that the clarification process be undertaken by means of an electronic conference. In short, the experts clearly pronounced themselves in favor of clarifying the notion of "direct participation in hostilities".

The ICRC used the opportunity of the expert meeting to briefly present some of its own thinking on elements for a general legal definition of the notion of "direct participation in hostilities". The purpose was to get on the spot, initial reactions from the experts that could assist the ICRC's Legal Division in further refining its internal reflection on the issue. While some experts expressed a reluctance to comment on a definition they did not have time to fully study, others did provide initial, very useful comments.

⁸ In that respect, note that article 6 § 5 Additional Protocol II stipulates that: "*At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.*"

Conclusion

Although probably too short in view of the multiplicity and complexity of the issues raised, the one-day meeting allowed for a first informal brainstorming session on the notion of "direct participation in hostilities". The variety of opinions expressed confirmed the perception that a unanimous interpretation of this legal concept does not exist and that much work is needed.

In answer to the three overarching questions posed by the ICRC at the outset of the meeting, the participants were virtually unanimous. It was clearly felt, as mentioned above, that the notion of "direct participation in hostilities" required further clarification. The process of clarification could be facilitated by the compilation of non-exhaustive list of acts clearly considered to be covered, or to fall outside the notion of "direct participation". Such a list should be accompanied by a general legal definition. The ICRC was deemed as the natural organization to lead the process and was entrusted with the task of finding the best way to continue the challenging and important process it had begun in cooperation with the TMC Asser Institute. Given the encouraging results of the meeting, the ICRC intends to continue expert consultations, including the organization of a follow up expert meeting of international humanitarian law specialists, in 2004.



'Direct Participation in Hostilities' under International Humanitarian Law

Agenda of the Meeting

08:45 - 09:00

Welcome and registration

09:00 - 09:15

Opening remarks by:

***Avril Mc Donald*, Head, Section IHL/ICL, T.M.C. Asser Institute
Jean-Philippe Lavoyer, Head of the Legal Division, ICRC**

PART I (09:15 - 12:40)

The notion of 'direct participation in hostilities' in IHL

Chair: Jean-Philippe Lavoyer, Head of the Legal Division, ICRC

First session: Overview of applicable law

Based on the 1949 Geneva Conventions - where it was used for the first time - the notion of 'direct participation in hostilities' reappears frequently in the 1977 Additional Protocols to the Conventions. However, the treaties do not provide a definition of this legal concept. The aim of this session will be to examine the meaning of 'hostilities' and 'direct participation' and to identify the differences in their content in the context of international and non-international armed conflicts, based on concrete examples. The discussion would also focus on whether it is feasible or useful to lay down criteria for defining 'direct participation in hostilities' and, if so, what such criteria could be (types of activity, duration?). It would also address questions such as - is the notion of 'direct participation in hostilities' only applicable to individuals or can it also apply to armed groups? If a category of civilians who contribute to the military effort but do not directly participate in hostilities is mapped out, the session would then also examine which norms are applicable to this particular group.

9:15 - 9:35 **Background Presentation**

Horst Fischer, Academic Director of the Institute for International Law of Peace and Armed Conflict, Ruhr-Universität, Germany; Professor of IHL, Leiden University, the Netherlands

9:35 - 9:45 **Commentator**

Charles Garraway, Colonel, ALS 2, Directorate of Army Legal Services, United Kingdom

9:45 - 10:45 **Discussion**

10:45 - 11:00 Coffee break

Second session: Current challenges: does the law correspond to reality?

Contemporary conflicts pose special challenges in relation to the notion of 'direct participation in hostilities'. Examples are the increased intermingling of armed groups with the civilian population, the lack of identification of those taking a 'direct part in hostilities', and questions related to measures that could be taken to ensure the protection of those who do not directly participate in hostilities. An additional issue is how to distinguish a police from a military operation and the rules governing use of force in these respective situations. Another current challenge is the so-called 'privatisation' of armed forces and how the rules apply to outsourced employees of private companies. The second session would focus on these and other current points of tension in the implementation of the notion of 'direct participation in hostilities', as well as on possible solutions.

11:00 - 11:20 **Background Presentation**

Michael Schmitt, Professor of International Law, George C. Marshall European Center for Security Studies, Germany

11:20 - 11:30 **Commentator**

Hans-Peter Gasser, former Legal Advisor, ICRC

11:30 - 12:40 **Discussion**

12:40 - 14:00 Lunch

PART II (14:00 - 17:30)

The consequences of direct participation in hostilities

Chair: Maria Nybondas, Researcher, T.M.C. Asser Institute

Third session: Legal consequences of direct participation in hostilities

Civilians directly participating in hostilities are traditionally considered as having waived their immunity from attack, thus becoming legitimate targets of attack for the time of their participation, both in international and non-international armed conflict. In international armed conflict, what is the scope of protection enjoyed by individuals who directly participated in hostilities and fell into the power of the enemy: what is the applicability of the fourth Geneva Convention and of the first Additional Protocol in such cases? What is the field of application of article 5 of the fourth Geneva Convention? Are individuals who participated in hostilities always subject to criminal prosecution? Finally, in non-international armed conflict, how does the absence of combatant status affect the treatment and protection of persons who have directly participated in hostilities and have fallen into enemy hands? What are the applicable norms? Are individuals who participated in hostilities always subject to criminal prosecution? Do the questions posed above need to be analysed from a different perspective? The third session of the Expert Meeting would be devoted to an examination of these and other issues.

14:00 - 14:20 Background Presentation

Louise Doswald-Beck, Secretary-General, International Commission of Jurists

14:20 - 14:30 Commentator

William K. Lietzau, Special Assistant to the General Counsel, U.S. Department of Defense

14:30 - 15:45 Discussion

15:45 - 16:15 Coffee break

Fourth Session: The future of the notion of direct participation in hostilities: is more law necessary?

The purpose of the last session would be to summarize the debate and, in particular, to determine what, if any, further steps are needed in order to clarify the notion of 'direct participation in hostilities'.

16:15 - 16:30 Summary of proceedings

Avril Mc Donald, Head, Section IHL/ICL, T.M.C. Asser Institute

16:30 - 16:45 Future steps

Jelena Pejic, Legal Advisor, ICRC

16:45 - 17:30 Discussion

ANNEX 2

**The International Institute of Humanitarian Law,
Sanremo, Italy,**

in cooperation with

**The International Committee of the Red Cross,
Geneva, Switzerland**



XXVIIth Round Table
on Current Problems of International Humanitarian Law:

***“International Humanitarian Law
and Other Legal Regimes:
Interplay in Situations of Violence”***

Agenda

4 – 6 September 2003
Sanremo, Italy
International Conference Centre
Grand Hôtel de Londres

International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence

Agenda

Wednesday, 3 September 2003

15:00 – 19:00 **Registration**
International Conference Center
Grand Hôtel de Londres

Thursday, 4 September 2003

09:00 – 12:30
Opening session – Plenary

09:00 – 09:30 Welcome addresses

09:30 – 10:45 Keynote addresses:

Dr. Ruud Lubbers, U.N. High Commissioner for Refugees
Dr. Jakob Kellenberger, President, International Committee of the Red Cross

10:45 – 11:15
Coffee break

11:15 – 12:30 Discussion

12:30 – 14:00
Lunch

14:00 – 16:00
Session II – Plenary

"Relationship between IHL and Other Legal Regimes"

Chairperson: *Judge Abdul Koroma*, International Court of Justice, The Hague

14:00 – 15:00 Background Presentations

- **Historical evolution of IHL, international human rights law, refugee law and international criminal law**
Prof. Michael Bothe, Johann Wolfgang Goethe University, Frankfurt
- **Mechanisms of implementation under IHL, international human rights law and refugee law**
Dr. Yves Sandoz, Member of the International Committee of the Red Cross

15:00 – 16:00 Discussion

16:00 – 16:30
Coffee break

16:30 – 18:30

Session III (beginning) – Three working groups – same topic

"Legal Qualification of Situations of Violence and Related Challenges"

Chairpersons: *Prof. Laurence Boisson de Chazournes*, University of Geneva
Prof. Chaloka Beyani, London School of Economics
Dr. Elzbieta Mikos-Skuza, Polish Red Cross

16:30 – 17:00 Background Presentations

- **International armed conflict: legal qualification and IHL as *lex specialis***
Prof. Fritz Kalshoven, University of Leiden
Prof. Viti Muntarbhorn, University of Bangkok
Prof. Yoram Dinstein, Tel Aviv University

17:00 – 18:30 Discussion

19:00
Reception

Friday, 5 September 2003

09:00 – 12:30

Session III (end) – Three working groups – same topic

"Legal Qualification of Situations of Violence and Related Challenges" (cont.)

