

REPORTS AND DOCUMENTS

International humanitarian law and the challenges of contemporary armed conflicts

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I. Introduction

This is the second report on “International Humanitarian Law (IHL) and the Challenges of Contemporary Armed Conflicts” that has been prepared by the International Committee of the Red Cross (ICRC) for an International Conference of the Red Cross and Red Crescent. In the years that have elapsed since the first report was presented to the 28th International Conference in Geneva, in December 2003, the daily reality of armed conflict has, unsurprisingly, not changed. While a factual description of the various conflicts that are being waged around the world today is beyond the scope of this report, suffice it to say that war has continued, inexorably, to bring death, destruction, suffering and loss in their wake.

Today, civilians still bear the brunt of armed conflicts. Civilians have remained the primary victims of violations of IHL committed by both State parties and non-State armed groups. Deliberate attacks against civilians, forced displacement of civilian populations, the destruction of infrastructure vital to the civilian population and of civilian property are just some examples of

prohibited acts that have been perpetrated on a regular basis. Individual civilians have also been the victims of violations of the law such as murder, forced disappearance, torture, cruel treatment and outrages upon personal dignity, and rape and other forms of sexual violence. They have been used as human shields. Persons detained in relation to armed conflicts have been deprived of their basic rights, including adequate conditions and treatment while in detention, procedural safeguards aimed at preventing arbitrary detention and the right to a fair trial. Medical personnel and humanitarian workers have also been the targets of IHL violations. In many instances, humanitarian organizations have been prevented from carrying out their activities or hampered in their efforts to do so effectively. This has further aggravated the plight of those whom they are meant to assist and protect. Attacks on journalists and other members of the media are a source of increasing concern as well.

While the suffering inflicted in war has not changed, the past four years have been characterized by growing public awareness of IHL and its basic rules – and therefore of acts that constitute violations of those rules. IHL principles and standards have been the focus not only of the usual expert debates but also, increasingly, of intense and wide-ranging governmental, academic and media scrutiny. Heightened interest in and awareness of IHL must be welcomed and encouraged, bearing in mind the fact that knowledge of any body of rules is a prerequisite to better implementation. Moreover, the 1949 Geneva Conventions have now become universal, making the treaties legally binding on all countries in the world. It is hoped that the ICRC's Study on Customary International Humanitarian Law, published in 2005, will also contribute to improved awareness of the rules governing behaviour in all types of armed conflicts.

The fact that IHL may be said to have stepped out of expert circles and to have fully entered the public domain has meant, however, that the risk of politicized interpretations and implementation of its rules has also increased. The past four years have provided evidence of this general trend. States have, on occasion, denied the applicability of IHL to certain situations even though the facts on the ground clearly indicated that an armed conflict was taking place. In other instances, States have attempted to broaden the scope of application of IHL to include situations that could not, based on the facts, be classified as armed conflicts. Apart from controversies over the issue of how to qualify a situation of violence in legal terms, there have also been what can only be called opportunistic misinterpretations of certain time-tested, specific legal rules. The tendency by some actors to point to alleged violations by others, without showing any willingness to acknowledge ongoing violations of their own, has also been detrimental to the proper application of the law.

The politicization of IHL, it must be emphasized, defeats the very purpose of this body of rules. IHL's primary beneficiaries are civilians and persons *hors de combat*. The very edifice of IHL is based on the idea that certain categories of individuals must be spared the effects of violence as far as possible regardless of the side to which they happen to belong and regardless of the justification given for armed conflict in the first place. The non-application or selective application of

IHL, or the misinterpretation of its rules for domestic or other political purposes, can – and inevitably does – have a direct effect on the lives and livelihoods of those who are not or are no longer waging war. A fragmentary approach to IHL contradicts the essential IHL principle of humanity, which must apply equally to all victims of armed conflict if it is to retain its inherent meaning at all. Parties to armed conflicts must not lose sight of the fact that, in accordance with the very logic of IHL, politicized and otherwise skewed interpretations of the law can rarely, if ever, have an impact on the opposing side alone. It is often just a question of time before one's own civilians and captured combatants are exposed to the pernicious effects of reciprocal politicization or deliberate misinterpretation by the adversary.

The purpose of this report, like the previous one, is to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action. The report is based on the premises outlined below.

First of all, the treaties of humanitarian law, notably the Geneva Conventions and their two Additional Protocols of 1977, supplemented by rules of customary humanitarian law, remain the relevant frame of reference for regulating behaviour in armed conflict. In the ICRC's view, the basic principles and rules governing the conduct of hostilities and the treatment of persons in enemy hands (the two core areas of IHL), continue to reflect a reasonable and pragmatic balance between the demands of military necessity and those of humanity. As discussed further on in this report, acts of violence with transnational elements, which have presented the most recent overall challenge for IHL, do not necessarily amount to armed conflict in the legal sense. Moreover, IHL is certainly not the only legal regime that can be used to deal with various forms of such violence.

Secondly, in the ICRC's view, the main cause of suffering during armed conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or to another reason – rather than a lack of rules or their inadequacy.

Thirdly, the law is just one among many tools used to regulate human behaviour and no branch of law, whether international or domestic, can – on its own – be expected to completely regulate a phenomenon as complex as violence. While IHL aims to circumscribe certain behaviour in armed conflict, there will always be States, non-State armed groups and individuals who will not be deterred from violating the rules, regardless of the penalty involved. The increase in suicide attacks targeting civilians in and outside of armed conflict is just a current case in point. In other words, the law, if relied on as the sole tool for eliminating or reducing violence, must be understood to have limits. Political, economic, societal, cultural and other factors that influence human conduct just as decisively must also be taken into account when contemplating comprehensive solutions to any form of violence.

Lastly, this report examines a number of issues that may be considered to pose challenges for IHL. The selection is non-exhaustive and does not purport to

include the full range of IHL-related subjects that the ICRC is currently considering or working on, or to which it may in future turn its attention.

II. IHL and terrorism

If, as has been asserted above, IHL principles and rules have entered the public domain over the past few years, it is in large part owing to debate over the relationship between armed conflict and acts of terrorism. The question that is most frequently asked is whether IHL has a role to play in addressing terrorism and what that role is.

IHL and terrorist acts

An examination of the adequacy of international law, including IHL, in dealing with terrorism obviously begs the question, “What is terrorism?” Definitions abound, both in domestic legislation and at the international level but, as is well known, there is currently no comprehensive international legal definition of the term. The United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others, whether and how acts committed in armed conflict should be excluded from its scope.¹

However, regardless of the lack of a comprehensive definition at the international level, terrorist acts are crimes under domestic law and under the existing international and regional conventions on terrorism and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity. Thus, as opposed to some other areas of international law, “terrorism” – although not universally defined as such – is abundantly regulated. The ICRC believes, however, that the very term remains highly susceptible to subjective political interpretations and that giving it a legal definition is unlikely to reduce its emotive impact or use.

IHL is the body of rules applicable when armed violence reaches the level of armed conflict, *and is confined only to armed conflict*, whether international or non-international. The relevant treaties are, of course, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, although IHL encompasses a range of other legally binding instruments and customary law as well. While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime.

It is a basic principle of IHL that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. The principle of distinction is a cornerstone of

¹ See note 3.

IHL. Derived from it are specific rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks and of the use of “human shields,” and other rules governing the conduct of hostilities that are aimed at sparing civilians and civilian objects from the effects of hostilities. IHL also prohibits hostage-taking, whether of civilians or of persons no longer taking part in hostilities.

Once the threshold of armed conflict has been reached, it may be argued that there is little added value in designating most acts of violence against civilians or civilian objects as “terrorist” because such acts already constitute war crimes under IHL. Individuals suspected of having committed war crimes may be criminally prosecuted by States under existing bases of jurisdiction in international law; and, in the case of grave breaches as defined by the Geneva Conventions and Additional Protocol I, they must be criminally prosecuted, including under the principle of universal jurisdiction.

IHL also specifically prohibits “measures of terrorism” and “acts of terrorism” against persons in the power of a party to the conflict. Thus, the Fourth Geneva Convention (Article 33) provides that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited,” while Additional Protocol II (Article 4(2)(d)) prohibits “acts of terrorism” against persons not or no longer taking part in hostilities. The context in which referral is made to these prohibitions suggests that the main aim is to underline a general principle of law, namely, that criminal responsibility is individual and that neither individuals nor the civilian population as a whole may be subjected to collective punishment, which is, obviously, a measure likely to induce terror.

In sections dealing with the conduct of hostilities, both Protocols additional to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. Additional Protocol I (Article 51(2)) and Additional Protocol II (Article 13(2)) stipulate that:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

The main purpose of these provisions is to reiterate the prohibition of acts committed in international or non-international armed conflict that do not provide a definite military advantage. While even a lawful attack against a military objective is likely to spread fear among civilians, these rules prohibit attacks specifically designed to terrorize civilians – such as campaigns of shelling or sniping at civilians in urban areas – that cannot be justified by the anticipated military advantage.

The explicit prohibition of acts of terrorism against persons in the power of the adversary, as well as the prohibition of such acts committed in the course of hostilities – along with the other basic provisions mentioned above – demonstrate that IHL protects civilians and civilian objects against these types of assault when committed in armed conflict. Thus, in current armed conflicts, the problem is not a lack of rules, but a lack of respect for them.

A recent challenge for IHL has been the tendency of States to label as “terrorist” all acts of warfare committed by organized armed groups in the course of armed conflict, in particular non-international armed conflict. Although it is generally agreed that parties to an international armed conflict may, under IHL, lawfully attack each other’s military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts. Thus, States engaged in non-international armed conflicts have, with increasing frequency, labelled any act committed by domestic insurgents an act of “terrorism” even though, under IHL, such an act might not have been unlawful (e.g. attacks against military personnel or installations). What is being overlooked here is that a crucial difference between IHL and the legal regime governing terrorism is the fact that IHL is based on the premise that certain acts of violence – against military objectives – are not prohibited. Any act of “terrorism” is, however, by definition, prohibited and criminal.²

The need to differentiate between lawful acts of war and acts of terrorism must be borne in mind so as not to conflate these two legal regimes. This is particularly important in non-international armed conflicts, in which all acts of violence by organized armed groups against military objectives remain in any event subject to domestic criminal prosecution. The tendency to designate them additionally as “terrorist” may diminish armed groups’ incentive to respect IHL, and may also be a hindrance in a possible subsequent political process of conflict resolution.

