

Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims

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Abstract

This article presents an overview of the various mechanisms to improve the situation of people affected by armed conflict. Some are anchored in international humanitarian law, but numerous actors are increasingly contributing to its implementation outside the original framework established for that purpose. Human rights monitoring bodies, the diverse organs and agencies of the United Nations and regional organizations, and governmental and non-governmental organizations are seeking to address situations of armed conflict. However, humanitarian action unattached to any political agenda and combining protection and assistance is often the only remedy for the plight of the victims of armed conflicts.



At the last International Conference of the Red Cross and Red Crescent, the ICRC reminded the assembled delegates that ‘the main cause of suffering during armed

* The opinions expressed here are those of the author and do not necessarily reflect the position of the ICRC.

conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or for another reason – rather than a lack of rules or their inadequacy'.¹ In the heat of battle, when the wagers of war and their victims are prey to mistrust and hostility, compliance with the rules does not come easily. Passions are unleashed and hatred and the desire for revenge give rise to all manner of depredations, sweeping aside calls to preserve a modicum of humanity even in the most extreme situations. Yet to make just such a call is the very purpose of international humanitarian law.

The present article deals with the way international humanitarian law is implemented and war victims are protected and assisted.² The first part describes the mechanisms provided for under international humanitarian law itself and briefly analyses their importance in practice. Particular emphasis is placed on the work of the ICRC and the implementation of international humanitarian law in non-international armed conflicts. Next, the growing tendency of human rights monitoring bodies to scrutinize situations of armed conflict is examined. An account is then given of the institutions and agencies that work to help war victims obtain due respect for their rights and person, independently of the framework provided for under international humanitarian law, i.e. through the UN system, regional organizations, intergovernmental organizations and NGOs. The various mechanisms and approaches vary considerably. In order to protect and assist war victims effectively, the international efforts should build on the comparative advantages of the different mechanisms and actors.

Mechanisms originating in international humanitarian law

The obligation of parties to a conflict to respect and ensure respect for international humanitarian law

The 1949 Geneva Conventions and 1977 Additional Protocol I thereto stipulate that the parties to an international armed conflict must undertake to respect and to ensure respect for those treaties. Each party is therefore obliged to do what is necessary to ensure that all authorities and persons under its control comply with the rules of international humanitarian law. The enforcement can include a wide variety of measures, both preventive and repressive, to ensure observance of that law. While this article focuses on the legal measures, other non-legal steps to create

1 *International humanitarian law and the challenges of contemporary armed conflicts*, Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007, *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 721.

2 In 2003, the ICRC organized a series of regional expert seminars on the theme of improving compliance with international humanitarian law (IHL) – see *Improving compliance with international humanitarian law*, ICRC Expert Seminars, Report prepared by the International Committee of the Red Cross, Geneva, October 2003, annexed to the report presented by the ICRC to the XXVIII International Conference of the Red Cross and Red Crescent, December 2003, pp. 48–74, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5tam64?opendocument> (visited on 28 May 2009).

an environment conducive to compliance with minimal rules, even during the worst situations, are absolutely essential to give the law a chance to be respected.

On a more practical level, the parties to an armed conflict must issue orders and instructions to ensure that these rules are obeyed and must supervise their implementation.³ Military commanders in particular have a great responsibility in this regard.⁴ However, in the final analysis each and every soldier and individual involved in the conflict must observe the rules of humanitarian law.⁵

The particular feature⁶ of international humanitarian law governing non-international conflicts is that it is addressed not only to the states party to those treaties, but more broadly to the 'Parties to the conflict', in the words of Common Article 3,⁷ or, according to Additional Protocol II, to 'dissident armed forces or other organized armed groups ...',⁸ but without conferring any legal status on them.⁹ Common Article 3 even governs situations¹⁰ in which state structures have totally collapsed,¹¹ for a conflict of this type can take place without the state itself being involved. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and by other persons or groups acting *de facto* on its instructions or under its control. As in international conflicts, the rules on non-international conflicts are ultimately destined for all persons taking direct part in the hostilities¹² and oblige them to conduct themselves in a particular manner.¹³

3 Article 80, Additional Protocol I (AP I).

4 See Jamie Allan Williamson, 'Some considerations on command responsibility and criminal liability' *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, pp. 303–317.

5 See also the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction (Trial Chamber), 10 August 1995, paras. 31 and 36, and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 128.

6 But also difficulties of legal interpretation. See for example Jean Pictet, *The 1949 Geneva Conventions, Commentary*, Geneva, ICRC, 1952–1959, Vol. I, p. 37, and Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary on the Additional Protocols)*, ICRC, Geneva, 1987, p. 1359.

7 For the different types of armed conflicts, see Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 69–94.

8 Article 1(1), with the restriction subsequently introduced into the Protocol according to which they require 'such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

9 Common Article 3, para. 4.

10 Neither Protocol II nor human rights law can provide legal responses to these situations, as they both presuppose that a State is 'operational'.

11 In English-speaking countries, the term 'failed state' is frequently used. See the results of the first Periodical Meeting of the States Parties to the Geneva Conventions on International Humanitarian Law, Geneva, 19–23 January 1998, Document No 37, p. 802, Section 2, *Armed Conflicts Linked to the Disintegration of State Structures*. See also Robin Geiss, 'Failed States'. *Die normative Erfassung gescheiterter Staaten*, Duncker & Humboldt, Berlin, 2005.

12 See the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 991–1047.

13 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, above note 5, para. 65–67, and Theodor Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law*, Vol. 89, 1995, p. 561 ff.

National implementation measures

To ensure that international humanitarian law is applied in situations of armed conflict, the entire range of implementation mechanisms provided for in the law itself must be used to the full, including in peacetime. National measures to implement humanitarian law arise from the pledge given by states party to humanitarian law treaties¹⁴ to respect those treaties and ensure that they are respected. This duty is made explicit in a series of provisions that oblige states to take particular implementation measures. Moreover, like all international treaties, the humanitarian law treaties call for a number of measures to be incorporated in national legislation, if this is not already the case.

The general obligation to take ‘measures for execution’ is laid down in Article 80 of Protocol I, which states that the parties ‘shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol’. Among the numerous measures set out in the Geneva Conventions and the Protocols additional thereto, two types of national measures are particularly important, namely the adoption by states of national laws to ensure that the treaties are applied,¹⁵ and measures relating to dissemination and training.

National implementing legislation is necessary for treaty provisions that are not self-executing and therefore require a legislative act for them to become applicable. Apart from the general obligation to ensure that the treaties are applied through primary and secondary legislation,¹⁶ the four Conventions and Protocol I provide for states to adopt any necessary legislative measures to determine appropriate penal sanctions for grave breaches of international humanitarian law.¹⁷

14 In particular the four Geneva Conventions of 12 August 1949 [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949 (GC II); Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (GC III); Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (GC IV)] and Additional Protocols I and II thereto of 8 June 1977 [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (AP II)]. For a full list of all treaties, see <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (visited on 28 May 2008). The point is under consideration every second year by the UN General Assembly: see *Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*, A/RES/63/125 (2008).

15 The Geneva Conventions (Article 48, GC I; Article 49, GC II; Article 128, GC III; Article 145, GC IV) and Article 84 of AP I require that the High Contracting Parties ‘communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers’ (in case of hostilities), their official translations of the treaty in question and ‘the laws and regulations which they may adopt to ensure its application’. The translations (in languages other than those of the original texts) are to be done by their government authorities. The ‘laws and regulations’ to be adopted and communicated are all the legislative acts to be performed by the various authorities invested with the powers to issue primary and secondary legislation that have a connection with the application of these instruments.

16 Article 48, GC I; Article 49, GC II; Article 128, GC III; Article 145, GC IV. AP I sets out the same obligation in Article 84.

17 Defined in Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV; and Articles 11(4) and 85, AP I.

Finally, legislation is needed to be able to prevent or punish misuse of the emblem and distinctive signs at any time.¹⁸ However, various attempts to strengthen the treaty-based obligations to prevent violations of international humanitarian law have failed. For example, a proposal to introduce an obligation for states to report to an international commission on the way national measures are applied was rejected.¹⁹

To put the law into effect and give effective protection to people affected by armed conflict, widespread knowledge of the law and training of those who will have to apply it are indispensable. Dissemination activities must be stepped up in wartime, but must already be in place in times of peace. States undertook, as an initial obligation, to disseminate the texts of the treaties in peacetime and in wartime, and to include study of these in military and if possible civilian instruction programmes, so as to ensure that the armed forces and the entire population are familiar with their content.²⁰ International humanitarian law is largely made up of obligations with which armed and fighting forces must comply, and must therefore form an integral part of their regular instruction and practical training. Yet despite their importance, the rules of war often feature only marginally in the military instruction programmes of most states.

The implementing measures required in peacetime to back up the obligation to spread knowledge of the Geneva Conventions and the Protocols thereto 'as widely as possible' are the training of qualified staff,²¹ the deployment of legal advisers in armed forces,²² emphasis on the duty of commanders²³ and special instruction for the military and authorities who may be called upon to assume relevant responsibilities.²⁴

18 Articles 53–54, GC I; Articles 43–45, GC II.

19 At the meeting of the Intergovernmental Group of Experts – see 'Follow-up to the International Conference for the Protection of war victims, (Geneva, 30 August–1 September 1995)', *International Review of the Red Cross*, No. 304, January–February 1995, pp. 4–38. It included an ICRC proposal of a reporting system and the setting up of an international committee of experts on IHL 'to examine the reports and advise States on any matters regarding the implementation of IHL' (pp. 25–27).

20 Article 47, GC I; Article 48, GC II; Article 127, GC III; Article 144, GC IV (the wording is almost identical in the four Conventions); Articles 19 and 83, AP I; Article 19, AP II.

21 Para. 1 of Article 6, AP I requires that the High Contracting Parties 'also in peacetime, endeavour, [...], to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.' This training should take place with the assistance of the National Society.

22 Article 82, AP I. The role of the legal advisers will be to 'advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject'.

23 Article 87, para. 1, AP I.

24 Article 83, AP I. Knowledge of international humanitarian law is also required on the part of civilian and military authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol' and hence in relation to protected persons. Paragraph 2 requires that such authorities 'be fully acquainted with the text' of these instruments.

Punishment for breaches

Several articles of the Geneva Conventions and Protocol I²⁵ specify the breaches that are to be punished by the states party to those instruments. All other violations constitute conduct contrary to the Conventions and Protocol and should be dealt with by means of administrative, disciplinary and criminal measures that the contracting parties are required to take to punish the perpetrators. Grave breaches are expressly listed; their distinguishing feature is that the parties to a conflict and the other contracting parties have an obligation to prosecute or extradite the perpetrator of such a breach, regardless of his nationality and the place of the breach, in accordance with the principle of universal criminal justice.²⁶ Grave breaches are considered war crimes.²⁷ Punishment of violations at national level immediately upon outbreak of a conflict and while it continues are particularly important if a negative spiral of serious and repeated violations of the law is to be avoided. A system of penalties must be an integral part of any coherent legal construct, from the point of view of deterrence and of coercive authority.²⁸

As the system of universal criminal jurisdiction had largely been left in abeyance by states, there was previously no effective prosecution and punishment of these types of crimes. However, international mechanisms such as the *ad hoc* Criminal Tribunals for the former Yugoslavia and for Rwanda, set up by the UN Security Council,²⁹ and in particular the International Criminal Court, have given an impetus to prosecutions at national level. International criminal law and its application by the international courts and tribunals is playing an increasingly important part in the interpretation and enforcement of international humanitarian law and in individual criminal liability for war crimes, as well as crimes against humanity and genocide often committed during armed conflicts. The role of the International Criminal Court is complementary to that of national justice systems. It will investigate or prosecute only where the state is ‘unwilling or unable genuinely to carry out the investigation or prosecution’.³⁰

The credibility of the International Criminal Court and its ability to perform its role of punishing international crimes depend on the adherence of as many states as possible to it. The fact that a number of influential states and some states currently involved in armed conflicts have not ratified the Rome Statute indicates a double standard in the implementation of international criminal law.

25 Articles 49–54, GC I; Articles 50–53, GC II; Articles 129–132, GC III; Articles 146–149, GC IV and Articles 85–89, AP I.

26 This principle imposes on the states parties to the humanitarian law treaties an obligation to prosecute and punish grave breaches. The obligation is absolute and cannot be attenuated, even by agreement between the interested parties (see common Article 51, GC I; Article 52, GC II; Article 131, GC III; Article 148, GC IV). The principle of universal jurisdiction in itself, however, only means that breaches (grave or not) may be prosecuted and punished by any State.

27 Article 85, para. 5, AP I.

28 See the sanctions issue of the *International Review of the Red Cross*, Vol. 90, No. 870, June 2008.

29 S/RES/827 (1993) resp. RES/955 (1994).

30 See Article 17, Rome Statute of the International Criminal Court of 7 July 1998.

This undermines its credibility to some extent and tends to confirm that political considerations carry the day even where international crimes have been perpetrated. Moreover, the international legal apparatus which aims mainly to punish the perpetrators can often only act years after the end of a conflict and cannot replace non-judicial means,³¹ although the creation of international courts and tribunals has strongly promoted recourse to that avenue for enforcing international humanitarian law.

Enquiry procedure

An enquiry procedure is provided for under the Geneva Conventions,³² but to date has never been used since its inception in 1929.³³ Its dependence on the belligerents' consent is doubtless one of the reasons why this mechanism has not been put to the test.

The International Fact-Finding Commission

Article 90 of Additional Protocol I was an attempt to systematize the enquiry process by instituting an International Fact-Finding Commission. This Commission is competent to 'enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violations'³⁴ thereof and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.' In particular, the idea was that the activities of the Commission should help to prevent polemics and violence from escalating during a conflict. It is doubtful, though, whether it could achieve this in practice without an operational arm on the ground and the necessary rapid-response capacity.

31 See Marco Sassòli, 'Humanitarian law and international criminal law', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford 2009, pp. 111–120.

32 Article 52, GC I; Article 53, GC II; Article 132, GC III; Article 149, GC IV. The procedure referred to by this common Article must be distinguished from an enquiry carried out by a detaining Power in accordance with Article 121, GC III or Article 131, GC IV (case of prisoners of war or civilian internees wounded or killed in special circumstances).

33 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929, Article 30. This mechanism was replicated in each of the 1949 Conventions. For further details, see Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruylant, Brussels, 1999, p. 30.

34 The expression 'grave breach' has a specific meaning and refers to the breaches listed as such in the four Conventions and Protocol I. However, the expression 'serious violation' is to be taken in the ordinary sense, which is left to the Commission's own appreciation. As Eric David remarks in his *Principes de droit des conflits armés* (4th edn, Bruylant, Brussels, 2008, p. 670), it can be deduced from the very general wording of Article 90(2)(d) that the Commission could be asked to enquire into violations of the law of armed conflict committed in a non-international armed conflict. Article 90(2)(d) refers to 'other situations', that is situations other than a 'grave breach' or a 'serious violation' of the Geneva Conventions and Protocol I; it requires the consent not of the 'High Contracting Parties' but of a 'Party to the conflict' and 'the other Party or Parties concerned'.

The Commission is competent to find facts and not to decide on points of law or to judge,³⁵ but even if it were to limit itself to findings of fact,³⁶ their pronouncement would often lead to their legal categorization and the elucidation of responsibilities.³⁷ Under Article 90, paragraph 5, the Commission is required to submit a report to the parties concerned on its findings of fact, with such recommendations as it deems appropriate. This article further specifies in subparagraph (c) that the Commission shall not report its findings publicly, unless all the parties to the conflict have requested it to do so.³⁸ The fact that its conclusions must remain confidential is reminiscent of the ICRC's *modus operandi*, but confidentiality is not really an appropriate way for an international commission to work.

In principle, the International Fact-Finding Commission can undertake an enquiry only if all the parties concerned have given their consent,³⁹ but there is nothing to prevent a third state from requesting an enquiry by the Commission into a grave breach or serious violation of humanitarian law committed by a party to conflict, provided that the party concerned has also recognized the Commission's competence.⁴⁰ This possibility arises out of the obligation to 'ensure respect for' the law of armed conflict.

Though established in 1991, the Commission has not yet been activated,⁴¹ nor is it likely to be unless it is enabled to undertake an enquiry on its own initiative or at the request of only one party to a conflict, or by virtue of a decision by another body (e.g. the UN Security Council).⁴² In practice, the enquiry commissions set up and foisted even on unwilling states by the UN Security Council⁴³ are better placed to meet the international community's expectations.

35 Sandoz *et al.*, *Commentary on the Additional Protocols*, above note 6, p. 1045, para. 3620.

36 The Commission's role can go beyond simple fact-finding, as it is authorized to lend its good offices to facilitate the restoration of an attitude of respect for the Conventions and Protocol I. By 'good offices', we may understand communication of conclusions on the points of fact, comments on the possibilities of a friendly settlement, written and oral observations by States concerned (*ibid.*, p. 1046, para. 3625).