Chairpersons: same as above

09:00 – 09:30 Background Presentations

- **Non-international Armed Conflict: legal qualification and parties to the conflict**
Prof. Dieter Fleck, Ministry of Defense, Germany
Brigadier Titus K. Githiora, Chief of Legal Services, Department of Defense, Kenya
Prof. Marco Sassoli, University of Quebec
- **Non-international armed conflict: the interplay of different legal regimes**
Prof. Djamchid Momtaz, Teheran University
Dr. Toni Pfanner, ICRC
Prof. Habib Slim, University of Tunis, Deputy Secretary-General, Tunisian Red Crescent

09:30 – 10:30 Discussion

10:30 – 11:00
Coffee break

11:00 – 11:30 Background Presentations

- **Extraterritorial "self-help" operations: meaning and the applicable law**
Dr. Yuval Shani, College of Management Academic Studies, Law School, Rishon Le Zion
Dr. Michel Veuthey, Academic Director, Adjunct Professor, Fordham School of Law, New York
Dr. Avril McDonald, TMC Asser Institute

11:30 – 12:30 Discussion

12:30 – 14:00
Lunch

14:00 – 15:30
Session IV – Plenary

"Protection of Persons in Situations of Violence: Specific Aspects"

Chairperson: *Professor Sir Nigel Rodley*, Human Rights Center – Department of Law,
University of Essex

14:00 – 15:30 Background Presentations

- **Deprivation of liberty**
Dr. Hans-Peter Gasser, Former Senior Legal Adviser, International Committee of the Red Cross
- **Judicial Guarantees**
Mr. Stephane Bourgon, Defense Counsel before the International Criminal Tribunal for Former Yugoslavia, The Hague
- **Use of Force**
Mr. Anthony Dworkin, Crimes of War Project

15:30 – 16:00
Coffee break

16:00 – 19:00
Session IV – Three working groups

"Protection of Persons in Situations of Violence: Specific Aspects"

Chairpersons: *Professor Sir Nigel Rodley*, Human Rights Center – Department of Law,
University of Essex
Mr. Arthur Mattli, Head of Section, Human Right and Humanitarian Law
Section, International Law Directorate, Swiss Federal Department of Foreign
Affairs
Prof. Chris Maina, University of Dar Es Salaam

Discussion

- **Deprivation of liberty**
- **Judicial Guarantees**
- **Use of Force**

21:00
Official Dinner

Saturday, 6 September 2003

09:00 – 12:30

Session V – Plenary

Concluding session

Chairperson: *Dr. Francois Bugnion*, Director for International Law and Cooperation within the Movement, International Committee of the Red Cross

09:00 – 10:15 Reports

- **Session II**, Rapporteur:
Ms. Monette Zard, International Council on Human Rights Policy, Geneva

- **Session III**, Rapporteurs:
Working group 1: *Dr. Toni Pfanner*, ICRC
Working group 2: *Dr. Yuval Shani*, College of Management Academic Studies,
Law School, Rishon Le Zion
Working group 3: *Dr. Knut Dörmann*, ICRC

- **Session IV**, Rapporteurs:
Working group 1: *Ms. Helen Duffy*, Interights
Working group 2: *Mr. Stephane Bourgon*, Defense Counsel before the ICTY
Working group 3: *Dr. Anne-Marie La Rosa*, International Labor Organisation

10:15 – 10:45
Coffee break

10:45 – 12:00 Discussion

12:00 – 12:30 Concluding remarks

Prof. Jovan Patrnogic, President of the International Institute of Humanitarian Law

ANNEX 3

Summary report

Improving Compliance with International Humanitarian Law ICRC Expert Seminars

Introduction

The International Committee of the Red Cross (ICRC), in co-operation with other institutions and organizations,¹ organized a series of regional expert seminars on the topic "Improving Compliance with International Humanitarian Law." The seminars were organized as part of the preparation for the 28th International Conference of the Red Cross and Red Crescent. Five seminars were held: in Cairo (23-24 April 2003), Pretoria (2-3 June 2003), Kuala Lumpur (9-10 June 2003), Mexico City (15-16 July 2003), and Bruges, Belgium (11-12 September 2003).

Each seminar followed the same agenda and participants included government experts, parliamentarians, academics, members of regional bodies, experts from non-governmental organizations, and representatives of National Societies of the Red Cross and Red Crescent, each acting in their individual capacities as experts in international humanitarian law (IHL). This report follows the outline of the agenda questions and includes a summary of both the expert presentations on each question and the ensuing discussions by all seminar participants.

The primary objective of the seminar series was to engage experts in international humanitarian law from all regions of the world in a creative and forward-thinking discussion of ways in which Article 1 common to the four Geneva Conventions ("common Article 1"), that is the States' obligation to "ensure respect" for international humanitarian law, might be operationalized. Particular attention was paid to measures for ensuring compliance that may be taken by States *during* armed conflict, rather than the more frequently debated subjects of pre-conflict implementation and dissemination initiatives or repressive measures, which are most frequently taken post-conflict. An emphasis was also placed on the specific problem of ensuring a better compliance with international humanitarian law by parties to non-international armed conflicts.

Debates throughout the seminars were animated and dynamic, revealing a great interest on the part of the expert participants in the subject matter. The experts expressed appreciation to the ICRC for taking the initiative to discuss these matters, underlining that such discussions are both appropriate and necessary in the current context.

¹ The regional expert seminars were organized by the ICRC in collaboration with the Egyptian National Commission for International Humanitarian Law (Cairo), the Ministry of Foreign Affairs of the Government of the Republic of South Africa (Pretoria), the Ministry of Foreign Affairs of Mexico (Mexico City), and the College of Europe (Bruges).

I. Summary of Conclusions

The discussions throughout the seminars reaffirmed the importance and relevance of international humanitarian law in the contemporary contexts of armed conflict and provided innovative ideas of how to improve compliance with international humanitarian law.

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 on-going armed conflict. In addition to a clear legal obligation on States to "respect and ensure respect" for international humanitarian law within their own domestic context, 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.

When discussing existing IHL mechanisms, most participants agreed that, in principle, the existing mechanisms were not defective and indeed have great potential, but suffer from lack of use linked to lack of political will by States to seize them. Participants noted in particular the great potential of the International Fact Finding Commission (Art. 90, Additional Protocol I), advocating for its use and suggesting ways in which it might become more active.

The unique role and credibility of the ICRC in ensuring compliance with international humanitarian law was the frequent subject of discussion, and it was clearly evident that participants expect the ICRC to continue undertaking active measures in this regard. Participants at all seminars commended the ICRC for its initiatives, noting the institution's great reputation for independence and impartiality and the prestige that has followed its successful endeavours. Participants were careful to note that any ICRC activity in this field must not, however, impinge on its neutrality and impartiality or compromise its operational activities and the protection it offers on the ground for those vulnerable to the effects of armed conflict.

Participants engaged in lively and imaginative discussions of potential new mechanisms for the respect for international humanitarian law. The various proposals included frequent reference to an IHL Commission, reporting procedures, individual complaints mechanisms, or observation missions. Most participants counselled, however, that the current political climate is not conducive to the establishment of a permanent or automatic institution, with some suggesting in the alternative that any proposals should be undertaken gradually, perhaps beginning as an *ad hoc* mechanism, a body with one or two desired functions, or a regional mechanism, earning trust and support with proven success over time. Nonetheless, participants cautioned against the potential fragmentation of IHL interpretation that might result from this approach and called for a safeguarding of the universality of international humanitarian law.

Finally, participants affirmed that both State actors and armed groups are bound by the provisions of international humanitarian law applicable in situations of non-international armed conflict, and called on all actors to work towards a better compliance with these provisions. Significant suggestions of how to practically improve compliance among armed groups included the conclusion of special agreements between State actors and armed groups (common Art. 3 (3) to the four Geneva Conventions), unilateral declarations by the

armed groups, and State grants of some kind of immunity to members of armed groups for their participation in hostilities. A number of proposals were made of new IHL mechanisms and, once again, the ICRC was commended as one of the most competent actors to effect improvement in compliance with international humanitarian law in non-international armed conflicts.

In conclusion, expert participants welcomed the opportunity to discuss these pressing and relevant issues of respect for international humanitarian law. Despite the difficulties of lack of political will crippling existing IHL mechanisms and a general atmosphere not conducive at the moment to the creation of new permanent mechanisms, participants remained optimistic that significant steps may be taken to improve compliance in today's international and non-international armed conflicts. They called upon the ICRC to continue this deliberation and consultation to further refine the proposals of the regional seminars, with a view to continued improvement in compliance with international humanitarian law obligations by all actors.

II. Discussion Theme I – Operationalizing Common Article

- 1) What are the scope and application of the obligation to "ensure respect" for international humanitarian law?**
- 2) How to practically translate individual State duty to ensure respect into its policies and actions?**

In order to set the foundation for subsequent questions concerning compliance mechanisms and procedures, each seminar began with an examination of Article 1 common to the four Geneva Conventions and Additional Protocol I, which states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."² Participants were asked to consider the scope of this obligation and also to identify what concrete measures a State might undertake to fulfil this duty.

Seminar participants recognized common Article 1 as conferring an obligation, both on States party to an armed conflict and on third States not involved in an on-going armed conflict. Participants noted that all states must perform this treaty obligation in good faith.³ The common Article 1 obligation was generally agreed upon as conferring an obligation applicable both in international and non-international armed conflict situations.

In addition to the clear legal obligation for States to "respect and ensure respect" for international humanitarian law within their own domestic context,⁴ at all seminars expert presentations and ensuing discussions emphasized the obligations placed by common Article 1 on third States. Third States are bound by a legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law⁵ nor take action that would assist in such violations. Participants illustrated this negative obligation by referring to prohibited actions such as the transfer of arms or sale of weapons to a State who is known to use such arms or weapons to commit violations of international humanitarian law. In this regard, in addition to common Art. 1, reference was made to the International Law

² Article 1 common to the four Geneva Conventions (1949) and Protocol I Additional to the Geneva Conventions (1977).

³ Vienna Convention on the Law of Treaties, Article 26, *Pacta sunt servanda*, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

⁴ Participants noted that this requires compliance with IHL by all branches of the government: executive, judiciary, legislatures, and armed forces.

⁵ See the Nicaragua case, wherein the International Court of Justice noted that under common Art. 1, the United States was under "an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions [...]". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, para. 115.

Commission Draft Articles on State Responsibility, Article 16, which attributes responsibility to a State that knowingly aids or assists another State in the commission of an internationally wrongful act.⁶

Seminar participants also acknowledged a positive obligation on States not involved in an armed conflict to take action – unilaterally or collectively – against States who are violating international humanitarian law, in particular to intervene with States over which they might have some influence to stop the violations.⁷ All participants affirmed that this entails at minimum a moral responsibility and that States have the right to take such action,⁸ with the majority of participants agreeing that this 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. States expressed this positive obligation, for example, in the Final Declaration of the International Conference for the Protection of War Victims in 1993:

We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to: [...] Ensure the effectiveness of international humanitarian law and take resolute action in accordance with the law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.⁹

Considering violations of international humanitarian law to be matters of international concern, participants clarified that action taken pursuant to common Article 1 should not be understood as an illegal interference in the internal affairs of another State. Furthermore, it was clearly understood that common Article 1 is not an entitlement to the use of force, a matter governed solely by the UN Charter, and that action pursuant to common Article 1 must be in accordance with international law.