Legal qualification

The legal qualification of what is often called the “global war on terror” has been another subject of considerable controversy.³ While the term has become part of daily parlance in certain countries, one needs to examine, in the light of IHL, whether it is merely a rhetorical device or whether it refers to a global armed conflict in the legal sense. On the basis of an analysis of the available facts, the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the “war on terror.” Simply put, where violence reaches the threshold of armed conflict, whether international or

2 As already mentioned, one of the main issues holding up the conclusion of negotiations on the draft UN Comprehensive Convention on International Terrorism is whether and how acts committed in armed conflicts should be excluded from its scope. While there is general agreement that acts committed by State armed forces in international armed conflicts would not be covered by the Convention, the point in dispute is whether acts committed by non-State armed groups should be excluded. For the reasons mentioned above, the ICRC believes that the Convention must not define as “terrorist” those acts that are permissible under IHL when committed by organized armed groups in non-international armed conflict. As already emphasized, all acts of violence committed by organized armed groups are already punishable under domestic criminal law.

3 More recently, it has been said that the “global war on terror” is limited to “Al-Qaeda, the Taliban and associated forces,” but that characterization does not change the basic premises of the approach.

non-international, IHL is applicable. Where it does not, other bodies of law come into play.

Under the 1949 Geneva Conventions, international armed conflicts are those fought between States. Thus, the 2001 war between the US-led coalition and the Taliban regime in Afghanistan (waged as part of the “war on terror”) is an example of an international armed conflict.

IHL does not envisage an international armed conflict between States and non-State armed groups for the simple reason that States have never been willing to accord armed groups the privileges enjoyed by members of regular armies.⁴ To say that a global international war is being waged against groups such as Al-Qaeda would mean that, under the law of war, their followers should be considered to have the same rights and obligations as members of regular armed forces. It was already clear in 1949 that no nation would contemplate exempting members of non-State armed groups from criminal prosecution under domestic law for acts of war that were not prohibited under international law – which is the crux of combatant and prisoner-of-war status. The drafters of the Geneva Conventions, which grant prisoner-of-war status under strictly defined conditions, were fully aware of the political and practical realities of international armed conflict and crafted the treaty provisions accordingly.

The so-called “war on terror” can also take the form of a non-international armed conflict, such as the one currently being waged in Afghanistan between the Afghan government, supported by a coalition of States and different armed groups, namely, remnants of the Taliban and Al-Qaeda. This conflict is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL. The same body of rules would apply in similar circumstances where the level of violence has reached that of an armed conflict and where a non-State armed actor is party to an armed conflict (e.g. the situation in Somalia).

The question that remains is whether, taken together, all the acts of terrorism carried out in various parts of the world (outside situations of armed conflict such as those in Afghanistan, Iraq or Somalia) are part of one and the same armed conflict in the legal sense. In other words, can it be said that the bombings in Glasgow, London, Madrid, Bali or Casablanca can be attributed to one and the same party to an armed conflict as understood under IHL? Can it furthermore be claimed that the level of violence involved in each of those places has reached that of an armed conflict? On both counts, it would appear not.

Moreover, it is evident that the authorities of the States concerned did not apply conduct of hostilities rules in dealing with persons suspected of planning or having carried out acts of terrorism, which they would have been allowed to do if

4 The sole exception is set out in Article 1(4) of Additional Protocol I and is subject to specific conditions, i.e. the existence of a war of national liberation.

they had applied an armed conflict paradigm. IHL rules would have permitted them to directly target the suspects and even to cause what is known as “collateral damage” to civilians and civilian objects in the vicinity as long as the incidental civilian damage was not excessive in relation to the military advantage anticipated. Instead, they applied the rules of law enforcement. They attempted to capture the suspects for later trial and took care in so doing to evacuate civilian structures in order to avoid all injury to persons, buildings and objects nearby.

To sum up, each situation of organized armed violence must be examined in the specific context in which it takes place and must be legally qualified as armed conflict, or not, based on the factual circumstances. The law of war was tailored for situations of armed conflict, both from a practical and a legal standpoint. One should always remember that IHL rules on what constitutes the lawful taking of life or on detention in international armed conflicts, for example, allow for more flexibility than the rules applicable in non-armed conflicts governed by other bodies of law, such as human rights law. In other words, it is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war. This is not always fully appreciated.

Status of persons

The ICRC also adopts a case-by-case approach, based on the available facts, in determining the legal regime that governs the status and rights of persons detained in connection with what is called the “global war on terror”. If a person is detained in relation to an international armed conflict, the relevant treaties of IHL fully apply. If a person is detained in connection with a non-international armed conflict, the deprivation of liberty is governed by Article 3 common to the four Geneva Conventions, other applicable treaties, customary international law, and other bodies of law such as human rights law and domestic law. If a person is detained outside an armed conflict, it is only those other bodies of law that apply.

In this context, it bears repeating that *only in international armed conflicts* does IHL provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives. In case of capture, combatants become prisoners of war and, as such, cannot be tried or convicted for having participated in hostilities. The corollary is that captured combatants can be interned, without any form of process, until the end of active hostilities. Captured combatants may, however, be criminally prosecuted for war crimes or other criminal acts committed before or during internment. In the event of criminal prosecution, the Third Geneva Convention provides that prisoners of war may be validly sentenced only if this is done by the same courts and according to the same procedure as for members of the armed forces of the detaining power. It is often not understood that prisoners of war who have been acquitted in criminal proceedings may be held by the Detaining Power until the end of active hostilities. In case of doubt about the

status of a captured belligerent, such status must be determined by a competent tribunal.

IHL treaties contain no explicit reference to “unlawful combatants.” This designation is shorthand for persons – civilians – who have directly participated in hostilities *in an international armed conflict* without being members of the armed forces as defined by IHL and who have fallen into enemy hands. Under the rules of IHL applicable to international armed conflicts, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” It is undisputed that, in addition to the loss of immunity from attack during the time in which they participate directly in hostilities, civilians – as opposed to combatants – 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 “privilege” of not being liable to prosecution for taking up arms, and they are thus sometimes referred to as “unprivileged belligerents” or “unlawful combatants.”

Regarding the status and rights of civilians who have directly participated in hostilities *in an international armed conflict* and have fallen into enemy hands, there are essentially two schools of thought. According to the first, “unprivileged belligerents” are covered only by the rules contained in Article 3 common to the four Geneva Conventions and (possibly) in Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. According to the other view, shared by the ICRC,⁵ civilians who have taken a direct part in hostilities, and who fulfil the nationality criteria set out in the Fourth Geneva Convention (Article 4),⁶ remain protected persons within the meaning of that Convention. Those who do not fulfil the nationality criteria are at a minimum protected by the provisions of Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I, applicable either as treaty law or as customary law.

Thus, there is no category of persons affected by or involved in international armed conflict who fall outside the scope of any IHL protection. Likewise, there is no “gap” between the Third and Fourth Geneva Conventions, i.e. there is no intermediate status into which “unprivileged belligerents” fulfilling the nationality criteria could fall.

The obvious question that arises here is what constitutes “direct” participation in hostilities and how the temporal aspect of participation should be defined (the wording is: “for such time as they take a direct part in hostilities”). As

- 5 This interpretation is implicitly recognized in Article 45(3) of Additional Protocol I – at least for States party to that treaty: “Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”
- 6 Pursuant to Article 4 of the Fourth 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.

is explained in Chapter IV.2 of the report, this is an issue that the ICRC has been striving to clarify since 2003.

Persons who have directly participated in hostilities can be interned by the adversary if this is absolutely necessary to the security of the detaining power. Under the Fourth Geneva Convention, a protected person who has been interned is entitled to have the decision on internment reconsidered without delay and to have it automatically reviewed every six months. While interned, a person can be considered as having forfeited certain rights and privileges provided for in the Fourth Geneva Convention, the exercise of which would be prejudicial to the security of the State, as laid down in Article 5 of that Convention and subject to the safeguards of treaty law and customary international law.

Under the Fourth Geneva Convention, persons who have been interned must be released as soon as possible after the close of the hostilities in the international armed conflict during which they were captured, if not sooner, unless they are subject to criminal proceedings or have been convicted of a criminal offence. This means that, after the end of an international armed conflict, the Fourth Geneva Convention can no longer be considered a valid legal framework for the detention of persons who are not subject to criminal proceedings.

In sum, it is difficult to see what other measures, apart from: (a) loss of immunity from attack, (b) internment if warranted by security reasons, (c) possible forfeiture of certain rights and privileges during internment and (d) criminal charges, could be applied to persons who have directly participated in hostilities without exposing them to the risk of serious violations of their right to life, physical integrity and personal dignity under IHL, such as attempts to relax the absolute prohibition of torture, and cruel and inhuman treatment. The ICRC would oppose any such attempts.

Combatant status, which entails the right to participate directly in hostilities, and *prisoner-of-war status*, do not exist in *non-international armed conflicts*. Civilians who take a direct part in hostilities in such conflicts are subject, for as long as they continue to do so, to the same rules regarding loss of protection from direct attack that apply during international armed conflict. The expert process mentioned above also aims to clarify the meaning of the notion of “direct participation in hostilities” in the context of non-international armed conflicts. Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes. Their rights and treatment during detention are governed by humanitarian law, human rights law and domestic law.

It must be emphasized that no one, regardless of his or her legal status, can be subjected to acts prohibited by IHL, such as murder, violence to life and person, torture, cruel or inhuman treatment or outrages upon personal dignity or be denied the right to a fair trial. “Unlawful combatants” are in this sense also fully protected by IHL and it is incorrect to suggest that they have minimal or no rights. One of the purposes of the law of war is to protect the life, health and dignity of all

persons involved in or affected by armed conflict. It is inconceivable that calling someone an “unlawful combatant” (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.