37 David, above note 34, p. 672.

38 One may wonder what interest a Party against which a violation is committed might have in requesting an enquiry from a Commission that has no power to punish and which does not make public its findings even if it discovers the most abominable massacres. The only possible 'sanction' – publication of the results of the enquiry – is virtually ruled out. Although discretion may be justified in the case of a body working for victims on the ground, it is less so when it comes to fact-finding, unless it serves to facilitate domestic criminal prosecutions.

39 Art. 90, AP I. In any case, acceptance of the Commission's competence by the impugned State certainly does not guarantee that the procedure will be a success: a belligerent State accused of violating the law of armed conflicts is hardly likely to assist the fact-finding body mandated to determine the truth of such an accusation (David, above note 34, pp. 673–675).

40 'Optional competence': Article 90(2)(d). However, States that ratify Additional Protocol I can make a declaration recognizing the 'compulsory competence' of this body in advance (Article 90(2)(a)).

41 See the website of the Commission at <http://www.ihffc.org/> (visited on 1 June 2009).

42 For further details, see Vité, above note 33, pp. 43, 99, 117.

43 For example, acting under Chapter VII of the United Nations Charter and adopting Resolution 1564 (2004), the Council requested the Secretary-General to rapidly establish an international commission of inquiry to investigate reports of human rights violations in Darfur, and determine whether acts of genocide had occurred there.

Protecting Powers

A Protecting Power is a neutral state mandated by a belligerent state to protect its interests and those of its nationals vis-à-vis an enemy state.⁴⁴ Its role is twofold: it can conduct relief and protection operations in aid of victims, and can at the same time supervise the belligerents' compliance with their legal undertakings. The Protecting Powers' tasks are huge and varied in view of the needs of persons protected for instance by the Third or Fourth Geneva Convention.

Since the Second World War, this system has very rarely been set in motion⁴⁵ and the chances of its being used successfully in future are slim, given the politically delicate role a state would have to play to discharge its responsibilities as a Protecting Power.⁴⁶ Article 5 of Protocol I, which assigns the ICRC a new role, allows it to tender 'its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent'.⁴⁷ However, the ICRC has acted more as a substitute,⁴⁸ for it has in effect assumed the great majority of the humanitarian tasks assigned to Protecting Powers. It has done so without prejudicing its other expressly recognized activities, but restricting itself to humanitarian activities in accordance with its mission.

Reparations

In an international armed conflict, the warring parties can be held responsible for breaches of international humanitarian law. An obligation to pay compensation for violations of international humanitarian law is laid down in Article 91 of Protocol I, and even as early as Article 3 of the 1907 Hague Convention.⁴⁹ According to the general international law of state responsibility, compensation is to be understood

44 Articles 8 and 10, GC I–III; Articles 9 and 11, GC IV.

45 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC/MacMillan, Geneva, 2003, pp. 860–901. These events are the Suez conflict (1956), the Goa crisis (1961), the conflict between France and Tunisia over Bizerte (1961), the Indo-Pakistani conflict (1971) and the South Atlantic conflict between Argentina and the United Kingdom (1982). 'Et même dans ces cas, le fonctionnement de l'institution était soit incomplet, soit le résultat du hasard, soit sujet à controverse': Georges Abi Saab, 'Les mécanismes de mise en œuvre du droit humanitaire', *Revue Générale de Droit International Public*, Vol. 82, 1978, pp. 103–129. This failure can be explained mainly in terms of political motives. It is rare for States to agree to submit to supervision by a third State in a situation of armed conflict.

46 For a more detailed discussion of these obstacles, see Vité, note 33 above, pp. 34 ff.

47 Article 5(3), AP I.

48 Articles 10, GC I–III; Article 11, GC IV and Article 5(4), AP I.

49 See the statement by the Permanent Court of International Justice (PCIJ) that 'any breach of an engagement [of international law] involves an obligation to make reparation' (PCIJ, *Case Concerning the Factory at Chorzów* (Merits), PCIJ Collection of Judgements, Series A, No. 17, 1928.). See also the International Court of Justice (ICJ), *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 152 and 153 and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)*, ICJ Reports 2005, para. 221. In general, see Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 497–527 and Emanuela-Chiara Gillard, 'Reparations for violations of international humanitarian law', *idem*, pp. 529–553.

more broadly as reparations⁵⁰ and encompasses a range of measures, including non-monetary means of restitution (re-establishment of the situation before the wrongful act was committed), satisfaction (acknowledgement or apology) and/or rehabilitation (including medical or psychological claim, or legal and social rehabilitation), and guarantees of non-repetition.⁵¹

Even in situations where large numbers of people have been victims of violations,⁵² those who have suffered direct or indirect personal harm as a result thereof are entitled to reparation.⁵³ However, purely monetary compensation could easily constitute an excessive burden in view of the limited resources available, the significant war damage and the enormous task of reconstruction after a conflict and require both an individual and a collective assessment, taking the scope and extent of any damage into account.⁵⁴ Rulings on reparations in individual cases can take account of the collective dimension of certain violations⁵⁵ and can lead to wider settlements for larger communities.

It is, however, disputed whether an individual right to reparations is recognized or not by international humanitarian law. Despite ‘an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparations directly from the responsible State’,⁵⁶ it does not yet form

50 The duty to make ‘reparations’ for violations of IHL is explicitly referred to in the Second Protocol to the Hague Convention for the Protection of Cultural Property (Article 38).

51 See Articles 30–37 of the *Draft Articles on State Responsibility*, adopted by the International Law Commission at its 53rd session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). Rehabilitation and guarantees of non-repetition are not included therein, but are considered part of the concept of reparation in Principle 18 of the *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by General Assembly Resolution 60/147 of 16 December 2005 (*Basic Rights on the Right of Remedy and Reparations*). Measures to sanction perpetrators of violations are sometimes also considered as part of reparations; see Inter-American Court of Human Rights, *Durand y Ugarte v. Perú (Reparations)*, Judgement of 3 December 2001, Series C, No. 89, para. 68; Art. 22 (f) of the *Draft Articles on State Responsibility*.

52 The Inter-American Court, for instance, recognized as victims 702 displaced persons who had fled their homes because of the lack of protection of the State against massacres of armed groups, and ordered measures to facilitate their return as reparation – see *Case of the Ituanga v. Colombia*, Judgement of 1 July 2006, Series C, No. 148, para. 234.

53 See International Criminal Court (ICC), *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgement on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victim’s participation of 18 January 2008, 11 July 2008, para. 38. See also European Court of Human Rights, *Cakici v. Turkey*, Judgement of 8 July 1999, Reports 1999-IV, para. 98.

54 See e.g. Rule 97 (1) of the Rules of Procedure and Evidence of the International Criminal Court, as well as Rule 98 on the Trust Fund for victims. See also Art. 6 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997 and Art. 5 of the Cluster Munitions Convention of 2008, which contain clauses on victim assistance that require States to develop and implement assistance plans and programmes, but are not focused on an individual right to reparations.

55 See for instance the Inter-American Commission for Human Rights in cases concerning indigenous communities: *Principal Guidelines for a Comprehensive Reparations Policy (Colombia)*, OEA/Ser/L/V/II.131, Doc. 1, 19 February 2008, para. 15.

56 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC/Cambridge University Press, Geneva/Cambridge, 2005, p. 541. See in particular the *Basic Principles and Guidelines on the Right to Remedy and Reparations*, above note 51.

part of customary law.⁵⁷ Preclusion by a peace settlement, sovereign immunity or the non-self-executing nature of the right to reparations under international law mostly rule out successful individual claims. Victims can thus only approach their own government, which may submit their complaints to the party or parties that committed the violation – a procedure that depends on relations between states, which have often both committed violations. In non-international armed conflicts, there is no treaty rule obliging states or non-state armed groups to make reparations for violations of international humanitarian law.⁵⁸

The possibility for an individual victim to claim reparations for a violation of international humanitarian law can nonetheless be inferred from Article 75 of the Statute of the International Criminal Court.⁵⁹ More importantly, human rights treaties require states to provide a remedy for violations.⁶⁰ At a regional level, both the Inter-American and the European Court of Human Rights have ordered reparations for victims of human rights violations that were simultaneously violations of international humanitarian law. They have done so in both international and non-international armed conflicts, e.g. in relation to Turkey, Cyprus, Chechnya, Guatemala, Colombia, Peru, and Bosnia and Herzegovina.⁶¹ Reparation has also been provided directly to individuals via different procedures, in particular through mechanisms set up by the Security Council,⁶² inter-state agreements⁶³ and unilateral acts such as national legislation,⁶⁴ or in response to requests submitted directly by individuals to national courts.⁶⁵

57 National courts rejected individual claims, notably the German Constitutional Court (Bundesverfassungsgericht), 2 BvR 1476/03 – Decision of 15 February 2006, para. 20–22, available at http://134.96.83.81/entscheidungen/rk20060215_2bvr147603.html (visited on 29 May 2009) and the Japanese Court (Claims for compensation from Japan arising from injuries suffered by former POWs and civilian internees of the ex-Allied Powers, Decision rendered by the Civil Division No. 31 of the Tokyo District Court, 26 November 1998, reprinted in Fujita *et al.*, *War and the Right of Individuals*, Nippon Hyoron-sha Co. Publishers, Tokyo, 1999, p. 104).

58 See Henckaerts and Doswald-Beck, above note 56, p. 549.

59 Para. 6. See also the Victims Trust Fund, established pursuant to Article 79.

60 Article 2(3), International Covenant on Civil and Political Rights (ICCPR), European Convention of Human Rights (ECHR) Art. 13 American Convention on Human Rights (ACHR) Art. 10 and 25, African Charter on Human and Peoples Right (Art. 7 (1)a (implicit)).

61 See in particular Karine Bonneau, 'Le droit à réparation des victimes des droits de l'homme, le rôle pionnier de la Cour interaméricaine des droits de l'homme', *Droits fondamentaux*, No. 6, janvier 2006–décembre 2007, available at www.droits-fondamentaux.org (visited on 1 June 2009); Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd edition, Oxford University Press, Oxford, 2005, pp. 397–454.

62 See the UN Compensation Commission established by S/RES/687 (1991) and 692 (1991), which reviews claims for compensation for direct loss and damage arising 'as a result of (Iraq's) unlawful invasion and occupation of Kuwait.' See Fred Wooldridge and Olufemi Eljas, 'Humanitarian considerations in the work of the United Nations Compensation Commission', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 555–581.

63 See for example the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, Article 1(1). It established the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, stating that these persons have the right to restitution of property of which they were deprived during hostilities.

64 See in particular the different treaties concluded and laws passed by Germany to indemnify victims of the war and the Holocaust.

65 See the examples in Henckaerts and Doswald-Beck, above note 56, pp. 542–549.

Nevertheless, broader international and/or national reparations schemes and especially those implemented via transitional justice mechanisms (including truth and reconciliation commissions)⁶⁶ can and should complement this rather selective legal regime. It is difficult to resolve claims on a case-by-case basis and the mere use of the term ‘reparation’ presupposes a violation of international law. This approach leaves out all the victims of armed conflicts who are not victims of violations and in particular all those affected by – lawful – collateral damage. Only a wider definition of victims including all persons affected by a conflict could enable the victims’ interests to be met more satisfactorily, and dealing with past conflicts requires much broader societal measures than just individual reparations.

The International Committee of the Red Cross (ICRC)

As the above international mechanisms for enforcing international humanitarian law work only very patchily, if at all, it is worth dwelling at greater length on the role assigned to the ICRC in the implementation of this body of law. In practice, the ICRC plays a key role in the protection of war victims.

Its principal mandate is to provide the victims of armed conflict with protection and assistance. It is enjoined ‘to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law’ and ‘to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’.⁶⁷ The ICRC’s internal basic doctrine with regard to its mission and activities has declared the dual nature of its work – operational help for victims of armed conflict on the one hand, and developing and promoting international humanitarian law and humanitarian principles on the other – to be part of the institution’s identity.⁶⁸

There are a hundred or so references to the ICRC in the 1949 Geneva Conventions and the Protocols thereto, and most of them are injunctions to act.⁶⁹

66 See the issue of the *International Review of the Red Cross* on Truth and Reconciliation Commissions (Vol. 88, No. 862, June 2006).

67 Article 5(2)(c)–(d), Statutes of the International Red Cross and Red Crescent Movement. These Statutes are approved by the International Conference of the Red Cross and Red Crescent that brings together the States party to the Geneva Conventions, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, and the National Red Cross and Red Crescent Societies. The International Tribunal for ex-Yugoslavia referred to the ‘fundamental task’ conferred upon it by the international community in accordance with the relevant provisions of international humanitarian law, namely to ‘assist and protect victims of armed conflicts’.

68 *The ICRC: Its Missions and Work*, Policy Document, adopted by the ICRC Assembly in June 2008, published in the *International Review of the Red Cross*, Vol. 91, No. 874, June 2009.

69 These mainly concern supervision of the application of international humanitarian law, the Central Tracing Agency (CTA), co-operation, dissemination and the repatriation of the wounded.

Other tasks are left to the ICRC's own discretion.⁷⁰ Finally, its exercise of the right of initiative⁷¹ is determined by needs and circumstances.

The various aspects of its mandate are the practical expression of what is often referred to as the ICRC's role as guardian of international humanitarian law.⁷² However, it is not the guarantor of humanitarian law. That role must be performed by the High Contracting Parties in accordance with their obligation under Common Article 1. They must, however, 'grant the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it [...] in order to ensure protection and assistance to the victims of conflicts ...'⁷³ In the *Simic* case, the International Criminal Tribunal for the former Yugoslavia⁷⁴ acknowledged the specific role of the ICRC in the implementation of international humanitarian law by upholding its immunity from the obligation to testify, even before international tribunals, in the interests of its ability to perform that role.⁷⁵

The ICRC has taken various steps to ensure that international humanitarian law is put into effect before war breaks out, and to step up both the protection of war victims and compliance with the rules.⁷⁶ It has, for example, been active in supporting national implementation measures and efforts to spread knowledge of the relevant law. It has set up an advisory service at headquarters and in the field to explore the entire range of measures for integrating international

70 For example, the collection and transmittal of information on protected persons and other tasks of the CTA.

71 See for example Yves Sandoz, 'Le droit d'initiative du Comité international de la Croix-Rouge', *German Yearbook of International Law (Jahrbuch für internationales Recht)*, Vol. 22, 1979, pp. 352–373.

72 See Yves Sandoz, 'Le Comité international de la Croix-Rouge: gardien du droit international humanitaire', *Mélanges Sahovic, Revue yougoslave de droit international*, 1996, available at <http://www.icrc.org/web/fre/sitefre0.nsf/html/about-the-icrc-311298> (visited on 28 May 2009).

73 Article 81(1), AP I.

74 See ICTY, *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness (Trial Chamber), 27 July 1999, paras. 47 and 72. See also Stéphane Jeannot, 'Recognition of the ICRC's long-standing rule of confidentiality – An important decision by the International Criminal Tribunal for the former Yugoslavia', *International Review of the Red Cross*, Vol. 82, No. 838, June 2000, p. 403–425.

75 See Anne-Marie La Rosa, *ICRC and ICC: two separate but complementary approaches to ensuring respect for international humanitarian law*, web interview available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/international-criminal-court-interview-101008> (visited on 1 June 2009).

76 To support the efforts made by the ICRC headquarters in Geneva and its delegations in conflict situations, the ICRC has set up a network of delegations that covers almost all countries not directly affected by an armed conflict. These regional delegations currently exist in 21 States, and each of them covers several countries. They are decentralized extensions of the headquarters and serve as relays to help it implement its general objectives and permanent tasks (national implementation measures, dissemination and development of international humanitarian law, co-operation with National Red Cross and Red Crescent Societies, etc.), in other words to perform the ICRC's overall mandate as set out in Article 5 of the Statutes of the International Red Cross and Red Crescent Movement. These delegations are supposed to alert headquarters rapidly in case of an emergency and prepare themselves to become operational during a conflict. They make possible a bilateral and multilateral dialogue with States, as well as with National Red Cross and Red Crescent Societies, to further the implementation of international humanitarian law.

humanitarian law into domestic systems,⁷⁷ and its staff review states' domestic legislation, military doctrine, education, training and sanction systems and propose any changes needed to bring them into line with the state's obligations under the humanitarian treaties. The ICRC's main target groups are 'those actors that have a significant capacity to influence the structures or systems (e.g. legislation, military doctrine and training, disciplinary and penal sanctions) associated with the actual and potential humanitarian problems identified. These actors include political authorities and parties, the judiciary, arms carriers, National Red Cross/Red Crescent Societies, the media, the private sector, religious groups, academic circles, non-governmental organizations (NGOs) and international organizations. Such actors may have a positive (or negative) impact on the lives and dignity of persons affected by armed conflict [...], and they may be in a position to facilitate (or hamper) the ICRC's access to concerned populations.'⁷⁸

Operations during an armed conflict

In working for the faithful application of international humanitarian law, the ICRC endeavours to persuade states and other parties concerned to accept and comply with the rules of international humanitarian law applicable in a given situation. The obligations that arise for them will differ, depending on whether a situation is classified as an international armed conflict or not, and this classification also determines whether or not a state is obliged to accept the ICRC's offers of services. In the case of an international armed conflict, most victims have the status of protected persons and states are under specific obligations both towards them and towards the ICRC,⁷⁹ whereas the law applicable to internal conflicts does not impose those same constraints on the belligerents.