Building on this foundational understanding of the scope and implications of common Article 1, seminar participants were then asked to consider how to practically translate this obligation into State practice and policies. A key question in this regard involved **how to create the political will of States**, both to ensure their own domestic respect for provisions of international humanitarian law, as well as to ensure its respect by other actors involved in an armed conflict. A positive attitude of influential states was seen as an essential prerequisite in this regard.

Beyond the question of political will of States, participants at all seminars also strongly advocated for the fostering of a **greater culture of respect for international humanitarian law** among all sectors of society, at national and international levels.¹⁰ All actors – parties to conflict, third states, and civil society – must be made aware that a greater

⁶ Draft Articles on Responsibility of States for internationally wrongful acts (International Law Commission, 53rd Session, 2001), Article 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

⁷ Carrying the chain of obligation one step further, one expert recommended that States should put pressure on a State they know to have influence over a violating State, urging the third State to fulfill its positive obligation under common Article 1 to attempt to ensure respect by the violating State.

⁸ Participants at one seminar discussed whether there are different levels of responsibility between enemy States, neutral States, and allies, considering that there may be a higher level of obligation for States to intervene when their allies or partners in a coalition are violating international humanitarian law.

⁹ International Review of the Red Cross, September-October 1993, ICRC, Geneva.

¹⁰ At the Pretoria conference, a parallel was drawn between the stigmatisation of slavery and the need for a similar future stigmatisation of violations of IHL.

respect for international humanitarian law is essential to limit the human suffering and destruction caused by armed conflict.

In order to achieve this "culture of respect", **civil society** must be sensitised to issues of international humanitarian law in the same way they are currently well-versed in issues of human rights law. Traditional non-governmental organizations and other actors in civil society must be given the necessary expertise to deal with IHL. Efforts to influence decision makers should include other actors such as churches or religious communities, trade unions, and other community organizations, many of whom might not be aware that they share the same ideas and ideals as those underlying international humanitarian law. Components of the Red Cross and Red Crescent Movement may be useful in sensitising and in capacity building. Finally, public opinion must be strengthened, both against the effects of war as well as concerning the role of international humanitarian law in protecting those affected by armed conflict.

Within a strong culture of respect for international humanitarian law, many actors may work to hold States responsible for their obligations under IHL and, more specifically, under common Article 1. Regarding what concrete actions States might take – either individually or collectively – to fulfil their common Article 1 obligations, seminar participants urged the following:¹¹

- **Dissemination and education** are essential actions that must be vigorously pursued in peacetime, targeting various sectors including: politicians, opinion makers, academics, military personnel, youth, civil society, media, and the general public. In this regard, participants pointed to successful campaigns by civil society, resulting in States ceasing to give aid to violating States or other effective measures to ensure compliance with international humanitarian law. The efforts of non-government organizations were endorsed by participants as highly effective, in their work of fact-finding and documentation, reporting, and denunciation regarding issues of international humanitarian law. The important role of national commissions for IHL was mentioned and speakers encouraged their creation by States. National Societies of the Red Cross and Red Crescent were also endorsed as valuable partners in spreading knowledge, although it was thought that their staff members and volunteers might need appropriate training in order to undertake this task. Some participants indicated that dissemination and education programs should be culturally adjusted to make them understandable.
- States must be encouraged to enact **national penal legislation** in order to be in a position to punish violations of international humanitarian law, during and after an armed conflict. Prosecution of war criminals should be highly visible in order to create a deterrent effect during armed conflicts.¹²
- Participants welcomed increased application of *universal jurisdiction* and other **international developments in repression for violations of international humanitarian law**, such as the creation of the International Criminal Court (ICC) and *ad hoc* tribunals. States were called upon to cooperate with the ICC, or at least not to thwart its efforts, as part of their obligation under common Article 1.
- Utilize the **existing mechanisms of IHL**, for example by referring situations of conflict to the International Fact Finding Commission or by offering to serve as a Protecting Power (discussed below, p. 54-56).

¹¹ One participant called for the drafting of a list of minimum obligations required by common Article 1.

¹² It was noted, however, that an emphasis on national legislation assumes that the domestic legal systems are capable and effective, although many perhaps are weak systems where norms might be ignored in practice.

- **Scrutinize all intended sales of armaments** to ensure that their export is not contrary to the provisions of any of the international humanitarian law/disarmament instruments, and that they are not used in violation of the provisions of any of the Conventions. In this regard, States should adopt legislation that would limit their capacity to aid others in violations of international humanitarian law, for example legislation that forbids the transfer of arms to violating States. In particular the trade of small arms to non-state actors needs to be addressed. This should be done at all levels domestically, in cooperation between governments regionally, and globally. Violators should be prosecuted. Similar action was suggested against illicit trade in drugs, natural resources (including gems or diamonds), and works of art, often undertaken to finance the continuation of armed conflict.
- In conflicts where they may have some influence, States should **engage in confidential, discreet negotiations**.¹³
- **Sanctions** may be an efficient action, if they are properly targeted and not harming those whom they are meant to protect in the end. It was noted, however, that in practice sanctions have been easily evaded.
- States were called upon to initiate more actions in **cooperation with the United Nations** (discussed below, p. 56)
- Exert **diplomatic pressure** on violating States – individually, collectively or through the actions of regional or international organizations.
- Make **public denunciations** of violations of international humanitarian law – individually, collectively, or through regional or international organisations.
- Undertake coercive measures, including **lawful reprisals** or **acts of retortion** (including refusal to enter into treaties or agreements with violating State; expulsion of diplomats; severance of diplomatic ties; suspension of public aid).¹⁴ Withdrawal of financial support as in the case of South Africa during Apartheid was seen as an effective measure as well as the refusal to grant over-flight rights for planes from a State that is found to be in breach of international humanitarian law.
- Where a situation has been created through international humanitarian law violations (e.g. the creation of a new state or establishment of a new government), States should **refuse to recognize the state of affairs** politically and should cut all aid or assistance.
- In the context of the upcoming 28th International Conference of the Red Cross and Red Crescent, States should make **pledges to promote respect for and implementation of international humanitarian law**. As indication of this commitment, States should review and consider withdrawing their reservations to the Geneva Conventions and other instruments of international humanitarian law.

¹³ One participant noted that although this form of quiet diplomacy may be effective, its one weakness is that it keeps the public in the dark.

¹⁴ One participant questioned the lawfulness of third States taking reprisal action, referring to the Draft Articles on Responsibility of States for internationally wrongful acts (International Law Commission, 53rd Session, 2001), Article 54, *Measures taken by States other than an injured State*: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." Based on Article 54, the participant argued that the formulation of "lawful measures" excludes reprisals.

- **Resort to International Court of Justice (ICJ)**¹⁵ in cases of difference of opinion concerning the application or interpretation of international humanitarian law in a specific context¹⁶ or request an advisory opinion on a legal question related to compliance with international humanitarian law.¹⁷
- **Offer to send peacekeeping forces**, making certain that those forces have a specific mandate to ensure respect for international humanitarian law in the context.
- **Amend domestic laws on asylum** to both facilitate the acceptance of individuals who were victims of violations of international humanitarian law and to prevent asylum for perpetrators of violations.

Participants, in particular in Pretoria, Mexico City and Bruges, showed great enthusiasm for **regional cooperation** in ensuring compliance with international humanitarian law, noting that many of the initiatives suggested above would be strengthened if considered collectively or at the regional level. Regional initiatives were considered effective, not only in responding to violations of international humanitarian law but also in preventative systems of "early warning" prior to the outbreak of hostilities. Participants to the Pretoria seminar voiced great hopes for the existing and foreseen regional and sub-regional structures.¹⁸ Participants in Mexico City advocated strongly for recourse to the Organisation of American States (OAS) and its Inter-American Commission and Court of Human Rights, pointing in particular to the credibility the Inter-American Commission has acquired through its accurate and expert dealings with issues of compliance with international humanitarian law. Bruges participants discussed the merits of developing "common positions" within the European Union regarding compliance with international humanitarian law. In Cairo and elsewhere, participants advocated cooperation within the Inter-Parliamentary Union, as well as other means to strengthen internal lobbies ("lobbies of internal elites") within countries that can network and convince States of their international humanitarian law obligations. Thus, even where formal regional bodies do not exist, seminar participants endorsed the usefulness of informal cooperation among States, to ensure respect for international humanitarian law.

3) How can existing international law mechanisms and bodies better be used?

Regarding existing international humanitarian law mechanisms, most participants agreed that, in principle, the existing mechanisms are not defective and indeed have great potential. While a bit of fine-tuning might be necessary and possible, the major problem is the **lack of political will** by States to seize them, and in particular, the reliance of most existing IHL mechanisms on the initiative or acceptance of the parties to a conflict in order to act. Absence of political will was also considered to be a result of lack of financial means and other support and lack of knowledge as to their potential. The need to increase specific knowledge concerning existing mechanisms was seen as particularly urgent among influential opinion makers and thus participants pointed to a need to identify those who must be informed and influenced in this regard: state authorities, intellectuals, media, civil society.

There was an agreement that the existing mechanisms of IHL suffer from **lack of use and a resulting lack of effectiveness**, although it was also noted that the lack of use in

¹⁵ Although this suggestion was supported by some participants, others questioned whether the ICJ is the most effective tool to use in this regard.

