

Protection of detainees: ICRC action behind bars

Alain Aeschlimann*

Alain Aeschlimann is the head of the Central Tracing Agency and Protection Division of the International Committee of the Red Cross

Abstract

The author describes the history and the premises and characteristics of the action of the ICRC in favour of persons deprived of liberty. He believes that the efficiency of its approach, in particular the visits to detainees, is closely linked to the respect of a constant and rigorous working method including the modalities of the visits and the confidentiality of the interventions to the authorities. Finally, the implication of the ICRC is to be inscribed in a large process and is complementary to the efforts of the authorities, other organizations and mechanisms as well as of the international community at large. Its approach however remains unique in several aspects.

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Founded in 1863 in reaction to the suffering on the battlefields, the ICRC soon took an interest in the situation of persons deprived of their liberty.¹ After the wounded and the sick, detainees are, historically, the third category of vulnerable persons with whom the ICRC has been concerned.

The ICRC's efforts aim, as a priority, to ensure that detainees are treated humanely and with respect for their dignity. Every detainee is in a situation of particular vulnerability, both vis-à-vis their captor and in relation to their environment. The change in status from free person to detainee means the loss of all points of reference and immersion in an unknown world where the rules are different and the values unfamiliar. Life in a closed environment away from the outside world tends to dehumanize people by eliminating

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individuality and responsibility. Detention is thus a fundamental change for each individual person, even if he or she is prepared for it.² This vulnerability is accentuated in situations of armed conflict and collective or political violence when the isolation and the temptation to use force in an abusive manner are even greater.

Facts and figures

In 2004, the ICRC visited 571,503 detainees held in 2,435 places of detention in more than 80 countries. Of this number, 29,076 detainees were registered and visited in 2004 for the first time and a total of 39,743 detention certificates were issued. The ICRC also organized seminars and advanced courses for police and security forces in 36 countries, in which several thousand participants took part.

Historical background

Developments in the nature of ICRC activities

The ICRC's first activities on behalf of detainees (for prisoners of war) took place during the Franco-Prussian War of 1870. Individual parcels (relief supplies) were distributed and mail forwarded to and from prisoners and their families.³ During the First World War the ICRC helped prisoners of war on a regular basis, and also took its activities a stage further. In addition to the distributing of parcels and delivering mail, internment camps were visited with a view to improving conditions there, reports were compiled on these visits, and individual information concerning the prisoners of war (based in particular on notifications sent by the various warring parties in the form of lists of prisoners) was centralized.

In 1918 and 1919, following the Bolshevik Revolution and the events in Hungary, the ICRC made its first visits to civilians and detainees held in connection with internal unrest (so-called political detainees). During the Second World War, the activities of the ICRC were similar to those it had deployed before; it also visited civilian internees. Its approach, in particular in the reports drawn up after visits to internment camps, was primarily factual and descriptive.

From 1947 to about 1975, the main conflicts occurred in the Middle East and Indochina, but the ICRC also turned its attention to a number of

1 In this article, the term “detainee” will be used to mean all persons deprived of their liberty, regardless of their status.

2 See on this subject Vivien Stern, *A Sin against the Future: Imprisonment in the World*, Penguin Books, London, 1998.

3 See in particular François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, 2003.

situations within individual countries.⁴ It continued to carry out the same type of activities in aid of detainees, but improved its working methods.⁵

During the period from 1975 to 1990, characterized by an intensification of Cold War conflicts and the end of wars of decolonization, the ICRC's areas of operation increased and its activities on behalf of persons detained for security reasons or so-called political detainees were expanded. The ICRC visited them in their places of detention, registered them fairly systematically and worked to restore contact between them and their families. It also sought to address the problem of forcible disappearances and took a broader view in general by analysing more closely the detainees' environment and the different stages or places of detention through which they had passed. It standardized its procedures and developed internal directives in a number of domains.⁶

The further increase in the ICRC's activities for detainees was partly spurred by several phenomena directly linked to the end of the Cold War. Some States had lost their external means of economic support, were bankrupt and could no longer maintain State structures, including prisons. This prompted the ICRC to extend the scope of its activities in terms both of the categories of detainees it was caring for (what is known as the "all-detainees" approach) and of the kinds of problems to which it sought to respond (structural, organizational, food emergencies, etc.). At the same time, many areas were experiencing periods of ethnic cleansing in which a clear desire to exterminate part of the population was evident. The ICRC consequently developed a more holistic approach in its activities for detainees, combining visits (or ascertaining the facts and conditions) with alerting the authorities to their responsibilities, providing training and expertise (via seminars on a wide variety of subjects), and giving assistance (health, habitat, etc.) in several fields.

Since the attacks of 11 September 2001, the ICRC has had to reconcile two sometimes contradictory priorities. On the one hand, a response must be found to the questioning of the legal framework and the widespread challenge to the inviolability of the physical and moral integrity of all or some detainees. On the other hand, appropriate solutions must be found to the growing disregard for their detainees of an increasing number of States. In the context of what is called the "war on terror", global and local elements are often intermingled, requiring an even greater consistency in the approach adopted and the action taken.

Development of the legal framework and the ICRC's visiting procedure

Before the twentieth century, the rules of customary law were more substantial than the codified international norms applicable to detainees, which were still

4 See in particular Jacques Moreillon, *The International Committee of the Red Cross and the Protection of Detainees*, Henry Dunant Institute, Editions L'Age d'Homme, Lausanne, 1973.

5 In particular, the conditions and procedure for visits were developed and standardized.

6 For example, with regard to hunger strikes and the death penalty.

relatively scant.⁷ The Hague Conventions of 1899 and 1907 contained an implicit ban on torture in that they required prisoners of war to be treated humanely. Following the experiences of the First World War, the 1929 Geneva Convention on prisoners of war quite clearly defined the status of prisoners and their living conditions, and notably introduced protection against acts of violence, cruelty, insults and the exertion of pressure.⁸ It also provided for detention to be monitored by protecting powers and the ICRC. The procedure for visits by them was defined, but an essential part of them was not made mandatory, namely the interview in private with the detainee.⁹ The 1929 Convention also laid the foundations of the Central Agency of Information (later the Central Tracing Agency) of the ICRC, which was responsible in particular for pooling information on prisoners of war and restoring contact between them and their families.

The Geneva Conventions of 1949 mark a watershed in that they extend the field of application from international armed conflict to non-international armed conflict and lay down conditions for the detention and treatment of detainees. They also confirm the right of the ICRC to visit prisoners of war during international armed conflicts and establish the same right with regard to civilian detainees. On the basis of the ICRC's experience, the Conventions introduced a procedure for visits from which no derogation is allowed.¹⁰ This procedure and the related conditions were to set the standard for the ICRC in all types of situations and are still scrupulously applied today. The two 1977 Protocols additional to the Geneva Conventions specify the fundamental guarantees to which detainees are entitled.

Under the impetus of the human rights movement, the treatment of persons in detention became a focus of attention for the international community. Since the 1960s, the human rights system and the framework of protection it provides for detainees has developed steadily, with the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1989). Non-prescriptive texts, too, have been adopted within the framework of the United Nations¹¹ and have been

7 One of the first texts to mention the respect due to detainees is the Lieber Code of 1863, which is the first codification of the laws of war and contains instructions for the humane treatment of prisoners. It was drawn up for the Northern armed forces fighting in the American Civil War.

8 Article 2 of the Geneva Convention of 1929.

9 According to Article 86 of the Geneva Convention of 1929, interviews may be held as a *general rule* without witnesses (emphasis added).

10 This resulted in particular from the ICRC's visit in June 1944 to the Theresienstadt camp, a "model" Potemkin camp used by the Nazis as propaganda to disguise the atrocities committed against the Jews and other target groups. As he was not allowed to speak in private with the Jewish internees and was constantly escorted by SS officers, the ICRC representative did not realize the real nature of the camp, the true situation of its occupants and the fate that was in store for them.

11 Notably the Standard Minimum Rules for the Treatment of Prisoners (1977), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (1990), the Code of Conduct for Law Enforcement Officials (1979), the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

increasingly considered as the relevant international standards. Professional associations have also established codes of conduct, including medical ethics applicable to health workers, particularly doctors, in protecting prisoners and other detainees from torture and other cruel, inhuman or degrading treatment or punishment. Regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981), the Inter-American Convention to Prevent and Punish Torture (1985), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) have likewise been adopted.

In parallel, various bodies, mechanisms, institutions and organizations likewise concerned with the situation of detainees have come into being, whose work often also includes visits to places of detention. The conditions and procedure for ICRC visits to persons in detention have gained widespread acceptance and are a point of reference for most other agencies and institutions that wish to make such visits. They have, for example, been fully incorporated in international conventions setting up visiting bodies.¹²

The basis for the ICRC's work

The ICRC determines the beneficiaries of its activities on the basis of existing humanitarian needs and according to criteria linked to the prevailing situation in a given context.

In situations of international armed conflict, the ICRC's mandate for its activities on behalf of detainees (prisoners of war, civilian internees and security or common law detainees in occupied territories) is very clear. The Geneva Conventions give the ICRC the right of access to these persons and entitle it to receive all relevant information pertaining to them.¹³

In non-international armed conflicts there is no explicit treaty basis for the ICRC to have access to persons deprived of their liberty: neither Article 3 common to all four Geneva Conventions, which authorizes the ICRC to offer its services (the right of initiative), nor Protocol II additional to the said Conventions refers to visits to detainees or prerogatives specific to the ICRC. Legally, the parties concerned are thus under no obligation to accept ICRC visits to detainees in internal conflicts. Nonetheless, such visits are a constant

12 See in particular Articles 2, 7 and 8 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, which established the European Committee for the Prevention of Torture (CPT), and Articles 4, 13 and 14 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 2002 (not yet in force), which establishes the Sub-Committee on Prevention of Torture along with national mechanisms for the prevention of torture.

13 Articles 123 and 126 Third Geneva Convention relative to the treatment of prisoners of war of 1949 (GC III) and Articles 76, 140 and 143 Fourth Geneva Convention relative to the protection of civilian persons in times of war (GC IV).

practice on the part of the institution; they are recognized internationally, in particular via numerous resolutions adopted at the International Conference of the Red Cross and Red Crescent¹⁴ and hence also by States party to the Geneva Conventions, and are accepted in nearly all contexts.

In determining the detainees for whom its activities are deployed in internal armed conflicts, the ICRC draws in practice partly on concepts applicable to international armed conflicts. It accordingly seeks to have access first and foremost to persons who have taken a direct part in the hostilities (members of government armed forces or rebel forces in enemy hands) and to civilians arrested by the government or the rebels on account of their support, whether real or presumed, for the opposing forces. During visits to persons detained in connection with an internal armed conflict, the ICRC is often led by extension to concern itself with other detainees held in the same places of detention, but for ordinary penal offences (common law detainees). In such cases, the ICRC considers either that all detainees are affected by the prevailing situation, or that it is contrary to its principles of humanity and impartiality to address the needs of only one category of detainees when others have identical, or sometimes even greater, humanitarian needs.

As mentioned above, the ICRC has widened its focus and has extended its activities beyond armed conflicts¹⁵ to situations of internal violence, and especially internal disturbances.¹⁶ The same applies to other situations of internal violence, i.e. political or social tension or political unrest, which have not yet reached the level of internal disturbances but which affect a large number of people, in which an intervention by the ICRC is a suitable means to address the needs of those persons affected by the situation. Characteristic of them is the

14 Notably Resolution I of the 25th Conference (1986), Resolution IV of the 24th Conference (1981), Resolution XVIII of the 21st Conference (1969), Resolution XXXI of the 20th Conference (1965), and Resolution XIV of the 16th Conference (1938).