The preceding observations on the relationship between IHL and terrorism should not be taken to mean that there is no scope or need for further reflection on the interplay between the two legal regimes – IHL and the one governing terrorism – or for clarification or development of the law. Indeed, as will be demonstrated in the discussion on procedural principles and safeguards for internment or administrative detention (see Chapter III and Annex 1), the ICRC has been working on ways of dealing with specific legal challenges that are also posed by acts of terrorism. What is submitted is that the fight against terrorism requires the application of a range of measures – investigative, diplomatic, financial, economic, legal, educational and so forth – spanning the entire spectrum from peacetime to armed conflict and that IHL cannot be the sole legal tool relied on in such a complex endeavour.

Throughout its history, IHL has proven adaptable to new types of armed conflict. The ICRC stands ready to help States and others concerned to clarify or develop the rules governing armed conflict if it is those rules that are deemed insufficient – and not the political will to apply the existing ones. The overriding challenge for the ICRC, and others, will then be to ensure that any clarifications or developments are such as to preserve current standards of protection provided for by international law, including IHL. The ICRC is well aware of the significant challenge that States face in their duty to protect their citizens against acts of violence that are indiscriminate and intended to spread terror among the civilian population. However, the ICRC is convinced that any steps taken – including efforts to clarify or develop the law – must remain within an appropriate legal framework, especially one that preserves respect for human dignity and the fundamental guarantees to which each individual is entitled.

III. Procedural principles and safeguards for internment or administrative detention

Under the Fourth Geneva Convention, internment is the severest measure of control that may be taken against a protected person by a party to an international armed conflict. The Convention provides that internment, which is a form of deprivation of liberty without criminal charges, may be imposed only for “imperative reasons of security” (Article 78) or if the security of the detaining power makes it “absolutely necessary” (Article 42). Internment must cease once the reasons for it no longer exist, or at the very latest upon the end of active hostilities. The Convention also spells out basic procedural rules to ensure that States do not abuse the considerable measure of discretion they have in determining what acts constitute a threat to their security. It must be admitted, however, that the rules are fairly rudimentary from the point of view of individual protection. Moreover, recent State practice – e.g. internment by States party to

multinational coalitions – has been characterized by divergences in the interpretation and implementation of the relevant rules, which has given rise to serious concern.

Internment is also practised in non-international armed conflicts, and is explicitly mentioned in Additional Protocol II, which further elaborates on Article 3 common to the Geneva Conventions. However, the treaty provisions provide no further guidance on what procedure is to be applied in cases of internment. It is submitted that the gap must be filled by reference to applicable human rights law and domestic law, given that IHL rules applicable in non-international armed conflicts constitute a safety net that is supplemented by the provisions of these bodies of law.

The challenge of interpreting the existing provisions of IHL in relation to internment is therefore not a new one. What has posed a problem more recently, mainly as a result of counter-terrorist operations conducted outside armed conflict, is the administrative detention, i.e. the detention without criminal charges, of persons suspected of various degrees of involvement in acts of terrorism. While international human rights law does not prohibit all forms of such detention (e.g., confinement, under certain circumstances, of immigrants with a view to expulsion), it has been argued that administrative detention for national security reasons is not one of them. A related but separate issue is whether and when cases of administrative detention require States to derogate from the right to liberty of person under the relevant human rights treaties.

The recent practice of States in drafting and implementing anti-terrorism legislation has shown that administrative detention is being increasingly used as a preventative tool in the fight against terrorism. However, it has also demonstrated wide divergences in the interpretation of human rights law as regards the procedural rights of persons affected. Moreover, there is no agreement at the international level on whether administrative detention for security reasons is lawful. While many States seem to think so, some non-governmental organizations and experts vigorously contest that approach.

In addition to obvious protection needs and in order to ensure consistency in its dialogue with various detaining authorities, the ICRC has developed institutional guidelines, entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence.” The document, which reflects the ICRC’s official position and now guides its operations, was published in the *International Review of the Red Cross*, Vol. 87 No. 858 June 2005, pp. 375–391. It sets out a series of broad principles and specific safeguards that the ICRC believes should, at a minimum, govern any form of detention without criminal charges. The accompanying commentary serves to illustrate the sources – both treaty-based and other types, including policy and best practice – from which the standards were derived. It is important to stress that the principles and safeguards enunciated in the guidelines provide minimum standards that are meant to be further calibrated in each specific context of application.

An informal expert meeting on the procedural guarantees that should apply in situations of internment or administrative detention was co-organized by the ICRC and Case Western Reserve University in Ohio (USA) in September 2007 and may be the starting point of a subsequent broader discussion with States and other actors.

IV. The conduct of hostilities

A number of current and recent armed conflicts have placed questions relating to the conduct of hostilities high on the agenda of legal and military debate. These questions have also aroused growing public interest, not least because of the many pictures and news stories carried by the media of civilians killed or injured and civilian property destroyed in the course of military operations. The twin issues of targeting and the choice of weapons are at the heart of the debate. The following sections therefore focus on methods and means of warfare.

1. General issues, in particular asymmetric warfare

In its report to the 28th International Conference in 2003, the ICRC presented a comprehensive survey of the main challenges for the law regulating the conduct of hostilities. The report highlighted the divergences in the interpretation of certain rules, such as those relating to the definition of a military objective, the principle of proportionality and the precautions in attack and against the effects of attacks. For the most part, this analysis remains pertinent today.

Research carried out for the ICRC's Study on Customary International Humanitarian Law, published in 2005, shed further light on the rules applicable to the conduct of hostilities in international and non-international armed conflict. The Study confirmed that the main provisions of Additional Protocol I on the conduct of hostilities reflect customary law applicable in international armed conflicts. It also found that many of these provisions were customary in non-international armed conflicts. Thus, the development of customary law has largely filled gaps existing in treaty law, which is still fairly rudimentary.

It should nevertheless be noted that, for the most part, the relevant rules discussed in the study simply reiterate the provisions of Additional Protocol I and thus do not clarify existing divergences in the interpretation and application of certain rules on the conduct of hostilities. This should come as no surprise since the aim of the study was to examine the practice and *opinio iuris* of States in order to identify the content of customary law. The extensive review of practice collected on the subject did not allow for the formulation of customary rules that would be more detailed than the relevant treaty-based provisions.

It is also worth noting that the concrete application of the treaty-based and customary rules that were identified in the 2003 ICRC report as requiring clarification are probably even more challenging in today's conflict environment,

which is increasingly characterized by asymmetric warfare (in particular owing to the growing involvement of non-State armed groups) and by urban warfare.

Asymmetric warfare

Asymmetric warfare is characterized by significant disparities between the military capacities of the belligerent parties.⁷ Its fundamental aim is to find a way round the adversary's military strength. Asymmetry often causes today's armed confrontations to take a more brutal turn, in which there is seemingly little place for the rule of law. While asymmetric warfare may have many facets, it specifically affects compliance with the most fundamental rules on the conduct of hostilities, namely the principle of distinction and the prohibition of perfidy. The following section focuses solely on challenges related to this facet, contains various illustrations and does not purport to be exhaustive.

When under attack, a belligerent party that is weaker in military strength and technological capacity may be tempted to hide from modern sophisticated means and methods of warfare. As a consequence, it may be led to engage in practices prohibited by IHL, such as feigning protected status, mingling combatants⁸ and military objectives with the civilian population and civilian objects, or using civilians as human shields. Such practices clearly increase the risk of incidental civilian casualties and damage. Provoking incidental civilian casualties and damage may sometimes even be deliberately sought by the party that is the object of the attack. The ultimate aim may be to benefit from the significant negative impression conveyed by media coverage of such incidents. The idea is to "generate" pictures of civilian deaths and injuries and thereby to undermine support for the continuation of the adversary's military action.

Technologically disadvantaged States or armed groups may tend to exploit the protected status of certain objects (such as religious or cultural sites, or medical units) in launching attacks. Methods of combat like feigning civilian, non-combatant status and carrying out military operations from amidst a crowd of civilians will often amount to perfidy. In addition, the weaker party often tends to direct strikes at "soft targets" because, in particular in modern societies, such attacks create the greatest damage or else because the party is unable to strike the military personnel or installations of the enemy. Consequently, violence is directed at civilians and civilian objects, sometimes in the form of suicide attacks. Resort to hostage-taking is also a more frequent phenomenon.

The dangers of asymmetry also relate to the means of warfare likely to be used by the disadvantaged forces. It appears more and more likely that States or

7 Many different definitions of "asymmetric warfare" have been provided in the doctrine, but it is beyond the scope of this report to attempt to define the term. As used here, it simply denotes a relationship characterized by inequality between the belligerents – in particular in terms of weaponry. Asymmetry is certainly not a new phenomenon, but it is an increasing common feature of contemporary conflicts.

8 The notion of "combatant" is used here in its generic sense, indicating persons who do not enjoy the protection against attack granted to civilians, but does not imply a right to combatant or prisoner-of-war status. It therefore includes civilians directly participating in hostilities.

armed groups that are powerless in the face of sophisticated weaponry will seek to acquire – or construct – chemical, biological and even possibly nuclear weapons (in particular, the “dirty bomb scenario”), against which traditional means of defending the civilian population and civilian objects are inadequate.

A militarily superior belligerent may tend to relax the standards of protection of civilian persons and civilian objects in response to constant violations of IHL by the adversary. For example, confronted with enemy combatants and military objectives that are persistently hidden among the civilian population and civilian objects, an attacker – who is legally bound by the prohibition of disproportionate attacks – may, in response to the adversary’s strategy, progressively revise his assessment of the principle of proportionality and accept more incidental civilian casualties and damage. Another likely consequence could be a broader interpretation of what constitutes “direct participation in hostilities” (see Section 2 below). The militarily stronger party may also be tempted to adopt a broader interpretation of the notion of military objective.⁹ Such developments would make the civilian population as a whole more vulnerable to the effects of hostilities.

In sum, military imbalances carry incentives for the weaker party to level out its inferiority by disregarding existing rules on the conduct of hostilities. Faced with an enemy that systematically refuses to respect IHL, a belligerent may have the impression that legal prohibitions operate exclusively for the adversary’s benefit. The real danger in such a situation is that the application of IHL will be perceived as detrimental by all the parties to a conflict (“spiral-down effect”) and this will ultimately lead to all-around disregard for IHL and thus undermine its basic tenets.