¹⁶ This is legally possible if the States in question have given their consent to ICJ's competence, either through the optional clause of compulsory jurisdiction or through *ad hoc* agreement.

¹⁷ An Advisory Opinion may be requested only by the UN General Assembly, the Security Council, or other UN organ or specialized agency authorized by the General Assembly, and only concerning an "abstract legal question" and not a particular dispute, although often a specific dispute may be underlying the question put to the court.

¹⁸ Specific mention was made of the future role of sub-regional organisations such as the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS), and various bodies or councils of the African Union. Participants in Pretoria also discussed the potential effectiveness of the Peer Review process and mediation by members of the African Union Council of the wise.

practice makes it impossible to properly evaluate the efficiency of the various mechanisms. Several participants called on everyone to focus creatively and optimistically on how to improve the situation.

From the agreement on lack of use and lack of effectiveness, however, participants were strongly divided on what should be the proper response. Although many participants submitted ideas for new mechanisms (see discussion below, p. 60), others – perhaps a greater number – voiced a strong preference to focus efforts on the reform or re-invigoration of existing mechanisms (discussed immediately below), declaring that the effectiveness of these mechanisms may be properly evaluated only after they have been put to use.

Those participants endorsing the resort to existing mechanisms held strongly to the opinion that more mechanisms will not necessarily mean more effectiveness. Some voiced concerns about a potential danger of fragmentation with a proliferation in IHL compliance mechanisms and advocated for a safeguarding of the universality of international humanitarian law.¹⁹ They pointed to the existing low level of enthusiasm for the current mechanisms on the part of States party to the Geneva Conventions and Additional Protocols, and warned that, although it might be a laudable long-term goal, it is too idealistic in this climate to think about the introduction of new permanent bodies or mechanisms. Proponents of this position called upon all to focus on the improvement of existing mechanisms and their adaptation to situations of non-international armed conflict. Part of the revitalization of existing mechanisms might be to give them functions participants considered desirable in potential new mechanisms and increase their tasks, strengthening them instead of weakening them.

Participants considered each existing mechanism and the possibilities for reform or renewal:

Enquiry procedure (Geneva Conventions I-IV, arts. 52/53/132/149)

Some participants supported the enquiry procedure as a potentially attractive option to parties to an armed conflict, due to the bilateral nature of the procedure. Given that a belligerent State *is bound* to accept the enquiry once activated by a party to the conflict, but that States need to agree on the procedure of enquiry or the appointment of an umpire, it was suggested that the drafting of a model procedure might facilitate acceptance by States. One proposal for a more stringent provision was the requirement of automatic acceptance of a proposed model procedure.

It was also recommended that agreement on an enquiry procedure be routinely included in bilateral agreements between parties to an armed conflict. Participants disagreed, however, on whether such bilateral agreements would be more realistically pursued during the "soft phase" preceding a full-fledged armed conflict or after hostilities have begun.

The provisions on arbitration contained in the Hague Convention (I) for the Pacific Settlement of International Disputes (Hague I) (29 July 1899) revised on 18 October 1907 might serve as a basis today. Their lack of use in the past does not mean they could not be used in the future.

¹⁹ In order to reduce the risk of fragmentation of IHL interpretation, one participant advocated for a system of referral of an IHL related case from a domestic court system to an IHL body, modelled on the opportunity within the European Union to refer cases to the European Court of Justice. With regard to the *ad hoc* Tribunals, it was pointed out that the common Appeals Chamber facilitates a uniform case law, and the hope was expressed that the International Criminal Court would take into consideration jurisprudence from the two *ad hoc* tribunals.

Meeting of High Contracting Parties (Additional Protocol I, art.7)

Participants saw value in pursuing meetings of High Contracting Parties. The proposal for more regular periodic meetings gained support.

Two main challenges were called to mind: first, the subject matter, and second, who might propose the convening of a meeting. Regarding subject matter, article 7 of the First Additional Protocol provides that meetings of High Contracting Parties may be convened "to consider general problems concerning the application of the Conventions and of the Protocol." Although some might consider that a meeting to discuss "general problems" might not have a direct impact on the conduct of Parties during an armed conflict, several experts pointed out that all "general problems" concerning compliance with international humanitarian law necessarily stem from specific violations. Thus, there should be no hesitancy to convene meetings of High Contracting Parties, as any decisions or deliberations will be relevant to state practice. A number of those who saw some merit in a conflict-specific meeting of High Contracting Parties indicated that such a meeting would not have an effect without the possibility of adopting sanctions in case of non-compliance.

Article 7 meetings of High Contracting Parties were discussed, at one seminar, as a potentially valuable opportunity to achieve State consensus on interpretations of general issues of international humanitarian law. Such a consensus on interpretation was considered easier to secure than agreement on revisions or amendments to the law.

Under Article 7 of the First Additional Protocol, the depositary of the Additional Protocol convenes meetings of the High Contracting Parties at the request of one of the Parties. Some participants suggested that the ICRC might also take an active role to propose that the depositary convene a meeting, noting that it is often politically difficult for States to take such an initiative. One new proposal was for meetings of High Contracting Parties to be convened on the basis of a report on problems related to lack of respect for international humanitarian law. Although some advocated for the report to be submitted by the ICRC, it was generally considered that this might have a negative impact on the neutrality of the institution. Alternatively, a proposal was made for a new expert body to be created whose task it would be to compile reports from States, non-governmental organizations, and individuals, for submission to the High Contracting Parties. This body would not take decisions on compliance, but would simply put together the report and request the meeting to be convened.

International Fact Finding Commission²⁰ (Additional Protocol I, art. 90)

Of all discussions of existing mechanisms, the greatest support was voiced for the International Fact Finding Commission (IFFC) and the advantages that might be gained through its seizure. The Commission was described as an existing body of expert members, poised ready to aid in the efforts to improve compliance with international humanitarian law, both through fact finding as well as by assisting with reconciliation efforts through its "good offices" function. Compared to the enquiry procedure described above, it has the advantage of being a permanent body with a standard procedure.

However, the **lack of will** by parties to an armed conflict was seen as the main impediment in the existing IFFC procedure that is based on State initiative and acceptance. For States that might be subject to enquiry, they may decide not to seize the Commission because they are protective of sovereignty, unwilling to have their actions scrutinized by others, or concerned that the Commission's findings might have a direct impact on State

²⁰ The Commission is often referred to, in the alternative, as the International Humanitarian Fact Finding Commission (IHFFC).

responsibility and possibly also on issues related to the *ius ad bellum* (international rules governing the right to employ force). However, it was noted that recent advances such as the adoption of the International Criminal Court Statute and developments in the context of the World Trade Organization²¹ signal a change in State willingness to accept scrutiny by others. To benefit from this shift in attitude, however, requires awareness building concerning the utility of and need for the International Fact Finding Commission.

It was urged that the **UN should be encouraged to utilize the International Fact Finding Commission**,²² for example based on UN Charter Chapter VII, and thus use the expertise of its members. The question was asked why the UN has thus far used *ad hoc* fact-finding missions and not relied on the existing International Fact Finding Commission. Given their expertise in international humanitarian law the members of the Commission may be used in fact finding missions mandated by the UN, and thus have the opportunity to prove in practice their competence and increase the acceptability of future work of the International Fact Finding Commission.

To counter the problem of lack of will some participants advanced the possibility of **amendments to the trigger mechanism** of the International Fact Finding Commission, in order to dissociate seizure of the Commission from State initiative. Several proposals were put forward: The Commission may have a *proprio motu* competence; a right of initiative could be given to non-governmental organizations or individuals; protecting powers or the UN Security Council may make a referral to the Commission. Where the International Fact Finding Commission itself takes initiative to encourage States to seize it for enquiry, it was recommended that they make public a State refusal to do so. It was reminded that, without any change to Article 90 or existing procedures, States not involved in an armed conflict might trigger the Commission, provided that the States party to an armed conflict have accepted the Commission's competence, by either Declaration or *ad hoc* acceptance. Third states should also encourage parties to an armed conflict to seize the International Fact Finding Commission.

In response to concerns that the procedures of the Commission are prohibitively cumbersome or heavy, Commission members advised that there is **freedom by consent to alter the procedures** and to adopt others on an *ad hoc* basis that might be more compatible with a given situation. For example, it was proposed that the membership of the Commission for a specific enquiry might be modified to a smaller number of three (from the seven members foreseen in Article 90).

Furthermore, more emphasis should be placed on the alternative role of the International Fact Finding Commission, through the offering of the **Commission's good offices**, which, as compared to the enquiry function, has the advantage of being forward-looking and thus perhaps perceived as less threatening to state sovereignty. It was submitted that an appeal to the good offices of the Commission might be included in bilateral agreements between parties to an armed conflict and the procedures adapted to the needs of the parties.

Some suggested that the International Fact Finding Commission should have **quasi-judicial powers** to give binding decisions. Also, one participant considered the main problem to be the question of publication of results, recommending that the Commission should be able to make its findings public.

²¹ In relation to the World Trade Organization, States have accepted procedures with a certain degree of automatic review.

²² Similarly, during the Bruges seminar it was suggested that the European Union adopt a common position calling upon European States to make use of the International Fact Finding Commission.

A major problem for some countries appears to be the **financial burden** that they have to bear if the International Fact Finding Commission takes action. This argument of cost was seen as a crucial issue for the acceptability of any compliance mechanism. To address this issue, some participants advocated for the creation of a fund to be managed by an independent body, where fifty percent of the costs of a Commission enquiry would come from the fund and the other fifty percent from the parties to the conflict in question.