15 Currently, approximately 75% of the contexts in which the ICRC is visiting detainees are not situations of international or internal armed conflict.

16 Internal disturbances are characterized by a profound disruption of internal law and order, resulting from acts of violence which do not, however, have the characteristics of armed conflict. They do not necessarily imply armed action, but consist of serious acts of violence over a prolonged period or a situation of latent violence. For a situation to be qualified as internal disturbances, it is irrelevant whether there is State repression, whether the disturbances are prolonged or of brief duration but with long-lasting or intermittent effects, whether they affect part or all of the national territory, or whether they are of religious, ethnic, political, social, economic or any other origin. They include riots or isolated and sporadic acts of violence (see Article 1 (2) of Protocol II additional to the Geneva Conventions of 1977 (AP II GC)) whereby individuals or groups of individuals openly make known their opposition and their demands. They may also include struggles between factions or against the authorities in place, or acts such as mass arrests, forcible disappearances, detention for security reasons, suspension of judicial guarantees, the declaration of a state of emergency or the proclamation of martial law, see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, 1987, pp. 1354-1356 (N. 4471-4479); Agreement of 26 November 1997 on the organization of the international activities of the International Red Cross and Red Crescent Movement, *International Review of the Red Cross*, No. 829, March 1998, p. 175; Marion Harrof-Tavel, "Action taken by the International Committee of the Red Cross in situations of internal violence", *International Review of the Red Cross*, May-June 1993, No. 294, p. 204.

absence of any effective means for detainees to protect themselves from abuse or arbitrary acts which are being or may be inflicted upon them, for they do not or no longer enjoy the minimum protection they can expect from the authorities¹⁷ or are subject to the arbitrary power of individuals. In such cases the ICRC intervenes to compensate for the absence or failure of internal regulatory mechanisms (able to curb the effects of violence) in the given context. Where necessary, the ICRC also seeks to limit the consequences should the authorities concerned (whether legal or *de facto*) lose their monopoly on force or their control over its use.

The ICRC offers its services if warranted by the gravity of humanitarian needs and the urgency of responding to them. In so doing it acts on the basis of its own right of initiative conferred by the Statutes of the International Red Cross and Red Crescent Movement.¹⁸ The authorities approached are therefore under no legal obligation to accept such an offer of services by the ICRC or to grant it access to the persons detained.¹⁹ However, its activities and visits to detainees in all these situations below the threshold of armed conflict can be considered a consistent and recognized ICRC practice that has been accepted in numerous contexts. The main consideration for the authorities concerned, over and above the legal aspects, is the experience and the professional competence of the ICRC and the potential practical interest of the visits, not forgetting the favourable image that often results from their acceptance.

ICRC visits are destined first of all for persons detained in connection with a situation of internal violence, mainly those who, because of their words, actions or writings, or even the simple fact of belonging to a particular ethnic group or religion, are considered by the authorities as a threat to the existing system. Broadly speaking, these persons are often classified as opponents who

17 In this article, the term “authority” is used in the broadest possible sense. It covers public or legal authorities (representatives of State structures), but also persons assuming responsibilities and acting in the name of an armed group or any other organized entity that is not recognized as a State.

18 Article 5 (2) lit. (d) of the Statutes of the International Red Cross and Red Crescent Movement which establish the ICRC mandate to provide assistance and protection to the victims of internal disturbances; see also Article 5 (3) of the Statutes.

19 Indirect reference to ICRC access to detainees outside situations of armed conflict can also be found in the resolutions of the International Conference of the Red Cross and Red Crescent (Resolution VI of the 24th Conference (1981) and Resolution XIV of the 16th Conference (1938)). Certain international conventions also refer to ICRC visits to detainees outside of armed conflicts (but do not constitute a legal basis for such visits): Article 6 (5) of the Convention against the Taking of Hostages (1979), Article 10 (4) of the Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), Article 7 (5) of the Convention for the Suppression of Terrorist Bombings (1997), Article 9 (3) of the Convention for the Suppression of the Financing of Terrorism (1999), and Article 32 of the Optional Protocol to the Convention against Torture (2002). Lastly, Resolution 23 of the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 – following which the General Assembly of the UN, in its Resolution 45/121, invited governments to be inspired by the resolutions and instruments adopted on said occasion to develop legislation and appropriate directives – states that “the international community has given [the ICRC] a mandate in the Geneva Conventions of 1949, the Protocols Additional thereto of 1977 and the Statutes of the International Red Cross and Red Crescent Movement, to protect persons deprived of their liberty as a result of these events [that is, situations of armed international and other conflict and internal troubles], in particular prisoners of war, civilian internees and security detainees”.

must be punished or at least controlled by depriving them of their liberty. Sometimes they are placed under special jurisdiction or are accused of crimes against the security of the State which are covered by specific national legislation. At other times they are detained under ordinary criminal law. The risk of being subjected to abuse or arbitrary acts is often greater for these detainees than for others. Lastly, the ICRC is concerned with the situation of detainees who are more likely to receive harsh treatment or suffer deprivations than in a stable situation, for instance when the authorities have, for whatever reason, lost full control over the law-enforcement officials.²⁰ In that case the ICRC's potential intervention will be for all detainees, regardless of the reasons for their detention.

The acceptance of an ICRC offer of services does not equate with recognition of the existence of a particular situation, especially a situation of armed conflict.²¹ The acceptance of ICRC visits is often an expression of the authorities' desire to ensure that detainees receive decent, humane treatment.

Outside of international armed conflicts, the ICRC has to obtain authorization to carry out its visits through negotiation, including with armed groups and possible non-State entities;²² these authorizations are given orally or in writing (in the form of an exchange of letters, safe-conducts signed by a minister, orders issued by the executive or the signing of a formal accord). The criteria determining the choice of procedure depend on the legal system, the functioning of the country's institutions, and considerations of advisability or national practice. The ICRC fairly often signs formal visiting agreements which, depending on the respective constitutional system, may have the formal value of international treaties and are sometimes published in official national bulletins.²³

Obtaining access to detainees can sometimes be difficult. It often requires time, patience and negotiating talent. In some situations the ICRC is present but is unable to have access to detainees. Similarly, other situations in which the ICRC would like to be active remain closed to it, and the relevant authorities are completely impervious to dialogue with the ICRC on any questions relating to detention as a whole and especially possible ICRC access to detainees. Sometimes, too, the ICRC does not obtain all it wants, for instance when certain authorities grant access only to some of the persons or only after a certain period of time has elapsed.

In practice, on more than one occasion governments have not respected or have sought to evade their obligation to permit visits by the ICRC in

20 This was notably the case in President Mobutu's Zaire, where there was practically no budget assigned to prisons and where the prisoners had to pay to meet their essential needs, or die.

21 Article 3 common to all four Geneva Conventions explicitly spells out this principle: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

22 The ICRC has visited detainees held by numerous armed movements such as the TPLF (Tigray People's Liberation Front) in Ethiopia, the RPF (Rwanda Patriotic Front) in Rwanda, the SPLA/M (Sudanese People's Liberation Army/Movement) in Southern Sudan, UNITA (National Union for the Total Independence of Angola), the LTTE (Liberation Tigers of Tamil Eelam) in Sri Lanka, the FARC (Colombian Revolutionary Armed Forces) in Colombia, the main Kurdish parties and *de facto* authorities in Iraqi Kurdistan, *de facto* authorities in Abkhazia and in Nagorny Karabakh, the Palestinian Authority, etc.

23 For instance, the treaty signed in South Africa in 1995 and with Azerbaijan in 2000.

international armed conflicts. They have either disputed the existence of an armed conflict (including situations of occupation) or the international nature of the conflict, or they have required the ICRC to negotiate access, or have simply refused access to all or some of the detainees.

To give a complete picture, the visits made by the ICRC to persons detained under the authority of international tribunals should also be mentioned (the International Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone). The ICRC has likewise regularly had access to the detainees held by various international forces (for peacekeeping, peace-making or peace-enforcement) such as UNOSOM in Somalia, SFOR in Bosnia, UNMIK and KFOR in Kosovo, and INTERFET and UNTAET in East Timor.

Preconditions for action

Analysis of the problems and situation

Any action on behalf of detainees requires the overall situation to be understood and analysed as carefully as possible. This knowledge is needed to establish relevant objectives and an appropriate strategy of action. The information needed is obtained with complete transparency and, if possible, with the cooperation of the authorities concerned. However, it may turn out that the latter consider certain questions to be a matter of national security, and this can on occasion hamper or at least significantly delay an appropriate understanding and analysis of the situation and the problems.

The main groups of factors to be taken into consideration are as follows:

- *The characteristics of the situation*

The type of conflict or other situation which, in the particular case in question, justifies intervention by the ICRC, the nature and extent of what is at stake for the warring parties and the persons concerned can influence the seriousness of the risks to which the detainees are exposed.

The type of entities in charge of the arrest and detention of persons deprived of their liberty (military and paramilitary forces, police forces, special intervention troops, militias, armed groups, private security organizations, etc.) is an important factor.

Socio-cultural factors which influence the level of tolerance for the use of violence in social relations in general and towards persons considered “deviants” or “delinquents” in particular must also be taken into account.

- *The State authorities’ policies and practices*

The main considerations here are the international commitments of the State and the warring parties (in particular, international humanitarian

law and international or regional treaties dealing with the protection of persons) and the incorporation of international rules into national legislation and regulations. Knowledge of the national legal and normative framework (legislation, rules, governmental directives), the possible deficiencies thereof and the extent to which it is or can be implemented²⁴ is important.

The custodial policy (the objectives to be achieved by imprisonment, the characteristics of different custodial systems and regulations in the prisons, the existence of stringent forms of detention and high security sections, etc.) and the methods of policing used (mass or targeted arrests, duration of periods of detention *incommunicado*, duration of detention in provisional places, brief or long-term deprivation of liberty, etc.) must be known. This also applies to the types of deprivation of liberty used (internment, administrative detention, penal detention, provisional detention).

- *The modus operandi of State authorities, particularly those linked to the administration of justice*
Knowledge of such factors as the *modus operandi* of the authorities, the reliability and functioning of the chains of command, the centralization or decentralization of structures and decision-making, and the degree of autonomy of the bodies in charge of policing, is of fundamental importance. The same is true of the workings of key institutions involved in detention such as the prison administration, the interaction between the different bodies concerned (police, judiciary, prison administration, ministries supporting the penitentiary services in key questions such as finance, health, education, work, etc.), and the existence of various supervisory mechanisms within the administration or judiciary.
- *The financial, material and human resources available to the authorities*
The factors to be taken into account are, in particular, the country's living standards and economic development, the level of the existing infrastructure, the national budget and the proportion allocated to prisons and the system of repression in the broad sense, the number of personnel engaged in the justice administration system, the tasks they perform and their level of training.
- *The organization of the diverse places of detention*
The focus here is on the system of detention and its regulation (in terms of categories of detainees, gender, age and the length of sentences

24 In a significant number of countries, particularly developing countries, the constitutional system and the laws are not implemented in full or are not respected throughout the national territory for a variety of reasons (budgetary problems, insufficient judges, refusal by civil servants and law enforcement officials to work in isolated regions or areas subject to security problems, etc.). In other cases, the executive suspends the application of certain laws either in actual fact or by adopting various decrees or directives.

imposed), the actual running of places of detention and detainees (including aspects such as the existence and quality of medical supervision and care, the possibilities for contact between detainees and their families, the availability of productive and educational activities for the detainees, and the system of disciplinary sanctions).