Urban warfare

Similar challenges concerning the definition of a military objective and the interpretation of the principle of proportionality and of precautionary measures also arise from the spread of urban warfare.¹⁰ Military ground operations in urban settings are particularly complex: those resisting attack benefit from innumerable firing positions and may strike anywhere at anytime. The fear of surprise attacks is likely to reduce the attacker’s armed forces ability to properly identify enemy forces and military objectives and to assess the incidental civilian casualties and

9 Of particular concern is the thinking, which is not necessarily specific to asymmetric warfare, that advocates attacks on “non-military” targets in order to better achieve the desired effect(s) of military operations. For example, in order to lower the enemy’s morale or turn the population against the government, a belligerent may decide to choose targets deemed not essential for the survival of the civilian population, such as entertainment or recreational facilities, stores or shops distributing luxury goods and the like, targets which do not correspond to the traditional definition of military objectives.

10 There is a link between the spread of urban and asymmetric warfare: technologically inferior belligerents, being unable to defend themselves on open ground, will often seek refuge in an urban environment. However, the link between the two is not automatic: disadvantaged forces in asymmetric warfare may also seek refuge in remote mountainous settings, for example; also, urban warfare is increasingly common in symmetric armed conflicts.

damages that may ensue from its operations. Likewise, artillery and aerial bombardments of military objectives located in cities are complicated by the proximity of those objectives to the civilian population and civilian objects.

The ICRC believes that the challenges posed to IHL by asymmetric and urban warfare cannot *a priori* be solved by developments in treaty law. It must be stressed that in such circumstances, it is generally not the rules that are at fault, but the will or sometimes the ability of the parties to an armed conflict – and of the international community – to enforce them, in particular through criminal law. The ICRC recognizes that today’s armed conflicts, especially asymmetric ones, pose serious threats to the rules derived from the principle of distinction. It is crucial to resist these threats and to make every effort to maintain and reinforce rules that are essential to protecting civilians, who so often bear the brunt of armed conflicts. The rules themselves are as pertinent to “new” types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted. The fundamental values underlying these rules, which need to be safeguarded, are timeless. While it is conceivable that developments in IHL might occur in specific areas, such as in relation to restrictions and limitations on certain weapons, a major rewriting of existing treaties does not seem necessary for the time being.

Nevertheless, there is an ongoing need to assess the effectiveness of existing rules for the protection of civilians and civilian objects, to improve the implementation of those rules or to clarify the interpretation of specific concepts on which the rules are based. However, this must be done without disturbing the framework and underlying tenets of existing IHL, the aim of which is precisely to ensure the protection of civilians. Despite certain shortcomings in some of the rules governing the conduct of hostilities, mostly linked to imprecise wording, these rules continue to play an important role in limiting the use of weapons. Any further erosion of IHL may propel mankind backwards to a time when the use of armed force was almost boundless.

The 30th Round Table organized jointly by the International Institute of Humanitarian Law and the ICRC in San Remo from 6 to 8 September 2007 “revisited” the law on the conduct of hostilities. This topic, chosen to commemorate the centenary of the 1907 Hague Conventions, as well as the 30th anniversary of the first two Protocols additional to the Geneva Conventions, led to discussions on existing treaty law and on developments in the rules governing the conduct of hostilities. Emphasis was also placed on a prospective analysis of the issues raised by the implementation of the relevant rules and on possible solutions to the alleged shortcomings that may be problematic for those in charge of their practical application.

2. The notion of “direct participation in hostilities”

As far as the conduct of hostilities is concerned, IHL essentially distinguishes between two generic categories of persons, namely members of the armed forces,

who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed to be peaceful¹¹ and must be protected against the dangers arising from military operations. While it is true that, throughout history, the civilian population has always contributed to the general war effort to a greater or lesser degree, such activities were typically conducted at some distance from the battlefield. They included, for example, the production or provision of arms, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.

Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields into civilian population centres, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the “civilianization” of the armed forces, by which is meant the introduction of large numbers of private contractors, as well as intelligence personnel and other civilian government employees, into the reality of modern armed conflict. Moreover, in a number of contemporary armed conflicts, military operations have attained an unprecedented level of complexity and have involved a great variety of interdependent human and technical resources, including remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems.

Overall, the increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, the wide variety of tasks and activities performed by civilians in contemporary armed conflicts and the complexity of modern means and methods of warfare have caused confusion and uncertainty as to how the principle of distinction should be implemented in the conduct of hostilities. These difficulties are further aggravated wherever armed actors do not distinguish themselves from the civilian population, such as during the conduct of clandestine or covert military operations or when persons act as “farmers by day and fighters by night.” As a result, peaceful civilians are more likely to fall victim to erroneous, unnecessary or arbitrary targeting, while members of the armed forces, unable to properly identify their adversary, run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians – at the same time as they must, and should have been trained to, protect civilians.

Key legal questions

This trend has emphasized the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do not participate directly in hostilities and civilians “directly participating in hostilities.” Under IHL, the notion of “direct participation in hostilities” describes individual

11 This term is used to denote civilians who do not take a direct part in hostilities.

conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants.¹² The notion of “direct” or “active” participation in hostilities, which is derived from Article 3 common to the Geneva Conventions, is found in multiple provisions of IHL. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities. Answers are therefore needed to the following three questions in relation to both international and non-international armed conflict:

- *Who is considered a civilian for the purpose of conducting hostilities?* The answer to this question will delimit the circle of persons who are protected against direct attack “unless and for such time as they directly participate in hostilities.”
- *What conduct amounts to direct participation in hostilities?* The answer to this question will define the individual conduct that entails the suspension of a civilian’s right to protection against direct attack.
- *What are the precise conditions under which civilians directly participating in hostilities lose their protection against direct attack?* The answer to this question will elucidate issues such as the duration of the loss of civilian protection, the precautions and presumptions that apply in case of doubt, the restraints imposed by IHL on the use of force against lawful targets and the consequences of restoring civilian protection.

ICRC initiative

In 2003, the ICRC, in co-operation with the TMC Asser Institute, initiated a process of research and expert reflection on the notion of “direct participation in hostilities” under IHL. The aim was to identify the constitutive elements of the notion and provide guidance for its interpretation in both international and non-international armed conflict. The emphasis was placed on interpreting the notion of “direct participation” in relation to the conduct of hostilities only and did not, or only very marginally, address the legal regime applicable in the event of capture or detention of persons having directly participated in hostilities. Moreover, the expert process was concerned with the analysis and interpretation of IHL only, without prejudice to questions which might be raised by the direct participation of civilians in hostilities under other regimes of international law, such as, most notably, human rights law or, where cross-border operations are concerned, the law regulating the use of inter-State force.

¹² Article 51(3) of Additional Protocol I; Article 13(3) of Additional Protocol II; Rule 6, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Geneva and Cambridge, 2005.

Four informal expert meetings were held in The Hague and in Geneva between 2003 and 2006.¹³ Each meeting brought together 40 to 50 legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations, attending in a personal capacity.

The *first expert meeting* laid the foundations for the research and led to the unanimous conclusion that the notion of direct participation in hostilities required further interpretation and that the ICRC should take the lead in this process. The *second expert meeting* delved deeper into the topic on the basis of an extensive questionnaire, which was distributed to the experts before the meeting and which focused on a wide range of practical examples and theoretical issues. The *third expert meeting* addressed some of the most complex legal issues relating to the topic, such as the implications of membership in organized armed groups during non-international armed conflicts as regards the applicability of the rule on direct participation in hostilities, the duration of the loss of protection, and the presence of private contractors and civilian employees in conflict areas.

Following these meetings, the organizers prepared a draft “Interpretive Guidance” document on the notion of direct participation in hostilities for discussion during the *fourth expert meeting*. The comments received during that meeting led to a revised version of the document, which was submitted to the experts for a round of written comments in July 2007. Taking those comments into account, the organizers will finalize the document.

The “Interpretive Guidance” document will endeavour to present a coherent interpretation of IHL as far as it relates to the direct participation of civilians in hostilities. The document, along with the complete proceedings of the expert process, is to be published in the course of 2008.

3. Regulating the use of cluster munitions

The use of cluster munitions is certainly not the only weapons-related issue of concern in the framework of contemporary armed conflict. However, it has recently come to the forefront of the international debate on means and methods of warfare. Given that the challenges posed by cluster munitions are closely linked to the core rules on the conduct of hostilities (distinction, prohibition of indiscriminate attacks, proportionality and precautions), the topic is addressed here.

Cluster munitions: A persistent problem

Cluster munitions have been a persistent problem for decades. In nearly every armed conflict in which they have been used, significant numbers of cluster

13 The Hague on 2 June 2003, The Hague on 25 and 26 October 2004, Geneva from 23 to 25 October 2005 and Geneva on 27 and 28 November 2006. An overview of the discussions and of the various views expressed during the expert meetings is provided in the summary reports, which are available at www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl311205 (visited on 15 October 2007).

munitions have failed to detonate as intended. Long after the fighting has ended, they have continued to claim the lives and limbs of innumerable civilians, with tragic social and economic consequences for entire communities. In Laos and Afghanistan – for example – cluster munitions used in the 1970s and 1980s still kill and injure civilians today. Because they have contaminated large swathes of land, unexploded submunitions have also made farming a dangerous activity and hindered development and re-construction. In both countries, the clearance of these weapons and other explosive remnants of war has consumed scarce national and international resources.

Unfortunately, more recent conflicts have only added to the list of States already dealing with the consequences of these weapons. Eritrea, Ethiopia, Iraq, Lebanon, Serbia, and Sudan are examples of countries in which cluster munitions have been used in the last decade. Like Afghanistan and Laos, they are now having to deal with this deadly legacy of war.