In international conflicts, the ICRC has traditionally drawn the parties' attention in a formal manner to the essential rules of international humanitarian law.⁸⁰

77 The ICRC set up its Advisory Service on International Humanitarian Law in 1996 to step up its support to States committed to implementing IHL. Specifically, the Advisory Service organizes meetings of experts, offers legal and technical assistance in incorporating IHL into national law, encourages States to set up national IHL committees and assists them in their work (see National Committees on IHL), promotes the exchange of information (for instance through its database), publishes specialist documents (for instance fact sheets, ratification kits, model laws, biennial report and biannual update) – see ICRC, *National Implementation of International Humanitarian Law (IHL) and the ICRC Advisory Service*, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/advisory_service_ihl?Opendocument (visited on 28 May 2009).

78 See 'ICRC Prevention Policy', p. 3, adopted by the ICRC Assembly on 18 September 2008, published in the *International Review of the Red Cross*, Vol. 91, No. 873, June 2009.

79 See Article 126, GC III and Article 143, GC IV. In these areas, the ICRC has a real right of intervention and supervision, in addition to its convention-based right of initiative set out in Article 9, GC I–III and Article 10, GC IV. Moreover, it can be appointed as (and act as a substitute for) a Protecting Power.

80 Recent examples: Chad/Libya (1987), the Gulf War (1990), Ecuador/Peru (1995) Ethiopia/Eritrea (1999), Afghanistan (2002), Iraq (2003) Lebanon–Gaza–Israel (2006/2009). On the practice in the Iraq war, see Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict', *German Yearbook of International Law*, Vol. 47, 2004, pp. 293–342.

Its memoranda⁸¹ to them contain a reminder of the relevant principles and rules of that law; they include the rules on the conduct of hostilities and on the protection of people affected by war. Legal classification of a situation as an armed conflict serves to highlight the belligerents' obligations, sets out a framework for the ICRC's operations, and provides guidance for its delegates in the field. The ICRC's overarching aim is to ensure that victims benefit at least *de facto* from treatment that complies with humanitarian rules, especially in internal conflicts.

In order to carry out their humanitarian operations, ICRC delegates must not only be present in warring countries but must also have access to the areas affected by the hostilities, as close proximity to the victims is vital for humanitarian protection and assistance. A headquarters agreement and a presence limited to the capital city will never be an adequate substitute for direct access to the people in need. Similarly, the ability of delegates to work in conflict-torn and potentially dangerous areas and to get to especially vulnerable people – in particular prisoners of war, detainees and civilian internees – is a *sine qua non* of what is known as protection work. In international conflicts, this right of access is expressly provided for in the Conventions⁸² and includes a real right of supervision.⁸³

Access naturally has to be negotiated with the authorities, and if necessary with all the warring factions. Their consent is indispensable to vouchsafe a minimum level of security. The negotiations have to take account of military interests and security considerations that often take precedence over humanitarian principles. Politics (foreign and domestic), the media, and economic parameters play a part. Although an agreement in principle is often relatively easy to obtain, putting it into practice is often much more difficult. Moreover, access to conflict areas does not in itself enable the ICRC to conduct all its humanitarian operations. For instance protection activities, particularly those related to detention, require specific agreements.⁸⁴

Once the ICRC has access, its treaty-based right of initiative authorizes it to undertake any humanitarian activity with the consent of the parties to the conflict concerned.⁸⁵ If the proposed action is explicitly based on humanitarian law, the ICRC has a wide scope for action (for example requesting a temporary

81 A sample was published in the *International Review of the Red Cross*, No. 787, January–February 1991, pp. 24–27. It is the *note verbale* and annexed memorandum of 14 December 1990 addressed to all the States party to the Geneva Conventions shortly before the outbreak of the Gulf War.

82 Article 126, GC III and Article 143, GC IV: ICRC delegates (like those of Protecting Powers) 'shall have permission to go to all places where prisoners of war may be [...]. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses [...]. They shall have full liberty to select the places they wish to visit [...].'

83 As in the case of visits to prisoners of war (Article 126, GC III). Beside Articles 126 and 143, GC IV, the word 'Supervision' appears in the margin. The titles that appear in the margins of the Conventions were added by the Secretariat of the diplomatic conference and are not part of the official texts. They therefore have only an indicative value. They are referred to in the edition of the Geneva Conventions published by the ICRC.

84 Although visits by ICRC delegates to prisoners of war (Article 126, GC III) and civilian internees (Article 143, GC IV) are an obligation in international armed conflicts, they nevertheless require negotiations to determine the modalities.

85 Article 9, GC I–III; Article 10, GC IV; Article 3 common to the four Geneva Conventions, paras. 2 and 3.

cease-fire to allow evacuation of the wounded, repatriation of wounded prisoners of war, creation of hospital and safety zones, protection of hospitals, organization of relief convoys through front lines). It may also have discussions with authorities in order to perform its role as a neutral intermediary in humanitarian matters that call for negotiations with or between the parties to a conflict – the purpose here is to alleviate the actual or potential humanitarian consequences of a conflict.⁸⁶ Another activity based on humanitarian law is that of its Central Tracing Agency (CTA), which gives moral and practical support to people of concern for the ICRC and to their families. It helps to trace the wounded and dead,⁸⁷ detainees,⁸⁸ civilians isolated in enemy-controlled territory,⁸⁹ displaced people and refugees⁹⁰ and unaccompanied children,⁹¹ and to reunite people with their families.⁹²

However, the ICRC's work is often carried out without a firm basis in the rules of international humanitarian law. Even limited *ad hoc* agreements often make it possible to save human lives or alleviate suffering during a conflict. The ICRC can prepare such agreements or respond to requests from parties to a conflict without having any justification other than the humanitarian nature of the action required (resettlement of displaced persons, exchange or release of prisoners, disarmament of armed groups, evacuation or surrender of fighters, etc.) In these situations the action must be based on specific and concurring requests from the parties. At the same time the ICRC must ensure that it does not risk compromising its fundamental principle of neutrality by giving a political or propaganda advantage to either party, or jeopardizing its traditional protection and assistance operations.

Indeed, the ICRC's credibility and acceptance among the parties to conflicts are based on its strict respect for the Fundamental Principles of the Red Cross and Red Crescent, which the States Parties to the Conventions have themselves recognized and agreed to respect. In situations of armed conflict, the principles of humanity, neutrality, impartiality and independence are particularly relevant.⁹³ These principles determine its approach and positions⁹⁴ and guide its operational

86 To be distinguished from the consequences related to the causes of a dispute or even its very object. The nature of these actions is already limited by the ICRC's role as a humanitarian organization, the priority to be given to its protection and assistance work, and by the Fundamental Principles of the Movement.

87 For the wounded, sick and dead of the armed forces (see Articles 15–16, GC I; Articles 18–19, GCII).

88 See Articles 70, 71, 120, 122 and 123, GC III for prisoners of war and Articles 107, 112, 113 and 129, GC IV for civilian internees.

89 See Articles 136 and 140, GC IV concerning the centralization of information relating to protected persons.

90 Article 73, AP I.

91 Article 78, AP I.

92 Article 74, AP I.

93 See Jean Pictet, *Red Cross Principles*, ICRC, Geneva, 1966, and *The Fundamental Principles of the Red Cross, Commentary*, Henry Dunant Institute, Geneva, 1979.

94 See Jean-Luc Blondel, 'The meaning of the word "humanitarian" in relation to the Fundamental Principles of the Red Cross and Red Crescent', *International Review of the Red Cross*, No. 273 November–December 1989, pp. 507–515, Marion Harroff-Tavel, 'Neutrality and impartiality – The importance of these principles for the International Red Cross and Red Crescent Movement and the difficulties involved in applying them', *idem*, pp. 536–552.

activity in the field. In its judgment in the *Nicaragua* case, the International Court of Justice confirmed the importance of the Red Cross principles by singling out humanity and impartiality as the essential conditions for all humanitarian action.⁹⁵

Protection and assistance

Through its operations, the ICRC endeavours to shield conflict victims from dangers, suffering and abuse to which they may be exposed and to provide them with support. Geared to the victims' vulnerabilities and needs, they will therefore vary according to circumstances and cover a wide range of activities, from dissemination of the humanitarian rules and principles to medical, nutritional and material aid. These activities are closely interrelated and can be viewed only as an inseparable whole. In armed conflicts, protection and assistance are inextricably linked: the ICRC sees protection first and foremost as an active presence in the vicinity of people affected by a conflict. Assistance activities often have a protection dimension and vice versa.⁹⁶

The primary aim of the ICRC's operations must be to confront the parties to an armed conflict with their responsibilities and get them to comply with their obligations under international humanitarian law to preserve the safety, physical integrity and dignity of people affected by the conflict. Its work is designed to help them shoulder those responsibilities. It includes activities that seek to increase the safety of individuals and limit the threats they face by reducing their vulnerability and/or exposure to risks.⁹⁷ Firsthand information gathered by the ICRC through its presence *in situ* and its access to victims serves as input for its representations, based on fact or law, to the authorities to persuade them to 'work for the faithful application' of humanitarian law.

These representations take place as part of a regular dialogue with the main contenders in an armed conflict, particularly the political and military authorities.⁹⁸ They can be made at various levels – for example, to the commander of an individual camp, the official responsible for all prison camps, the general headquarters, or even at ministerial or presidential level. They may be made by a delegate, the head of the local or regional delegation, the ICRC Director of Operations or the ICRC President. They may be made orally or in writing, by letter

95 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, p. 14, para. 243.

96 See the ICRC Assistance Policy, adopted by the ICRC Assembly on 29 April 2004, published in the *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 677–693, as well as the ICRC Protection Policy, adopted by the Assembly of the ICRC on 23 September 2008, published in the *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 751–775.

97 See ICRC Protection Policy, above note 96, p. 752.

98 Ministries of Foreign Affairs are the usual diplomatic channel, but most of the ICRC's representations are made to Ministries of Defence, Security or the Interior, or to the President's office (often with the aid of a liaison officer).

or by *note verbale*. The type of representation will depend on the gravity of the violation, the urgency of the matter and above all the interests of the victims.⁹⁹

These approaches may take various forms. The extent to which they achieve their aims will obviously depend on the relationship of trust between the authorities and the ICRC. Although as a general rule the ICRC's representations remain confidential,¹⁰⁰ in the case of serious and repeated violations it can nevertheless appeal to the international community, even denouncing those violations publicly and calling for an end to them.¹⁰¹ In recent years such appeals have become more and more frequent, particularly in major conflicts such as those in Somalia, Rwanda, Congo, the former Yugoslavia, Afghanistan, Iraq, and Israel and the occupied territories.¹⁰² Nevertheless, the ICRC's practice in this regard is cautious so as not to make the numerous widespread violations appear banal by raising the alarm too frequently, and also not to jeopardize its ability to take action on the ground.

More often than not, the protection activities have to be complemented with assistance activities. Whereas the parties to a conflict bear the primary responsibility for meeting the basic needs of the civilian population under their control, relief operations are required to make up for a lack of supplies essential for the population's survival. Under international humanitarian law, parties to a conflict need only guarantee access to assistance operations on condition that the assistance is impartial and neutral, and if the supply of goods essential to the survival of the civilian population is insufficient.¹⁰³ An assistance operation therefore

99 See Deborah Manicini-Griffoli and André Picot, *Humanitarian negotiation, A Handbook for securing access, assistance and protection for civilians in armed conflicts*, Centre for Humanitarian Dialogue, Geneva, October 2004. For a practical example of the different interventions, see Toni Pfanner, 'Principled humanitarian action in the East Timor crisis', in Larry Minear and Hazel Smith (eds), *Humanitarian Diplomacy: Practitioners and their Craft*, United Nations University Press, Tokyo, 2007, pp. 174–193.

100 On dialogue and confidentiality, see ICRC Protection Policy, above note 96, pp. 758–761.

101 Public statements are subject to specific and cumulative conditions defined in the ICRC's institutional policy (namely, '(1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of the violations have been established of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to violations; (4) such publicity is in the interest of the persons or populations affected or threatened.' – see 'Action by the ICRC in the event of violations of international humanitarian law', *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400).

102 The first appeal to the international community in the Iran/Iraq war, based on Article 1 common to the four Conventions, was still an exceptional step (see *International Review of the Red Cross*, No. 235, July–August 1983, pp. 220–222 and No. 239, March–April 1984, pp. 113–115). In connection with the conflict in the former Yugoslavia alone, the ICRC issued over 50 public appeals, often in response to particularly tragic or deadly events, in order to express its acute concern at the serious violations of international humanitarian law that were taking place there.

103 See Articles 23 and 55, GC IV; Article 70, AP I; Article 3 common to the four Geneva Conventions and also *Compilation of United Nations Resolutions on humanitarian assistance*, OCHA Policy Studies Series, 2009, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112152> (visited on 7 August 2009). See also Article 18, AP II. For more details on the rules of international humanitarian law applicable to relief, see Sylvain Vité, *Rights and duties of all actors under international humanitarian law*, presented at the Expert Meeting on Humanitarian Access in Situations of Armed Conflict,

must be negotiated in advance with the warring parties. In an international armed conflict, consent must be given where the said conditions are met.¹⁰⁴ However, authorization to deliver assistance is often delayed or withheld without any justification based on overriding military necessity.¹⁰⁵ The ICRC can only carry out an assistance operation if it is able to ascertain the urgency and nature of the needs on the ground by assessing the categories and numbers of potential beneficiaries and organizing and supervising the distribution of relief accordingly.¹⁰⁶ It closely supervises the use to which assistance is put in order to prevent misappropriation and politicization of its aid by armed forces or groups. It is obliged to do so in order to comply with the requirements of humanitarian law.¹⁰⁷ Unlike some other players, and strictly following the Red Cross principles, it wants to provide assistance independently of political or military structures and without taking sides as to the cause of conflict.¹⁰⁸

Co-operation with the National Red Cross or Red Crescent Society

Co-operation with National Societies is indispensable for the ICRC to promote contingency measures for the implementation of international humanitarian law,¹⁰⁹ and even more so when it is preparing to conduct operations during a conflict. Humanitarian work by National Societies is mainly based on the Conventions themselves, and the primary responsibility for rendering assistance to the victims of armed conflicts rests with the respective National Society as a humanitarian auxiliary to the public authorities.¹¹⁰ Article 81(2) of Protocol I,¹¹¹ which is addressed mainly to public authorities and their subsidiary bodies, stipulates that the parties to a conflict 'shall grant to their respective National Societies the facilities necessary for carrying out their humanitarian activities, in accordance with the fundamental principles of the Red Cross'.¹¹²

30th June–1st July 2008, Montreux (on file with the author); François Bugnion, above note 45, pp. 658–67, 804–844.

104 See Articles 23 and 55, GC IV.

105 See Article 71(3), AP I (temporary restriction of the movements of relief personnel). However, famine is often illegally used as a weapon, either to gain control of a group of people (by drawing civilians towards regions where supplies are less scarce) or to drive a group of people out of a particular region. Starvation of the civilian population is prohibited according to Article 54 para. 1, AP I.

106 See ICRC Assistance Policy, above note 96.

107 I.e. the requirement that assistance be neutral and impartial – see Article 23, GC IV and Article 18, AP II.

108 Pierre Krähenbühl, 'The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 505–514.

109 See Article 3(2), subpara. 3, and Article 5(4)(a), Statutes of the International Red Cross and Red Crescent Movement.

110 See for example Article 26, GC I; Articles 24–25, GC II; Article 63, GC IV; Articles 6 and 17, AP I; Article 18, AP II and Article 3(2), subpara. 2, Statutes of the International Red Cross and Red Crescent Movement (above note 67).