Protecting Powers and their substitutes (Geneva Conventions I-IV, arts. 8/8/8/9; Additional Protocol I, art. 5)

Although the Geneva Conventions and the First Additional Protocol foresee an *obligation* to designate a Protecting Power, this mechanism has seldom been used since World War II. Some participants claimed that this provision has now fallen into disuse, doubting that the mechanism can be revived.²³ A number of possible reasons for the failure to designate a Protecting Power were indicated: (1) the perception that very few States are considered "neutral" and either able or willing to carry out the role of Protecting Power; (2) the majority of current conflicts are non-international armed conflicts, where Protecting Powers are not foreseen; (3) States may not recognize the existence of the armed conflict; (4) sometimes diplomatic relations are maintained despite the conflict; (5) often the ICRC *de facto* undertakes most of the functions of a Protecting Power.

In order to revitalize the role of Protecting Powers, a number of suggestions were made:

- Improve knowledge of the potential utility of Protecting Powers.
- Establish a list of neutral States willing and able to take on the role of Protecting Powers.
- Suggest appointment of a single Protecting Power common to all parties in the armed conflict.
- Conversely, to lighten the burden on one or two Protecting Powers, appoint three States with one State coming from the region of the conflict.
- Entrust to the Protecting Power the function of referral of alleged grave breaches and other serious violations of international humanitarian law to the IFFC, removing the condition of consent of/initiative by the parties to the conflict.

Participants also proposed that the ICRC should display a greater readiness to accept the role of substitute protecting power or that the ICRC should automatically take this role. However, it was noted that the ICRC prefers to act from its own legal basis, as this enables the institution to freely pursue its initiatives without threat to the fundamental principles of neutrality and independence.

Cooperation with the United Nations (Additional Protocol I, art.89)

Article 89 of the First Additional Protocol provides: "In situations of serious violations or 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." Although there was no in-depth discussion on whether this provision creates an *obligation* to resort to the UN in situations of serious violations of international humanitarian law, many of the suggestions from participants as to how States might fulfil their common Article 1 obligation referenced cooperation with the UN and greater use of the various UN bodies and mechanisms for IHL compliance. When encouraging States to consider cooperation with the UN in this regard, participants noted the increasingly active role the UN,

²³ Interestingly, it was noted that although European governments may see this mechanism as having fallen into disuse, governments in other regions (Asia and Africa in particular) allegedly are not aware of it or its potential.

and in particular the Security Council, are taking regarding compliance with international humanitarian law.

The numerous submissions referring to use of existing UN mechanisms are summarized below (p. 60), with the summary of deliberations concerning existing human rights mechanisms. More generally, participants made the following additional proposals for State cooperation with the UN:

- As constituent members of the various UN organs, States should request appropriate UN bodies to: issue statements on applicability of international humanitarian law and denunciation of violations committed; impose sanctions; establish *ad hoc* tribunals; trigger prosecution by the International Criminal Court; give specific mandate to peacekeeping forces to ensure a better respect for international humanitarian law.
- Create a Security Council-affiliated supervisory mechanism for international humanitarian law, which is triggered automatically when the Security Council makes a resolution authorizing use of force. This might be conceived of as either a permanent mechanism, triggered by Chapter VII resolution, or an *ad hoc* mechanism established for the specific context related to the authorized use of force.
- Ask the Security Council to, using its mandatory powers, decide that the International Fact Finding Commission must be seized.
- Advocate for the creation of UN *ad hoc* fact-finding commissions to evaluate international humanitarian law compliance. To the contrary, however, other participants noted that this role should be left to the International Fact Finding Commission and the UN should be encouraged to seize the existing Commission rather than create its own *ad hoc* fact finding commission.
- Seek a declaration from heads of States, at UN level similar to the millennium summit, in which they reiterate their support for international humanitarian law and set concrete targets.

Despite the frequent calls for State cooperation with the UN, some participants also strongly declared concerns that the Security Council in particular is currently too politicised and thus constrained and selective in which issues it addresses. Other experts, however, indicated that the Security Council must still be called upon to act, regardless of such concerns. Speakers recalled that, despite an apparent imbalance of power between decision makers, all States must recognize that the protections of international humanitarian law are universal, to be applied and complied with by both weak and strong nations. A number of experts identified a possible obligation on permanent members of the Security Council not to use an unreasonable or politically motivated veto, although other participants disagreed.

Interestingly, under this agenda topic many of the participants focussed on cooperation with regional bodies rather than with the UN.

Role of the ICRC

Participants at all seminars commended the ICRC for its initiatives concerning compliance with international humanitarian law, noting its great reputation for independence and impartiality and the prestige that has followed its successful endeavours. ICRC activities in areas of promotion of treaties and implementation, monitoring of IHL compliance, and contributions to the further development of international humanitarian law were specifically called to mind.

Commenting on the moral and political authority that the ICRC enjoys, many participants advocated for a greater ICRC role in reminding States and non-state actors of their obligations under international humanitarian law. To further improve IHL compliance, seminar participants suggested that the ICRC might consider doing the following:

- When aware of international humanitarian law violations in a particular context, ICRC might bring these concerns to a group of interested states, encouraging them to take action through denunciation, bilateral pressure, etc. A willingness to do this will enhance the ICRC role of facilitator, and protect it from having to take the role of denunciation.
- For particularly egregious and systematic violations of international humanitarian law, the ICRC should make public appeals – as it has done at various times over the years.
- In addition to its current efforts to educate armed forces concerning IHL, the ICRC should train legal advisors to the armed forces in the "soft skill" of how to make themselves heard in the chain of command during armed conflict regarding respect for international humanitarian law. This is not intended to increase knowledge, which the military instructor likely already has, but focuses rather on improving skills of influence during the armed conflict.

While calling for greater ICRC activity and initiative, participants also cautioned that the unique role of the ICRC must be protected; it must not be asked to do anything that would impinge on its neutrality and impartiality or compromise its operational activities and the protection offered on the ground for those vulnerable to the effects of armed conflict. In addition, the mandate of the ICRC must be reinforced in order to permit increased access to the victims of armed conflict. One participant who was not in favour of an increased role for the ICRC in denouncing violations noted that the institution is appropriately "victim-oriented" and not "violation-oriented".

All of the above-mentioned mechanisms are mandated for use during international armed conflict and do not apply *per se* to non-international armed conflict. Under Article 3 common to the four Geneva Conventions and First Additional Protocol and Article 18 of the Second Additional Protocol, the ICRC or other organizations may offer their services in non-international armed conflict. In addition, the International Fact Finding Commission has expressed its willingness to conduct an enquiry related to a non-international armed conflict. Further discussion of compliance with international humanitarian law in non-international armed conflict is included below, p. 64.

4) To what extent can existing supervision mechanisms or bodies of other branches of international law be effectively used in the field of international humanitarian law?

Seminar discussions on this topic focussed predominately on the various universal and regional human rights systems, and their consideration of issues of compliance with international humanitarian law.²⁴ It was noted that many human rights bodies – both universal and regional – have taken the initiative to consider issues of international humanitarian law; this growing trend may not be surprising given that, in times of armed conflict, human rights often are not respected unless international humanitarian law is likewise respected.

At all seminars, the majority of participants recognized a strong complementarity between human rights and international humanitarian law, particularly as to their common objective: the protection of humanity. Participants noted, in particular, the overlapping of fundamental human rights and provisions of international humanitarian law pertaining to issues such as right to life, prohibitions against torture and degrading treatment, and conditions of detention. However, participants at all seminars also cautioned strongly against

²⁴ Participants also discussed avenues of criminal repression, including bringing cases before the International Criminal Court or *ad hoc* tribunals and the pursuit of cases based on principle of universal jurisdiction. As criminal repression was, however, outside of the direct scope of the seminars, specific details of these interventions are omitted from this report.

any blurring of the distinction between the two bodies of law and voiced concerns that increased consideration by regional human rights bodies in particular might lead to a fragmentation or lack of universality in the application of international humanitarian law.

Regarding the degree to which existing human rights bodies and mechanisms should be encouraged to consider issues of international humanitarian law, despite the fact that each seminar witnessed some participants in favour of and others against the growing trend, there was a noticeable difference of majority opinion between the various seminars. Generally speaking, participants in Pretoria and Mexico City strongly supported the consideration of international humanitarian law by human rights bodies whereas in Kuala Lumpur experts preferred the reinvigoration of existing IHL mechanisms. Participants in Cairo and Bruges were equally in favour of both options.

The majority of participants in Pretoria and Mexico City who spoke on this issue advocated strongly in support of human rights bodies – and in particular, the regional systems – taking international humanitarian law into consideration.²⁵ Their increasing practice of considering international humanitarian law was generally considered useful, because of the availability of universal and regional human rights systems, the mounting public recognition they enjoy, and the acknowledgement that both human rights and international humanitarian law apply during armed conflict.

In Pretoria, the participants who did not support the creation of new IHL-specific mechanisms appeared to advocate predominately for the use of existing mechanisms of human rights to consider international humanitarian law. Many of the Pretoria experts expressed hope in the potential for the regional and sub-regional systems in Africa to become more effective in the field of international humanitarian law.

In Mexico City, much of the discussion in this regard focussed on the current practice of the Organization of American States (OAS) and its Inter-American Commission on Human Rights and Inter-American Court of Human Rights. In particular, the Inter-American Commission was commended for its invocation of international humanitarian law in country reports, general reports, and cases. The Inter-American Court has made it clear that neither the Commission nor the Court have a competency to directly apply international humanitarian law or pronounce on violations thereof, although they are free to consider and use international humanitarian law in interpretation of the provisions of the Inter-American Convention, in particular when discussing human rights in the context of an armed conflict. The OAS as a whole was also commended for being very IHL-oriented.

It should be noted that in both Pretoria and Mexico City, despite calls for human rights bodies to be more active in the field of international humanitarian law, participants also cautioned against blurring the distinctions between the two bodies of law. Furthermore, most experts were generally in favour of a *concurrent* examination of international humanitarian law by human rights mechanisms, in addition to the revitalization or creation of an IHL body where human rights would not be considered.