Favourable environment and regulatory mechanisms

Understanding the situation and phenomena and analysing the functioning of the various custodial institutions and facilities is no easy matter. When intervening from outside the administration, it is very difficult to claim an ability to understand all the issues involved.

Respect for the dignity and well-being of detainees depends on the existence of a favourable environment. The primary responsibility for establishing and maintaining such an environment rests with the authorities concerned. They are duty-bound to provide for the vital needs of the persons they arrest and detain and to guarantee that they receive decent, humane treatment. When they become aware of problems, they have to take all necessary steps as soon as possible to remedy them. This also means proceeding to make a prompt and impartial investigation wherever there are grounds to believe that abuses have taken place,²⁵ and then, if the facts are confirmed, imposing appropriate penalties.²⁶

This favourable environment, even if it does exist, is potentially unstable. It may be undermined at any time by unforeseen events such as terrorist attacks, the appearance of social tensions or simply changes in attitudes. Thus the risk of abuse is constant. Favourable environments therefore have to be monitored, developed and consolidated by mechanisms able to detect abuses as soon as they come to light and exert the necessary pressure on the relevant authorities to ensure that they take the appropriate steps. This is what is known as regulatory mechanisms.

There are essentially two different types of regulatory mechanism:

- internal regulatory mechanisms, i.e. those which act inside the country and are specific to the society in which they work. They include the independent media, various citizens' rights groups, lawyers, an independent judicial system, the traditional role of elders in certain societies,²⁷ etc.;
- external regulatory mechanisms, i.e. those which act at the level of the international community, mainly by bringing diplomatic and economic pressure to bear on the authorities concerned. They include the

25 This obligation is notably contained in Article 12 of the Convention against Torture.

26 In particular, on the basis of Article 4 of the Convention against Torture, but also under the provisions of the Geneva Conventions concerning grave breaches and other serious violations of international humanitarian law (Articles 40, 50, 129 and 146 of GC I, II, III and IV respectively).

27 For example in Somali or Burundi society.

international media, international tribunals, other governments,²⁸ international humanitarian organizations (UN agencies and NGOs) and international human rights bodies or organizations.²⁹

The response of the various intervening parties forming the regulatory mechanisms cannot be simple and reduced to a single common denominator. Diverse and complementary action is required (in particular, political measures and measures to foster development and cooperation) whose common goal is to restore the parameters that ensure respect for the fundamental rights of the individual. The ICRC, essentially by virtue of its independence, its day-to-day presence on the ground, its contacts with all relevant authorities and its marked preference for confidential dialogue, acts as a substitute for internal regulatory mechanisms and intervenes mainly in crisis situations when internal regulatory mechanisms are dysfunctional, obstructed, or do not or no longer exist.

Characteristics of the ICRC's approach

The ICRC's approach in the field of detention has several particular characteristics.³⁰ Some are shared by other organizations and bodies. Others are specific to the ICRC (comprehensive approach, individual follow-up, total independence vis-à-vis political authorities, ability to intervene inside the countries concerned, ongoing dialogue with all relevant authorities at various levels). Those characteristics combined are what makes the ICRC's approach unique.

An adapted approach

The ICRC's priority is to persuade the responsible authorities to respect the fundamental rights of individuals. For that purpose the best response or responses have to be defined, based on an analysis of the situation as a whole and adapted to the problems identified and their causes.

The causes of problems and dysfunction may be attributable to a policy or strategy of repression whose concept or implementation does not comply

28 Under Article 1 common to all four Geneva Conventions, the States Parties are required not only to respect the Conventions, but also to ensure respect for them in all circumstances.

29 The latter may be linked to the UN bodies established by treaties such as the Committee against Torture (established by the Convention against Torture), the Human Rights Committee (established by the 1966 Covenant on Civil and Political Rights), the Committee on the Rights of the Child (established by the 1989 Convention on the Rights of the Child); mechanisms established by resolutions of the UN Commission on Human Rights such as the Special Rapporteur on Torture, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, or the Working Group on Arbitrary Detention; the Office of the High Commissioner for Human Rights); or regional organizations (bodies established by regional treaties, such as the European Committee for the Prevention of Torture, the Inter-American Commission on Human Rights, or the African Commission on Human and Peoples' Rights) and mechanisms established by the resolutions of regional organizations (such as the Special Rapporteur on Prisons and Conditions of Detention in Africa; or they may be NGOs).

30 See in particular Pascal Daudin and Hernan Reyes, "How visits by the ICRC can help prisoners cope with the effects of traumatic stress", in *International Responses to Traumatic Stress*, Baywood Publishers, New York, 1996, pp. 219-256.

with international norms and standards. Others are due to failures, or even an inability, of the authorities to ensure that their institutions and systems operate in such a way that the detainees' integrity and dignity are respected. Lastly, social factors, such as the level of tolerance for the use of violence, may play a role. In practice, it is not always possible to identify clearly the respective importance of these different parameters.

For the ICRC, the principal challenge is to ensure that its activities are suited to the needs and diversity of the situations in which it is working at a given time; adapted approaches are thus required. Moreover, these vary increasingly from one situation to another. There are few points in common, for example, between an interrogation and detention centre such as that in Guantánamo Bay, run by a country with such substantial resources at its disposal as the United States, and overpopulated, outdated prisons in a developing country such as Rwanda. The ICRC thus makes regular efforts to adapt accordingly the forms of action it takes.³¹

An integrated approach: From visits to assistance

In its approach, the ICRC gives priority to make the relevant authorities aware of their responsibilities. Efforts to promote a sense of responsibility are effective, provided there is a minimum of political will to follow the recommendations made and to cooperate properly. This political will may also be generated by third parties able to influence the authorities (mobilization), or even by public pressure (denunciation).³² The ICRC's own practice with regard to denunciation is restrictive and requires the existence of specific conditions.³³ When the

31 There are five main forms of action:

- persuasion or promotion of a sense of responsibility: convincing the authorities to take action themselves to stop an abuse or violation or to help the victims thereof;
- support: direct or indirect cooperation with the authorities by giving them the means to fulfil their legal obligations;
- substitution: acting in lieu of the defaulting authorities to stop an abuse or violation or help the victims thereof;
- mobilization: generating the interest and external influence of other entities (States, NGOs, institutions of civil society, international or regional organizations) to obtain support enabling an abuse or violation to be prevented or stopped or to elicit encouragement or help for the authorities in fulfilling their legal responsibilities and obligations;
- denunciation: publicizing the existence of abuse and violations so as to exert pressure on the authorities and compel them to take action to stop an abuse or violation or to help the victims thereof.
- For definitions, see: Paul Bonard, *Modes of action used by humanitarian players: criteria for operational complementarity*, ICRC, Geneva, 1999; Sylvie Giossi Caverzascio, *Strengthening Protection in War: A Search for Professional Standards*, International Committee of the Red Cross, Geneva, 2001, pp. 29-33; *Humanitarian Protection: A Guidance Booklet*, Hugo Slim and Luis Enrique Eguen, ALNAP, London, 2005 (forthcoming).

32 In situations of armed conflict, denunciation and calls for action by States party to the Geneva Conventions are based in particular on Article I common to all four Conventions which requires them "to respect and to ensure respect for the present Convention in all circumstances".

33 See "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *International Review of the Red Cross*, January-February 1981, No. 220, pp. 76-83; see also reference 42.

political will is there but the means or know-how are lacking, the ICRC can provide support through various activities, including the strengthening of local capacities. In emergencies or when, despite the best of intentions, the authorities are incapable of meeting all the basic needs of detainees, the ICRC can go further and provide direct assistance by selectively assuming on some of the authorities' duties.

Visits to detainees are the very core of the ICRC's approach. Visits are clearly an effective way of identifying the incidence of ill-treatment, inadequate conditions of detention and the existence of any other problem. By simply taking place they can to some extent also have a prophylactic effect and thus be instrumental in preventing abuse. They play a psychological role, too: for months or even years, the ICRC delegate is often the only benevolent person to whom the detainees can speak and in particular voice all their frustrations and anxieties without fear. Visits are lastly an opportunity to start a practical dialogue with the detaining authorities, for the ICRC's intermittent presence in a place of detention cannot guarantee that the detainees' physical and moral integrity will be respected. Only the detaining authorities themselves can assume this responsibility. That is why the purpose of the ICRC's activities is to convince the authorities, by approaching them, to adopt the solutions it recommends for the humanitarian problems it has observed.

While focusing primarily on people — the detainees with whom the ICRC delegates speak — the visits do give insight into all aspects of detention and consequently all factors influencing the detainees' lives (for example, the premises, the organization of the prison service, the administration's internal regulations and directives, etc.).

On the basis of these visits and its findings, the ICRC adopts a whole range of measures. First there are discussions with the administration of the places of detention and their superiors, then working documents summarizing its findings and the recommendations made, followed by summary reports on the situation at one or more places or with regard to a particular problem. These approaches take place at all levels of the custodial system and the chain of command, whether civilian, military or under police control. In parallel, and with the consent of the authorities concerned, the ICRC can take a series of interdependent steps and initiatives to support its work of overseeing the places of detention or its approaches to ensure that the detainees receive decent, humane treatment. They include:

- advising on legal and similar matters (e.g. prison legislation, regulations on prison organization, etc.);
- translating reference works published by the ICRC or, with their consent, those of other authors or organizations³⁴ into a national language;

34 This was particularly the case in Ethiopia with the translation into Amharic of the manual "A Human Rights Approach to Prison Management: Handbook for Prison Staff", Andrew Coyle, International Centre for Prison Studies, London, 2002.

- advising, sometimes with the provision of material support, on the establishment and organization of State services and facilities;³⁵
- setting up specialized training for law enforcement personnel (police and security forces and the military),³⁶ prison personnel³⁷ or specialists working in prisons,³⁸ e.g. medical personnel and those in charge of the water supply and sanitary facilities;
- organizing interdisciplinary workshops bringing together professionals from a wide variety of fields to work on the same problem;³⁹
- bringing the authorities together with organizations specialized in fields in which the ICRC does not claim to have specialized knowledge;
- renovating or providing new sanitation, (latrines, septic tanks, showers, etc.), kitchens or health facilities (building and equipping clinics and/or providing medical supplies, etc.);
- organizing the exchange of family news between detainees and their families (in the form of Red Cross Messages) monitored, or even censored, by the competent authorities;
- delivering hygiene products or recreational items directly to the detainees;
- providing food or setting up a food chain in exceptional circumstances,⁴⁰ or taking emergency action in the event of epidemics such as cholera.

Flexibility

Since its vocation is to act in highly varied contexts across the world, the ICRC has to be as flexible as possible. The main priorities are to serve the interests of the people affected — the detainees — and to meet their needs. There is no room for dogmatism or a single approach.