The concerns raised by cluster munitions, however, are not limited to the post-conflict and long-term effects of unexploded submunitions. They include the dangers posed by these weapons during armed conflicts as well, even when they function as intended. Cluster munitions distribute large numbers of explosive submunitions over very wide areas. Some models will saturate a target area of up to 30,000 square metres. In addition, the accuracy of the released submunitions is often highly dependent on wind, weather conditions, and the reliability of complex delivery systems. As a result, it is difficult to control the effects of these weapons and there is a serious risk of significant civilian casualties, particularly where military objectives and civilians intermingle in a target area.

Concerns under international humanitarian law

No IHL treaty has specific rules governing cluster munitions. However, the characteristics and consequences of these weapons raise serious questions as to whether they can be used in accordance with fundamental rules of IHL. Some of the key questions are outlined below.

1. There are concerns as to whether cluster munitions may be used against military objectives in populated areas in accordance with *the rules of IHL concerning distinction and the prohibition of indiscriminate attacks*. These rules are intended to ensure that attacks are directed at specific military objectives and are not of a nature to strike military objects and civilians or civilian objects without distinction.

As indicated earlier, most cluster munitions are designed to disperse large numbers of submunitions over very wide areas. In addition, many types of submunitions are free-falling and use parachutes or ribbons to slow and arm themselves. This means that these explosives can be blown by the wind or diverted from their intended target when released at an incorrect airspeed or altitude. They can often land in areas other than the specific military objective targeted.

In addition, the wide-area effects of these weapons and the large number of unguided submunitions released would appear to make it difficult, if not

impossible, to distinguish between military objectives and civilians or civilian objects in a populated target area.

2. There are also concerns arising in relation to *the rule of proportionality*. This rule recognizes that civilian casualties and damage to civilian objects may occur during an attack against a legitimate military objective but requires, if an attack is to proceed, that the incidental impact on civilians not outweigh the military advantage anticipated. An attack that causes excessive incidental civilian casualties or damage in relation to the concrete and direct military advantage anticipated would be disproportionate and therefore prohibited.

It is clear that implementing the rule of proportionality during the planning and execution of an attack using cluster munitions must include an evaluation of the foreseeable incidental consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable effects of submunitions that become explosive remnants of war (ERW). With regard to ERW, this was most recently confirmed in the Final Declaration of the Third Review Conference of the Convention on Certain Conventional Weapons (CCW), in which States party noted “the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack.”

The principal issue in this regard is what is meant by “foreseeable.” Is it credible to argue today that the short-, mid- or long-term consequences of unexploded submunitions are unforeseeable, particularly when these weapons are used in or near populated areas? As we know from past conflicts, civilians present in a target area will predictably need to gather food and water, seek medical care and conduct other daily activities which put them at risk. If they have left the area during the hostilities, it is quite foreseeable that they will return at the earliest opportunity and be at risk from unexploded submunitions.

3. *The rules on feasible precautions* are particularly important when cluster munitions are used, given their effects both during and after a conflict.¹⁴ These rules require that both sides take specific action to reduce the chances that civilians or civilian objects be mistakenly attacked and to minimize civilian casualties when an attack is launched. Such action includes careful selection and verification of targets, the cancellation or suspension of attacks, the dissemination of warnings before an attack and efforts to avoid locating military objectives in populated areas.

The main issue here is how the rules on feasible precautions in attack are implemented in the light of the known characteristics and foreseeable effects of cluster munitions. Implementing the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian casualties and damages would require, for example, that a party consider the accuracy of the cluster munition and its targeting system, the size of the dispersal pattern, the amount of ERW likely to

14 Additional Protocol I (Articles 57 and 58) and customary international law.

result, the presence of civilians and their proximity to military objectives, and the use of alternative munitions and tactics. It could also require that submunitions not be used in populated areas and that alternative weapons be considered. Given the range of possible measures, why do high levels of civilian casualties resulting from cluster munitions remain a regular and predictable feature of conflicts in which these weapons are used? The persistence of this problem raises questions concerning the extent to which the rules on feasible precautions are being applied in the case of cluster munitions.

4. An important step towards reducing the post-conflict impact of cluster submunitions and other ERW was taken in 2003 when States party to the CCW adopted the *Protocol on Explosive Remnants of War*. The Protocol, which entered into force on 12 November 2006, provides an important framework for reducing the post-conflict dangers posed by all forms of unexploded and abandoned ordnance. The International Red Cross and Red Crescent Movement has called on all States to adhere to this landmark agreement at the earliest opportunity.

However, the Protocol does not contain legally binding measures to prevent the steady increase in the global burden of explosive remnants of war. The scale of the problem is growing far more rapidly than clearance operations can remedy it. One of the greatest contributors to this burden, when they are used, is cluster munitions. The Protocol also does not address the high risk of indiscriminate effects from a cluster-munitions attack when the submunitions *do* detonate as intended, particularly if the attack is in a populated area.

ICRC action

The ICRC and many National Societies have been urging governments to take urgent steps to address the problem of cluster munitions. In order to consider ways of doing this, the ICRC organized a meeting in Montreux, Switzerland (18 to 20 April 2007) for government and independent experts. The meeting produced a frank and in-depth exchange of views on many of the humanitarian, military, technical and legal issues relating to cluster munitions and considered ways of reducing their impact on civilian populations.

The ICRC believes that the specific characteristics of cluster munitions, their history of causing severe problems from a humanitarian standpoint, particularly when used against military objectives in populated areas, and the questions raised above strongly argue for the development of specific rules to regulate these weapons. In view of recent international developments and the insights gained at the Montreux meeting, the ICRC is of the opinion that a new IHL treaty regulating cluster munitions should be concluded. The treaty should (i) prohibit the use, development, production, stockpiling and transfer of inaccurate and unreliable cluster munitions; (ii) require the elimination of current stocks of inaccurate and unreliable cluster munitions; and (iii) provide for victim assistance, the clearance of cluster munitions and activities to minimize the impact of these weapons on civilian populations. Until such a treaty is adopted, the ICRC believes

that States should, on an individual basis, immediately end the use of such weapons, prohibit their transfer and destroy existing stocks.

An international agreement of this type would, if adopted, go a long way towards reducing the future impact of cluster munitions. The ICRC will, as a matter of urgency, continue to work with governments and National Societies to advance the negotiation and conclusion of a new IHL treaty on cluster munitions.

V. Non-international armed conflicts

The majority of contemporary armed conflicts are not of an international character. The daily lives of many civilians caught up in these conflicts are ruled by fear and extreme suffering. The deliberate targeting of civilians, the looting and destruction of civilian property, the forced displacement of the population, the use of civilians as human shields, the destruction of infrastructure vital to civilians, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world. The challenges presented by these conflicts are, to a certain extent, related to a lack of applicable rules, but more importantly, to a lack of respect for IHL.

Substantive challenges

Article 3 common to the four Geneva Conventions laid down the first rules to be observed by parties to non-international armed conflicts. These rules protect persons not or no longer taking an active part in hostilities by prohibiting murder, mutilation, torture, cruel treatment, the taking of hostages, and outrages upon personal dignity, in particular humiliating and degrading treatment. The passing of sentences without the observance of “all the judicial guarantees which are recognized as indispensable by civilized peoples” is also prohibited. The article states that the obligations listed constitute a “minimum” safety net that the parties are bound to observe.

Over time, the protections set out in common Article 3 came to be regarded as so fundamental to preserving a measure of humanity in war that they are now referred to as “elementary considerations of humanity” that must be observed in all types of armed conflict as a matter of customary international law.¹⁵ Common Article 3 has thus become a baseline from which no departure, under any circumstances, is allowed. It applies to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be held.

The law governing non-international armed conflict has gone through constant development since it was first codified, in particular with the adoption, in

15 International Court of Justice, *Nicaragua v. United States*, para. 218.

1977, of Protocol II additional to the Geneva Conventions, which “develops and supplements Article 3 common to the Geneva Conventions.”¹⁶ However, treaty law may be said to still fall short of meeting some essential protection needs in non-international armed conflicts.

The rudimentary nature of treaty law has been partly overcome by the development of customary international law over the last 30 years.¹⁷ Customary rules have the advantage of being applicable to all parties to an armed conflict – State and non-State – independent of any formal ratification process. In substance, they fill certain gaps and regulate some issues that are not sufficiently addressed in treaty law, in particular in relation to the conduct of hostilities. The crystallization of customary law therefore both extended and strengthened the rules of IHL applicable in non-international armed conflicts. However, while customary international law is as much a source of international law as is treaty law, its rules or contents are frequently challenged owing to its mostly non-written form. In addition, there are still areas in which treaty law and customary law remain limited. Some of these are mentioned elsewhere in this report:

- Article 3 common to the four Geneva Conventions sets out minimum obligations with respect to persons who are detained. However, it does not provide guidance for all aspects of detention to which it may apply. It does not, for example, spell out procedural safeguards for internment, which is a form of deprivation of liberty imposed for imperative reasons of security that is recognized by humanitarian law (see Chapter III). In the ICRC’s view, other bodies and sources of law, as well as appropriate policies, should be relied on to develop a regime consistent with common Article 3. The ICRC institutional position takes cognizance of this (cf. Annex 1).
- Despite the significant development of customary international law, certain issues relating to the *law on the conduct of hostilities*, namely the notion of direct participation in hostilities, deserve further examination.

Other challenges, either to the rules themselves or to the facts on the ground, relate to the scope of application of treaty law. Determining if and when a given situation amounts to a non-international armed conflict remains sometimes difficult.

In certain cases, for example, it is unclear whether a group resorting to violence can be considered as a “party to the conflict” within the meaning of common Article 3. Apart from the level of violence involved, the nature of the non-governmental group must also be taken into account when a situation is

16 Other treaties applicable to non-international armed conflicts include 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, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

17 See Henckaerts and Doswald-Beck, above note 12: out of 161 existing customary rules identified in this study, 147 are considered to be applicable in such situations. In some areas, the rules are identical or similar to those provided by treaty law, in particular by Additional Protocol II. In other areas, the study identified rules that go beyond current treaty law and have therefore contributed to filling gaps in the regulation of internal armed conflicts.

qualified in legal terms. Where the internal structure of the group is loose or where a clandestine chain of command is at play, the question that arises is whether the group is sufficiently organized to be characterized as a party to an armed conflict. Such determinations must be made on a case-by-case basis.¹⁸ Only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the relevant rules of IHL apply.

