International Institute of Humanitarian Law

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Respecting International Humanitarian Law: Challenges and Responses

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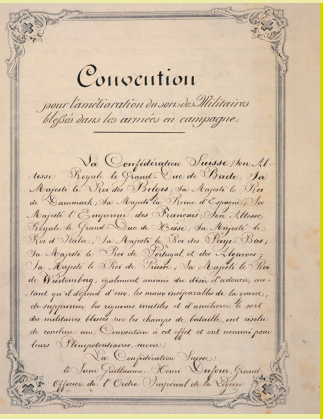
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pour l'amélioration du sort des Militaires blessés dans les armées en campagne.

Politica

FrancoAngeli

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Respecting International Humanitarian Law: Challenges and Responses

36th Round Table on Current Issues
of International Humanitarian Law
(Sanremo, 5th-7th September 2013)

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Table of Contents

II. Working towards respect for IHL through training and dissemination

III. The challenge of IHL compliance

IV. Lessons on IHL compliance from other systems of international law

Preface

A successful and effective implementation of international humanitarian law (IHL) is not only assessed by the capability to apply its rules and principles when confronted with situations of armed conflict, but it is also contingent upon the will to look back on the events that shaped this branch of international law in the course of history.

Recent developments in Mali, the Arab Spring uprisings, the persisting civil war in Syria and the endless crisis situation in Afghanistan are constant reminders of the need to focus on strengthening compliance with IHL, without forgetting the weaknesses in the existing mechanisms for the implementation and dissemination of norms and principles of humanitarian law.

What is of fundamental importance is that all actors, who have a specific role to play in increasing the respect for IHL, continue to perform their respective tasks and find ways of expanding and intensifying the protective reach of this body of norms. This is the primary responsibility of States and non-state parties to armed conflicts, and it is also supported by the United Nations, regional and other International Organisations, ICRC, National Red Cross and Red Crescent Societies, NGOs, civil society, media and other actors involved.

Jointly organised, as is the tradition, with the International Committee of the Red Cross, the 36th Round Table provided a prestigious forum and a special occasion for addressing the complex challenges raised by the respect for IHL and for trying to identify appropriate responses.

Its work focused on several main thematic areas including: the observance of IHL in recent conflicts; the respect of IHL through training and dissemination; the challenge of IHL compliance and the lessons on IHL compliance from other systems of international law; the implementation of IHL after the end of an armed conflict.

Training and dissemination of IHL, core activities of the Sanremo Institute, remain a key legal and practical prerequisite for IHL compliance. Progress in this field has been made but still much remains to be done especially with regards to the means and mechanisms of dissemination, which have to deal with an increasing level of complexity. However, one of the priorities is still to ensure that awareness of IHL and of the humanitarian consequences of disrespect for IHL is integrated by the parties in a way that will produce concrete results in the field.

In publishing these proceedings, which include most of the interventions made during the 36th Round Table on current issues of IHL, the Sanremo Institute aims to take these accomplishments a step further by highlighting the increasing importance of the respect for and enforcement of IHL in a rapidly changing security environment, and by providing useful work

which will contribute to reinforcing the understanding of the vital need to strive for better IHL implementation.

Fausto Pocar
President of the International Institute of Humanitarian Law

Opening session

Opening Remarks

Fausto Pocar
President, International Institute of Humanitarian Law, Sanremo

It is for me a great pleasure and a real privilege to open this 36th Round Table on current issues of international humanitarian law and to welcome such a distinguished audience on this prestigious occasion.

Sono particolarmente lieto e onorato di porgere un caloroso benvenuto a tutti i partecipanti a questa Tavola Rotonda organizzata congiuntamente, secondo un'ormai consolidata tradizione, dall'Istituto Internazionale di Diritto Umanitario e dal Comitato Internazionale della Croce Rossa (CICR) che desidero ringraziare unitamente ai Comitati ed alle Società Nazionali di Croce Rossa e Mezzaluna Rossa che hanno contribuito alla realizzazione di questo importante evento.

Un vivo e sincero ringraziamento va innanzitutto a tutte le Autorità e Istituzioni, alle personalità, ai membri e agli amici dell'Istituto che hanno voluto essere presenti a questo consueto appuntamento internazionale, che da oltre quarant'anni l'Istituto organizza a Sanremo nel mese di settembre.

Sono lieto di porgere il mio personale saluto e la mia gratitudine al Rappresentante del Comune di Sanremo, l'Avv. Gianni Berrino, alla Vice Presidente del CICR, Christine Beerli; al Segretario Generale Aggiunto delle Nazioni Unite per gli Affari Giuridici, Patricia O'Brien, che ci onora nuovamente della sua presenza, a Peter Bouckaert di Human Rights Watch e a tutti i relatori che hanno accolto il nostro invito ad intervenire ai lavori di questa Tavola Rotonda.

Una viva riconoscenza va al Ministero degli Esteri, in particolare al Sottosegretario Mario Giro, che ci raggiungerà nella giornata conclusiva di questa Tavola Rotonda e al Ministero della Difesa del Governo italiano, per il supporto offerto in passato e per aver accordato, anche quest'anno, il patrocinio all'evento. Sono altresì riconoscente alla Presidenza del Consiglio del Governo italiano, in particolare al Sottosegretario per i Rapporti con il Parlamento per il messaggio di apprezzamento che ci ha fatto pervenire.

Un grazie particolare al Governo svizzero, svedese e norvegese per il sostegno offerto nella realizzazione di questa 36ª Tavola Rotonda.