At each seminar, participants who advocated against the increased consideration of international humanitarian law by human rights bodies noted a number of specific problems: lack of express competence to examine issues of international humanitarian law, except where some fundamental human rights and protections of international humanitarian law overlap; lack of adequate knowledge of international humanitarian law by members of the human rights bodies; the slow pace of deliberations and decisions among many of the

²⁵ Examples include: European Court applying human rights to conflict situations; Inter-American system pointing out the IHL violations and then arguing how they violate the human rights enshrined in the Inter-American treaty. The African system might be given clear competency regarding international humanitarian law, although this is not yet clear.

human rights bodies; the lack of ability to address violations by armed groups; the opinion in some regions that human rights bodies are overly politicised or lack neutrality; the potential fragmentation or "regionalization" of international humanitarian law.

In Kuala Lumpur, in particular, the majority of participants speaking on this issue strongly cautioned that mechanisms should reflect the clear distinction between the bodies of human rights and international humanitarian law. In addition, a number of Asian experts expressed the opinion that human rights mechanisms have become too politicised, and thus there would be a risk of "tainting" international humanitarian law by subjecting it to consideration by human rights mechanisms. In conclusion, the majority of experts in Kuala Lumpur appeared to agree that although existing human rights bodies might be able to contribute something to the improvement of respect for international humanitarian law, given the inherent risks in this approach as described above, the human rights mechanisms should not be the only resort and should not be actively encouraged. They preferred, in the alternative, to focus efforts on the reinvigoration of the existing IHL mechanisms.

Seminar participants who advocated a greater emphasis on international humanitarian law by the existing human rights mechanisms suggested the following.²⁶

- Refer matters of international humanitarian law to the UN Commission on Human Rights, making use of its public and confidential procedures.
- Encourage the appointment of special rapporteurs or working groups on issues of IHL compliance.
- Broaden the scope of State periodic reports on compliance to include issues of international humanitarian law, to be followed as usual by public consideration and issuance of general observations or recommendations.
- Continue to support the consideration of international humanitarian law by regional human right bodies, using international humanitarian law indirectly as a source of authoritative guidance when applying human rights treaties in time of armed conflict.

5) Can new supervision mechanisms be envisaged?

6) Can a new international humanitarian law body be envisaged?

Participants at all seminars entered into creative and productive deliberations on what new proposals might be considered, summarized below.²⁷ Generally speaking, participants noted that proposals for new mechanisms must be considered as complementary to the improvements in existing mechanisms already recommended; some participants observed that new innovations should serve to strengthen existing mechanisms.

It was suggested that the creation of any new permanent IHL body be undertaken gradually, perhaps beginning as an *ad hoc* mechanism, a body with one or two functions, or a subject-specific mechanism focussed only on one aspect of the law, earning trust and support over time. This was in response to voiced concerns that the general atmosphere at present is not conducive to the establishment of a permanent or automatic institution. Participants attributed this to the problem of political will, noting that States appear to want to reserve the option only to initiate a procedure or utilize a mechanism when they stand to benefit from it. Participants in one seminar suggested that gradual acceptance might be accomplished through the initial creation of a regional IHL mechanism. Therefore, despite

²⁶ It should be noted that suggestions were made without discussion of feasibility or likelihood of change of mandate necessary for direct consideration of issues of IHL by existing human rights bodies and mechanisms. Without change of mandate, the scope of consideration would likely be limited to those human rights provisions that overlap directly with issues of international humanitarian law.

²⁷ In addition to new legal means by which to improve compliance with IHL, participants also noted the need to think outside the legal framework and contemplate non-legal means. These considerations are discussed throughout the report.

potential risk of double standards or selectivity, most participants advocated for a gradual beginning with *ad hoc* mechanisms or procedures, with the ultimate goal of gaining momentum leading to a permanent institution, in the same way that the *ad hoc* tribunals paved the way for the great success of acceptance of the International Criminal Court. In all cases, the universality of international humanitarian law must be preserved.

In order to more constructively consider proposals for a new IHL body or mechanisms, seminar participants advised an examination of the failures/weaknesses of existing mechanisms.²⁸ In brief, it was recommended that any new proposed mechanism or body:

- Must be neutral and impartial; any form of bias or self-interest on the part of an IHL supervisory body will undermine the whole process.
- Must have sufficient power over the States, in order to operate effectively.
- Must be able to act independent of state initiative/acceptance by states in question (i.e. must have mandatory powers).
- Must take considerations of cost and administrative burden into account.

Keeping these various considerations in mind, the participants gave the following proposals for new IHL supervision mechanisms or bodies:

One of the recurring proposals was for an **IHL Commission** or **Office of the High Commissioner for International Humanitarian Law**. Such a Commission might be created by resolution at a meeting of the High Contracting Parties, out of the International Conference of the Red Cross and Red Crescent, as a "treaty body" to the Geneva Conventions through an optional protocol, by the initiative of the ICRC, or through the UN Security Council or General Assembly. Many of the proposed functions for an IHL Commission are analogous to those found in existing human rights bodies, including the following:

- Reporting System
- Individual Complaints Mechanism
- Examination of complaints by one State against another, or complaints by/against armed groups
- Observation or fact-finding mechanism linked to reporting or general recommendations
- Quasi-judicial consideration of violations

Several of the proposed functions were also considered independently, without the creation of an overriding Commission. These individual functions and proposals are described in more detail below.

Regarding the proposed IHL Commission, some participants expressed apprehension that it would infringe on the already existing mandate and work of the ICRC, expressing preference for strengthening the role of the ICRC and other existing mechanisms. Other concerns voiced by participants included: costs, ineffective bureaucracy, and the current political climate and feasibility of creation.

Regarding the suggestion of a reporting system, a few variations were proposed. First, an **Information Exchange System / Periodic Reporting System** was considered, wherein States would submit reports on implementation of international humanitarian law.

²⁸ In addition, one presenter recommended that when considering new IHL mechanisms, lessons should be drawn from other bodies of international law. Specifically, the expert noted that in the fields of labour law, environmental law, and the law of disarmament, the various existing supervision and enforcement mechanisms (including reporting, enquiry, settlement of disputes, and non-compliance mechanisms) are designed to respond to the specificities and objectives of each respective branch of law. Furthermore, effective mechanisms often consider the control of compliance to be a long-term process of dialogue with a State, with the objective of encouraging a violating State back into the conventional community.

Given concerns about the "reporting fatigue" that exists under the mandatory reporting systems found in human rights and other legal fields, it was suggested that the IHL system might begin as a voluntary review procedure by States willing to submit such reports, and grow in acceptance and permanence from there.²⁹ Participants noted that this proposal is likely to be effective only in peacetime.

Other participants advocated for a system of **Ad hoc Reporting**, where States allegedly in violation of international humanitarian law are called upon to submit a report regarding the allegations, either during or post-conflict. Although acknowledging it would be difficult to expect a State in conflict or directly post-conflict to be accurate or to report factually, participants felt that such an *ad hoc* reporting system targeting alleged violators would be more effective regarding compliance and could be most easily implemented in cases of long-lasting conflict or occupation.

Regarding both of these reporting proposals, it was considered that reports might be submitted to a new IHL Commission (discussed above) or independently, perhaps to a Meeting of High Contracting Parties, to the International Conference of the Red Cross and Red Crescent, or to a committee established solely for the purpose of reviewing such reports and cross-checking the information therein.³⁰ Some experts felt that any reporting mechanism should be accompanied with an inspection mechanism. As with reporting systems in environmental law or disarmament law, it was noted that the ultimate objective of an international humanitarian law reporting system should be to give solutions or work towards improving the situation; thus it should also be considered what follow-up a reporting mechanism should require of the States under scrutiny.

Some participants voiced support generally for the institution of an **Individual Complaints Mechanism**,³¹ either independently or as part of an IHL Commission (discussed above). Advocates pointed to the self-disciplining effect such a mechanism would have on States and also highlighted its potential as a forum for the granting of remedies to victims of violations of international humanitarian law.³² It was again noted that this mechanism might not be effective in active armed conflict, except for long-lasting conflict or occupation. In the same vein as discussions about a reporting system, experts voiced hope that a complaints mechanism might somehow be linked with a follow-up tool leading to improvement of the situation for all, not simply addressing violations committed against a few complainants. Although the concept of an individual complaints mechanism was received favourably by some participants, many questions were left unanswered, however, concerning procedures, subject-matter jurisdiction, exhaustion of local remedies, involvement of armed groups, and whether the desired outcome should be recommendations, decisions, or some quasi-judicial determination.

More generally, it was suggested that, to be effective, the proposed IHL Commission should be endowed with **quasi-judicial powers**. This might be accomplished through the establishment of a **quasi-judicial Committee on IHL** or through granting such powers to an alternatively proposed **Committee of States** or **Committee of IHL Experts** (discussed below). The quasi-judicial capacities for the proposed IHL Commission were suggested as an alternative to a previous proposal to endow the existing International Fact Finding

²⁹ A prototype of the Information Exchange System (IES) was recently tested in Germany, on issues of national implementation. The German Red Cross prepared the framework and ministries fed the information.

³⁰ One participant encouraged participants to consider building on the current preparations for the 28th International Conference of the Red Cross and Red Crescent, where all States have been asked to submit a report on the status of their pledges and plans of action from the previous conference.

³¹ This mechanism has been under consideration for some time, beginning with a proposal by the Hague Appeal for Peace and currently under consideration by Amsterdam University.

³² The requirement to pay compensation to victims is contained in the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, Article 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." It was argued that this provision confers an entitlement for the individual to claim compensation.

Commission with such powers. The ICRC or other independent bodies could refer alleged violations of international humanitarian law to such a Committee or Commission for consideration.