The visits and follow-up activities are not the same with regard to detainees in what are called provisional places of detention such as police stations,

35 In particular improving prison medical services.

36 The ICRC organizes courses at various levels (particularly basic courses and courses for instructors) with the main objective of creating a national long-term capacity to continue the same type of training. It seeks essentially to familiarize participants with the laws, ethical codes of conduct and professional standards in force, and places a very strong emphasis on respect for the physical and moral integrity of suspects during arrest and detention. It is careful not to teach techniques (e.g. for interrogation) in fields where it is not competent and could not get involved without compromising its principles of action, especially its neutrality. For police and security forces, the basis for these courses is found in the publication *“To Serve and Protect: Human Rights and Humanitarian Law for Police and Security Forces”*, ICRC, Geneva, 1998. For the armed forces the ICRC has published a training guide: *The Law of Armed Conflict: Teaching File for Instructors*, ICRC, Geneva, 2002.

37 This can take the form of international seminars on a regional scale, support for seminars organized by other organizations, national training seminars on international standards and workshops on various problems to do with imprisonment and the prison system. Where appropriate, these workshops are held with the participation of foreign experts or officials or specialized organizations.

38 Such training can take the form of practical workshops at a single prison, at a regional level, or at the national level, the implementation of pilot projects or the provision of technical experts.

39 For instance on the treatment of tuberculosis, or more generally on the organization of custodial services (judges, criminal investigation department, prison administration).

40 In 2004, e.g. in Rwanda, Madagascar and Guinea.

interrogation centres, or even military bases and permanent places of detention as prisons. Being faced with administrative detention or internment is not the same as detention under judicial control. The detention of hostages, in particular by private persons or militias having no direct or organic link to the authorities, poses challenges of its own. The same is true of detention by international forces or international tribunals. Activities on behalf of detained women or children require many specific questions to be taken into consideration.⁴¹

This flexibility also applies to the mere organization of ICRC visits. The number of delegates or specialists involved (from one to a dozen), the frequency of visits (sometimes one a week, or even one a day; in other situations, one a year or even fewer), the type of visits (a complete tour of the entire premises and installations, or a partial visit relating to limited problems) can all vary significantly. The steps and recommendations to which the visits give rise can also differ substantially, as can the possible measures and initiatives which follow the visits.

Proximity and regular presence

The ICRC does not comment nor act in the field of detention if, for whatever reason, it has not visited the detainees and has no firsthand knowledge of the situation. When it is authorized to visit the detainees, the ICRC establishes a permanent representation, sized according to the number of places of detention and detainees and the importance of the identified or prospective needs. Where appropriate, the ICRC deals with several countries from the same representation.

This direct presence enables the ICRC simultaneously to acquire sufficient knowledge of the situation, be in close proximity both to the detainees and the authorities, maintain an ongoing dialogue, and intervene very rapidly on the ground in the acute phase of a crisis.

A strictly humanitarian, non-political and independent approach

The ICRC has a precise objective in mind, namely improving the situation of detainees by doing all it can to ensure that they are treated with dignity and humanity.

Anxious to preserve the trust of all parties, the ICRC is independent not only with regard to political interests: it likewise does not get involved in any way in the political problems giving rise to the tense situations in which it intervenes, or comment on the reasons for detention. Similarly, the pertinence of the accusation, the guilt of the detainee, the legitimacy of the laws permitting the detention (martial law, exceptional laws, the normal penal code — or simply the absence of law) are not a direct consideration for the ICRC. The offence of which the detainee is accused (armed combat, terrorism, subversion, wrong thinking, etc.)

41 On this subject see in particular “*Addressing the Needs of Women affected by Armed Conflicts: An ICRC Guidance Document*”, ICRC, Geneva, 2004, pp. 113-160.

is therefore irrelevant to the ICRC once it has determined that he or she falls within its field of interest.

Independence is one of the fundamental principles of the ICRC. In its work, the ICRC takes constant care to be perceived also as independent and exclusively motivated by the desire to alleviate suffering.

Dialogue – confidentiality – impact

The cornerstone of the ICRC's approach is dialogue, both with the detainees and with the authorities.

Since it seeks cooperation and not confrontation with the authorities, the ICRC has to maintain a close, structured, professional and transparent relationship with them. Dialogue in particular is the logical next step after any visit to a place of detention. It enables a regular flow of objective information, based on regular contact with the detainees, to be maintained with the relevant authorities and culminates in the formulation of proposals for solutions. As mentioned above, constant dialogue with all parties responsible, at whatever level, enables the visit to be part of an ongoing process. It is also conducive to the sense of proximity between the ICRC and the authorities, law enforcement services and detainees.

The priority given to dialogue is an incentive for the ICRC to multiply its contacts and devise new ways of reaching the potential perpetrators of violence or those who control them. In crisis situations, dysfunction in the official chains of command or problems in the supervision of subordinates regularly come to light, often requiring all echelons of the civil and, if need be, military hierarchy to be contacted, informed and convinced of the soundness of the ICRC's recommendations. Sometimes a State disintegrates into several factions with a direct or indirect influence on the situation and treatment of detainees: it then becomes crucial to be able to contact and discuss with them.

To be constructive and successful, the ongoing dialogue envisaged by the ICRC must be firmly rooted in a relationship of trust. This trust, nurtured by frequent meetings between the ICRC and the authorities, is established and built up thanks, among other things, to the confidential nature of its work. Confidentiality is a working method and it is a strategic choice. It is therefore not an end in itself. It also allows work to be done on what are generally very sensitive issues, in complete independence and free of any pressure by public opinion, the media or political organizations. Moreover, confidentiality unquestionably makes access easier, particularly to places to which the authorities are reluctant to admit outsiders.

By accepting the working methods of the ICRC and its presence and involvement in places of detention, the authorities agree to enter into discussions on sensitive issues such as the occurrence of torture and commit themselves to dealing with them in good faith. The ICRC also has to be wary that its presence and activities are not exploited by the authorities. So confidentiality has its limits.

When the ICRC's representations and efforts have no significant impact or when the authorities do not abide by the agreed procedures, the ICRC may decide to publicize its concerns. This may also lead to a suspension of its activities, primarily its visits to detainees, until a new agreement has been reached or the authorities have renewed their commitment not to tolerate further abuses. The ICRC decides to make a public denunciation only when strict conditions are met,⁴² and when it is convinced that emerging from its customary reserve in this way will benefit the detainees and not harm them. In general, the main concern of the detainees to whom the ICRC has access is not to be abandoned, rather than wanting to see their situation made public. In every such case, the decision whether to go public and when to do so is given considerable thought.

The ICRC insists that the authorities in the countries in which it is working must observe the same rules of confidentiality with regard to its findings and recommendations. When they fail to do so, the ICRC in turn may then also decide to abandon those rules. Historically, confidentiality has on the whole been respected by the authorities. Situations in which leaks have led to partial or complete publication in the press of ICRC reports on places of detention generally date back quite a long time, to Algeria (1960), Greece (1969), Pakistan (1972), Chile (1975) and Iran (1979). More recently, the report handed over by the ICRC to the American authorities and detailing its findings during visits from May to November 2003 to detainees in Iraq was published by the *Wall Street Journal*.⁴³ Likewise, information in its confidential reports on its visits to the internment camp at Guantánamo Bay was published in the press.⁴⁴ The ICRC expressed its concern about these leaks, which are contrary to the conditions, procedure and cooperation agreed in advance with the relevant authorities. Apart from the effects they might have on the detainees' situation, such repeated leaks could also detract from the importance, in the minds of the authorities of other countries, of the confidentiality that the ICRC imposes upon itself and strictly adheres to, or wrongly give them the impression that it has changed its working methods.

Interest in the individual, and individual follow-up

The ICRC's vocation is to attend above all to individuals and their problems, and it has given itself the ability to do so. Throughout their time in captivity it

42 These conditions are: 1) the existence of large-scale and repeated violations; 2) the ICRC delegates have directly witnessed such violations, or their existence and extent and respective data have been established by means of reliable and verifiable sources; 3) the ICRC's confidential approaches to end these violations have had no impact or results; 4) a public statement by the ICRC would be conducive to the interests of the persons concerned. Cf. "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *International Review of the Red Cross*, January-February 1981, No. 220, pp. 76-83.

43 "Excerpts from the executive summary of the 'Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation'", *Wall Street Journal*, 7 May 2004.

44 "Red Cross finds detainee abuse in Guantánamo", A. Lewis, *New York Times*, 30 November 2004; "Iraq: new war, old tactics?", *Newsweek*, 24 January 2005.

monitors the detainees it deems to be at risk. The risk factor is assessed according to their status or the abuse to which they have been, or are potentially likely to be, subjected. Individual monitoring may also sometimes take place on an ad hoc basis during a particular period of captivity (in particular until the detainee has been sentenced in due process of law and his or her situation thereby normalized, or until satisfactory conditions of detention have been granted), or for detainees who are vulnerable or have particular problems.

More specifically, the ICRC takes note of the identity of such detainees, which is then entered into a database and stored at its headquarters for several years after its intervention in the respective context has ended. During its subsequent visits, the ICRC regularly checks whether the detainees it has registered are still present or where they have been transferred to, and whether or how their situation has changed. Interviews in private with the detainees enable the ICRC to find out how they are coping with imprisonment and the difficulties encountered in their daily life. They also give it an opportunity to identify detainees or groups who are suffering abuse. In principle, each case will then be followed up either by a request to the authorities concerned to take corrective measures, by a repetition of the visit, or even by individually addressing the personal problems of certain detainees.

Individual approach and structural approach

In many contexts the ICRC has realized that an approach centred on only some detainees or categories of detainees with specific problems necessitating protection was inappropriate or needed to be complemented by a wider approach covering the detainees as a whole. In such cases all factors that are related to or significantly influence detention and the detainees' situation, and thus their lives, have to be taken into account. In principle, this can have a greater impact than by intervening simply to address individual problems. The structural approach and the individual approach are moreover generally inseparable and complementary.

The main problems encountered in the prisons are in fact very often structural in origin. For instance, a lack of rules clearly defining the duties and responsibilities of personnel often results in abuses that could be prevented. Also, slowness of the judicial system leads to big delays in dealing with cases of detainees awaiting trial. These delays cause congestion in the penitentiary system, which in turn gives rise to a series of problems in running the prisons and maintaining adequate material conditions of detention. Quite often, the shortcomings and abuses identified are nothing new and existed well before the situation which justified the ICRC's intervention, even though that situation may have exacerbated them.

The structural approach focuses on improving the way the places of detention are run and the administration of justice in the broad sense so as to benefit a large number of the detainees, if not all of them. The ICRC takes a comprehensive view of the problems and thus often carries out a kind of audit or consultancy, producing a thorough appraisal of the situation for the relevant authorities. The purpose is to recommend means of reducing structural shortcomings and

dysfunctioning, to render the work of law enforcement institutions more compatible with international standards, to educate and to enable systems and behaviour to be reformed in the long term.

Wherever the authorities show a genuine desire to improve the situation by strengthening their institutional capacities and/or implementing recognized practices, the ICRC often backs up its initiatives and recommendations with practical hands-on support for these efforts. It then regularly calls on the services of consultants or works in partnership with organizations specialized in a particular field.

Conditions and procedure for visits to detainees

The ICRC carries out its visits to places of detention according to specific terms and conditions which are applied across the board⁴⁵ and have to be accepted by the authorities in question before any visit can take place. They are the guarantee for professional and credible work and enable the ICRC to assess the situation as accurately as possible, whilst safeguarding the interests of the detainees.

There are five main conditions governing ICRC visits:

1. Access to all detainees within the ICRC's field of interest

The ICRC must have the guarantee and the genuine possibility of coming into contact with all persons having the status, or belonging to the category, for which it has negotiated access.