111 Para. 2.

112 It also calls upon National Societies to provide them with the same facilities under the same conditions (para. 3). For the Co-operation within the Red Cross and Red Crescent Movement see the Agreement on the Organization of the International Activities of the Components of the International Red Cross and

The objective of the operational partnership is to reach persons affected by conflict and respond to their needs as quickly and efficiently as possible. Close co-operation has been established, for example, in first aid,¹¹³ public health,¹¹⁴ assistance programmes and tracing missing persons. The activities conducted by the ICRC, except for those assigned to it by its specific mandate under international humanitarian law and more specifically the various protection activities, can often be carried out just as well or even better and with due respect for the Fundamental Principles of the Red Cross by the National Society concerned. Only when the National Society cannot assume its responsibilities does the ICRC offer to step in. In an internal conflict, however, the principles (independence vis-à-vis the authorities, neutrality in the conflict and impartiality of aid) are difficult for National Societies to comply with, and they are rarely able to do their job throughout the territory, particularly in rebel-controlled areas. Since national humanitarian organizations are often unable in such situations to respond to needs, international operations need to be present to plug any gaps in the national relief system.

Limitations

To be able to perform its specific role, the ICRC has to carefully weigh all the implications its public reactions to violations could have for the victims and, as a secondary consideration, for its own activities on their behalf. When faced with the dilemma of either remaining silent and being able to help the victims, or speaking out and not being able to alleviate their plight, the ICRC chooses the first approach.¹¹⁵ By the same token, the need to safeguard its operational mandate restricts its ability to co-operate with enquiries or judicial procedures, as it would have to break its commitment to confidentiality vis-à-vis both the parties to conflict and the victims themselves to do so. It would thereby risk forfeiting the trust of the authorities and other parties with whom it engages in dialogue and being refused access to victims.¹¹⁶

The ICRC's role as a neutral and independent humanitarian organization is therefore first and foremost an operational one. Its objective is to bring relief to

Red Crescent Movement, adopted by the Council of Delegates, Seville, 25–27 November 1997 (Seville Agreement), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP4Y> (visited on 28 July 2009). Each Movement component (National Red Cross and Red Crescent Societies, their International Federation and ICRC) has distinct but closely related and complementary rules. The ICRC will act as lead agency, as provided for in Article 4 of the Agreement, in situations of international and non-international armed conflicts, internal strife and their direct results (Article 5.3.1, Seville Agreement).

113 Training of relief workers, supply of drugs and medical supplies, reinforcements for the ambulance service, etc.

114 Mobile clinics, water and sanitation programmes, logistical and administrative support for medical and surgical teams, etc.

115 See Jakob Kellenberger, 'Speaking out or remaining silent', *International Review of the Red Cross*, Vol. 85, No. 855, September 2004, p. 593–610.

116 See also Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', *Yearbook of International Humanitarian Law*, Vol. 10, December 2007, pp. 45–75.

the victims, improve their situation in practical ways, and persuade those responsible to treat them with humanity and work for better application of the law. Quasi-judicial supervision *a posteriori*¹¹⁷ to restore victims' rights is not part of its mandate. It cannot be 'at once champion of justice and of charity'.¹¹⁸

Implementation in non-international armed conflicts

A distinction is made in international humanitarian law between international and non-international armed conflicts. It is also reflected in the implementation mechanisms: in the latter case they are addressed to the 'parties' to non-international armed conflicts, i.e. states but also non-state groups. Neither Article 3 common to the four Geneva Conventions nor Additional Protocol II expressly provides for international implementation mechanisms. All attempts to create such mechanisms, let alone a real system of legal supervision, were thwarted by the 'internal affairs' reflex.¹¹⁹ Besides the humanitarian right of initiative enshrined in Article 3, only an obligation to disseminate the Protocol remains in its Article 19.

Neither Protecting Powers nor enquiry or fact-finding procedures¹²⁰ are provided for in the law applicable to non-international armed conflicts. It is at best uncertain to which extent armed opposition groups incur responsibility and are under an obligation to make reparations. The obligation to prosecute and try war criminals, which is also implicitly contained for non-state entities, is hard for them to implement, and the parties to such conflicts are moreover often unwilling to enforce criminal responsibility.¹²¹ Before adoption of the Statute of the International Criminal Court, there was no specific mechanism in international humanitarian law to prosecute and try perpetrators of violations of that law or put an end to such violations. However, the general rule enshrined in Article 1 common to the Geneva Conventions means that the warring parties are bound to

117 See David, above note 34, p. 645–648. This is rather a restriction that the ICRC imposes on itself, because of the way it perceives its role; for the Protecting Power, the mandate could be construed differently.

118 Cf. Jean Pictet, *The Fundamental Principles of the Red Cross*, above note 93, p. 54.

119 In Protocol II, it is stated that nothing in the Protocol shall be invoked 'for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State' or 'as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs' (Article 3, paras. 1 and 2).

120 Immediately following its constitutive meeting in Bern on 12–13 March 1993, the International Fact-Finding Commission expressed its readiness to conduct enquiries, subject to the consent of all parties to the conflict, on violations of humanitarian law other than grave breaches and other serious violations, including those committed in civil wars. Although the extension of the Commission's mandate to non-international armed conflicts is to be welcomed, we may wonder whether it really has the capacity to look into all violations. In any given armed conflict, there will be hundreds and even thousands of serious violations. The Commission would be in danger of being flooded with allegations if the offer were to be really taken up.

121 See Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflicts', *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, pp. 655–690.

ensure respect for international humanitarian law¹²² and to prevent and punish violations of it. Indeed, according to the International Court of Justice¹²³ the obligation to ensure respect for the Conventions also applies to Common Article 3 and hence to non-international conflicts. This obligation applies to third states too.

The criminalization of violations of Common Article 3 as violations of the laws and customs of war¹²⁴ or as defined in the Statute of the International Criminal Court¹²⁵ cannot obscure the fact that state practice, not to mention that of non-state entities, is still embryonic in terms of effective prosecution and punishment of violations of the laws and customs of war in internal conflicts. The measures for implementing international humanitarian law therefore essentially rest with authorities at the national level.

Special agreements and unilateral declarations

The rules on internal conflicts as laid down in Common Article 3 and Protocol II can be supplemented by those that govern international armed conflicts. In terms of Common Article 3(2), parties to a conflict must endeavour to put all or part of the other rules of the Conventions into effect by means of special agreements. In order to interpret the rudimentary rules pertaining to non-international conflicts and make them easier to understand and apply, it is necessary to proceed by analogy with the more detailed (and more demanding) rules applicable to international conflicts. This is an appropriate course to take, as the humanitarian and military challenges of both types of situation are often similar and there can be no real justification for differentiating between them.¹²⁶ Problems arising over the legal classification of a conflict can be overcome pragmatically by means of an agreement, since this will have no impact on the legal status of the contracting parties.¹²⁷

An agreement can be entered into on all or some of the provisions relating to international armed conflict. Such agreements mostly concern particular provisions (e.g. setting up of safety zones,¹²⁸ simultaneous release of wounded prisoners, etc.). There have also been broader references to humanitarian law

122 The ICJ took the view in *Military and Paramilitary Activities in and against Nicaragua* (above note 95, p. 129, para. 255) that Article 1 imposed obligations of conduct in relation to an international armed conflict too.

123 *Ibid.*, p. 114, para. 220.

124 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, para. 86; Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusko Tadić*, 17 July 1995 (Amicus Curiae brief submitted by the United States), p. 37; Antonio Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts', in Antonio Cassese (ed), *Current Problems of International Law*, Giuffrè, Milan, 1975; Meron, above note 13, p. 560. See also Article 8(e), Rome Statute of the International Criminal Court.

125 See Article 8(e), Rome Statute of the International Criminal Court.

126 For example, the rules on conduct of hostilities.

127 Common Article 3, para. 4.

128 See Yves Sandoz, 'The establishment of Safety Zones for Persons Displaced within their Country of Origin', N. Al-Nauimi and R. Meese (eds), *International Legal Issues Arising under the Decade of International Law*, 1995, pp. 899–927.

treaties or parts of treaties, e.g. in the case of the conflict in the former Yugoslavia.¹²⁹ These special agreements are often the result of an ICRC initiative, and are often prepared by the ICRC and concluded under its auspices.¹³⁰

Special agreements between the parties to a non-international armed conflict (either between a State and an armed group or between armed groups) allow for an explicit commitment to comply with a broader range of rules of international humanitarian law. An agreement may be constitutive if it goes beyond the treaty or customary provisions already applicable in the specific context (thereby creating new legal obligations), or it may be declaratory if it is simply a restatement of the law that is already binding on the parties independently of the agreement. As pointed out by the International Criminal Tribunal for the former Yugoslavia, the former category implicitly develops the customary law applicable to internal armed conflicts.¹³¹

States are often unwilling to enter into such agreements with armed groups, as they may be concerned about appearing to grant legitimacy to an armed group party to a conflict. In practice, special agreements are more frequently attempted and successfully concluded when the conflict is both seemingly intractable and more ‘equal’ in terms of the fighting between the State and armed groups (i.e. that the armed group is more ‘State-like’ in terms of territorial control, effective hierarchical chain-of-command, etc.).¹³²

Armed groups party to non-international armed conflicts may also make a unilateral declaration (or ‘declaration of intention’), in which they state their

129 In the *Tadic* case, the ICTY Trial Chamber did not examine the question of whether the provisions on grave breaches apply as a result of agreements concluded under the auspices of the ICRC. The Appeals Chamber nevertheless concluded that the agreements call for the prosecution and punishment of all violations that take place in the conflict (ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, para. 136).

130 See the agreements published in the annexes to Michèle Mercier, *Crimes sans châtime – L’action humanitaire en ex-Yougoslavie 1991–1993*, Bruylant, Brussels, 1994, Documents III, IV and V, as well as the following agreements: Mozambique National Resistance (RENAMO) Joint Declaration with the Government of Mozambique on the guiding principles of humanitarian assistance, 16 July 1992; Frente Farabundo Marti para la liberacion nacional – FMLN, San José Agreement on Human Rights, 26 July 1990 (both reproduced in NSA Database/Geneva Call, ‘Statements of Non-State Armed Actors under International Humanitarian Law’, March 2000, pp. 8 and 14, available at <http://www.genevacall.org/resources/testi-reference-materials/testi-nsa-states/nsa-states-mar00.pdf>); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998, available at <http://www.philsol.nl/A03a/CARHRIHL-mar98.htm>; Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement to Protect Non-combatant civilians and civilian facilities from military attack, 10 March 2002, available at <http://www.vigilsd.org/resolut/agreemsd.htm#Agreement%20between%20the%20Government%20of%20the%20Republic> (all sites visited on 7 August 2009).

131 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, paras. 104–109.

132 As noted in the *Commentary* to Common Article 3 (Pictet, above note 6, p. 43), a special agreement ‘will generally only be concluded because of an existing situation which neither of the parties can deny, no matter what the legal aspect of the situation may in their opinion be.’ See also Toni Pfanner, ‘Asymmetrical warfare from the perspective of humanitarian law and humanitarian action’, *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.

commitment to comply with international humanitarian law or specific rules thereof.¹³³ Some armed groups take the initiative to make such declarations through a public statement or press release. At other times the ICRC (or another humanitarian actor or organization) initiates, negotiates and/or receives the declarations.

There is a long history of general¹³⁴ or partial¹³⁵ declarations of intent. The primary function of a unilateral declaration is to provide armed groups (or their proxies) with an opportunity to express their consent to be bound by the rules of humanitarian law, given that they cannot ratify or formally become party to humanitarian law treaties. Express commitment through a unilateral declaration provides the hierarchy with an opportunity to take ownership of ensuring respect for the law by their troops or fighters. In addition, it can lead to better accountability and compliance by the armed group, through providing a clear basis for follow-up, as well as dissemination to its members, especially when the declaration explicitly mentions the armed group's responsibility to disseminate international humanitarian law and to punish breaches. Similar functions can be fulfilled by the inclusion of humanitarian rules in armed groups' codes of conduct.

133 See Denise Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé', *Revue belge de droit international*, 1984–1985/1, pp. 298–320.

134 See for instance: the response of General de Gaulle of the *Comité National Français* (which was in effect the 'Free French' government between 1941 and 1943) – ICRC archives, A/CICR, B G70/I 1940–1941; *Letter of General de Gaulle to Max Huber*, 19 November 1941. See also the declarations of the following organizations: the Agence Juive, Vaad Leumi and the Arab High Committee (*Revue Internationale de la Croix Rouge*, No. 353 (1948), p. 335; the Palestinian Liberation Organisation (1989 declaration on adherence to the GCs, available at <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS> – see also the corresponding note of the Swiss Federal Council, reproduced in the *Revue Internationale de la Croix Rouge*, No. 781 (1990), pp. 69–70); the South West Africa People' Organization (SWAPO/Namibia), reproduced in NSA Database/Geneva Call, above note 130; the African National Congress (ANC), *International Review of the Red Cross*, No. 200 (1977), p. 479 (see also ANC declaration to the ICRC of 28 November 1980, in NSA Database/Geneva Call, above note 130); ANC-ZAPU (Rhodesia/Zimbabwe), *International Review of the Red Cross*, No. 200 (1977), p. 479; the União Nacional para a Independência Total de Angola/Angola, *International Review of the Red Cross*, No. 219 (1980), p. 320; the Liberation Tigers of the Tamil Eelam (Sri Lanka/1988), quoted in the *Israeli Yearbook on Human Rights*, Vol. 30, 2000, p. 213, and also available at <http://www.tamilnation.org/unitednations/uncom92.htm#a16>; the Revolutionary People's Front (RPF/North-East India/1997), available at http://www.geocities.com/CapitolHill/Congress/4568/documents/main_d.html; New Peoples' Army/NDFP (Philippines/1973/1991), available at <http://home.casema.nl/ndf/>; the Justice and Equality Movement (JEM) and the Sudan Liberation Movement/Army, available at <http://www.hdcentre.org/files/110708.pdf>; PKK (Turkey/1994), available at <http://www.kurdistan.org/Articles/ismet.html> (as well as its 1995 statement to the UN, available at <http://www.hartford-hwp.com/archives/51/009.html>). All sites visited on 7 August 2009.

135 The 'partial' declarations relate only to selected aspects of IHL as applicable, mostly the recruitment of child soldiers and the use of anti-personnel mines. For the latter, a number of examples can be found in NSA Database/Geneva Call, above note 130. The Geneva Call Deed of Commitment on Landmines and a list of its signatories can be found at <http://www.genevacall.org/signatory-groups/signatory-groups.htm> (visited on 7 August 2009). Such declarations can, however, also cover particular aspects of IHL (e.g. declarations to refrain from attacking civilians) through various means (including e.g. *fatwas*).

The most common argument against the promotion of unilateral declarations is that they are often made in an attempt to gain political legitimacy and there might be little chance of implementation of the commitments.¹³⁶ However, practice suggests that even if the primary motivation appears to be political, one can nonetheless capitalize on the express commitment made by an armed group, using it strategically as an operational tool to promote and improve compliance with the law. Declarations provide a point of entry, or essential ‘first step’, to establishing contact and beginning a dialogue. The negotiations can help to identify a responsible interlocutor with whom to begin a strategic dialogue and work towards building understanding and improving the political will, capacity, and practice of compliance of the party.

The right of humanitarian initiative

There remains the right of initiative conferred on the ICRC by Common Article 3, paragraph 2. Under this provision, ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’¹³⁷ Although the ICRC does not have a monopoly on this right of initiative,¹³⁸ states have nevertheless enshrined it in the Statutes of the Red Cross/Red Crescent Movement¹³⁹ as a veritable international mandate for the ICRC.

Parties to conflict can decline the ICRC’s or any humanitarian organization’s offers but must give them due consideration.¹⁴⁰ The obligation not to decline ‘for arbitrary or capricious reasons’ an offer made in good faith and intended

136 However, it is important to recognize that States also are often politically motivated when ratifying treaties or making other international commitments. This does not stop the international community from accepting these commitments or from attempting to hold States accountable to them.

137 Protocol II does not provide for the same right of initiative for the ICRC, even in cases where this Protocol is applicable. See Sandoz, above note 71, pp. 364–367.

138 If the criteria laid down in Common Article 3 (humanity, impartiality and non-discrimination) are met, any organization may offer its services. On the Red Cross Fundamental Principles as criteria for humanitarian action, see ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 243.

139 See Statutes of the International Movement of the Red Cross and Red Crescent, Article 5(2)(d) ‘[...] to endeavour at all times – as a *neutral institution* whose humanitarian work is carried out *particularly in time of international and other armed conflicts or internal strife* – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’ (emphasis added). The ICRC often bases its offers of services on this provision in cases where it does not wish to make a legal classification of a conflict.