In conclusion, despite the development of customary international law, the clarification and possibly the development of the law applicable in non-international armed conflicts remains a major challenge.

In addition to these legal challenges, the law governing non-international armed conflict faces other challenges in practice, the most prominent of which is probably asymmetric warfare. However, the answer to the challenges posed by it does not seem to lie in the legal domain – in particular in the development of IHL. Conduct by the militarily inferior party (often the non-State party), which is regularly condemned in this type of warfare, already involves serious violations of IHL and may entail individual criminal responsibility (attacks against civilians, civilian objects and specially protected objects, the use of human shields, hostage-taking, etc.) A relaxation of the obligations of the militarily superior party in reaction to violations by the other side is not an option either. Such a step would lead first to a weakening and then to an erosion of various types of protection for which the international community has fought for a long time. This would almost inevitably lead to serious violations of life, physical integrity and dignity thus far prohibited by IHL. States and other actors that may be too quick to claim that the law is no longer adequate in dealing with contemporary forms of armed violence should bear this in mind.

Taking these considerations into account, the ICRC plans to examine current and new types of armed violence and assess the current status of the law of non-international armed conflict, in the light of treaty law and customary international law. On the basis of the results, it will evaluate whether there is a need for further clarification or development of the law with a view to strengthening the protection of persons and objects affected by non-international armed conflicts.

Respect for IHL in non-international armed conflicts

Discussions at the regional expert seminars organized by the ICRC in 2003 showed that improving compliance with IHL is most challenging in non-international armed conflicts, especially in relation to non-State parties to such conflicts. Specific circumstances, such as the increasingly fragmented nature of armed conflicts occurring in weak or failed States, the asymmetric nature of most conflicts and the growing involvement of civilians in hostilities tend to undermine observance of the law. Against this background, looking for new ways of achieving

18 See also “IHL and Terrorism”.

better implementation and enforcement of humanitarian law must be seen as a priority.

It should be noted that considerable efforts have been made over the last 15 years to ensure that individuals responsible for serious violations of IHL are prosecuted and punished. Ad hoc tribunals have been established, as well as the International Criminal Court and special or mixed tribunals. While these developments should continue, particular attention must also be paid to improving compliance with IHL while an armed conflict is going on. It is of utmost importance that preventive mechanisms be consolidated if the law is to fulfil its protective role. States have a crucial role to play in such an effort.

At the suggestion of the experts convened for the regional seminars, the ICRC has focused its attention on this aspect of the problem. One result has been the publication of *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (ICRC, April 2007). This publication is based on ICRC experience in non-international armed conflicts. It summarizes some of the considerable challenges the ICRC has faced and the lessons it has learnt in its efforts to increase respect for IHL. It also includes an overview of the dissemination activities, the legal tools, and the methods of persuasion that the ICRC has used for improving compliance with IHL. The main findings are outlined in the following paragraphs. In addition, to the tools presented, it should not be forgotten that States not involved in a non-international have a role to play – individually or collectively – in ensuring respect for IHL, also with regard to non-State armed actors. This responsibility exists to the extent that States have or can have some influence on the behaviour of the parties to an armed conflict. It is not 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.

When seeking to engage with the parties to non-international armed conflicts and to improve their compliance with IHL, the ICRC has faced the following challenges.

Diversity of conflicts and parties

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to those that are essentially unstructured. The parties – whether States or organized armed groups – vary widely in character. Depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy all have a direct impact on a party’s compliance with the law. Organized armed groups, in particular, are extremely diverse. They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in relation to the extent of their territorial

control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate IHL.

Denial of applicability of IHL

Not infrequently, a party to a non-international armed conflict – either a State or an armed group – will deny the applicability of humanitarian law. Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of “tension” or one that involves banditry or terrorist activities that do not amount to a non-international armed conflict, as recognition that such an armed conflict is taking place would, in their view, implicitly grant “legitimacy” to the armed group. Non-State armed groups might also deny the applicability of IHL on the grounds that it is a body of law created by States and that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by strong ideology.

Lack of political will to implement humanitarian law

A party may have no – or not enough – political will to comply with the provisions of humanitarian law. Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law, there will be no political will to implement the law.

Ignorance of the law

In many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts.

Based on its long experience in situations of non-international armed conflict, the ICRC has drawn a number of lessons which could be helpful to more effectively address parties to non-international armed conflicts with a view to an improved respect for IHL.

Present the law “strategically”

Merely making the parties to an armed conflict aware of the law or of their specific obligations is not enough to ensure compliance. The law should be presented and discussed “strategically,” in a manner that is relevant and adapted to the context, and as part of a deliberate plan to engage the parties. This is necessary if parties are to develop a receptive attitude towards the law, which is the first step towards compliance. To present the law “strategically” implies knowing and understanding a party’s motivations and interests. This will make it easier to explain why it is in

the party's interest to observe the law. Arguments may be based on the following considerations: military efficacy and discipline; expectation of reciprocal respect and mutual interest; reputation (adherence to IHL can improve the party's image or public standing), appeal to core cultural values that mirror those of IHL, long-term interests (e.g. facilitation of post-conflict national reconciliation and a return to peace) and the risk of criminal prosecution.

Understand and adapt to the unique characteristics of the conflict and the parties

Given the great diversity of armed conflicts and parties, there is no uniform approach to the problem of lack of respect for humanitarian law. Any effort to increase respect for the law will be more effective if it takes into account the unique characteristics of a specific situation. This is especially true with regard to the parties themselves. It is particularly helpful to know and to understand a party's motivations and interests in order to explain why it is in the party's interest to comply with the law.

Work in the context of a long-term process of engagement

Attempts to influence the behaviour of parties to a non-international armed conflict will be most effective if they are part of a process of engaging and building up a relationship with each of those parties. Carried out over the long term, such a process will also provide opportunities for acquiring insight into the characteristics of the parties and thus form a basis for discussing the law "strategically." It will also lead to opportunities for addressing issues such as the party's political will and capacity to comply with the law.

In addition to dissemination and training activities, which are crucial to making the rules of IHL known and to building a foundation for discussions concerning respect for the law, a number of legal tools have been used by the ICRC and other humanitarian actors in their efforts to improve compliance with humanitarian law by parties to non-international armed conflicts. Such tools do not themselves guarantee increased respect, but they nevertheless provide a basis on which legal representations can be made and on which accountability can be required. These tools, which are interrelated and reinforce each other, include the following:

- Special agreements between the parties to non-international armed conflicts whereby they explicitly commit themselves to comply with humanitarian law (see Article 3 common to the four Geneva Conventions)
- Unilateral declarations (or "declarations of intention") by armed groups party to non-international armed conflicts whereby they commit themselves to comply with IHL
- Inclusion of humanitarian law in codes of conduct for armed groups
- References to humanitarian law in ceasefire or peace agreements
- Grants of amnesty for mere participation in hostilities

It is hoped that the contents of the publication *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, which have only been summarized here, will serve to inform and assist others who might wish to undertake efforts to increase respect for IHL in non-international armed conflicts.

VI. Regulating private military and private security companies

Over the last few years, the traditional roles of the State and its armed forces in wartime have increasingly been contracted out to private military and security companies (PMCs/PSCs). While the presence of these companies in conflict situations is not new, their numbers have grown and, more significantly, the nature of their activities has changed. In addition to the more traditional logistical support, PMCs/PSCs have been involved more and more in activities that bring them close to the heart of military operations – and thereby into close proximity to persons protected by IHL. These activities include protecting military personnel and assets, training and advising armed forces, maintaining weapons systems, interrogating detainees and sometimes even fighting.

Many of the discussions relating to PMCs/PSCs centre on the legitimacy of outsourcing the use of force and on the question of whether there should be formal limits placed on the right of States to do so. Whatever the outcome of those discussions, the only realistic assumption in the medium term is that the presence of PMCs/PSCs in armed conflicts is bound to increase. The tendency of many States to downsize their armed forces means that there will be fewer troops available for active combat. Given the highly complex nature of modern weapons systems, the armed forces are also increasingly dependent on outside expertise in this area. PMCs/PSCs will also continue to be hired by States whose armies are understaffed or insufficiently trained. Even some international and non-governmental organizations now use the services of PMCs/PSCs for their own security. It is not to be excluded that in the future armed opposition groups will also hire PMCs/PSCs. It is likewise possible, although it appears unlikely for the moment, that PMCs/PSCs will be hired for multinational military operations if States cannot provide the troops required.

Given its exclusively humanitarian mandate, the ICRC's interests lie not in joining the debate over the legitimacy of the use of private companies in armed conflicts but rather in finding ways of bringing about greater compliance with IHL. The question for the ICRC is not whether PMCs/PSCs should be present in armed conflicts but rather what IHL says when they are. What are the obligations of PMCs/PSCs and their staff and what are the obligations of States? This is the focus of the following section of the report.

It is sometimes said that PMCs/PSCs operate in a legal vacuum, that international law gives no answers as to how violations committed by their staff should be handled. This has been the tenor of numerous media reports. Such a broad statement is incorrect from a legal point of view and it is important to stress

that obligations do exist in that regard. However, it is also true that there are problems of implementation due to the unwillingness or inability of States and other parties to uphold the rules in practice. Moreover, existing international rules are sometimes so broadly formulated as to require clarification in order to give practical and realistic guidance as to how States should transpose them into their national legal systems and practice. This is the case, in particular, with regard to two main issues:

1. The status, rights and obligations of the employees of PMCs/PSCs
2. The obligation of States to respect and ensure respect for IHL in connection with the activities of PMCs/PSCs

While the former question is rather clear as a matter of law, although often confusing in practice, the latter requires further clarification.

Status, rights and obligations of the employees of PMCs/PSCs

PMCs/PSCs are private companies. While IHL is binding on non-State actors, this is only the case insofar as they are parties to an armed conflict (namely, organized armed groups). As legal entities, private companies are not bound by IHL, contrary to their staff who, as individuals, must abide by IHL in armed conflicts.