2. Access to all premises and facilities used by and for detainees

This condition is the logical corollary of the first one. The ICRC wants to have access to all detainees, wherever they may be (prison, camp, police station, military garrison, etc.). It also wants to have access to the entire premises there, including communal facilities (cells, WC, showers, kitchens, refectory, visiting room, workshops, sports areas, places for worship, infirmary, punishment cells, etc.). Such access makes it possible, in particular, to verify the conditions of detention and make sure that there are no detainees concealed from the ICRC during its visit.

3. Authorization to repeat the visits

Experience shows that a single visit has few positive long-term effects and does not enable protective activities to be developed. It is, moreover,

⁴⁵ See also Philippe de Sinner and Hernan Reyes, "Activités du CICR en matière de visites aux personnes privées de liberté. Une contribution à la lutte contre la torture", in Antonio Cassese (ed.) *La lutte internationale contre le terrorisme*, Nomos Verlagsgesellschaft, Baden-Baden, 1991, pp. 153-171; Pascal Daudin et Hernan Reyes, "How visits by the ICRC can help prisoners cope with the effects of traumatic stress", in *International Responses to Traumatic Stress*, Baywood Publishers, New York, 1996, pp. 219-256; Hernan Reyes, "Visits to prisoners by the ICRC", in *Torture Supplementum* No. 1, 1997, pp. 28-30; Marina Staiff, "Visits to detained torture victims by the ICRC (I): Management, documentation, and follow-up", *Torture*, Vol. 10, No. 1, 2000, pp. 4-7.

imperative to be able to see certain detainees again to ensure that they have not been subjected to reprisals after their interview with the ICRC. The possibility to repeat visits is therefore one of the key conditions for any ICRC action on behalf of detainees. Each detainee registered by the ICRC will be monitored throughout his or her entire detention and will be seen again periodically, whether transferred elsewhere or not. As a general rule, the frequency of visits is adapted to the detainees' needs. For objective reasons consideration must also be given, however, to the available human, material and financial resources.

4. Possibility to speak freely and in private (without witnesses) with the detainees of the ICRC's choice

The private interview without witnesses is truly a fundamental principle of the ICRC's work in places of detention. It enables the ICRC to get to know the detainees' point of view and individual circumstances, and to gain insight into the reality of prison life – not only the material and psychological conditions in the place visited but also all aspects of the treatment experienced by the detainees in other places. In the day-to-day life of the detainees the private interview is intended as a special time in which they can genuinely say what they think without being overheard by the authorities and their fellow detainees, and can sometimes even vent their feelings orally without fear of punishment.

The interviews are conducted at a place chosen by the ICRC as best guaranteeing confidentiality (e.g. a cell, the library, the exercise yard, etc.) and, within reason, take place without any time limit. The private interview is a time for listening and dialogue, during which it is of utmost importance to be able to communicate in a language understood by the detainee; the presence of an ICRC interpreter or, if unavoidable, of a fellow detainee chosen to act as an interpreter, is therefore sometimes necessary.

The information obtained during the private interview is essential for the ICRC, but it is aware of certain subjectivity on the part of the detainees and takes this into account when evaluating problems. Before mentioning to the detaining authorities any information given by a detainee, the ICRC makes sure that the detainee in question agrees to that information being passed on.

5. The assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorize it to compile such a list during the visit

The ICRC can then at any time check on the detainees' presence and monitor them individually throughout the various stages of their detention.

Other terms and conditions can be negotiated and added to the agreement reached with the authorities concerned: the possibility to make visits at any time without prior notice or at short notice; the possibility to provide certain services

(distribute aid or family messages); automatic notification by the authorities of arrests, transfers and releases, etc.

Irrespective of the type of place of detention, the organization of the visits and the actual visiting procedure are, in principle, basically the same. A standard visit to a place of detention normally consists of the following stages:

- an initial interview with the authorities of the place of detention to enable the ICRC to clarify both its and their expectations and constraints. It is also an opportunity to gather information on how the place is run and the main problems facing the authorities;
- a tour of the entire premises, accompanied by the authorities, so that the ICRC can familiarize itself with the place of detention and find out how it is organized and handles its daily work, including the functioning of installations such as the kitchens, the sanitary installations or the facilities for family visits;
- interviews in private with the detainees, which generally account for most of the time taken up by the visit;
- a final interview with the authorities of the place of detention to relate their perception of the situation to that of the detainees and to outline the ICRC's findings and recommendations;
- a follow-up to the visit by contacting the authorities concerned, either the person in charge of the place of detention or at a higher level, as mentioned above.

Professionalism

In order to be relevant, formulate recommendations adapted to the various contexts and take appropriate action, the ICRC makes a point of being professional in its approach. Its various activities, in particular the visits to places of detention, are carried out by duly trained delegates. Doctors experienced in matters relating to detention, and experts in fields such as water, sanitation and habitat, nutrition or judicial guarantees are regularly included in its teams. When it feels that none of its staff has the requisite expertise, it may call in consultants, especially experts on prison organization.

Good offices and interventions as a neutral, independent intermediary

In a significant number of situations, the ICRC has played a part in the release and/or repatriation of detainees. In principle, the parties to an international conflict must themselves release and repatriate prisoners of war; ICRC participation is not mandatory. It has nevertheless always been the ICRC's practice to be available in complex situations or when dialogue between the former belligerents remains difficult. Over the last 20 years it has been systematically requested to take part and has thus acquired considerable experience and know-

how, imbued with great tenacity. That tenacity is particularly evident when the process takes several years, as it did for the prisoners of war of the Iran-Iraq conflict or those held in connection with the Western Sahara conflict. In practice, the ICRC agrees with the respective parties on the conditions and procedures for release and repatriation (in particular, it insists on interviewing all detainees in private to find out whether they object to being repatriated, so as to ensure that the principle of *non-refoulement* is respected, i.e. that they are not being returned against their will). Next, agreement is reached on a repatriation plan defining all the practical aspects and mainly the logistics available. Besides the two conflicts mentioned above, the ICRC has acted as a neutral and independent intermediary in connection with the Gulf War and various other conflicts: in Nagorny Karabakh, the Democratic Republic of Congo, between Eritrea and Ethiopia and previously between Eritrea and Yemen, and in southern Lebanon, Croatia and Bosnia-Herzegovina.

More recently, the ICRC has also been asked to supervise the release and return home of persons detained in connection with an internal armed conflict, either during the hostilities (e.g. soldiers held by the FARC in Columbia, the NPA movement in the Philippines and the LTTE in Sri Lanka) or more often after the signing of a peace agreement (as in Angola, Sudan, Liberia or the Ivory Coast).

Arousing public awareness and a sense of responsibility among States

In numerous countries there is little awareness of — or interest in — matters of detention. Yet prison conditions in many cases are alarming, and all too often prisoners die for want of care or food. Cooperation programmes and projects supported by economic institutions such as the World Bank or the International Monetary Fund often bypass this complex area. Whilst many countries do admittedly receive aid to reform their judicial system, the custodial system and conditions in prisons, including the need for renovation, often receive only marginal attention.

The ICRC regularly seeks to use its presence in numerous international fora and its network of high-level contacts to highlight the difficult situation of prisons in many countries, stressing the urgent need for swift action and assistance. It also periodically publicizes these issues. All its efforts to raise awareness and generate action take place within the limits imposed by its confidentiality, although the difficult material conditions in prisons are often public knowledge in the countries directly concerned.

Standards and reference bases

Working to achieve the adoption of standards

Throughout its history, the ICRC has vigorously participated in the development and adoption of legal standards protecting various categories of

detainees.⁴⁶ In addition, it has regularly taken part in meetings of experts, sessions of working groups set up within the framework of the UN, notably by the Commission for Human Rights, and diplomatic conferences which have led to the adoption of new detention-related norms. The acknowledged expertise of the ICRC, its international standing as well as its observer status in the United Nations General Assembly and the Economic and Social Council enable it to participate in most discussions on peremptory norms and non-mandatory texts taking place at an international level. One of the most recent examples was the participation of the ICRC in various meetings held over a period of several years within the framework of the Commission for Human Rights that led to the adoption in 2002 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

The ICRC also regularly takes part in meetings of experts or professional groups seeking to formulate professional standards in various technical fields. It participates, for instance, on a regular basis in meetings of the World Medical Association on the work of doctors in the field of detention. One of its staff members also took part in the preparatory work which led to the formulation of the Istanbul Protocol on the documentation of torture.⁴⁷

Lastly, the ICRC has published, either on its own or in partnership with other organizations, various manuals in which it shares its experience and seeks to establish professional standards in areas such as water, sanitation, prison hygiene and habitat,⁴⁸ and the prevention and treatment of tuberculosis in prisons.⁴⁹

Reference bases

In situations of international armed conflict, the content and form of the assessments made and steps taken by the ICRC are based on the rules and obligations laid down by the Third and Fourth Geneva Conventions (which regulate in quite a detailed manner the living conditions and treatment in captivity) and by Additional Protocol I. In areas where international humanitarian

46 These efforts were first made within the ICRC's role as the driving force behind IHL. The Statutes of the Movement stipulate (in Article 5 (2) lit g) that one of the major functions of the ICRC is "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (in Article 5 (2) lit g). In February 2003, the ICRC accordingly organized an international conference of governmental and non-governmental experts which examined the question of missing persons and adopted a declaration (see the ICRC report "The missing and their families: Summary of the conclusions arising from events held prior to the International Conference of Governmental and Non-Governmental Experts" (19-21 February 2003), (ICRC/The Missing/01.2003/EN-FR/10) and the "Acts of the Conference" (The Missing/03.2003/EN-FR/90)).

47 See United Nations High Commissioner for Human Rights, *The Istanbul Protocol: Manual on the Effective Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No. 8, United Nations, New York and Geneva, 2001.

48 See Pier Giorgio Nembrini, *Eau, assainissement, hygiène et habitat dans les prisons*, ICRC, Geneva, 2004.

49 See Dermot Maher, Malgosia Grzemska et al., *Guidelines for the Control of Tuberculosis in Prison*, World Health Organization, Geneva, 1998.

law is silent or incomplete, the ICRC can refer to other bodies of law, notably those cited earlier,⁵⁰ insofar as they are applicable in the State in question.

International humanitarian law applicable in non-international armed conflict contains general principles but remains succinct with regard to the situation, organization and management of detainees, their treatment and their conditions of detention. It may refer, by analogy, to concepts expressly formulated for international conflicts. More often, it has recourse to other bodies of law and it often makes general reference to minimum humanitarian principles or recognized international standards, with or without mentioning a specific norm or article. Where appropriate, it also cites national law.

In internal disturbances and other situations of internal violence the ICRC may, again by analogy, invoke concepts laid down in international humanitarian law, but generally bases its activities on other rules of law. The texts to which it most readily refers are the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment,⁵¹ which serve as a universal benchmark for detention and prison matters. At the same time the ICRC is careful not to take a stance on what should be social objectives (punishment, reintegration into society) or on the conditions in which the deprivation of liberty takes place (administration of justice, penitentiary policy).

In dealing with more technical matters such as health and sanitation, new developments and the latest studies by specialists and professional associations, if relevant in the respective context, are taken into full consideration.