140 Pictet, above note 6, Vol. 1, p. 57. See also Article 5, para. 2 of the resolution on human rights protection and the principle of non-intervention in the internal affairs of States adopted by the International Law Institute on 13 September 1989. Robert Kolb takes the view that a refusal is not arbitrary when, for example, the offer or its implementation is not politically neutral, where the aid offered is to be dispensed to enemy combatants, etc. (Robert Kolb, ‘De l’assistance humanitaire: la résolution sur l’assistance humanitaire adoptée par l’Institut de droit international à sa session de Bruges en 2003’, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 853–878).

exclusively to provide humanitarian assistance¹⁴¹ dovetails in effect with the requirements of human rights law.¹⁴²

The offer is to be addressed to the parties to a conflict. Depending on the type of conflict and the needs ascertained, the organization will make its offer to the government, the dissident authority or other warring parties (for example, rival armed factions) with a view to gaining access to all the victims on the respective territories they control. It may make an offer to one party independently, as the only relevant condition is the impartial nature of the humanitarian operation. Once a party has accepted its offer, the ICRC takes the view that it is entitled to provide the services concerned, irrespective of the other warring parties' acceptance.¹⁴³ However, it does seek the government's consent to access the whole of the territory, including areas under the control of an armed group. To perform its humanitarian task to the full, the humanitarian organization must enjoy the complete trust of the authorities that control *de jure* or *de facto* the territory where the operation is taking place. In the absence of consent, whether explicit, implicit or at least tacit, the aid workers would rapidly encounter safety and security problems.

An offer of services is not simply intended to enable aid workers to be sent to a country engaged in an armed conflict. Through such an offer the humanitarian organization also makes known its willingness to perform certain tasks under its mandate (visits to security detainees and vulnerable groups within the civilian population, provision of medical, nutritional and material assistance, tracing of missing persons). As the conflict develops, and with it the needs of the people affected, specific offers will have to be prepared, discussed and accepted. Day-to-day negotiations at several levels are often necessary at that stage. They may concern agreements on visits to prisoners or to a single individual, but mostly deal with matters such as how and under what conditions the humanitarian organization can access conflict areas.

The responsibility of the international community

'Ensure respect' for international humanitarian law

The undertaking in Article 1 common to the four 1949 Geneva Conventions to 'ensure respect for' international humanitarian law means that the Contracting

141 Institut de droit international, *L'assistance humanitaire*, para. VIII.1. See also Juan Antonio Carrillo Salcedo, 'Le droit à l'assistance humanitaire: à la recherche d'un équilibre entre les devoirs des autorités territoriales et les obligations des donateurs des secours humanitaires,' *Law in Humanitarian Crises/Le droit face aux crises humanitaires*, Vol. II, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 112.

142 For example, 'the prevention of access to humanitarian food aid in internal conflicts or other emergency situations' is a violation of the right to adequate food (Committee on Economic, Social and Cultural Rights, *General Comment No. 12*, E/C.12/1999/5, 12 May 1999, para. 19).

143 Sandoz, above note 71, p. 364; Michael Bothe also takes the view that an action undertaken unilaterally by the ICRC would be in keeping with international law (see 'Relief Actions: The Position of the Recipient State', in Frits Kalshoven (ed), *Assisting the victims of armed conflict and other disasters*, Martinus Nijhoff, Dordrecht, 1989, p. 96.

Parties are obliged to help bring about compliance with the Geneva Conventions whenever they are applicable, even in conflicts in which those parties are not involved. This provision thus reinforces the responsibility of each contracting state, which besides regulating its own conduct must act by all appropriate means to ensure that humanitarian law is observed by all other states. 'It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.'¹⁴⁴

This article has been invoked several times, by the UN General Assembly,¹⁴⁵ the Security Council¹⁴⁶ and the International Court of Justice,¹⁴⁷ as well as by the ICRC.¹⁴⁸

The said undertaking by the states party to the Geneva Conventions and the Protocols additional thereto to 'respect and ensure respect for' those instruments 'in all circumstances' encompasses a wide range of means (in addition to those expressly provided for by international humanitarian law, for example the appointment of Protecting Powers or the International Fact-Finding Commission). These include diplomatic, confidential or public approaches and public appeals.¹⁴⁹ The scope of this obligation¹⁵⁰ can only be assessed case by case, depending on factors such as the appropriateness of the various means available and the nature of the relationship between third states and the warring parties. The challenge posed by this provision was consequently not to spell out its content, but

144 Pictet, above note 6, vol. I, p. 26.

145 See e.g. A/RES/63/96 (2008).

146 See e.g. S/681 (1990), S/RES/764 (1992) and S/RES/ 955 (1994).

147 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, paras. 96–98 and 158–159; ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 220.

148 In 1983 and 1984, the ICRC based itself on Article 1 common to the Geneva Conventions in issuing formal appeals to the States party to the Geneva Conventions to use their influence with Iraq and Iran, then at war with one another, and prevail upon them to comply with the law of armed conflict (see above note 102).

149 For an account of the means to which States can resort to meet this obligation, see Umesh Palwankar, 'Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law', *International Review of the Red Cross*, No. 298, February 1994, pp. 11–27, and the European Guidelines on promoting compliance with international humanitarian law (IHL), *Official Journal of the European Union*, 2005/C 327/04 (in particular part III, Operational Guidelines, Means of Action at the Disposal of the EU in its Relations with Third Countries).

150 Before the ICJ's *Wall* opinion (above note 49), the legal scope of the obligation to 'ensure respect for' international humanitarian law was disputed, particularly with regard to whether the obligation binds only the parties to a conflict or whether it also implies a duty (and, if so, what duty) for third States. At the least, States should 'not [...] encourage persons or groups engaged in [conflict] to act in violation of the provisions of Article 3 common to the four Geneva Conventions' – ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, para. 220. For more details, see Luigi Condorelli and Laurence Boisson de Chazournes, 'Quelques remarques à propos de l'obligation de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"', in Christophe Swinarski (ed), *Mélanges Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 17–35; Nicolas Levrat, 'Les conséquences de l'engagement pris par les Hautes Parties Contractantes de faire respecter les Conventions humanitaires', in Frits Kalshoven and Yves Sandoz (eds), *Mise en oeuvre du droit international humanitaire*, Martinus Nijhoff, Dordrecht, 1989, pp. 263–296; Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3–61.

rather to identify as precisely as possible the measures available to third states for influencing the parties to a conflict.¹⁵¹ Although Article 1 throws the doors wide open to action in support of compliance with the law, states have rarely ventured beyond discreet representations behind the scenes.

Provision for a further type of ‘co-operation’ in the event of serious violations of international humanitarian law is made by Article 89 of Protocol 1, in which the Contracting Parties undertake to ‘act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’. If the violations are on such a scale that a continuation of them would constitute a threat to international peace and security (within the meaning of Article 39 of the UN Charter), it is up to the United Nations Security Council to take note of the fact, to make recommendations and, if it deems necessary, to decide on measures to be taken under Articles 41 and 42 of the Charter. The use of force can then be envisaged: the purpose of such measures is not essentially to enforce humanitarian law, but to terminate a situation that is a threat to international peace and security. In this case, the legal basis is not to be found in humanitarian law.¹⁵²

Specific multilateral fora for international humanitarian law?

The establishment of a new specific body that would allow compliance with international humanitarian law to be examined in a multilateral forum has been proposed on several occasions. Certain mechanisms of the United Nations could have a specific competence to deal with international humanitarian law (e.g. a specific subsidiary body of the Human Rights Council), a High Commissioner of International Humanitarian Law¹⁵³ could exercise functions similar to those of the bodies for implementation of human rights,¹⁵⁴ or a limited inter-state body could supervise the application of international humanitarian law, whether treaty- or resolution-based.¹⁵⁵

During the drafting of the 1977 Protocols additional to the Geneva Conventions, the ICRC itself put forward various ideas for international supervision of parties involved in a conflict.¹⁵⁶ Among the avenues suggested were potential roles for existing international and regional organizations, the establishment of an international commission on humanitarian law or the creation of an international court on international humanitarian law.¹⁵⁷

151 ICRC, *Improving Compliance*, above note 2, p. 6.

152 See section on the Security Council starting at note 201 below.

153 See *Report of the Secretary General on the Respect of Human Rights in Armed Conflicts*, Doc. UN A/8052 (1970). p. 54.

154 By examining reports presented by States (and even possibly non-state actors), individual complaints procedures, etc.

155 e.g. by the UN General Assembly or the International Conference of the Red Cross and Red Crescent

156 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 3, annex 21 and Vol. 2, Sect. B, p. 61.

157 See also the various proposals in ICRC, *Improving Compliance*, above note 2, p. 28.

In 1998 the Swiss government organized a First Periodical Meeting of States parties to the Geneva Conventions (as provided for by Article 7 of Protocol I) on general problems concerning the application of international humanitarian law. The discussions centred on two general topics: respect for and security of the personnel of humanitarian organizations, and armed conflicts linked to the disintegration of state structures.¹⁵⁸ The opportunity has not been taken to develop this forum for discussion of the implementation of the law, as no second meeting has yet been organized. Although they deal generally with international humanitarian law, the International Conferences of the Red Cross and Red Crescent – which assemble the States parties to the Geneva Conventions together with the components of the International Red Cross and Red Crescent Movement – carefully avoid being drawn into questions of implementation, as the participants (the Movement in particular) fear a politicization and possible polarization of the Conference.

The history of international humanitarian law shows that states have consistently rejected any form of binding supervision of their conduct in armed conflict, especially in non-international conflicts. It is not surprising that experts ‘pointed to the existing low level of enthusiasm for the current mechanisms on the part of States party to the Geneva Conventions and Additional Protocols, and warned that, although it might be a laudable long-term goal, it is too idealistic in this climate to think about the introduction of new permanent bodies or mechanisms.’¹⁵⁹ If such a mechanism were to come about, it would often overlap with human rights procedures and would probably lead to interminable discussions about whether or not international humanitarian law is applicable in a specific situation. In his report to the Millennium Summit the UN Secretary-General nonetheless recently proposed, without further specification, ‘establishing a mechanism to monitor compliance by all parties with existing provisions of international humanitarian law’.¹⁶⁰

‘Responsibility to Protect’ (R2P)

Also pertinent to the international community’s responsibility but independent of international humanitarian law, the concept of ‘Responsibility to Protect’ (R2P) has recently become a widespread topic of debate in humanitarian and political spheres. Its rationale is ultimately to increase the protection of individuals against

158 Acting in its capacity as depositary of the Geneva Conventions, the Swiss Government convened the Conference in Geneva, from 19 to 23 January 1998 pursuant to Recommendation VII of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, January 1995) and Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, December 1995). The meeting was attended by the representatives of 129 States parties to the Geneva Conventions and 36 observer delegations. Preliminary discussions had indicated that States wished the debates to be informal and did not intend to negotiate any new texts. Accordingly, the Chairman presented his conclusions in a report which is not binding on the participants. See *International Review of the Red Cross*, No. 323 (1998), pp. 366–394.

159 ICRC, *Improving Compliance*, above note 2, p. 10.

160 Report of the Secretary-General, *We the Peoples: the role of the United Nations in the 21st Century*, A/54/2000, 27 March 2000, para. 212.

the most heinous crimes. It was developed from the notion of ‘humanitarian intervention’ as reflected in the 2001 Report of the International Commission on Intervention and State Sovereignty.¹⁶¹ The 2005 World Summit Outcome anchored the concept in the UN environment. It affirmed the responsibility of each state to protect its population against genocide, war crimes, ethnic cleansing and crimes against humanity, and invited the international community,¹⁶² whenever necessary, to help states in this task and to take action collectively in cases where a state fails to uphold that responsibility.¹⁶³ The Security Council introduced R2P into its deliberations when discussing the protection of civilians in armed conflict.¹⁶⁴

In substance, R2P refers to the responsibility to prevent those crimes and to react to them. In terms of prevention, it consists of action to ‘encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability’. Parts of the reactive responsibilities of the international community, namely to ‘use appropriate, humanitarian and other peaceful measures to help to protect populations from those crimes’,¹⁶⁵ are already contained in Article 1 common to the Geneva Conventions. In referring to enforced collective action through the Security Council based on Chapter VII of the Charter – ‘should peaceful means be inadequate and national authorities manifestly fail to protect their populations’¹⁶⁶ – R2P goes beyond the system of international humanitarian law. The Outcome document, however, limits this responsibility: it does not refer to an ‘obligation’ but to being ‘prepared’ to take collective action, ‘on a case-by-case basis and in co-operation with relevant regional organizations’. This part of R2P is a declaration of the willingness to act and an essentially political concept. It has not yet attained the status of an international rule, irrespective of the fact that it is derived from international norms

161 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, accessible at <http://www.iciss.ca/pdf/Commission-Report.pdf> (visited on 28 May 2009). See also *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, set up by the Secretary-General of the UN (UN Doc. No. A/59/565), available at <http://www.un.org/secureworld> (visited on 28 May 2009). The concept has evolved from the initial concept of the ‘*droit d’ingérence*’ (cf. General Assembly (GA) Resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990). See also the website of the International Coalition for the Responsibility to Protect <http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents> (visited on 1 June 2009) and of the International Crisis Group (including the list of literature) at <http://www.crisisgroup.org/home/index.cfm?id=4521> (visited on 1 June 2009).

162 UN General Assembly, *2005 World Summit Outcome*, paras. 138 and 139, 15 September 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (visited on 28 May 2008).

163 On 12 January 2009, the UN Secretary General addressed a report to the UN GA containing proposals regarding the operational implementation of the R2P concept. This report had not yet been discussed by the GA at the time of writing the present document.

164 See Security Council Resolution 1674 (2006) operative para. 4. Equally, several States referred to R2P in the deliberations of the Security Council on 14 January 2009 in its debate on the same issue. See Provisional Meeting report S/PV.6066, accessible at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20SPV%206066.pdf> (visited on 28 May 2009). The final text will be printed in the *Official Records of the Security Council*.

165 UN GA, *2005 World Summit Outcome*, para. 138, 15 September 2005, accessible at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (visited on 28 May 2008).

166 *Idem*, para. 139.

such as the provisions of international humanitarian law and is described as an ‘emerging norm of collective responsibility to protect’.¹⁶⁷ There is no systematic obligation to act collectively to stop the most heinous crimes from occurring, but the Security Council – an essentially political organ – can selectively decide how and in which situations it may act. However, the concept of R2P implicitly underlines the *erga omnes* character of certain obligations¹⁶⁸ of international humanitarian law and is a reminder that all states have a legal interest in seeing that those obligations are respected.¹⁶⁹

Protecting war victims through human rights treaty bodies

International humanitarian law and its implementation are not a closed system. They form part of the general framework of international law. The protection of victims of armed conflicts concerns first of all the parties to a conflict and their obligations under the international instruments drawn up to implement that protection.

The close relationship between humanitarian law and human rights

Despite differences in their historical and philosophical origin, their approaches to codification, their scope both *ratio materiae* and *ratio personae* and the fact that different institutions oversee their implementation, international humanitarian law and human rights often converge. They pursue a common aim, namely protection of the human being. The overlapping, complementarity and mutual influence of these two branches of law¹⁷⁰ are also reflected in their implementation. Except in cases of derogation, international human rights law applies during armed conflict. The various bodies of the United Nations, along with national and international jurisprudence and doctrine, affirm the principle that ‘[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’¹⁷¹ According to the International Court of Justice in its *Wall* decision, ‘there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be

167 See the conclusions in Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights*, UN, New York, 2005.

168 The scope of States’ obligations, including their secondary responsibilities, is wider under international humanitarian law than under the R2P concept, which focuses only on the four crimes that it covers and does not cover other obligations under international humanitarian law.

169 See also ICJ, *Barcelona Traction Light and Power Co Ltd*, ICJ Reports 1970, paras. 33–34.

170 See Cordula Droege, ‘Elective affinities? Human Rights and humanitarian law’, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 501–548.

171 UN GA Resolution 2675 (XXV), *Basic principles for the protection of civilian populations in periods of armed conflict* (9 December 1970). The two Additional Protocols explicitly acknowledge the application of the human rights during armed conflicts (Article 72, AP I; Preamble, AP II).

matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁷²

The fundamental questions as to the relationship between humanitarian law and human rights law are overshadowed by the legal, but even more political question of whether human rights implementation mechanisms should also govern situations of armed conflict. The mechanisms provided for in humanitarian law are often considered to be less stringent, only exceptionally applied and only rudimentarily developed, especially in non-international armed conflicts. Human rights mechanisms, however, promise a more open – and often judicial – treatment of serious violations of ‘fundamental human rights in armed conflict’.

Human rights treaty monitoring bodies

The human rights treaty monitoring bodies¹⁷³ favour a strict interpretation of their mandates and confine themselves to applying the conventions they were set up to monitor. They generally do not incorporate international humanitarian law in their work.¹⁷⁴ Of the bodies in charge of monitoring the present eight international human rights treaties,¹⁷⁵ there is only one notable exception in this regard, namely the Committee on the Rights of the Child, as the Convention on the Rights of the Child refers explicitly to international humanitarian law.¹⁷⁶ However, the bodies mandated to monitor the compliance of states parties with their treaty obligations have not hesitated to affirm that the respective treaties apply in situations of international and non-international armed conflicts or in cases of occupation.¹⁷⁷

172 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 106; confirmed in ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, General List No. 116, para. 216.