Individuals working for private companies in armed conflicts have rights and obligations under IHL – but there is no single status covering all employees. The status of each individual depends on the particular situation in which he or she is operating and the role that he or she performs. Also, the attitude towards mercenaries, which is often emotionally charged and highly political, tends to complicate the legal examination of their status.

In international armed conflicts, employees of PMCs/PSCs can fall into any of several legal categories:

First of all, they can be members of the armed forces in the sense of Article 4(A)(1) and (3) of the Third Geneva Convention¹⁹ if they are incorporated into those forces, as has been the case in a number of instances. Far more frequently, however, States resort to PMCs/PSCs because they are downsizing their own armed forces. Thus, there are likely to be few instances where PMCs/PSCs form part of the armed forces.

Secondly, employees of PMCs/PSCs can be militias or other volunteer corps belonging to a State party to an armed conflict within the meaning of Article 4(A)(2) of the Third Geneva Convention.²⁰ This is the case if, in a situation of international armed conflict, they constitute a group “belonging to” a party to the conflict and fulfil the four criteria defining that group: to be under responsible command, to have a fixed distinctive sign, to carry arms openly and to obey the laws and customs of war.

Thirdly, a number of employees of PMCs/PSCs are likely to fall into the category of civilians accompanying the armed forces within the meaning of Article

¹⁹ See also Article 43 of Additional Protocol I.

²⁰ *Ibid.*

4(A)(4) of the Third Geneva Convention – one of the examples explicitly mentioned in that article are civilian members of military aircraft crews or supply contractors. It is important to stress that civilians accompanying the armed forces remain civilians. While they are entitled to prisoner-of-war status in an international armed conflict, they are not, as civilians, entitled to directly participate in hostilities and can arguably be prosecuted under domestic law for doing so. However, not all contractors will fall into the category of civilians accompanying the armed forces. In order for a person to qualify as such, there must be a real link, namely he or she must provide a service to the armed forces, not merely to the State.

In fact, given the limitations on all the above categories, the majority of PMC/PSC employees will fall into the category of civilians. As such, they benefit from the protection afforded to civilians under IHL. In international armed conflicts, they are covered by the Fourth Geneva Convention (as long as they fulfil the nationality criteria set out in Article 4), Additional Protocol I and customary law. In non-international armed conflicts, they come under common Article 3, Additional Protocol II and customary law. If they participate directly in hostilities, however, they lose the protection from attack afforded to them as civilians in both types of conflict.

Lastly, in relation to status, the term “mercenary” must be mentioned, as it is often used, particularly by the media, to describe PMC/PSC employees. From a strictly legal point of view, this description is incorrect in most cases owing to the narrow definition given to the term under IHL. In order to qualify as a “mercenary” under IHL, a person must meet each of the following six criteria: he or she must (1) have been recruited specially to fight in an armed conflict, (2) in fact be taking a direct part in hostilities, (3) be motivated essentially by the desire for private gain; (4) be neither a national of a party to the conflict nor a resident of any territory controlled by a party to the conflict, (5) not be a member of the armed forces of a party to the conflict, (6) not have been sent by a State that is not a party to the armed conflict on official duty as a member of its own armed forces. A number of these criteria may lead to the exclusion of most PMC/PSC staff from the category of “mercenary” as defined under IHL. This is because, first of all, most PMC/PSC employees are not specifically contracted to fight in an armed conflict and do not take a direct part in hostilities. They are quite often hired to provide other services, for example in the areas of training, personal security or intelligence. Secondly, all nationals of one of the parties to the conflict are excluded. Lastly, simply by incorporating them into its armed forces, a State wishing to use PMCs/PSCs can avoid having its staff considered as mercenaries even if all the other conditions are met.

In any event, from the point of view of IHL applicable in international armed conflicts, a person who falls into the category of mercenary is not considered a combatant and has no right to prisoner-of-war status (Article 47 of Additional Protocol I). Consequently, mercenaries can be prosecuted under domestic law for directly participating in hostilities. Nonetheless, provided they fulfil the nationality criteria set out in Article 4 of the Fourth Geneva Convention,

mercenaries are protected persons (within the limits set by Article 5 of that Convention). Otherwise, the provisions of Article 75 of Additional Protocol I would apply to them as a matter of treaty law or customary international law.

States remain, of course, free to prohibit PMCs/PSCs altogether, or to prohibit certain services they provide, such as those involving direct participation in hostilities. For instance, States party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the Convention for the Elimination of Mercenarism in Africa have an obligation to criminalise mercenarism in their internal domestic order. The issue of mercenarism is closely linked to the question as to how much a State can and should outsource the use of force and remains important. IHL, however, does not address that question.

Obligations of States

States have a number of obligations under international law with regard to the activities of PMCs/PSCs. These obligations need to be clarified in order for States to put adequate legislation and mechanisms into place.

Under Article 1 common to the four Geneva Conventions, all States have an obligation to respect and ensure respect for IHL. Several categories of States have a role to play, in particular: States that hire PMCs/PSCs, States on whose territory PMCs/PSCs operate, States in whose jurisdictions PMCs/PSCs are incorporated, and States whose nationals are PMC/PSC employees.

States that hire PMCs/PSCs have the closest relationship with them. At the outset, it is important to stress that those States themselves remain responsible for respecting and fulfilling their obligations under IHL. For instance, Article 12 of the Third Geneva Convention clearly stipulates that whoever is individually responsible, the detaining power remains responsible for the treatment of prisoners of war. This close relationship also means that States can be directly responsible for the acts of PMCs/PSCs when these are attributable to them under the law of State responsibility, particularly if the PMCs/PSCs are empowered to exercise elements of governmental authority or if they act on the instructions or under the direction or control of State authorities.

In addition, States contracting a PMC/PSC have an obligation to ensure respect for IHL by the company. This is a rather broad legal obligation, but best practice gives an indication of how it can be fulfilled by States. For instance, States could include certain requirements in the company's contract, such as adequate training in IHL, the exclusion of specific activities such as participation in military operations or the vetting of employees to ensure they have not committed violations in the past.

Lastly, States that hire PMCs/PSCs, like all other States, must repress war crimes and suppress other violations of IHL committed by PMC/PSC staff.

States on whose territory PMCs/PSCs operate also have an obligation to ensure that IHL is respected within their jurisdictions. In practice, this can be done by enacting regulations providing a legal framework for the activities of PMCs/PSCs. For instance, States could establish a registration system imposing certain

criteria for PMCs/PSCs; or they can have a licensing system, either for individual companies, or for specific pre-defined services, or on a case-by-case basis for each service.

States in whose jurisdictions PMCs/PSCs are incorporated or have their headquarters likewise have an obligation to ensure respect for IHL. They are particularly well-placed to take practical, effective measures because, like States on whose territory PMCs/PSCs operate, they have the possibility to regulate and license PMCs/PSCs. They could enact regulations requiring that PMCs/PSCs meet a number of conditions to operate lawfully, for instance that their employees receive appropriate training and be put through an adequate vetting process.

Lastly, States whose nationals are PMC/PSC employees should be mentioned. While these States may have virtually no link to the company as such or to the operation, they have a strong jurisdictional link to the employees and may thus be well-placed to exercise criminal jurisdiction over them should they commit violations of IHL, even abroad.

In short, different States have obligations under IHL. Taken together, these obligations form quite an extensive international legal framework surrounding the operations of PMCs/PSCs. Some of the obligations are relatively broad, and there is a need for guidance so that States can put them into practice. There are a variety of ways in which this can be done effectively and in which remaining gaps in accountability can be filled.

The Swiss initiative on PMCs/PSCs (carried out in co-operation with the ICRC)

In view of the increasing presence of PMCs/PSCs in armed conflicts, the government of Switzerland has launched an initiative to promote respect for IHL and propose ways of dealing with the issue. The objectives of the initiative²¹ are:

1. to contribute to the intergovernmental debate on the issues raised by the use of private military and security companies;
2. to study and develop good practices, on the basis of existing obligations, in order to assist States in respecting and ensuring respect for IHL and human rights law.

The ICRC is working closely with the Swiss government on this initiative with the aim of achieving greater respect for IHL.

After initial consultations, two meetings, for governmental experts, academics, non-governmental organizations and members of the industry were held in 2006 to discuss existing obligations and the possibility of regulation. The process will continue throughout 2008 with expert consultations on specific issues and intergovernmental meetings.

21 For further information, please consult the website of the initiative at <http://www.eda.admin.ch/psc>.

VII. Occupation and other forms of administration of foreign territory

Occupation

Occupation is a situation that is regulated by international law. It is essentially based on the concept of effective control of a territory as implied by the definition provided in Article 42 of The Hague Regulations of 1907: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

It is not disputed that the relevant provisions of the Hague Regulations of 1907, of the Fourth Geneva Convention of 1949 and of Additional Protocol I of 1977 are still fully applicable in all cases of total or partial occupation of a foreign territory, whether or not the occupation meets with armed resistance. In general terms, the law of occupation provides the legal framework for the temporary exercise of authority by an occupying power; it tries to strike a balance between the security needs of that power, on the one hand, and the interests of the ousted authority and those of the local population, on the other. In the classical interpretation of occupation law, sovereign title does not pass to the occupying power and the latter essentially has to preserve the *status quo ante* as far as possible. The occupying power is thus obliged to respect the existing laws and institutions and to introduce changes only where necessary to carry out his duties under the law of occupation, to maintain public order and safety, to ensure orderly government and to maintain security.

Occupation law has, however, been challenged on the grounds that it is unsuitable to the complex features of more recent situations of occupation. The reluctance of certain States to accept the applicability of occupation law to situations in which they are involved has been justified by claims that those situations differ considerably from classical occupation by a belligerent force and should be governed by a more specific body of rules than the law of occupation currently affords.

According to some scholars, certain fundamental concepts of public international law, such as the right to self-determination, as well as developments in human rights law, have not been duly reflected in occupation law. The applicability of human rights law to situations of occupation has generated important questions deserving examination, such as how far an occupying power can go in implementing that law in occupied territory. Particular issues have also arisen in relation to the right to self-determination, including whether an occupying power can take legislative action to further the exercise of this right by the people and whether the right to self-determination can justify wholesale changes in the occupied territory, be they social, economic, political or institutional.