The ICRC's recommendations are generally based more on a reasoned response to the immediate needs observed than on legal concepts. In the steps it takes and the recommendations it submits, the ICRC tries to be as flexible as possible. In particular, it has not established what might be called "ICRC standards" that it follows or that are more or less applicable in all contexts.⁵² Its approach will depend on factors such as the kind of situation, the law in force, the international treaties ratified by the country or binding on the authorities, the country's traditions, culture and level of development, the capabilities of the detaining authority, the categories of detainees concerned and the type of detention.

Objectives of ICRC activities

In general, the purpose of the ICRC's intervention is to have the detaining authority respecting the detainees' physical and moral integrity.

50 See the part *Development of the legal framework and the ICRC visiting procedures* (reference 11)2.

51 For a commentary on these minimum rules, see *Making standards work, an international handbook on good prison practice*, Penal Reform International, London, 2001.

52 An institution such as the European Committee for the Prevention of Torture (CPT) has adopted a different approach and has published the standards it recommends and on which it bases its work. They appear in reports drawn up by the CPT after its visits and made public if the State concerned agrees. See Rod Morgan and Malcolm Evans, *Combating Torture in Europe*, Council of Europe Publishing, Strasbourg, 2001.

In the course of an armed conflict, whether international or internal, one of the objectives of ICRC visits is to check that international humanitarian law is and continues to be applied. The various problems that affect the life, the physical and mental well-being and the dignity of a detainee are often interconnected. In all situations the ICRC concentrates on the detainees' needs it considers to be the most important, i.e. it seeks first and foremost to prevent or terminate:

- disappearances;
- torture and other forms of ill-treatment;
- inadequate or degrading conditions of detention;
- severance of family links;
- disregard for essential judicial guarantees.

Efforts to prevent disappearances and summary executions

Efforts to prevent disappearances are essentially based on the earliest possible identification of persons at risk. Under international humanitarian law, the parties to a conflict must pass on all information they possess about combatants and civilians who have been reported missing.

In international armed conflicts, it is mandatory for the detaining power to have a capture card filled in by each prisoner of war, to draw up and pass on lists of prisoners of war, to establish a national information bureau responsible for centralizing information on those persons and to send all relevant information to the ICRC.⁵³ Through its Central Tracing Agency, the ICRC in turn centralizes the information supplied by all parties to the conflict and gathers information itself on persons deprived of their liberty who are protected by the Geneva Conventions. Many of these rules are also applicable in internal armed conflict. In all other situations, the immediate, accurate registration by duly appointed government officials of all persons taken into custody is an obligation under national law and in various instruments of international public law.⁵⁴ Registration by the authorities constitutes an official recognition of the arrest and deprivation of liberty. Respect for this rule of transparency is indispensable to protect individual persons and to combat disappearances, extrajudicial executions and arbitrary arrests.⁵⁵ Alongside the registration of information by the authorities, much can be done to prevent disappearances by informing the families about the arrest and detention, in accordance with the right to know expressly laid down in international humanitarian law⁵⁶ and deriving also from the interpretation of diverse rules and principles in situations not covered by that law.

53 Article 122 GC III; with regard to civilian internees see Articles 106 and 138 GC IV.

54 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 12 and 16 (1).

55 Precise registration guidelines are given notably in the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (Principle 12) and the Standard Minimum Rules for the Treatment of Prisoners (Rule 7).

56 The right to know is stipulated in particular in Article 32 AP I GC. It also derives from Articles 69 and 70 GC III; Articles 25 and 26 GC IV; and Article 5 (2) lit. (b) AP II GC.

The ICRC places particular emphasis on the prevention of disappearances by reminding the authorities of their obligation to register and notify. When capture or arrests are followed immediately by summary execution, only insistent enquiries by the ICRC based on general data or on specific cases witnessed by survivors (families, or persons captured at the same time and visited subsequently by the ICRC) can have an effect. When the disappearance occurs some time after the arrest, usually during the interrogation phase, the identification of detainees by the ICRC assumes its full value. This identification process, which consists in noting the identity of detainees whom the ICRC deems to be at risk, must take place as soon as possible. Identification can play its preventive (and dissuasive) role to the full only if it is understood and accepted by the detaining authority and is followed up by regular visits to the persons thus registered.

In several conflicts, the ICRC has encouraged and actively participated in the implementation of mechanisms to facilitate dialogue with and between the relevant authorities and to speed up resolution of the distressing problem of missing persons. In so doing, it has constantly stood by the families of those reported missing by helping them to search for the truth, attempting to respond to their legitimate expectations and giving material and psychological support.

Efforts to combat torture and other forms of ill-treatment

Despite the outlawing of torture and other acts of cruel, inhuman or degrading treatment or punishment, such practices are very widespread. Torture has been the subject of lively debate in recent years, especially in the media. Regular attempts are being made to narrow down the notion of torture, omit the fact that cruel, inhuman and degrading treatments are also prohibited and justify the use of “special” methods in certain situations, giving the impression that in actual fact protection in this domain is being eroded in many parts of the world.

The ICRC firmly rejects any recourse whatsoever to torture and other forms of ill-treatment.⁵⁷ It considers that respect for human dignity far outweighs any justification of torture and that the prohibition contained in international law is absolute and allows for no exceptions of any kind. Whilst being fully aware that States have legitimate concerns for their security, it deems that human dignity prevails over the interests of a State and that it is impossible to decree that torture and other forms of ill-treatment are an evil that is regrettable, of course, but nonetheless necessary. In particular, methods of interrogation and investigation which respect human dignity must be employed, even in the case of people accused of the worst crimes, such as acts of terrorism.

57 See in particular “The International Committee of the Red Cross and the torture”, *International Review of the Red Cross*, December 1976, No. 189, pp. 610-617. See also Philippe Sinner and Hernan Reyes, “Activités du CICR en matière de visites aux personnes privées de liberté: Une contribution à la lutte contre la torture”, in Antonio Cassese (ed.), *La lutte internationale contre le terrorisme*, Nomos Verlagsgesellschaft, Baden-Baden, 1991, pp. 153-171.

Definitions

International law absolutely prohibits torture and other acts of cruel, inhuman or degrading treatment or punishment.⁵⁸ Equally, international humanitarian law in particular rules that persons not or no longer taking part in hostilities shall in all circumstances be treated humanely.⁵⁹ Article 3 common to the Geneva Conventions applicable to non-international armed conflicts, but which contains elementary considerations of humanity, reaffirms the same and stipulates that not only “cruel treatment and torture”, but also “outrages upon personal dignity” and degrading treatment are prohibited at any time and in any place whatsoever.⁶⁰ Acts of torture and of cruel, inhuman or degrading treatment have been established as international crimes, and those who perpetrate them must be prosecuted or extradited.⁶¹

The definition of torture specified in the United Nations’ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is widely accepted. In its Article 1 the term “torture” is defined thus as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Article 12 of this Convention also prohibits “other acts of cruel, inhuman or degrading treatment or punishment” as do the Geneva Conventions and the Additional Protocols thereto. However, none of these notions is defined in them. On the other hand, the jurisprudence of the International Tribunals for the former Yugoslavia and for Rwanda, the Rome Statute of the International

58 Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits “torture”. Article 16 also imposes an obligation to “undertake to prevent...other acts of cruel, inhuman or degrading treatment or punishment...which do not amount to torture.” While the Convention bans torture absolutely (“No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Article 2), the “no exceptional circumstances” rule does not explicitly apply to cruel, inhuman or degrading treatment. However, the International Covenant on Civil and Political Rights (ICCPR) explicitly states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” (Article 7). The prohibition of any derogation applies to both torture and cruel, inhuman or degrading treatment (Article 4 (2) ICCPR).

59 Article 13 (1) GC III (referring to prisoners of war) and Article 27 (1) GC IV (referring to protected civilians). See also Article 31 and/ 32 GC IV (prohibition of coercion respectively of corporal punishment and torture) and Articles 11 and 75 AP I GC.

60 Article 3 common GC (I) (1) lit. a and d. See also Article 4 AP II GC.

61 Provided for in particular in Articles 5 to 9 of the United Nations Convention against Torture, Articles 49 and 50 GC I of the First Geneva Convention, Articles 50 and 51 GC II of the Second Geneva Convention, Articles 129 and 130 GC of the Third Geneva Convention III, Articles 146 and 147 GC IV of the Fourth Geneva Convention and Article 85 AP I.

Criminal Court (1998) and the elements of war crimes recently specified under this Statute⁶² do give some definitions. These definitions tally with those elaborated by the various bodies established by the human rights treaties, regional tribunals and various national jurisdictions.

For the purpose of international humanitarian law, the definition of torture is the same as the one spelled out in the Convention against Torture, except that the involvement of a public official or other person acting in an official capacity is not considered to be a prerequisite. For the other forms of ill-treatment, a significant level of pain or mental or physical suffering is required.⁶³ One element becomes clear throughout: it is practically impossible to establish precisely, whether technically or legally, the threshold of suffering or degree of pain “required” for each category has been met, given that each individual will feel and react differently when subjected to the same methods. The impact will vary appreciably depending on factors such as his or her mental health, physical resistance, past history, age, sex, social origins, level of political motivation, cultural aspects and immediate environment. The duration or accrual of different forms of ill-treatment also has to be considered. Sometimes, torture can be a single act. On other occasions, it is necessary to take into account the accumulation of several practices over a certain period of time, whereas these same practices would appear harmless if they had occurred in an isolated manner or outside the context in question.⁶⁴ Torture also has a strong cultural connotation. The meaning it has in a given social order and the intention behind it are very important. Some forms of behaviour may be considered “benign” in one culture, whereas they infringe a religious interdict, for example, in another.

Torture and other forms of ill treatment always have two components, the physical and the psychological, and these are inextricably interlinked. According to most victims, the psychological element is much more traumatizing than the physical element.⁶⁵ It is also distinctly more difficult to identify, or indeed to quantify. Thus, for example, witnessing the torture of loved ones, of

62 See Knut Doermann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC/Cambridge, 2003, pp. 44-70.

63 Thus, the difference between the various notions lies mainly in the intensity of the pain and suffering and the absence of any specific underlying intent, unlike torture. To be categorized as inhuman or cruel treatment (the terms are considered synonymous), an act must result in a significant level of pain or suffering, at times described as serious. Outrages upon personal dignity are acts which entail a significant level of humiliation or debasement and express contempt for human dignity.

64 See for instance the jurisprudence of the European Court of Human Rights: “The five techniques [wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink] were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (...). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”; *Ireland v. the United Kingdom*, ECHR, 18 January 1978, para. 167.

65 See in particular Hernan Reyes, “Torture and its consequences”, in *Torture*, Vol. 5, No. 4, 1995, pp. 72-76.

one's children or even a third party, can be far more traumatic than undergoing physical torture oneself. The view that there cannot be torture unless there are physical after-effects is wrong.

The ICRC does not have its own particular definition of torture or of other forms of ill-treatment. It does not in fact desire to get embroiled in legalistic discussions or theoretical debates (for example, on the extent to which the suffering experienced is a result of “legitimate” or “acceptable” pressure) at the expense of meaningful dialogue concerning the treatment and the conditions of detention. For the ICRC, what matters most is not so much whether a particular form of behaviour may be labelled torture or constitutes another form of ill-treatment, but to put an end to those practices, irrespective of definitions, that cause detainees to suffer. It accordingly describes in a factual manner what has happened, to whom, in what circumstances, who was responsible and, above all, the consequences for the victim. Rather than employing the term “torture” or other qualifications of treatment the ICRC thus prefers as a general rule to employ the generic term “ill-treatment”, which is not defined in law and covers all types of pressure, whether physical or psychological, that may be used against a detainee.⁶⁶

The ICRC's priorities and methods of combating torture and other forms of ill treatment

Particularly in situations of conflict or internal violence, all persons deprived of their liberty risk undergoing torture or ill-treatment at each phase of their detention. Torture is usually carried out in secret, away from the public eye. It is therefore extremely rare for ICRC delegates to be direct witnesses of acts of torture or other forms of ill treatment, even when they have authorization to visit detainees during the interrogation period.