A number of participants advocated for the creation of a diplomatic forum such as a **Committee of States** or **Committee of IHL Experts**, similar to the UN Commission on Human Rights or its Sub-Commission on the Promotion and Protection of Human Rights. Either body might be created independently or considered as part of an IHL Commission (discussed above). Such a Committee might give general observations to establish doctrine, consider both thematic and country-specific situations, designate special rapporteurs or working groups that might conduct fact-finding enquiries or otherwise look into specific issues of compliance with international humanitarian law. The participants did not deliberate on how the States might be selected for such a committee, but regarding the proposed Committee of IHL Experts, it was recommended that the experts be independent persons of high integrity, acting in their personal capacity. Participants considered the possibility that the ICRC might seize this Committee when particularly concerned about violations, without stepping outside of its mandate.

During one seminar, participants strongly endorsed the proposal for deployment of **"Monitors"** on the ground in armed conflict, who will be eyewitness to violations, inducing States to comply with international humanitarian law. It was proposed that the contribution of individuals to serve as monitors might come jointly from non-governmental organizations, the UN, and civil society, with some coordinating body. Ideally the monitors would be on the ground before the outbreak of hostilities, and thus might serve as part of a regional or global "early warning" system.

Other proposals that were not discussed in great detail included the following:

- **National Commissions on IHL – proposed fact-finding mandate**, whereby the national commissions would be given the mandate to monitor or carry out fact-finding tasks while a conflict is ongoing. It was noted that States might be more comfortable with this suggestion than with an enquiry by the International Fact Finding Commission, given that it would be a national body. Such a national mechanism should not, however, be considered as an obstacle to the initiatives of an international mechanism or body.
- Based on concepts from the 1954 Convention for Cultural Property:
 - The creation of a **National High Commissioner for IHL** (see Art. 6 of the Regulations for the Execution of the 1954 Convention);
 - **National on-site inspectors** (into armed forces, police forces, government authorities) (see Art. 7 of the Regulations for the Execution of the 1954 Convention);
 - **A representative for specially protected persons and groups** and protected objects, competent for persons or property under control of that country (based on Art. 2 (a) of the Regulations for the Execution of the 1954 Convention).
- **Network of Internal Lobbies**, establishing a regional or global network of internal elites from States (Ministries of Foreign Affairs, Ministries of Defence, parliamentarians) who will advocate together for greater compliance with international humanitarian law. Such a network might also be useful for dissemination efforts and serve as a pressure group to address the problem of lack of political will of States.

III. Discussion Theme II – How to Ensure Compliance in Non-International Armed Conflicts

The spirited discussions on the issue of improving compliance during non-international armed conflicts revealed the expert participants' interest in this particularly challenging task. As most current armed conflicts are waged within the boundaries of states, the participants welcomed the opportunity to wrestle with this pressing and timely subject.

The questions posed during this portion of the seminars dealt both with how to better hold armed groups accountable for compliance with international humanitarian law, as well as what mechanisms or procedures might be envisaged to increase respect for international humanitarian law by both State actors and armed groups.

Seminar participants concurred that both State actors and armed groups, without question, are bound by the rules of international humanitarian law applicable in non-international armed conflict.³³ However, participants also noted a number of obstacles that impede attempts to ensure their compliance: States often deny the applicability of international humanitarian law out of reluctance to acknowledge that a situation of violence amounts to an internal armed conflict and an unwillingness to grant "legitimacy" to the armed group by recognizing them as party to a conflict. The frequent "internationalization" of many contemporary internal armed conflicts creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. Furthermore, armed groups often lack sufficient incentive to abide by international humanitarian law, given that implementation of their IHL obligations is usually of little help to them in avoiding punishment under domestic law for their mere participation in the conflict. Other problems discussed include the asymmetrical nature of the relationship and the methods of warfare between State armed forces and armed groups; increased prevalence of involvement of private security companies in situations of armed conflict; and the dilemmas posed by conflict in failed states.

One recurrent theme throughout the deliberations was the importance of taking into account the cause of the conflict or the motivation of the armed groups, when considering what incentives or solutions might work in improving compliance. The motives for waging war are as diverse as the actors involved: pursuit of power, territorial disputes, economic interests, ethnic or religious differences, denial of fundamental human rights or the rights of minorities, or common criminality. Participants cautioned that any proposed solution – whether supervision mechanisms, incentives offered, or mediation negotiations – must take the objectives of the parties to the conflict into consideration. Proposals should also take into account other characteristics that may vary from one non-international armed conflict to another, including the level of organization and control of the armed group and the degree of intensity of the conflict and violence in that particular context.

As one means to address compliance with international humanitarian law by all actors, participants also considered the potential of reaffirming the essential considerations of humanity, perhaps through a text that would gather and reiterate the fundamental legal standards that should be observed in all situations of organized armed violence.

1) How can armed groups better be held accountable for compliance with international humanitarian law?

Although it was acknowledged that armed groups are bound by the provisions of international humanitarian law governing non-international armed conflict, it was

³³ Norms of international humanitarian law applicable in non-international armed conflict includes the provisions of Article 3 common to the four Geneva Conventions, Additional Protocol II (where the State has ratified), and norms of customary international law.

recommended that better accountability by armed groups for international humanitarian law might be achieved by granting them an opportunity to express their consent to be bound by the rules, something not provided for in existing IHL treaty law. The express consent would provide evidence of willingness to comply and could make a tremendous impact in terms of dissemination.

Participants advocated for the encouragement of **special agreements** between States and armed groups, such as those envisaged under common Article 3 (3) of the Geneva Conventions, considering such agreements to be one of the most powerful ways under the current treaty regime to better regulate non-international armed conflict. Special agreements provide added incentive to comply based on mutual consent of the parties, making clear the equal international humanitarian law obligations on both the State and armed groups. The primary obstacle would be the willingness of States to enter into such agreements, in particular where the State denies that the violence has reached the level of internal armed conflict or where the State refuses to acknowledge the armed group as party to the conflict. It must be emphasized that the plain language of common Article 3 indicates that a special agreement does not affect the legal status of the parties.

If a special agreement on implementing a broader scope of international humanitarian law obligations is unattainable, State actors and armed groups might be convinced to reach a limited agreement on selective IHL provisions that should appeal to both sides, for example safety zones or hospital zones, provisions on missing persons found in Article 33 of the First Additional Protocol, or judicial guarantees. An agreement on a more limited number of additional provisions would not change the fact that the parties to the armed conflict would nevertheless remain bound to all applicable international humanitarian law norms.

A **unilateral declaration** by the armed group of their commitment to comply with international humanitarian law might also be pursued, especially where the State is unwilling to enter into a special agreement. A tool already utilized by the Geneva Call³⁴ with regard to the Ottawa Treaty banning anti-personnel landmines, the aim of such a declaration is to provide a self-disciplining effect on the armed groups, in particular where groups are concerned about their public image and reputation. Although acknowledging the risk that unilateral declarations might be made for purely political motives without real commitment to adhere to the rules stated therein, seminar participants regarded the declarations positively, as an additional tool of leverage available to encourage compliance with international humanitarian law. For greater enforceability, a number of participants suggested that the unilateral declaration be combined with a verification mechanism that might supervise compliance with international humanitarian law in the conflict. It was unclear with whom the declarations should be deposited, although one expert suggested the creation of an "International Forum for Non-State Actors" that might serve as depository. The roles of supervision and depository also might be given to a proposed IHL Commission, discussed previously, or to the ICRC, although there was some opposition from participants pointing to the limits of the ICRC mandate.

Armed groups should also be encouraged to adopt an internal code of conduct or disciplinary code incorporating international humanitarian law provisions. Although perhaps less public than a declaration or special agreement, this device might lead to greater implementation of IHL norms by the armed group and thus more directly impact their training and dissemination. The willingness of the armed group to include these provisions might also be made public.

³⁴ Geneva Call is a non-governmental organization dedicated to engaging armed groups in a landmine ban and to respect humanitarian norms. To facilitate this process, Geneva Call provides the opportunity for armed groups to sign a "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action."

Finally, it was also suggested that a commitment to adhere to international humanitarian law norms be included in ceasefire agreements. Such a commitment would apply to provisions of the law that come into force after the cessation of hostilities, such as provisions for repatriation, and would also be important in case of renewal of hostilities.

2) What kind of incentive can be given to armed groups to apply international humanitarian law in practice, given the fact that they enjoy no criminal immunity for mere participation in hostilities?

When faced with internal armed conflict, States are likely to react with repressive action and severe penalties against members of armed groups, even when they comply with international humanitarian law. The participants noted that this leaves the armed groups with little incentive to adhere to international humanitarian law in practice, as they know they will likely face maximum penalties for mere participation in hostilities.

When asked what alternative incentives might be given to armed groups to comply with international humanitarian law, participants engaged in intense discussions about the possibilities of a **grant of immunity from prosecution for participation in the armed conflict**. Throughout the consideration of possible methods for granting immunity, discussed below, it was of course underscored by all participants that there can be no amnesty or other form of immunity from criminal process for alleged war crimes or serious violations of international humanitarian law.

Participants saw great potential in the possible **granting of amnesty** to members of armed groups for acts of mere participation in hostilities. Recognizing that the Second Additional Protocol's formulation that States should consider granting the "broadest possible" amnesties (Additional Protocol II, art. 6(5)) comes only at the end of an armed conflict and contains no guarantees for the members of armed groups, participants recommended that States be persuaded to commit themselves to a **mandatory amnesty** for acts of mere participation in hostilities. In the words of one participant, it is simply a matter of, in non-international armed conflicts, refraining from prosecution of acts that would be lawful in an international armed conflict.

Participants advocated for a link between a proposed grant of amnesty by the State and an express consent of compliance with international humanitarian law by the armed group, recognizing that if members of armed groups are given the necessary guarantees, they might more readily commit themselves to abide by the provisions of international humanitarian law. Therefore, States might make such a commitment in a special agreement entered into with the armed group, making the amnesty contingent upon the armed group's commitment to and subsequent compliance with international humanitarian law.