Linked to that is a broader debate about the alleged increasing inadequacy of the premise underlying occupation law, namely that the exercise of provisional authority to which the occupant is entitled does not permit the introduction of

wholesale changes to the legal, political, institutional and economic structure of the territory in question. Indeed, it has been argued that the static nature of occupation law places an undue emphasis on preserving the socio-political *continuum* of the occupied territory. In that context, it has been pointed out that the transformation of an oppressive governmental system or the rebuilding of a collapsing society – by means of occupation – could be in the international community’s interest and possibly necessary for the maintenance or restoration of international peace. Consequently, it may be said that there has been a growing divergence between occupation law, which requires that the laws and institutions in place be respected, and the perceived necessity of fundamentally altering a society under occupation in certain circumstances.

The questions raised above are equally relevant when the transformative goals of certain occupations, often justified by human-rights considerations, ensue from a UN Security Council mandate. Certain rules of occupation law have given rise to debate about their consistency with responsibilities outlined by the Council given that, in certain situations, the obligation to preserve *the status quo ante* can hardly be reconciled with the goal of overhauling a system of government. Some have described this situation as a clash of obligations, or as a “carve-out” by the UN Security Council of parts of occupation law. Departure from occupation law seems to be accepted by legal scholars to the extent that it does not affect *jus cogens* norms contained in IHL instruments.

For the purposes of this report, it is premature to propose any definite answers. It is submitted nevertheless that some limits must be set on change that may be effected during a situation of occupation, if one accepts the need for change, as advocated by some. While an occupying power may have a degree of flexibility in implementing human rights norms, including the right to self determination, it certainly cannot be given *carte blanche* to change legislation and institutions so as to conform to its own political, legal, cultural and economic needs or values. Occupation law, it should not be forgotten, is a coherent whole that carefully balances a variety of different interests, from which derogations should only be possible in exceptional circumstances.

Other forms of administration of foreign territory

Aside from the various challenges posed by contemporary situations of occupation, another set of challenges has arisen in relation to the applicability of IHL to UN peace-keeping operations, particularly those that involve the international administration of a territory under a Chapter VII mandate. In its various interventions under that Chapter, the UN has not always assumed direct governmental functions, but has instead relied on domestic institutions or, where they were not available, assigned responsibility to the forces engaged on the ground or to a specific body charged with administering the territory concerned. Important questions arising from such situations include whether IHL and occupation law are applicable to this type of UN operation and under what circumstances. Consequently, it seems necessary to clearly define the legal

framework regulating the administration of a territory by multinational forces or by an international civil administration and the particular relevance of IHL and occupation law in that context. To this end, an examination of whether IHL provides practical solutions to many of the problems faced by an international civil or military administration would seem appropriate.

On the basis of the issues raised above, as well as others that have presented recent challenges for occupation law (some of them already mentioned in the ICRC report submitted to the 28th International Conference), the ICRC intends to analyse whether and how far the rules of occupation law might need to be reinforced, clarified or developed. In 2007 the ICRC initiated a project on occupation law aimed at examining questions arising in connection with recent situations of occupation and other forms of administration of foreign territory. The project, which includes consultations with key actors and the organization of expert meetings, is expected to follow up on discussions held at a 2003 expert meeting that focused on the applicability of IHL and occupation law to multinational peace operations. The ICRC hopes, with the assistance of legal experts, to propose substantive and procedural ways of moving forward.

VIII. Increasing respect for IHL: the role of sanctions

Better implementation of IHL both in peacetime and in armed conflicts is a constant priority for the ICRC. In its report to the 28th International Conference, the ICRC focused its attention on means and methods of achieving greater respect for and compliance with IHL in armed conflicts, in particular by highlighting the extent and scope of States' obligation to "respect and ensure respect" for IHL in all circumstances. It also organized a series of five regional expert seminars that examined, along with other issues, existing and potential IHL supervisory and enforcement mechanisms.²²

Four years after the report was presented to the 28th International Conference, the goal of achieving greater respect, implementation and enforcement of humanitarian law remains an abiding challenge. This is primarily the responsibility of the parties to armed conflicts, whether State or non-State.

Implementation presupposes an understanding of and a commitment to respect the law by all belligerents. It also requires sustained action by States in their legal orders and practice with a view to adopting the wide range of national implementation measures required by IHL, including the enactment of legislation, the development of military manuals, and proper training and command supervision within the armed and security forces. In addition, appropriate sanctions, of a criminal or disciplinary character, must be provided for and applied against those who violate the rules.

²² One concrete outcome of the expert meetings is discussed in Chapter V.

Important progress has been achieved over the past four years in the domestic legal orders of a great number of States, which have sought to adapt their legislation and practice to the provisions of IHL and resulting obligations. This is, *inter alia*, reflected in the establishment by an increasing number of States of national committees and other bodies in charge of advising their governments on matters relating to IHL and its domestic implementation. Nevertheless, much remains to be done and this is an issue of constant concern to the ICRC.

Significant strides have also been made in the last 15 years with regard to the creation of international mechanisms for the recognition of individual criminal responsibility. Ad hoc tribunals have been established, as well as the International Criminal Court and special or mixed tribunals. Some States have also proved willing to exercise extraterritorial jurisdiction over war crimes in order to prosecute and punish serious violations of IHL in their own domestic courts. However, while recognition of individual criminal responsibility may thus be said to have undergone important developments, improving compliance with IHL by all belligerents on the battlefield is and remains a key challenge.

ICRC initiative on the role and deterrent effect of sanctions against perpetrators of serious violations of IHL

In 2004 the ICRC published a study²³ on the roots of behaviour in war, the object of which was to identify the factors that are crucial in conditioning the conduct of belligerents. One of the study's main conclusions was that training, strict orders and effective penalties for failure to obey those orders are the best means of influencing the behaviour of weapon bearers.

The ICRC has been examining these conclusions in greater depth, focusing in particular on the role of sanctions in ensuring greater respect for IHL. It also sought to further substantiate the conclusions and to reflect on two questions identified as essential. These questions relate to the nature and characteristics of sanctions and to the environment in which they are applied. Both questions are being examined with a view to dissuading arms carriers from committing serious violations of IHL.

The nature and characteristics of sanctions

The first part of the ICRC's examination focuses on three main issues, beginning with the deterrent nature of sanctions, namely the role played by the threat of punishment as opposed to the punishment itself.

In this connection, the ICRC observed that if sanctions were applied randomly and were thus unpredictable, combatants were generally willing to take a chance and violate the law since they considered that there was a high probability that they would not be punished. Moreover, if sanctions were regarded as purely

23 Daniel Munoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.

hypothetical, they would not be effective in preventing violations, no matter how heavy the penalty might be. This shows that the effectiveness and legitimacy of sanctions must be strengthened at all levels. Indeed, the problem is less one of inadequate criminal provisions as one of lack of implementation. In the heat of armed conflict, courts – whether domestic or international – usually cannot and do not intervene by sentencing and punishing violators. Thus, there is a need for alternative or complementary solutions that make sanctions a reality. If the perpetrators of serious IHL violations expected to be punished, whether through the criminal justice system or by any other means, their behaviour could change. In this respect, disciplinary sanctions should be explored because of the rapid and effective signal they send combatants and the heavy stigma attached to them in terms of peer rejection. However, caution should be exercised in two regards: first of all, disciplinary sanctions might be seen as leading to efforts to conceal the gravity of a crime and, secondly, they might be insufficient to satisfy the interests of the victims.

The second question relates to the issue of *to whom sanctions apply*. In all types of armed conflict, international law extends criminal responsibility for violations beyond the circle of actual perpetrators to encompass a large number of potential participants, including senior military and civilian officials. The ICRC is particularly interested in assessing the impact of this extended responsibility in relation to the role of the individuals concerned (arms carriers, heads of field units, commanders or civilian officials) and the sanctions that could be attached to their unlawful behaviour.

The third topic studied is the *forms of justice* – civilian or military – and their impact in terms of ensuring greater respect for IHL. Where no provision has been made for the exclusive jurisdiction of either civilian or military courts, additional work is required to set the criteria according to which the division of competences should be established.

The influence of the environment on the deterrent effect of sanctions

The second part of this reflection seeks to examine the context in which violations of IHL occur and the applicability of sanctions. Identifying the factors that influence behaviour in armed conflicts calls for a reflection that goes beyond the topic of sanctions and considers all the elements likely to influence that behaviour, especially since sanctions are clearly not seen and understood in the same manner by arms carriers everywhere. There is also merit in attempting to reconcile the values of different groups with those of IHL. The ICRC is willing to conduct a study on sanctions' efficiency which would take into account the influence of factors characterising pre-identified scenarios in which sanctions are called to be applied, which is a highly under-explored area of research.

The expectations and needs of victims

When considering the role of sanctions, it is important to give serious thought to the interests of victims of IHL violations and to the type of system that could best

meet their expectations and needs. The fact that criminal proceedings do not always take the interests of victims into account is often a source of frustration, disappointment and anger. Issues such as truth, reparation and vetting, which play a key role in permitting societies and the individuals that make them up to heal and rebuild their lives, cannot be appropriately dealt within a traditional criminal-justice system. Alternative mechanisms should be considered in this regard. These mechanisms could also impose sanctions on perpetrators – albeit of a different nature than strictly criminal sanctions – which would result from a bargaining process between the victims, the perpetrators and the affected society. The ICRC hopes to further explore alternative or complementary processes and measure their impact on preventing serious IHL violations.

How the research is being carried out

In order to carry out this examination, the ICRC has been working with a group of independent experts from various fields. They were invited to respond in writing to four case studies and attended two informal meetings, held in April 2006 and June 2007, where they discussed topics such as the nature of sanctions, various forms of responsibility and justice, the risks of court action, and amnesty, the needs of victims and mechanisms of transitional justice. The meetings helped narrow down the issues that will be addressed at a broader inter-regional meeting to be held in November 2007. The purpose of the November meeting will be to develop and draft concrete proposals designed to assist the ICRC in its efforts to help establish an integrated system of sanctions, one that would have an effective long-term influence on the behaviour of combatants and on their environment with a view to promoting better compliance with IHL.