The ICRC's work to prevent or to put an end to torture and other forms of ill-treatment is essentially based on corresponding accounts given by detainees to ICRC delegates during private talks. The findings of ICRC doctors with regard to possible physical and psychological after-effects are also taken into consideration. This information is then analysed, compared and evaluated in the light of other accounts and other sources so as to determine its intrinsic consistency and its authenticity and to avoid distortions or half-truths.

The documentation of torture and other forms of ill-treatment is a delicate task. This documentation requires diplomatic skill, a marked empathy with the victims, a considerable amount of time in order to establish a relationship of trust with the detainee, patience and common sense, as well as sound detention-

⁶⁶ In practice, the ICRC may nevertheless come to use the term “torture” when:

- the methods used indisputably amount to torture, especially when the level of physical and psychological suffering was undeniably intense;
- the cumulative effects of difficult conditions of detention and treatment have or could have major psychological consequences (for example a combination of factors over a certain length of time, such as keeping detainees in total uncertainty as to their fate, “manipulation” of their surroundings and living conditions, and the use of special interrogation techniques).

related experience of the personnel involved, in particular doctors.⁶⁷ Simply listing the methods used on an individual is often insufficient to determine whether there has been ill-treatment. Nor is it enough to confine the documentation to searching for marks as evidence; this can even be totally counter-productive. First and foremost, it is necessary to evaluate all the circumstances surrounding the treatment in question — including the impact of the different methods on the person concerned.

The ICRC is not a judicial or investigative body, it does not seek to prove that acts of torture or other forms of ill-treatment have been perpetrated. With the consent of the detainees concerned, it brings what are essentially alleged facts to the knowledge of the authorities, together with its own observations and conclusions. It is then incumbent upon these authorities to conduct their own enquiry and, if the information reported by the ICRC turns out to be correct, to take all necessary steps, whether organizational, administrative, disciplinary, or even penal.

The purpose of torture is the debasement and total submission of the person concerned to the whims and arbitrary power of the torturer.⁶⁸ Because it leaves such deep psychological scars, its consequences are long-lasting. Prevention is therefore of paramount importance and the ICRC places particular emphasis on it. When a person is being subjected to torture or other forms of ill-treatment, all its efforts are centred on putting a stop to that treatment. It also insists that victims of torture be given the care and attention demanded by their condition. Indirectly, it does what it can to lessen the after-effects (through an ICRC delegate or doctor lending a sympathetic ear, helping to restore contact between the detainee and his or her family, etc.), but it has neither the knowledge nor the capacity to continue therapeutic activities in the long term, especially after the detainee has been released. This delicate task is best undertaken by specialized institutions, with which the ICRC is in regular contact and which it can even support to some extent.⁶⁹

When it suspects or knows of the occurrence of torture and other forms of ill-treatment, the ICRC tries to identify and speak in private with the detainee concerned as quickly as possible. In such cases it is very important to register the detainee and repeat the visits, with the same considerations as those mentioned above for persons at risk of forcible disappearance.

67 See *The Istanbul Protocol*, *op. cit.* (note 47), a basic reference text in terms of the documentation of torture. On the same or other closely related issues, see also Camille Giffard, *The Torture Reporting Handbook*, Human Rights Centre, University of Essex, Colchester, 2000, p. 159; Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, London and San Francisco, 2002, p. 227; F. Sironi, *Bourreaux et victimes: Psychologie de la torture*, Odile Jacob, Paris, 1999; Hernan Reyes, "ICRC visits to prisoners", in *Torture*, Vol. 3, No. 2, 1993, p. 58, "Visits to prisoners by the ICRC", in *Torture Supplementum* No. 1, 1997, pp. 28-30, and "The role of the physician in ICRC visits to prisoners"; Marina Staiff, "Visits to detained torture victims by the ICRC (I): Management, documentation, and follow-up", *Torture*, Vol. 10, No. 1, 2000, pp. 4-7 and "Visits to detained torture victims by the ICRC (II): The psychological impact of visits and interviews with detained torture victims", in *Torture*, Vol. 10, No. 2, 2000, pp. 41-44.

68 See Amnesty International, *Combating Torture: A Manual for Action*, London, 2003; Walter Kälin, "The struggle against torture", *International Review of the Red Cross*, No. 324, 1998, pp. 433-444.

69 As it is doing, for instance, with the Algerian Red Crescent Society.

The ICRC's main course of action is to approach the authorities. The approach will be adapted in form and content to the particular circumstances in order to achieve the best possible results, while always bearing in mind that the interest of the detainees concerned comes first. For example, if the ICRC fears that its intervention may lead to reprisals, it will take a different line. Similarly, it will approach different authorities depending on the seriousness of the torture and other forms of ill-treatment, the causes and the underlying motives, the place where they occurred. The ICRC can request and recommend a very wide range of measures, from the institution of an enquiry to the adoption of sanctions, and including such elements as supervising and training personnel, improving the chain of command, adapting the organization and the coordination of various State bodies, or stepping up internal inspections.

The list of arguments used by the ICRC varies perceptibly depending on the environment in question and those with whom it has to speak. The main arguments used are of a legal or moral nature. It may also have recourse to arguments based on the medical consequences of torture and other forms of ill-treatment, the authorities' international reputation, aspects of internal politics (e.g. the risk of triggering an outbreak and increase of violence) or structural considerations (e.g. the risk that such practices could become generalized).

Efforts to ensure decent conditions of detention

Detainees must be able to have decent living conditions compatible with their dignity and their physical and psychological well-being. In very many countries this is not the case: sometimes out of political ill-will, but more often for lack of resources, the material conditions of detention become so catastrophic that the detainees' physical integrity and even their very lives are in jeopardy.

Clearly, the custodial authorities in many countries can count only on pathetically low funding. The priorities of governments are elsewhere, as evidenced by the admitted inability of certain authorities to maintain proper conditions of detention. The lack of resources is often exacerbated by endemic overcrowding, which makes it even more difficult to maintain satisfactory conditions and run the places of detention properly. These factors end up by undermining the motivation and goodwill of those responsible for the well-being of detainees and provide a breeding ground for neglect and corruption.

Situations of conflict or internal violence accentuate these phenomena still further. They have considerable and long-lasting economic repercussions on all systems and basic facilities, including the penitentiary system. While people arrested in connection with a situation of violence are exposed to a number of specific risks, such a situation does undeniably aggravate the conditions of detention of the entire prison population.

In many contexts, detainees survive only because of their own ingenuity, their ability to organize and the material support they may receive from their families. Time after time, there are truly critical situations in which the survival of the most vulnerable detainees is no longer guaranteed (for example,

a high incidence of severe malnutrition, a cholera epidemic, etc.) and depends on emergency assistance from outside.

International law, including international humanitarian law, contains specific requirements for conditions of detention. The conditions are further elaborated in “soft law” texts (mainly the *Standard Minimum Rules for the Treatment of Prisoners*) and are supplemented by regional norms, such as the European penitentiary norms⁷⁰ and numerous national laws and regulations. International standards often remain fairly generalized because their implementation depends on local conditions, the environment and many interdependent factors. For instance, the estimated occupancy rate (or the surface area available for each detainee in a cell) will depend on such elements as the number of hours spent outside the cell, the sleeping conditions (on the floor, benches, beds or bunk beds), the ventilation, lighting, available recreational and other activities, access to water and to the sanitary facilities, etc.

During its visits, the ICRC evaluates the material conditions of detention by examining all the parameters relating to:

- the infrastructure of the place of detention (buildings, dormitories, beds, sanitary facilities, waste water disposal, ventilation, exercise areas, etc.);
- the detainees’ access to the facilities available (e.g. the frequency of access to the showers or to medical care). The existence of a facility does not necessarily mean that the detainees are allowed to use it;
- internal administration and regulations (timetables, family visits, correspondence, leisure activities, etc.);
- the management of detainees, and discipline (relations between the detainees and the authorities, possibility of talking to the prison authorities, recreational and training activities, social rehabilitation programmes, the duration and conditions of solitary confinement, etc.);
- the detainees’ internal organization (political disputes, gangs, internal reprisals, cooperation with the authorities, etc.).

With the authorities’ agreement, the ICRC may decide to act partially or completely as a substitute for them by providing direct help itself, starting with what is known as “light” assistance such as cleaning materials, bedding or even recreational items. When the needs are more substantial, work will be financed or carried out to improve the living conditions (installation or renovation of toilets, septic tanks, washbasins, showers, kitchens, etc.) or health care facilities (construction and equipment of clinics, provision of medical supplies for them, etc.). In emergency situations the ICRC may go even further and set up a therapeutic feeding programme or provide food as a whole. Mindful of the potential negative effects and the risk of creating dependency or disrupting the

70 European Prison rules adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 available at: <<http://www.uncjin.org/Laws/prisrul.htm>> (last visited 29 March 2005).

normal supply system, the ICRC is wary of engaging in such programmes and decides to do so only after careful consideration and in accordance with precise conditions agreed with the authorities, especially when a long-term commitment is envisaged. Except in extreme cases when many human lives need to be saved, as in Rwanda shortly after the genocide, the ICRC does not engage in such works where there is a risk that they may serve to increase prison capacity and thus be conducive to a policy of repression, whether that policy is legitimate or not.

The ICRC often takes up contact with third parties, alerts them to the seriousness of the situation and encourages them to support the authorities by strengthening their capacity and providing them with greater financial or material resources. Sometimes, with the authorities' consent, the ICRC may go so far as to pass on descriptive documents to the donors. It did so for instance in the case of Malawi, where it had made a technical evaluation of the conditions of detention conditions; it addressed its report to the authorities, and then made it available to donors.

Efforts to avoid the disruption of family links

For detainees, isolation is a major concern. International humanitarian law contains several clauses on maintaining contact between detainees and their families.⁷¹ The basic idea is that, other than in absolutely exceptional circumstances, the authorities must allow and even arrange for the exchange of family news within a reasonable lapse of time. The same principle holds true outside situations of armed conflict.⁷²

In some situations the authorities are reluctant or refuse to give information to the detainees' families. If they also refuse to let the detainees correspond directly with their families, the ICRC becomes the only source of information and means of passing on family news (through Red Cross Messages).

In international conflicts in which postal and telecommunication links between the belligerents are severed, the ICRC, via its Central Tracing Agency, is *de facto* the sole means of communication across the front lines. The same applies in internal conflicts in which the rebel faction controls a part of the territory.

While reminding the authorities of their obligations with regard to establishing and maintaining family contact, the ICRC often simultaneously gives detainees the possibility, after censorship by the detaining authority, to exchange news of a strictly private and family nature, sometimes after years of silence. When necessary, the ICRC also tries to trace detainees' families and may decide to facilitate family visits by organizing the logistics for them, as it does for the families of Palestinian detainees imprisoned in Israel and the occupied territories. This service provided by the ICRC is often the only link with the outside world.