173 See Françoise J. Hampson, ‘The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body’, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 549–572.

174 On this practice, which dates back to the former United Nations Human Rights Commission, see U. Sundberg, ‘The Role of the United Nations Commission on Human Rights in Armed Conflict Situations’, *Human Dignity Protection in Armed Conflict*, Institute for International Humanitarian Law (28th Round Table, San Remo, 2–4 September 2004), Nagard, Milan, 2006, pp. 30–36.

175 Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT) & Optional Protocol to the Convention against Torture (OPCAT) – Subcommittee on Prevention of Torture Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW) and Committee on the Rights of Persons with Disabilities (CRPD).

176 Article 38(1), Convention on the Rights of the Child (1989): ‘States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.’

177 See for example CCPR, *Concluding Observations: Democratic Republic of Congo (DRC)*, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; CESCR, *Concluding Observations: Colombia*, UN Doc. E/C.12/1/Add.74, 30 November 2001; CERD, *Concluding Observations: Israel*, UN Doc. CERD/C/304/Add.45, 30 March 1998; CEDAW, *Concluding Observations: Sri Lanka*, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002; CRC, *Concluding Observations: Colombia*, UN Doc. CRC/C/COL/CO/3, 8 June 2006.

Moreover, almost all states in the Americas and Europe and several in Africa are party to a regional human rights convention.¹⁷⁸ The Inter-American Commission and Court have recognized the applicability of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights to armed conflict situations.¹⁷⁹ The European Court of Human Rights has applied the European Convention both in non-international armed conflict¹⁸⁰ and in situations of occupation;¹⁸¹ in recent years that Court in particular has rendered several judgments which have an impact on the legal reading of situations of armed conflict and the applicable law. It has notably agreed to hear cases, brought by Chechen civilians against Russia, of human rights abuse during the Second Chechen War and has made more than 30 rulings to date.¹⁸²

The Inter-American Commission on Human Rights refers freely to international humanitarian law where necessary, both in general reports and in individual decisions.¹⁸³ This suggests that the Commission considers itself competent to examine not only the conduct of states but also that of non-governmental armed groups.¹⁸⁴ However, the Inter-American Court of Human Rights takes the view that, while it cannot apply international humanitarian law directly, it can use it to interpret the provisions of the American Convention on Human Rights when they have to be applied in times of armed conflict.¹⁸⁵ In contrast, the European Court of Human Rights has never explicitly referred to international humanitarian law to

178 All 47 Members of the Council of Europe are party to the European Convention and 24 of the 35 Organisation of American States are parties to the American Declaration of Human Rights. The African Charter on Human and Peoples' Rights (ACHPR), adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986. Presently, 25 States are party to it.

179 Inter-American Court of Human Rights (IACtHR), *Ba'maca Vela'squez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, para. 209; Inter-American Commission on Human Rights, *Coard v. the United States of America*, Case 10.951, OEA Doc. OEA/ser.L/V/II.106.doc.3rev, 1999, para. 37; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

180 See e.g. European Court of Human Rights (hereinafter ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005; *Ergi v. Turkey*, Judgment of 28 July 1998, Reports 1998-IV; *Ahmet Oezkan and others v. Turkey*, Judgment of April 6, 2004.

181 See e.g. Report of the European Commission of Human Rights, *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, European Commission of Human Rights Decisions and Reports 125; ECtHR, *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV.

182 More than 3300 applications have been filed with the ECtHR by ethnic South Ossetians against Georgia. As of 18 March 2008, over 100 cases had been filed against Russia, involving approximately 600 Georgian applicants and Georgia has filed an interstate application against Russia.

183 See e.g. Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, OEA/Ser.L/V/II.98 doc. 6 rev., 13 April 1998, Original: Spanish; *Violence and discrimination against women in the armed conflict in Colombia*, OEA/Ser.L/V/II. Doc. 67, 18 October 2006, Original: Spanish.

184 Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev.1, at 72, para. 6, based on AG/RES. 1043 (XX-0/90) of 1990.

185 *Las Palmeras, Preliminary Objections*, Judgement of 4 February 2000, Series C, No. 67, paras. 32–34; *Bámaca Velásquez v. Guatemala*, above note 179, para. 207–209. The UN Human Rights Committee has also acknowledged that it can take into account other branches of international law to assess the legality of derogations (*General Comment No. 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev/1/Add.11, 24 July 2001, para. 10).

support its judgements, even in cases linked to armed conflicts.¹⁸⁶ It has refrained from even mentioning humanitarian law, probably to avoid potential problems of material competence; but even so, the Court could not avoid referring to concepts stemming directly from humanitarian law, namely the distinction between combatants and civilians.¹⁸⁷ In the African human rights system, treaties on the protection of women and children specifically address the context of armed conflict.¹⁸⁸ Yet the judicial body, the former African Commission on Human and Peoples' Rights, based its decisions almost entirely on human rights law. Nevertheless, it did hold in connection with the right to life that the state must take all possible measures to ensure compliance with international humanitarian law in a civil war.¹⁸⁹ In 2004, the Commission was replaced by the African Court of Human and Peoples' Rights, which was subsequently merged with the African Court of Justice to form the African Court of Justice and Human Rights.¹⁹⁰ These mechanisms have not yet become operational, in effect leaving victims of violations in Africa without any judicial recourse when their national systems fail to provide a remedy.

The issue of regional human rights mechanisms is of even greater importance, since the human rights treaties may apply not only within the national borders of the state party thereto but also to acts committed by it abroad – including in situations of armed conflict. The International Court of Justice,¹⁹¹ the Human Rights Committee¹⁹² and the Inter-American Court¹⁹³ endorsed this principle of extraterritorial application of human rights by emphasizing that it is unconscionable to permit states to do abroad what they are prohibited from doing at home.¹⁹⁴ The jurisprudence of the European Court of Human Rights – in particular, on the meaning of 'effective control' and the question whether the

186 On the practice of the ECtHR, see William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', *European Journal of International Law*, vol. 16, 2005, pp. 741–767.

187 *Ibid.*; Michael J. Dennis and Andre M. Surena, 'Application of the international covenant on civil and political rights in times of armed conflict and military occupation: the gap between legal theory and state practice', *European Human Rights Law Review*, Issue 6, 2008, pp. 714–73; Michael Bothe, 'Die Anwendung der Europäischen Menschenrechtskonvention in bewaffneten Konflikten – eine Überforderung', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 65, 2005, p. 615.

188 Article 11, Protocol to the ACHPR on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, 11 July 2003; Article 22, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

189 African Commission on Human and Peoples' Rights, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999), para. 50.

190 See Protocol on the Establishment of the African Court of Human and Peoples' Rights, entered into force on 25 January 2004, available at http://www.achpr.org/english/_info/court_en.html (visited 7 August 2009); Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at <http://www.unhcr.org/refworld/docid/4937f0ac2.html> (visited 7 August 2009).

191 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 106.

192 Human Rights Committee, *General Observation No. 31 [80]*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

193 See IACtHR Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, 30 October 1997.

194 See the various contributions in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp/Oxford, 2004.

application is restricted to detention of persons – demonstrates the uncertainty as to how far human rights treaties should govern situations in which humanitarian law is *lex specialis*.¹⁹⁵ Differing jurisdiction and jurisprudence of the various treaty bodies may directly affect the actual conduct of hostilities and the distribution of roles among allied parties to a conflict, especially as acts of different belligerents may or may not be subject to review by human rights bodies.

This tendency to examine the conduct of war through human rights mechanisms has met with opposition from various quarters. First, states are averse to any form of judicial supervision of their behaviour during hostilities that could hamper their ability to wage (and win) a ferocious and bloody war. Second, they argue that the reality of conflict and the disruption of justice systems in wartime are not conducive to a judicial approach. Further objections are that simultaneous application of international humanitarian law and international human rights law, which sometimes lead to contradictory conclusions, could destabilize armed forces and facilitate a ‘pick and choose’ approach which could ultimately dilute universally applicable standards. Non-state entities taking part in a conflict would not fall within the purview of an international judicial system based on human rights, and some of the roles played by human-rights monitoring mechanisms seem ill-adapted to the characteristics of non-governmental armed groups. Finally, it is argued that this type of approach could lead to a regionalization of the law applicable in armed conflicts, as not all regions have judicial human rights mechanisms such as those found in Africa, the Americas and Europe.¹⁹⁶

Despite these issues judicial human rights mechanisms, and in particular the Inter-American Court of Human Rights and the European Court of Human Rights, have provided a considerable boost to the implementation of international humanitarian law even though they do not formally apply it. Moreover, prompted by the International Court of Justice’s interpretation of the law in the *Wall* case,¹⁹⁷ these courts uphold the extraterritoriality of human rights and their consequent applicability in military operations and armed conflicts outside the borders of the states party to the relevant treaties. Although the contours of this case-law have not yet been finally determined, this interpretation overturns the earlier view of the difference between international humanitarian law and human rights law, as regards both substance and implementation. In its boldest formulations, it is a major step towards a larger role for judicial processes in the context of war – as intimated by the first judgements handed down by the international criminal tribunals – and towards greater protection for war victims, including provision for reparation which is almost entirely lacking in international humanitarian law.

195 ECtHR, *Issa and others v. Turkey*, Judgement of 16 November 2004, para. 71; see also *Isaak v. Turkey*, Appl. No. 44587/98, Admissibility Decision of 28 September 2008, p. 19. See also House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, Decision of 13 June 2007, [2007] UKHL 26, paras. 61–83, 91, 105–132.

196 ICRC, *Improving Compliance*, above note 2, p. 17.

197 ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, para. 102.

Protecting war victims through the United Nations system

The obligation to ensure respect for international humanitarian law by the parties to a conflict also applies to third states. The most high-profile contributions to this implementation effort are made through the United Nations, regional organizations and non-governmental organizations, even though they are given no specific role, or only a marginal one, under the terms of that body of law.¹⁹⁸

Clearly, the United Nations cannot but be concerned by armed conflicts. Recourse to war is no longer a legitimate way of settling disputes, and keeping or where necessary restoring international peace and security is one of the UN's fundamental aims. Once an armed conflict breaks out, the various UN bodies, each within its own specific role, must concern themselves with international humanitarian law, which is an integral part of the corpus of international law that the United Nations must comply with and promote.

In working towards respect for human rights¹⁹⁹ the relevant UN bodies have come to assign ever greater significance to compliance with international humanitarian law within the framework of human rights law, outside the treaty system. However, the relationship between the different human rights monitoring systems and their respective link with international humanitarian law remains a moot point.²⁰⁰ The few observations below illustrate and explain the importance attached by the various UN bodies to the implementation of humanitarian law.

The Security Council

The Security Council has often called for respect for international humanitarian law and has gone so far as to express the view that compliance with its rules and principles is an important factor for restoring peace. Compliance with international humanitarian law by warring parties can help to avoid a spiral of violence and be a first step in a conflict-settlement process. Over the past two decades, humanitarian matters have loomed large in the Security Council's deliberations and decisions, frequently in the absence of any immediate hope for a settlement to a conflict. This concern was particularly evident in connection with the conflict in the former Yugoslavia.²⁰¹

198 Their pronouncements can also refer directly to international humanitarian law. Under Article 89 of AP I, '[I]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'. Formally, this provision does not allow them to act in situations other than international armed conflicts. Article 1 common to the four Geneva Conventions, in which the contracting States undertake to ensure respect for the law, goes further in that it also covers internal conflicts and addresses the entire international community, represented by its world body.

199 Articles 1(3) and Article 55(c), United Nations Charter.

200 See Christine Byron, 'A Blurring of Boundaries: The application of International Humanitarian Law by Human Rights Bodies', *Virginia Journal of International Law*, Vol. 47 (2007), pp. 839–896.

201 More than thirty Security Resolutions adopted in connection with that conflict contain references to international humanitarian law (see for example S/RES/ 743 (1992) that established the FORPRONU; S/RES/770 (1992) on humanitarian assistance for the former Yugoslavia; S/RES/771(1992) on ICRC access

The UN Charter as framework

As long as the Security Council remains within the broad framework of the UN Charter, it is not limited to the instruments made available to it by international humanitarian law and can innovate. It can take wide-ranging decisions and even create new mechanisms²⁰² as long as it acts in accordance with the purposes and principles of the Charter²⁰³ and does not violate the norms of *jus cogens*. The main check on the Security Council's decisions is, however, the possibility that states may disregard its decisions: without the Member States' support, the resolutions are mere wishful thinking.²⁰⁴

Whereas the system established under international humanitarian law rests essentially on the consent of the parties to a conflict, particularly in internal conflicts, the measures authorized by Chapter VII of the Charter require no consent and can be imposed. The Security Council does not remain within the framework of international humanitarian law, and often combines aspects of *jus ad bellum* (direct or indirect interventions in current military operations) and of *jus in bello* (initiatives to protect war victims). In doing so, especially where force is used to impose these measures, the Security Council is implementing the UN Charter and not humanitarian law, which does not admit of any interference in a conflict. It cannot be neutral between an aggressor and the victim of an aggression. This differs from the approach necessary for proper application of international humanitarian law, in which neutrality is *de rigueur* and which makes it vital that the Security Council should also, as stated in the preamble to Protocol I additional to the Geneva Conventions, apply its provisions 'to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.

The Security Council's practice furthermore reveals a difference in treatment inasmuch as it does not consider conflicts that arise within or involve a permanent member of the Security Council (or their allies) in the same way as conflicts arising in other states. Although the Charter does not explicitly oblige the Security Council to act impartially, these differences of treatment – or double standards – affect the credibility of the Council and do little to bolster support for

to camps and prisons; S/RES/808 (1993) and S/RES/827 (1993) on the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law on the territory of the former Yugoslavia; S/RES/913 (1994) on events in Graze; S/RES/941 (1995) condemning ethnic cleansing, particularly in Banja Luka and Bijeljina, and S/RES/1010 (1995) on release of detained persons in Bosnia and Herzegovina.

202 See e.g. S/RES/ 1820 (2008) on women, and peace and security and sexual violence in situations of armed conflict.

203 Article 24, para. 2 of the Charter; cf. ICTY, *Prosecutor v. Tadic*, above note 5, paras. 28–30.

204 See for instance the critical remarks of the Secretary General on the lack of implementation of travel bans and asset freezes by Member States, *Report of the Secretary General on the protection of civilians in armed conflict*, (S/2009/277), p. 5 (at 21).

the crucial tenet that international humanitarian law must be applied ‘in all circumstances.’²⁰⁵

Situation-specific practice

The list of actions in Article 41 of the Charter is merely indicative and does not limit the Security Council’s choice of means for achieving the desired objective or restoring and keeping the peace.²⁰⁶ In its practice, the Security Council has been primarily concerned with the effects of international conflicts and frequently calls upon the belligerents to respect humanitarian law (examples include the Iran/Iraq conflict,²⁰⁷ the territories occupied by Israel,²⁰⁸ the invasion of Kuwait,²⁰⁹ Ethiopia/Eritrea,²¹⁰ Iraq,²¹¹ Georgia, etc.²¹²). It has, however, increasingly addressed non-international armed conflicts (such as Somalia, Rwanda, Liberia, Afghanistan²¹³). These can also constitute a threat to international peace and security, have an impact on neighbouring countries (huge influxes of refugees), provoke interventions by third countries or destabilize entire regions. Moreover, the international community cannot stand by and watch hundreds of thousands of people die, as a catastrophe of that nature is in itself a threat to international peace and security.

The Security Council has, for instance, called for recognition of the applicability of the Fourth Geneva Convention;²¹⁴ for prisoners of war to be released and repatriated;²¹⁵ for unrestricted access and safe passage to be given to aid deliveries;²¹⁶ for travel bans and asset freezes for those responsible for violations;²¹⁷ for a commission of enquiry to be set up;²¹⁸ for *ad hoc* criminal tribunals to be established;²¹⁹ or for a situation to be referred to the International Criminal Court, even if the state concerned is not a party to the Rome Statute.²²⁰

205 See the Preamble of AP I, para. 5.

206 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 5, paras. 22 and 31.

207 S/RES/598 (1987) on repatriation of prisoners of war in the Iran/Iraq conflict and S/RES/540 (1983) on attacks against the civilian population in the Iran/Iraq conflict.

208 S/RES/681 (1990) on the application of the Fourth Geneva Convention in the occupied territories.

209 S/RES/687 (1991) on repatriation of Kuwaiti detainees held in Iraq; S/RES/674 (1990) and 670 (1990) on the applicability of the Fourth Geneva Convention in Kuwait.