States might also consider including in their criminal law some sort of immunity for acts of participation in hostilities. Although States may consider such a commitment to grant immunity to be an incentive for rebellion, participants believed that States could be convinced of the benefits that would follow, in terms of greater respect for international humanitarian law by both sides to the armed conflict. Some participants noted that such immunity would not cover all acts initiating rebellion or an uprising; regarding possible prosecution for resorting to armed violence in violation of the national law of a State, the authorities in power should abstain from applying the maximum penalty.

Participants reflected upon the recent practice in the Latin American context and elsewhere of grants of improper "blanket" amnesties for war crimes and other serious violations of international humanitarian law and human rights law, most frequently granted to State actors. Due to this practice, some participants who otherwise supported granting of immunity for participation in hostilities were hesitant to embrace the label "amnesty". In

Mexico City, therefore, it was suggested not to use the word “amnesty” but to use a different term for this grant of immunity permissible under international humanitarian law.

Although amnesties were the primary focus of deliberation, participants also discussed a possible **reduction of punishment** in cases of compliance with international humanitarian law where, during a domestic trial of members of armed groups for taking part in hostilities, the tribunal will take their level of respect for international humanitarian law into consideration when deciding upon punishment or sentences. A number of participants saw this as a useful incentive.

A final suggestion was that armed group members be afforded some sort of **"combatant-like" status**, if they fulfil certain conditions such as distinction from civilian population and respect for the provisions of international humanitarian law. During the limited discussions of this proposal, diverging views were expressed.

In addition to these legal incentives, the seminar experts also considered what **strategic incentives or arguments** might be used to convince armed groups, as well as State actors, of the benefits and protections of adherence to international humanitarian law. Armed group leadership should be counselled that compliance might lead to the following gains: reciprocal respect by the State actors, including proper treatment of detained members of the armed group; increased effectiveness and cohesiveness of the armed group itself; enhanced legitimacy as a political actor; saved lives and preservation of the dignity of civilians; greater probability of dialogue with the State; facilitation of aid or assistance to conflict-affected areas through agreed upon "humanitarian corridors". In addition, the armed groups should be reminded that one day the conflict will end, and that regardless of whether they take the role of legitimate governing authority or not, they may be held accountable for the crimes they committed during the conflict. Conversely, participants observed that many of these incentives might not appeal to armed groups that are motivated by pure criminality or with links to organized crime. The strategic arguments raised will have to take into consideration the motivation and objectives of the armed group.

Participants remarked that States might also be receptive to many of these strategic arguments, especially where the conflict is long lasting or where there is protracted violence between various armed groups. Additional considerations to be presented to States included the following: criminalization alone is likely to lead to unlimited violence; respect for international humanitarian law may serve as a model for humanitarian respect within civil society; adhering to international humanitarian law and calling upon the armed group to do the same may lead to a correlative stigmatization or change in public perception of the armed group if they refuse to comply.

The prevalent challenge conveying such strategic arguments, however, is the question of who can serve as a messenger, to the armed groups in particular. Participants persisted in calling upon the ICRC to take this role, referring to the Institution's proven practice in establishing contacts with armed groups, in order to both recall their obligations under international humanitarian law, as well as to advocate for protection and assistance for the civilian population. Although other actors might use similar strategies when attempting to negotiate between armed groups and State actors, many participants concluded that the ICRC is in the best position to succeed in this regard, especially in light of its legal bases for action during non-international armed conflict.

It was suggested that the ICRC undertake to prepare a study of practice in non-international armed conflicts with a view to identifying situations in which amnesties or something similar to combatant status were granted to armed groups and to summarize the "lessons learned". This study should also examine the motives that have in the past led armed groups and State actors to respect international humanitarian law.

3) How can existing international humanitarian law mechanisms and bodies be used in non-international armed conflicts?

None of the existing IHL supervision mechanisms, apart from the ICRC, are expressly mandated to address situations of non-international armed conflict. However, the **International Fact Finding Commission** has expressed a willingness to be seized in situations of non-international armed conflict, and most participants recommended that the Commission should indeed be utilised in this way, on an *ad hoc* basis.

In addition, participants considered how the **bilateral enquiry procedure** and the concept of **protecting powers** might be used as models for situations of non-international armed conflict. There was particular interest in the protective function of a protecting power, with participants submitting that the ICRC might step in as a substitute Protecting Power to establish contact between the parties, assist the victims, and remind the parties of their responsibilities under international humanitarian law. Third States, especially those who have credibility with both sides of the conflict, might consider doing the same, or might even be willing to attempt to negotiate between the State and the armed groups, as Norway has done in Sri Lanka. Regional bodies might also appoint facilitators to bring parties to an internal armed conflict together. Regardless of who plays the role, many participants noted that it is vital to have a neutral third party, who may offer their good offices to the parties to the conflict.

Once again, the **ICRC** was credited as the most probable to succeed in these efforts. Where outside actors might be accused of "illegal interference", the trusted and respected position of the ICRC, and the role acknowledged for it in common Article 3, puts it on a better footing to encourage special agreements or unilateral declarations, to advocate for the victims, or to call to mind the international humanitarian law obligations of both sides to the conflict.

In the absence of other existing mechanisms, participants stressed that States should criminalize serious violations of international humanitarian law under their national laws based on universal jurisdiction to make sure that violations can be punished, no matter whom the perpetrator might be. Domestic prosecution, which must cover both sides of the conflict, will be possible during an armed conflict, while international tribunals often only work after an armed conflict.

Given the lack of mandate among IHL mechanisms to deal with non-international armed conflicts, **mechanisms and bodies of other branches of international law** such as the UN Commission on Human Rights and the Inter-American Commission on Human Rights have taken initiative in this regard. However, as discussed previously, the absence of a formal mandate for international humanitarian law restricts their practice. Furthermore, human rights mechanisms lack the competence to deal directly with violations by armed groups, although they attempt to address them in reports or General Recommendations, or by finding States responsible for omission or acquiescence in the face of violations by armed groups.³⁵ The existing individual complaints mechanisms in human rights law are therefore only partially useful in situations of non-international armed conflict. Nonetheless, participants once again spoke of great hopes for the potential of the **regional systems** to address issues of compliance with international humanitarian law in non-international armed conflict, in particular in Africa and Latin America.

³⁵ One expert pointed out that one weakness of the existing system is that there is no international mechanism for scrutinizing compliance of armed groups, available in case of violations committed by a collectivity. For the time being one has to rely solely on concepts of individual responsibility for war crimes.

4) Is there a need for specific supervision, enquiry or fact-finding possibilities?

Deliberations concerning a new mechanism or body for addressing international humanitarian law compliance in non-international armed conflicts evoked many of the same sentiments as the previous discussions related to international armed conflict. As stated above, some participants were convinced that in the current political climate it is more advisable to consider beginning gradually, with *ad hoc* systems or with mechanisms incorporating a limited number of possible functions, and working towards a permanent comprehensive body in the future.

Despite this hesitation, participants nevertheless engaged in imaginative deliberations of what mechanisms might be worth considering for the long-term. Once again, the idea of an **IHL Commission** was raised, with participants suggesting that many of the functions considered previously in the context of international armed conflict might likewise be utilized for improving compliance in non-international armed conflicts. Individual functions might also be considered independently and might include **reporting**, a **complaints mechanism**, and **observation or fact-finding missions**. For an IHL Commission or any other individual mechanism to be successful in non-international armed conflict, it would have to be carefully considered how to include the rights and responsibilities of armed groups. For the non-international armed conflict context, it was also suggested that an IHL Commission might take on the additional tasks of supervising or monitoring unilateral declarations or special agreements entered into by the parties, or of serving as depository for such declarations or special agreements.

A slight variation was advanced during the discussions of non-international armed conflicts, with the suggestion of a **High Commissioner for IHL** or **IHL Ombudsman** modelled after the OSCE High Commissioner for National Minorities. In this respect, the High Commissioner or Ombudsman would be envisaged as a wise statesman who engages in discussions predominately behind the scenes, with a view to anticipating and ultimately resolving disputes. This was endorsed as potentially useful for internal armed conflicts, in particular.

Another new proposal was the establishment of a **pool of respected statesmen**, including former heads of states or ambassadors or former heads of humanitarian organizations, or a "committee of the wise", who might be called upon to intervene in non-international armed conflicts, perhaps negotiating between the State and armed groups to arrive at cease-fire or peace agreements.

In particular, at the Pretoria seminar, participants supported the idea that non-governmental organizations should be encouraged to report on international humanitarian law compliance in the same way as they do on human rights compliance.

In addition to specific proposals for new IHL mechanisms or procedures, seminar participants also discussed what steps might be taken more generally to improve respect for international humanitarian law in the context of non-international armed conflict. As with the discussions concerning international armed conflict, many participants advocated for increased **dissemination and education** to the armed groups, recalling to them their obligations under international humanitarian law and reminding them that because the conflict *will* come to an end some day, their future acceptance and position of power may rest on their adherence to the principles of international humanitarian law during the armed conflict. Dissemination *before* the outbreak of an internal armed conflict is essential, as it will not only help to curb violations during the armed conflict, but will ideally create a spirit of humanitarianism that will serve to mitigate the tensions within a society before the outbreak of armed conflict, hopefully making the outbreak less likely. Participants noted that it is important to educate the general public about international humanitarian law protections and

provisions, making people aware of under what circumstances it applies and what protections must be afforded.

Sanctions were also advocated, against States or armed groups who violate international humanitarian law in internal armed conflict (through cutting of supply lines and financial support, travel restrictions, weapons embargoes, etc.), as well as against States who aid armed groups who are violating international humanitarian law.

Finally it was recommended that armed groups be offered **technical assistance** in order to better comply with international humanitarian law, for example assistance with the clearance of landmines.