71 Notably Article 71 GC III and Articles 25, 107 and 116 GC IV.

72 In particular, Principle 19 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment and Rule 37 Standard Minimum Rules for the Treatment of Prisoners.

Efforts to ensure respect for essential judicial guarantees

Uncertainty about their fate is regularly a main source of anxiety for detainees. Where judicial guarantees are concerned, the problems are often inextricably linked (for instance, overcrowding is increased by procedural delays or the absence of any trial or verdict, the extortion of confessions is the main cause for ill-treatment, etc.). As mentioned several times above, the ICRC's intervention has the greatest impact when it consists of comprehensive action to deal with all the causes.

While careful not to comment on the reasons for imprisonment, the ICRC nevertheless ascertains that persons who are the subject of criminal proceedings are benefiting from the judicial guarantees laid down by international humanitarian law and other international norms. Its efforts with regard to judicial guarantees are centered primarily on ensuring respect for personal dignity before, during and after the trial. Its role is not to ensure that the trial is conducted in an equitable manner.

It must be stressed in particular that the ICRC takes no interest in the content of an interrogation carried out by the authorities. It does not matter to the ICRC whether a prisoner is guilty or not, or has made a confession. Its sole objective is to ensure that detainees are treated correctly during interrogation. The subject of confessions may nevertheless be raised in order to determine whether a detainee has been forced to sign a statement, whether he or she was able to read through the text they were signing, whether the language was understood, etc. The ICRC will make sure the detainee realizes that in so doing it is interested only in understanding the system and procedures work, and not in the content of the interrogation or the detainee's guilt.

Besides giving priority to improving the humanitarian situation of the detainees and ensuring that their dignity is respected, the ICRC also looks to the legal and practical consequences of violations of judicial guarantees (procedural delays, incomplete files, no trial, etc.). Lastly, the ICRC also seeks to bring about full compliance with international humanitarian law in situations of armed conflict, in accordance with its mandate to work for the faithful application thereof.

International humanitarian law does contain a number of rules relating to judicial guarantees: for prisoners of war who have committed an offence against the laws or regulations during their internment, or a war crime prior to their capture;⁷³ civilians in an occupied territory who are protected by the Fourth Convention and are undergoing prosecution, or civilian internees who have committed an offence;⁷⁴ all persons who are in the power of a party to an international conflict;⁷⁵ and persons detained in connection with an internal conflict.⁷⁶

73 Articles 82 to 88 and 99 to 107 GC III.

74 Articles 31, 33, 66 to 75 and 117, 118 and 126 respectively GC IV.

75 Article 75 of Additional Protocol I.

76 Article 3 common to the Geneva Conventions and Article 6 AP II.

The provisions of international humanitarian law on this subject, and especially those of the two Protocols, largely echo the more elaborate provisions contained in the instruments of human rights law, in particular the Covenant on Civil and Political Rights of 1966.

The said guarantees apply, either alternatively or cumulatively, to the various stages of the procedure – arrest, investigation, trial and sentencing, and the appeal phase.

The ICRC focuses as a priority on detained persons who come within its sphere of interest, those it considers to be at risk. As in the case of material conditions of detention, it is often difficult, however, if not impossible to distinguish in practice between different categories of detainees when addressing the question of judicial guarantees.

Before the ICRC decides to take action in that regard, several parameters which have been carefully analysed in advance must come together. Four standard situations, based on the condition of the large majority of judicial systems in countries where the ICRC works, can be identified as follows:

- *absence or breakdown of the judicial system* (an “anarchic” situation with severe dysfunction or even disintegration of governmental structures, or a “destructured” situation in which governmental bodies, though still in existence, no longer function): as it is pointless to invoke judicial guarantees in a non-existent or inoperable system, the approach will be based on humanitarian arguments;
- *existence of a system based on custom or ancestral values* (regulatory system and settlement of disputes/conflicts that derive from custom or tradition – council of elders, arbitration by a sage – or from religion): the approach will draw, by analogy, on the general principles contained in judicial guarantees, but the arguments used will be mostly humanitarian;
- *an ailing judicial system* (the judicial system exists formally in name but is unable to function correctly for various reasons such as insufficient resources and judges or systematic involvement of the executive): depending on the respective circumstances, the approach will be based as much on legal as on humanitarian arguments;
- *a functioning judicial system* (possible abuses affecting specific categories of persons, or isolated dysfunctioning): the interventions will take place in a targeted manner within a well-established legal framework, with well-founded legal arguments.

After having decided that it is appropriate to invoke judicial guarantees in the standard situation in question, the ICRC then analyses several factors, above all the detainee’s situation (general identification of the judicial guarantees which have not been respected, legal and humanitarian consequences) and his or her interest in having the judicial guarantees invoked (determination of the detainee’s wishes, assessment of risks or potential negative effects).

To gather targeted information, it is also necessary to pinpoint the judicial guarantees which the ICRC wishes to examine closely or underscore: these generally include the right not to testify against oneself and compliance with certain procedural time limits.

The information required for steps to be taken can be obtained in several ways: when registering the detainee's identity, during private interviews specifically on legal matters, during a sample survey, etc. At times (mainly in situations of international armed conflict), the ICRC decides to attend trials as an observer and is thus able to see for itself how part of the procedure works.⁷⁷

The ICRC's interventions may be comprehensive (to address a generalized phenomenon) or on an individual basis; they may be made by name or not, relate to a specific issue or period of time, be the subject of an *ad hoc* approach (which may also take the form of a report) or be part of a general approach that covers all aspects of detention; they may single out certain groups of detainees (those condemned to death, those who have been forgotten, those who have been given the heaviest sentences, etc.) or be backed up by handing over lists (e.g. of all detainees who have been awaiting trial for a certain length of time).

The requests and recommendations made to the authorities differ according to the various judicial guarantees and usually relate to such matters as instituting an enquiry to verify the allegations presented by the ICRC and take steps to ensure that such incidents do not recur; improving the way in which the courts function; requesting transfers; seeing that time limits and other procedural rules in force are respected; speeding up proceedings; allowing the benefit of conditional release or amnesty; and very exceptionally quashing or reviewing sentences, etc.

The persons to be approached must be carefully identified, since respect or non-respect for judicial guarantees is above all attributable to the judicial power and its agents. In general, they are not the same authorities as those dealing with other detention-related problems. This consideration must be taken into particular account for a general approach encompassing various aspects of detention.

International efforts and international cooperation

A number of organizations and bodies are working in the field of detention, and consultation and coordination between them is necessary. Within the limits imposed by confidentiality, the ICRC takes part in this consultation. It is particularly reticent where information about ill-treatment is concerned, but very open to seeking complementarity of activities.

The ICRC is therefore in principle in favour of holding periodical coordination meetings, especially within the framework of support activities and

77 It did so, for example, in Iraq at trials of Iranian POWs during the Iran-Iraq war, in Kuwait after the Gulf War and the reinstatement of the Kuwaiti government in 1991, and in Ethiopia after 1994 at the trials of the Derg dignitaries.

preferably in the presence of the authorities, with the aim of drawing up a list of needs that are being met and those that are not, of getting to know and understand the options chosen by the other intervening bodies, and establishing possible complementary courses of action so as best to meet needs and share experiences. Coordination also enables common standards to be promoted.

Emergence of new organizations visiting places of detention

In view of the distinctive features and closed nature of the places of detention, the presence of other intervening parties gives rise to additional questions. The ICRC has *a priori* a positive attitude towards the intervention of other bodies since it may lead to improving the impact of humanitarian action in the widest sense and to ensuring that international standards are respected. However, it is important to remain vigilant so as to avoid the risk of too many parties becoming involved, as well as that of the application of different standards.

The ICRC has limited interaction with mechanisms such as the Special Rapporteurs of the Commission on Human Rights, owing to the very occasional presence of the latter in places of detention and the obligation they generally have to obtain the express agreement of the authorities for each visit or group of visits. The procedures for visits are not explicit, and can in theory vary from one mechanism to another. However, one practice has progressively gained favour, namely to follow the same procedures as the ICRC, except with regard to the repetition of visits.

The adoption of the European Committee for the Prevention of Torture (CPT) a few years ago and, in the near future, of bodies set up by the Optional Protocol to the Convention against Torture (OPCAT) offer very interesting prospects. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has, for instance, instituted the same principal procedures for visits as those followed by the ICRC. It furthermore stipulates that the CPT “shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto.”⁷⁸ In practice, this clause has been applied in a flexible manner, taking into account the distinctive features of each context. In Russia, for instance, the ICRC and the CPT together came to the conclusion that it was illogical to exclude Chechnya from places that the CPT visits in Russia on the grounds that the ICRC was already visiting certain places of detention there. In short, it was agreed that the CPT should inform the ICRC when it intends making a visit so as to avoid the risk of the two institutions being in the same place at the same time. This exchange of information has been extended in parallel to encompass the geographical extent of the Council of Europe towards the east of the continent, particularly in the Balkans and in the southern Caucasus, where the ICRC also visits detainees. The ICRC

78 Article 17 (3).

and the CPT organize periodical meetings in which matters of common interest are discussed, while respecting the commitment to confidentiality which each institution has given to the authorities in question.

OPCAT, which has not yet entered into force, establishes as visiting bodies a Subcommittee on Prevention of Torture (its secretariat will be the Office of the High Commissioner for Human Rights) and national preventive mechanisms. A key factor with regard to the system envisaged will be the extent to which these national preventive mechanisms will have the necessary resources and independence to carry out effective work. OPCAT stipulates that its provisions “shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.”⁷⁹ When this Protocol comes into force in countries where the ICRC also visits detainees, a system for carrying out periodical consultations similar to the one that exists with the CPT will have to be discussed.

Conclusion

The ICRC is making considerable efforts to bring a minimum level of humanity to places of detention and ensure that the dignity of detainees is respected. This task is complex and requires unfailing determination and a well-developed ability to adapt to circumstances. The ICRC cannot expect that one day its mission in the field of detention will be completed; there is always a new crisis or detainees in need who await its presence. The involvement of the ICRC is part of an extensive process and is complementary to the efforts of the authorities, other organizations and mechanisms, as well as the international community as a whole. Nevertheless, the ICRC’s approach, which it has sought to adapt over the years, in many ways remains unique.

The practices developed by the ICRC, based on the specific role conferred upon it by international humanitarian law and on the experience it has gained in tense internal situations, are now widely emulated throughout the world. The effectiveness of its approach, particularly its visits to detainees, is bound up with respect for consistent and rigorous working methods which include the conditions and procedures for visits and the confidentiality of the steps it takes. The deployment of appropriate material and human resources is also of great importance.

The protective effect of the ICRC’s activities will depend above all on its ability to intervene on behalf of detainees by approaching the responsible authorities and, more generally, to overcome indifference. Indeed, the lack of media

79 Article 32 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

interest in the suffering of detainees, apart from a few exceptions, and political indifference or lack of will all help to weaken the universal principles of humanity enshrined in international humanitarian law and other bodies of law.

The ICRC has regularly to explain its work on behalf of detainees. They often voice their frustration to it. Certain authorities question its objectivity or cooperate only partially with it. The public or other intervening parties often fail to understand the ICRC's self-imposed reserve and the confidentiality that governs its actions. Nonetheless, the *leitmotiv* of the ICRC remains the deep conviction that it has given maximum consideration to its method of intervention and the reasons for it, that it has done its utmost, and that it has taken every conceivable step to improve the conditions of detention and the treatment of detained persons in a given situation.