210 S/RES/1320 (2000).

211 S/RES/1546 (2004).

212 S/RES/1808 (2008).

213 Among the numerous resolutions, see for example S/RES/1872 (2009) on Somalia; S/RES/1870 (2009) on Sudan; S/RES/925 (1994) on Rwanda, S/RES/1383 (2001) on Afghanistan.

214 S/RES/681 (1990) on Israel and the Occupied Territories.

215 S/RES/598 (1987) on repatriation of prisoners of war in connection with the Iran/Iraq war.

216 S/RES/1870 (2009) on Sudan.

217 S/RES/1572 (2004) on Côte d’Ivoire and 1591 (2005) on Sudan.

218 S/RES/1564 (2004) on Sudan.

219 S/RES/808 (1993) and 827 (1993) for the former Yugoslavia and S/RES/935 (1994) for Rwanda.

220 S/RES/1593 (2005) on Sudan.

However, it can also set up UN Protection Forces,²²¹ protected towns²²² and humanitarian corridors,²²³ a compensation system for the victims of armed attacks²²⁴ or even a reporting system related to international humanitarian law.²²⁵

In the words of the Secretary-General, the 'Security Council [...] has a critical role in promoting systematic compliance with the law. In particular, the Council should: (a) Use all available opportunities to condemn violations, without exception, and remind parties of, and demand compliance with, their obligations; (b) Publicly threaten and, if necessary, apply targeted measures against the leadership of the parties that consistently defy the demands of the Security Council and routinely violate their obligations to respect civilians; (c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court.'²²⁶

Protection of the civilian population

In 1999, the Council adopted the ground-breaking thematic resolution on the protection of the civilian population, articulating clearly and specifically the link with the Council's responsibilities for the maintenance of international peace and security.²²⁷ Since then, the Secretary-General has reported seven times on this issue to the Security Council,²²⁸ which discusses the reports and their recommendations and increasingly refers to the concept of R2P.²²⁹ The main challenges are currently considered to be promoting greater compliance with the legal obligations, also by non-state entities, the growing role of peacekeeping missions in the protection of civilians, humanitarian access and increased accountability.²³⁰

Even a cursory examination of the mandates of peacekeeping forces shows that the scope of their operations is no longer limited to and indeed goes well beyond classic activities such as supervising and maintaining cease-fires, observing borders or acting as a buffer between belligerents. The protection of civilians is now considered to be a task inherent in all peacekeeping missions, not merely a military

221 S/RES/743 (1992) that set up the FORPRONU in the former Yugoslavia.

222 S/RES/824 (1993) on safe areas in Bosnia and Herzegovina and 819 (1992) for Srebrenica.

223 S/RES/918 (1994) for Rwanda.

224 S/RES/687 (1991) setting up a fund to compensate foreign governments, nationals and corporations for any direct loss, damage or injury caused by Iraq's unlawful occupation of Kuwait.

225 *Monitoring and Reporting Mechanism on Children Affected by Armed Conflict*, set up under Security Council Resolution 1612 (2005).

226 *Report of the Secretary General on the protection of civilians in armed conflict*, above note 204, p. 8 (at 37).

227 See S/RES/1265 (1999) and its sister resolution S/RES/1269 (2000).

228 See the last report of 29 May 2009 (S/2009/277, above note 204) which gives an overview of the last decade.

229 See e.g. the last report S/PV.6151 (Resumption 1). The Security Council furthermore established an Expert Group on the Protection of Civilians.

230 See S/2009/277, pp. 10–12.

task. The range of possible assignments includes protection of the civilian population, distributing information and collecting data on violations of human rights and humanitarian law, and assistance for war victims. This role is performed by military observers and by police and human rights specialists. In the former Yugoslavia, for example, the UNPROFOR units in charge of supervising compliance with human rights (the Civilian Affairs department and civilian police force) have already played an important part in ensuring respect for humanitarian law.

However, the fact that military and humanitarian operations coexist within peacekeeping forces is not unproblematic. Military operations go beyond purely humanitarian objectives and encompass political aims, whereas humanitarian action, by its very nature, can never be coercive. The use of force, even for valid humanitarian reasons, inevitably transforms a humanitarian action into a military one, and a threat of force to facilitate a humanitarian operation may be enough to jeopardize that very operation. Nor can such a threat be maintained indefinitely – if it is not put into effect, it is likely to undermine not only the credibility of the military operation but also all efforts made to ensure that humanitarian operations are carried out on the basis of consent, as humanitarian law requires.

The General Assembly

In its Resolution 2444 (XXIII) of 19 December 1968 entitled ‘Respect for human rights in armed conflicts’, the United Nations General Assembly did not confine itself to listing the principles to be observed in such situations. It also paved the way for resolutions calling for compliance with international humanitarian law in general, as well as in specific situations. The broad functions and powers of the General Assembly allow it to discuss and make recommendations on all matters that fall within the purview of the United Nations, subject to the prerogatives of the Security Council.²³¹ Through its resolutions on specific conflicts, the General Assembly draws the attention of the states making up the international community to their responsibility under Article 1 common to the four Geneva Conventions to ‘ensure respect for’ international humanitarian law.²³² The following subsidiary bodies are particularly important:

The Human Rights Council

Since the establishment of the Human Rights Council in March 2006, there has been some uncertainty about the relationship between the Council and the Social,

²³¹ Art. 10–12, 14 and 15 of the UN Charter.

²³² See e.g. A/RES/63/96 (2008) (concerning the Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories).

Humanitarian and Cultural Affairs Committee (Third Committee),²³³ as both of these two subsidiary bodies of the General Assembly are in charge of promoting and implementing human rights at world level. However, neither of them hesitates to invoke humanitarian law to underpin their recommendations. States are also divided as to how far the Council, and above all the special procedures mechanisms set up by the former Human Rights Commission and taken over by the Council,²³⁴ should take international humanitarian law into consideration. Some states fear that selective treatment of certain armed conflict situations, particularly in the Middle East, may further politicize the Council, whereas other states, knowing their strong position in this forum, favour discussions in it about the application of international humanitarian law. Whatever the decision, the Council should not assume the function of the various human rights treaty bodies which bring some impartiality to the often politicized debate.

The main aim of the Human Rights Council is ‘to address situations of violations of human rights [...] and make recommendations thereon.’ However, it also concerns itself with armed conflict situations, albeit from a human rights angle.²³⁵ The first resolution of the Council’s very first special session already dealt with humanitarian law, even though it was entitled ‘Human rights situation in the Occupied Palestinian Territory’.²³⁶ Eight of the eleven special sessions held to date have dealt with armed conflict situations, five of them in the Middle East.²³⁷ When such a situation is considered²³⁸ (as is currently the case for Sudan, Somalia or Israel/Occupied Palestinian Territories),²³⁹ or a matter within the purview of

233 An important part of the Committee’s work focuses on the examination of human rights questions, including reports of the special procedures of the newly established Human Rights Council. The Committee hears and interacts with 25 such special rapporteurs, independent experts, and chairpersons of workings groups of the Human Rights Council.

234 ‘Special procedures’ is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 30 thematic and 8 country mandates. Special procedures mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories (country mandates), or on major phenomena of human rights violations worldwide (thematic mandates).

235 See for example Human Rights Council Resolution 9/9, 24 September 2008, on the protection of the human rights of civilians in armed conflict, in which the Council requested relevant special procedures and the Human Rights Council Advisory Committee, and invited human rights treaty bodies, within their respective mandates, to continue to address the relevant aspects of the protection of human rights of civilians in armed conflicts in their work.

236 Human Rights Council, S-1/Res.1, 6 July 2006.

237 Israel/OPT (1st session, July 2006), Israel/Lebanon (2nd session, August 2006), Israel/OPT (3rd session, November 2006), Sudan/Darfur (4th session, December 2006), Israel/West Bank-Gaza (6th session, January 2008), Congo (8th session, November 2008), Israel/Gaza (9th session, February 2009), Sri Lanka (11th session, May 2009).

238 Which situations are addressed by the Council, whether a country is condemned for violations or whether a special rapporteur is appointed are all matters subject to political haggling and are not necessarily decided on the basis of objective criteria.

239 In practice, the references to international humanitarian law are often very general. For recent examples, see *Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia* (Mr Ghanim Alnajar), A/HRC/7/26, 17 March 2008; *Report of the Special Rapporteur on the situation of human rights in the Sudan* (Sima Samar), A/HRC/9/13, 2 September 2008.

international humanitarian law is addressed,²⁴⁰ at least an otherwise unscheduled discussion forum on the law applicable during an armed conflict is then possible. States and public opinion pay close attention to the discussions in these fora, and although those in the Council are highly politicized and the emphasis is placed on human rights, they can have a deterrent effect and perform a ‘naming and shaming’ function.

One innovation ushered in with the Council is the Universal Periodic Review (UPR). This mechanism provides for a review of the human rights situation in each of the 192 UN Member States. Resolution 5/1 specifically empowers the UPR to consider compliance *inter alia* with international humanitarian law obligations. This law has been touched upon on several occasions in the review process in cases where the country in question was involved in an armed conflict.²⁴¹ References to it have also been made in the other mechanisms, for instance the new Human Rights Council Advisory Committee that serves as a think-tank for the Council and provides it with expertise and advice on thematic human rights issues,²⁴² the special procedures mechanisms²⁴³ and the revised complaint procedure that enables individuals and organizations to bring human rights violations to the Council’s attention.²⁴⁴ The Human Rights Council thus continues to work with the UN ‘special procedures’ mechanisms. The working groups, representatives or special rapporteurs mandated by the Council to review particular situations certainly should consider the interaction between human rights and humanitarian law, but have not done so systematically.²⁴⁵

240 Several of the themes addressed also arise in armed conflicts (torture, mercenaries, terrorism, disappearances, extrajudicial killings, etc.).

241 See for example the UPR process outcome on Israel, Cape Verde, Colombia and Uzbekistan, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/VDUX-7QBUCS?OpenDocument> (visited on 28 May 2009).

242 Pursuant to Human Rights Council Resolution 5/1, the Human Rights Council Advisory Committee, composed of 18 experts, has been established to function as a think-tank for the Council and work at its direction. The Advisory Committee replaces the former Sub-Commission on the Promotion and Protection of Human Rights. The function of the Advisory Committee is to provide expertise in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Such expertise shall be rendered only upon the latter’s request, in compliance with its resolutions and under its guidance. See *Human Rights Council Advisory Committee: Establishment*, available at <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm> (visited 28 July 2009).

243 See Philip Alston, Jason Morgan-Foster and William Abresch, ‘The competence of the UN Human Rights Council and its Special Procedures in relation to armed conflict: Extrajudicial executions in the “war on terror”’, *European Journal of International Law*, Vol. 19, 2008, pp. 183–209.

244 See the Human Rights Council President’s text entitled ‘UN Human Rights Council: Institution Building’ (Resolution 5/1) by which a new Complaint Procedure is being established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms. ECOSOC resolution 1503 (XLVIII) of 27 May 1970 served as a working basis for the establishment of a new Complaint Procedure.

245 See for example the reports prepared by the *Monitoring and Reporting Mechanism on Children Affected by Armed Conflict*, set up under Security Council Resolution 1612, above note 225, which hardly make any reference to IHL in their conclusions.

The Economic and Social Council

The principal organ of the United Nations for the co-ordination of economic and social affairs, the Economic and Social Council (ECOSOC),²⁴⁶ is particularly relevant for formulating policy recommendations addressed to the Member States and the UN system on strengthening the co-ordination of UN humanitarian and disaster relief assistance.²⁴⁷ The reports submitted to ECOSOC by the Secretary-General describe the major humanitarian trends and challenges, including those in situations of conflict, and the key processes to improve humanitarian co-ordination.²⁴⁸ While mainly concerned with increasing the efficiency of humanitarian action by the UN system, it also highlights the challenges to principled humanitarian action largely drawn from international humanitarian law²⁴⁹ and the Fundamental Principles of the Red Cross and Red Crescent Movement, on which the ECOSOC bases its recommendations.²⁵⁰

The Secretary-General and the UN agencies

The UN Secretary-General obviously plays a key role in the implementation of humanitarian law, as he takes care of the practical arrangements for and the follow-up to the actions of the other non-judicial UN bodies, and may bring matters to the attention of the Security Council on his own initiative.²⁵¹ Acting under his authority, the UN High Commissioner for Human Rights is responsible for the UN's activities in the human rights sphere.²⁵² In addition to co-ordinating and rationalizing these activities, the High Commissioner has to 'play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world ...'²⁵³ Under this mandate the High Commissioner has sent human rights observers to countries in conflict, and has gradually begun to take an interest in respect for international humanitarian law. Over the years, the Office of the High Commissioner for Human Rights (OHCHR) has stepped up its presence on the ground in order to promote human rights and help strengthen national

246 See Chapter X of the UN Charter. Under Article 62 of the UN Charter, ECOSOC may make recommendations 'for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.

247 Prior to 2006, ECOSOC acted in its capacity as co-ordinator of humanitarian assistance or via recommendations of the Human Rights Commission, set up by ECOSOC in 1946.

248 See e.g. A/64/84-E/2009/87, 28 May 2009.

249 *Idem*, pp. 7–9, e.g. the safety and security of humanitarian personnel, the increase of actors in humanitarian assistance, the distinguishing between humanitarian and military or political actors.

250 See e.g. ECOSOC resolution 2008/36, 25 July 2008.

251 Article 99, Charter of the United Nations.

252 In Resolution A/RES/48/141 of 20 December 1993, the General Assembly endorsed the recommendations of the World Conference on Human Rights held in Vienna in 1993 and the role of the High Commissioner.

253 A/RES/48/141, 20 December 1993, para. 4(f).

institutions and civil society.²⁵⁴ It has expanded his operational mandate to include technical co-operation, in particular for the administration of justice. The work of these ‘human rights observers’ is therefore highly varied, ranging from information-gathering on past violations to emergency operations.

In a bid to meet the needs of victims of armed conflicts and natural disasters more effectively, the UN Under-Secretary-General for Humanitarian Affairs has set out to strengthen ‘the co-ordination of humanitarian emergency assistance of the United Nations’.²⁵⁵ The Department of Humanitarian Affairs, with the support of its Inter-Agency Standing Committee (IASC), is supposed to ensure that there are no overlaps or gaps in humanitarian aid by distributing tasks to the various UN agencies concerned in keeping with their mandates.²⁵⁶ The proliferation of agencies carrying out humanitarian work and the diversity of their areas of specialization, their abilities and their working methods has fostered a spirit both of complementarity and of competition.

Under international humanitarian law, no entity within the UN system has the same specific role as the ICRC of providing conflict victims with protection and assistance; but all the UN bodies deal with conflict situations in some way or another and can and must concern themselves with war victims within the terms of their mandates, at least on the periphery of areas affected by conflict. Besides the High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees (UNHCR),²⁵⁷ the World Food Programme (WFP), the United Nations Children’s Fund (UNICEF),²⁵⁸ the United Nations Development Programme (UNDP) and to a lesser extent the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO),²⁵⁹ among others, have acted on behalf of conflict victims.

According to the Secretary-General, ‘blurring of humanitarian, political and security objectives can also occur within United Nations operations,

254 Of the eleven national OHCHR offices, most are in countries affected by conflict. OHCHR has a Rapid Response Unit that supports its work and helps it to deploy staff into the field very quickly. To enable the UN to anticipate and respond to deteriorating human rights situations in different parts of the world, OHCHR is often asked to send or support missions or commissions of enquiry to look into allegations of serious human rights violations. Since it was set up in 2006, the Rapid Response Unit has sent missions or commissions of enquiry to Timor Leste, Western Sahara, Liberia, Lebanon and Beit Hanoun (Occupied Palestinian Territories).

255 See UN General Assembly, *Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, A/RES/46/182, 19 December 1991. For the newest resolution on this topic, see A/RES/63/139, 11 December 2008.

256 The ICRC and the International Federation of Red Cross and Red Crescent Societies attend the IASC as observers.

257 The United Nations Secretary-General mandated the Office of the High Commissioner for Refugees to act as lead agency for the United Nations in the former Yugoslavia in order to provide refugees and displaced persons with protection and assistance (letter of 14 November 1991 addressed by the Secretary-General to the High Commissioner for Refugees – on file with the author). This role has been confirmed in a number of conflicts and has been endorsed by the United Nations General Assembly (see for example A/RES/48/116, 20 December 1993).

258 UNICEF and the ICRC conducted a major operation to protect women and children in Cambodia in 1980 (see William Shawcross, *The Quality of Mercy*, Simon and Schuster, New York, 1984).

259 For the protection of cultural property in armed conflict.

particularly in so-called integrated missions, where humanitarian actors work alongside political and peacekeeping missions.²⁶⁰ In post-conflict situations,²⁶¹ but also in conflict situations,²⁶² he reaffirmed integration as the guiding principle where the UN has a country-team and a multi-dimensional peacekeeping operation or a political mission/office, in order to ‘maximise the individual and collective impact of the UN’s response’. Co-ordinated but diverse approaches should take full account of the various strengths of the objectives of political and humanitarian mandates.

However, political, military and humanitarian actors are not always pursuing the same goal. Peace-making or peace-building, for instance, are not the primary aims of humanitarian actors, even though they consider the impact of their humanitarian work on reconciliation between adversaries and refrain from any activity which might inadvertently fuel violence; they even consider setting up projects that could ease tensions at the local level. Their primary aims are to save lives and alleviate human suffering. The subordination of humanitarian activities to political goals risks causing insurgents, or parts of the population, to perceive humanitarian agencies as instruments of a foreign agenda, entails security risks, fuels scepticism about the accountability of humanitarian actors and can be detrimental to bringing independent and impartial aid to conflict areas.²⁶³

In all operations conducted under the aegis of the United Nations, a clear distinction should be made between humanitarian activities and the political activities that form part of the remit of the UN Secretary-General. To the extent that the UN agencies contribute to the implementation of humanitarian law, they have to enjoy a degree of independence, sometimes referred to as the ‘humanitarian space’, in relation to the political organs of the United Nations, and have to be able to guarantee the impartiality of their humanitarian operations. The United Nations accordingly refers to ‘the humanitarian principles of humanity, neutrality, impartiality and independence’ ‘within the framework of humanitarian assistance’.²⁶⁴ However, the understanding of those principles can vary.²⁶⁵

260 See e.g. A/64/84-E/2009/87, 28 May 2009, p. 9.

261 See *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict*, A/63/881-S/2009/304, 11 June 2009.

262 See Decisions of the Secretary-General – 25th June meeting of the Policy Committee (26 June 2008). This was followed up by Policy Instructions on *OCHA’s Structural Relationship Within an Integrated UN Presence*, 1 May 2009.

263 See e.g. *An ICRC perspective on integrated missions*, Official Statement, 31 May 2005, at <http://www.icrc.org/web/eng/siteeng0.nsf/html/6DCGRN> (visited on 7 August 2009).

264 See S/RES/ 1674 (2006), operative para. 21.

265 In particular, the principles of neutrality and independence. For the interpretation of these principles by the ICRC, see Pictet’s *Red Cross Principles* and *The Fundamental Principles of the Red Cross* (both above note 93). The principle of neutrality is interpreted differently by the Red Cross and the United Nations (see Umesh Palwankar (ed), *Symposium on Humanitarian Action and Peace-keeping Operations*, ICRC, Geneva, 1994, in particular the glossary at the end of the report). See also Frits Kalshoven, ‘Impartiality and neutrality in humanitarian law and practice’, *International Review of the Red Cross*, No. 273, November–December 1989, pp. 516–535 and Maurice Torelli, ‘From humanitarian assistance to “intervention on humanitarian grounds”’, *International Review of the Red Cross*, No. 795, May–June 1992, pp. 228–248.

The International Court of Justice

The International Court of Justice, as principal judicial organ of the United Nations, contributes to the implementation of humanitarian law through its jurisprudence and its advisory opinions. It may be called upon to settle a dispute between states concerning the application of international humanitarian law if both states have accepted the Court's jurisdiction.²⁶⁶ Generally, the Court has jurisdiction only on the basis of consent and only states may be parties in contentious cases.²⁶⁷ When requested to hear a case or give an opinion on a matter linked to an armed conflict, the International Court of Justice quite naturally applies international humanitarian law, as unlike many other international judicial bodies it is free to refer to all applicable international law, not just a selected branch or treaty.²⁶⁸ In *Nicaragua v. the United States of America*, the United States, which had previously accepted the Court's compulsory jurisdiction when it was created in 1946, withdrew its acceptance following the Court's judgment in 1984 that called on the US to 'cease and to refrain' from the 'unlawful use of force' against the government of Nicaragua. The Court ruled that the United States was 'in breach of its obligation under the Treaty of Friendship with Nicaragua not to use force against Nicaragua' and ordered the United States to pay war reparations.²⁶⁹ In its final judgment in the *Congo case*, the Court held that the armed activities of Uganda in the Democratic Republic of Congo (DRC) between August 1998 and June 2003 violated international human rights and international humanitarian law and ordered Uganda to pay reparations to the DRC.²⁷⁰ Both judgements may have influenced conscious building, but had not been implemented yet. The advisory opinions on the *Legality of Nuclear Weapons* and on the

266 Chapter XIV of the United Nations Charter authorizes the UN Security Council to enforce the rulings, but such enforcement is subject to the veto power of the five permanent members of the Council.

267 See Article 36, Statute of the International Court of Justice.

268 See Article 38(1), Statute of the International Court of Justice.

269 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 95, paras. 60 and 218. The United States refused to participate after the Court rejected its argument that the ICJ lacked jurisdiction to hear the case. The US later blocked enforcement by the Security Council, making Nicaraguan attempts at obtaining compliance futile. At the end of 2008, the Nicaraguan head of state made a renewed request for reparations (17 billion USD) based on this judgement: see Ivan Castro, 'Nicaragua asks U.S. for war reparations in aid row', Reuters, 2 December 2008, available at <http://www.reuters.com/article/domesticNews/idUSTRE4B115920081202> (visited on 7 August 2009).

270 Having found Uganda to be an occupying power in Ituri (DRC), the Court found that Uganda was responsible for violations of international human rights and humanitarian law in that territory. Those alleged violations included wide-scale massacres of civilians, acts of torture, and other forms of inhumane and degrading treatment. Additional claims included the unlawful seizure by Ugandan soldiers of civilian property, the abduction and forcible conscription of several hundred Congolese children by the Uganda People's Defence Force in 2000, and the failure of Ugandan forces to distinguish between combatants and non-combatants, as required under international humanitarian law. See *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, paras. 181–221. The DRC claimed ten billion US dollars in reparations, but the compensation has to be worked out through bilateral negotiations between the two states. However, the negotiating process could be so protracted that a settlement might take many years to conclude, if ever – it will also be very difficult to enforce this compensation ruling.

Construction of a Wall in the Occupied Palestinian Territories were legal and political highlights,²⁷¹ but did not lead to practical changes in their respective fields. Though the opinions are influential and widely respected, under the Statute of the Court they are inherently non-binding.

Activities of regional organizations

Like the United Nations, regional organizations are not primarily concerned with implementing international humanitarian law. Nevertheless, the consequences of armed conflicts have prompted them to take an ever greater interest in the humanitarian dimension of conflict. They engage in efforts not only to prevent wars where possible, or at least contain them, but also to find peaceful solutions. Where there are no more promising avenues to take, these solutions often begin with a modicum of respect for humanity in the midst of combat.

The growing interest of regional organizations in international humanitarian law finds expression at several levels. The Organization of American States (OAS),²⁷² the African Union (AU),²⁷³ the European Union (EU)²⁷⁴ and the Organization for Security and Co-operation in Europe (OSCE), for example, have all made pronouncements based on international humanitarian law. The recognition of the significance of international humanitarian law by member states is also reflected by the reference in an article of the ASEAN Charter.²⁷⁵

However, they do not restrict themselves to passing resolutions; they also attempt to play a mediating role and frequently send observers into conflict areas with a broad mandate that often includes monitoring compliance with that law, in particular in Europe. European observers whose main task, in co-operation with the OSCE, was to supervise compliance with a cease-fire in the former Yugoslavia²⁷⁶ quickly became involved in humanitarian operations such as visits to prisons and

271 See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226; ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, above note 49, p. 13.

272 AG/RES. 2293 (XXXVII O/07) *Promotion of and Respect for international humanitarian law*, adopted at the 4th plenary session of the General Assembly, held on 5 June 2007.

273 See for example: African Union Peace and Security Council, *Communiqué of the 163rd Meeting*, PSC/MIN/Comm. 4 (CLXIII), 22 December 2008, para. 9 (condemning attacks on civilians and humanitarian workers in Somalia); Central Organ of the Mechanism for Conflict Prevention Management and Resolution (Central Organ) at Heads of State and Government Level, *Communiqué of the Seventh Ordinary Session*, Central Organ/MEC/AHG/Comm. (VII), 3 February 2003, para. B.4 (urging respect for human rights and humanitarian law in Côte d'Ivoire); Central Organ at Ambassadorial Level, *Communiqué of the 86th Ordinary Session*, Central Organ/MEC/AMB/Comm. (LXXXVI), 29 October 2002, para. B.4 and D.4 (calling on parties in the DRC and Liberia to observe humanitarian law).

274 In particular through the organs of the Council of Europe. See in particular the European Guidelines on promoting compliance with international humanitarian law (IHL), *Official Journal of the European Union*, 2005/C 327/04.

275 See Art. 2 of the ASEAN Charter (into force since December 2008): 'ASEAN and its Member States shall act in accordance with the following Principles: ... (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.'

276 See the Brioni Joint Declaration by the Yugoslavian government and the European Troika of 7 July 1991 following the Slovenia war (published in Mercier, above note 131, pp. 260–266) which conferred on the

the escorting of convoys. The consolidation of the OSCE as an institution²⁷⁷ has been followed by a high-profile observer presence in the Balkans and the southern Caucasus. The Parliamentary Assembly of the Council of Europe has conducted several fact-finding missions to countries and territories affected by armed conflicts (and other forms of violence), leading to the adoption of resolutions and recommendations addressing issues of a humanitarian nature.²⁷⁸ Implementation of the provisions spelled out in the recommendations adopted is then assigned to the Committee of Ministers. The African Union finally began to play a visible role in the field within the framework for the prevention, management and settlement of conflicts set up in Cairo in June 1993.²⁷⁹

If regional organizations monitor compliance with international humanitarian law, there is bound to be a positive impact on its implementation, but the essentially political nature of these organizations may be reflected in their operations and may sometimes jeopardize the work of humanitarian agencies that must be conducted with impartiality and remain untainted by political considerations.

Activities of governmental and non-governmental organizations

On the basis of Article 1 common to the four Geneva Conventions, states have, as already pointed out above, a broad range of means to discharge their obligation to ensure respect for international humanitarian law. A wide range of actions are possible, ranging from instruction in the law within the framework of military co-operation to supplying the logistical infrastructure to facilitate humanitarian operations. Governmental agencies are often present in conflict situations and provide financial and/or material support for humanitarian organizations²⁸⁰ or become operational themselves to alleviate the plight of war victims.²⁸¹ It is plain

European mediators a broad mandate in relation to the future of the Yugoslav Federation and opened the way to the deployment of a mission by OSCE observers.

277 The OSCE missions are conflict prevention and management instruments. As regards humanitarian law, see chapters VII and VIII of the *Code of Conduct on Politico-Military Aspects of Security*, adopted at the Conference on Security and Cooperation in Europe, Budapest, 1994. This Code reminds States at length of their obligations under international humanitarian law, particularly as regards dissemination and instruction. 'Appropriate CSCE bodies, mechanisms and procedures will be used to assess, review and improve if necessary the implementation of this Code' (Chapter IX).

278 See for instance Resolutions 1633 (2008) and 1857 (2009) on the consequences of the war between Georgia and Russia.

279 A joint African Union/United Nations Hybrid operation in Darfur was authorized by Security Council Resolution 1769, 31 July 2007. The Council, acting under Chapter VII of the United Nations Charter, authorized UNAMID to take necessary action to support the implementation of the Darfur Peace Agreement, as well as to protect its personnel and civilians, without 'prejudice to the responsibility of the Government of Sudan'. UNAMID formally began operations on 31 December 2007.

280 The different departments responsible for emergency or development aid, which are often present in the embassies of their countries, for example the Canadian International Development Agency (CADI), the UK Department for International Development (DFID), the Swedish International Development Agency (SIDA), the United States Agency for International Development (USAID). Also, at regional level, the European Community Humanitarian Office (ECHO).

281 *Corps Suisse d'Aide humanitaire, Gesellschaft für Technische Zusammenarbeit, etc.*

that when governments engage in such operations they will always be viewed with some suspicion, particularly if the humanitarian services they provide also benefit the opponents of the country's legal government. Moreover, when conducting operations in a conflict-driven country, it is not easy to refute an accusation of interference in domestic affairs.

Today's conflicts and emergency situations are quite diverse in nature, intensity and magnitude. Each of them produces a distinct mix of humanitarian needs and brings along its specific constraints. In the face of this enormous variety of humanitarian calls, the diversity of non-governmental organizations (NGOs) greatly enhances the flexibility and the appropriateness of the response. During war-time, NGOs are exercising the right of initiative provided for in international or non-international conflicts.²⁸² This right is not limited to the ICRC but can be exercised by 'any other impartial humanitarian organization'. In conflicts, NGOs often fill the gaps left by international organizations; they generally address specific issues and some of them have operations in many parts of the world. Examples are *Médecins sans Frontières* (Doctors without Borders), the Norwegian Aid Committee (NORWAC), the International Rescue Committee, CARE, Save the Children, OXFAM and the Islamic Relief Society, to name but a few. Activities stretch from emergency relief, mine action and primary healthcare, to human rights, conflict resolution, democracy and legal aid, and over to development, agriculture, trade, education, gender, environment, and even telecommunications. Many organizations combine a number of these and just add humanitarian relief to the mix. They assist various specific groups such as children, women, elderly, disabled, refugees/internally displaced/asylum seekers.

Where they come across indiscriminate acts of war, summary executions or acts of torture and misappropriation of humanitarian aid, the role of these organizations cannot remain restricted to that of a mere purveyor of medical and material aid; many are therefore gradually supplementing their emergency assistance operations with measures to protect conflict victims. Other non-governmental organizations actually focus on this very issue. Certain organizations such as Human Rights Watch, Amnesty International and the International Commission of Jurists mainly advocate respect for human rights by denouncing violations, but are also increasingly introducing humanitarian law into their arguments to draw attention to human rights violations in armed conflict.

Conclusions

There are obvious tensions – and even frictions – between protection of war victims in the midst of fighting and judicial supervision, between consent and

282 See for example Philippe Ryfman, 'Non-governmental organizations: an indispensable player of humanitarian aid', *International Review of the Red Cross*, Vol. 89, No. 865 March 2007, pp. 21–45; and Mario Bettati and Pierre-Marie Dupuis (eds), *Les ONG et le Droit International*, Economica, Paris, 1986.

enforcement, between humanitarian action and denouncing violations, and between an impartial humanitarian approach and a political approach. Improving the situation of victims of armed conflicts means using an adequate combination of the various means, and building on their comparative advantages. This must happen first and foremost at the field level, while the global level should strive to support field initiatives.

International humanitarian law and its mechanisms remain international law's modest response during periods of armed conflict. Today, international enforcement of the law is still exceptional in the absence of a central enforcement system. Willingness and ability to comply with the rules largely lie in the hands of belligerents, and supervisory mechanisms are merely based on their consent and good faith. Humanitarian law is best suited to supervision on the spot and endeavours to provide protection and assistance directly to the victims of armed conflicts. The goal is to reach *all* persons affected by armed conflict, unlike the restricted judicial approach which only takes victims of a violation of the law into account.

However, international humanitarian law needs political pressure to have a chance of succeeding. If the victims' interests so demand, recourse should be had to the States parties to the Geneva Conventions by virtue of their obligation to '*ensure respect for*' international humanitarian law under Article 1 common to the four Geneva Conventions. Humanitarian law does call upon states to take political measures, both individually and collectively through the United Nations, to induce belligerents to comply with its precepts. The Human Rights Council discusses situations of armed conflict and the Security Council in particular tries to enhance protection of the civilian population on the ground by mandating peacekeeping missions to carry out protection activities, or seeking to create a political environment conducive to facilitating humanitarian access. In exceptional circumstances, even military means may be the only remedy to stop endless killings. As ever in decisions by these essentially political organs, an impartial approach cannot always be guaranteed, and the 'responsibility to protect' in particular remains a deliberately vague concept.

Yet international humanitarian law would lose its *raison d'être* if politics were to take precedence over humanitarian considerations: the very essence of international humanitarian law is the divide it creates between *ius in bello* and *ius ad bellum*, so that victims are protected and assisted whatever the reasons for the conflict. In the face of widespread violations of the most basic rules by parties to conflict, and the inability or unwillingness of the international community to take bolder measures to stop the violations or even the conflict, humanitarian action not linked to any political agenda often remains the only remedy, at least for the situation of the conflict victims. The use of humanitarian action as a political tool and its integration into policy makes humanitarian operations captive to the political and military ambitions underlying the conflict, thereby undermining humanitarian access to victims.