Un mio personale riconoscimento va, infine, ai coordinatori della Tavola Rotonda, ai due Vice Presidenti dell'Istituto Michel Veuthey e Baldwin de Vidts e Jelena Pejic del Comitato Internazionale della Croce Rossa.

Le thème de cette Table Ronde, “Le respect du Droit International Humanitaire: Défis et Réponses”, est très actuel et particulièrement important si on considère la complexité des scénarios qui caractérisent le contexte de la sécurité internationale.

Le droit international humanitaire se voit aujourd’hui de plus en plus confronté à de nouveaux défis et sa mise en oeuvre se heurte à de grandes difficultés puisque la nature, les instruments et les protagonistes de la guerre ont changé.

Garantir un meilleur respect du droit international humanitaire est une condition préalable et indispensable pour que les personnes, qui sont impliquées dans des situations de conflit armé, puissent trouver protection. Si, d’une part, on trouve une convergence générale sur le fait que le respect du droit international humanitaire par les États et les autres acteurs non étatiques est souvent insatisfaisant, il y a aussi, d’autre part, la nécessité de mieux comprendre les mesures possibles qu’on peut prendre sur le plan juridique, pratique et politique pour contribuer à renforcer et à rendre plus efficace le respect de cet ensemble de règles.

C’est un sujet qui est au coeur des activités de l'Institut International de Droit Humanitaire de Sanremo. Depuis plus de quarante ans, l'Institut joue un rôle essentiel et fondamental sur le plan international, non seulement comme centre de recherche et de formation - il suffit de penser aux plusieurs manuels élaborés sous les auspices de l'Institut, traduits en plusieurs langues et utilisés dans le monde entier - mais surtout comme un lieu de réflexion et de débat sur les grandes questions liées à l'application du droit international humanitaire et des droits de l'homme.

Let me start my intervention by remembering, on this occasion, Brigadier General Erwin Dahinden, member of the Council of the Institute, who unexpectedly passed away in December 2012. Brigadier General Dahinden gave an extremely significant contribution to shaping, developing and implementing the programmes of the Institute ever since he joined the Council, and he showed a lively and passionate commitment to the Sanremo Institute’s purpose of promoting international humanitarian law (IHL), human rights (HR) and related issues.

For more than forty years now the International Institute of Humanitarian Law has played an important and unique role in providing an international and informal forum for in-depth reflections and open debates, bringing together experts and key personalities from diplomatic, military, humanitarian and academic circles from different regions of the world, with the aim of discussing current developments and challenges of relevance to international humanitarian law.

The 36th Round Table on current issues of international humanitarian law will focus on “Respecting IHL: Challenges and Responses”. It will provide in-depth analysis of the specific challenges arising from the respect

of IHL and will try to identify the measures and mechanisms which could enhance respect for IHL before, during and after an armed conflict, as well as shed light on the role which various actors play - or can play - in achieving better IHLimplementation at the international level.

Improving respect for IHL is a necessary precondition to eradicate the suffering of people affected by armed conflicts. IHL is continually challenged by the evolution of contemporary armed conflict.

The observance of IHL in recent conflicts will be the starting point of this Round Table. An overview of the current challenges to which IHL has been exposed in different situations of armed conflict (such as in the cases of Afghanistan, Syria, Mali and Somalia) will allow us to recognise the major current concerns of contemporary armed conflicts and to identify in which direction efforts have to be addressed in order to ensure a much more effective implementation of IHL.

As shown once again by some of the recent events occurring during the last months, civilians are the primary victims of violations of IHL committed by both state and non-state actors in contemporary armed conflicts.

The nature of contemporary armed conflicts continues to provide challenges for the application and respect of IHL in a number of areas, ranging from the classification of armed conflicts to the use of new technologies. There is a strong need to understand and respond to these challenges to ensure that IHL continues to perform its protective function in situations of armed conflict.

While there is general acceptance that IHL implementation by States, as well as by non-state actors, is often considered unsatisfactory, there is the need to better understand the legal, practical and policy measures which could contribute to strengthening the observance of these norms.

What should be the response to the lack of respect for IHL while an armed conflict is on-going? This appears to be the main legal and practical challenge.

It is very important to have in mind the state of the existing IHL compliance mechanisms, which operate in both international and non-international armed conflicts, in order to identify the legal, political and practical reasons for their inadequate use and whether they are sufficient as such or if it is a matter of misuse. In this regard, lessons learned from the compliance mechanisms of other areas of law and a consideration on whether new IHL compliance mechanisms might be of assistance are essential. This is particularly important as regards the multifaceted existing mechanisms in the HR field, in light of the emerging view that a point strategy aiming at compliance with HR and IHL should be envisaged.

I am confident that the discussions arising in the forthcoming days will provide an overview of the measures that States and other actors may take

with a view to enhance respect for IHL. In particular, emphasis has to be given to the question of whether measures taken in peacetime are sufficient or not; to the choice of additional activities and mechanisms to be developed to foster compliance of IHL; and to the role to be played by States and non-state actors, including National Red Cross and Red Crescent Societies, International Organisations and NGOs.

The role of other organisations and actors in fostering respect for IHL has become increasingly important. Intergovernmental organisations and the UN, in particular, play an important political and legal role in promoting respect for IHL, but they are also facing their own issues. Ensuring respect for IHL is the heart of the UN effort to promote peace and security. The challenges faced by the UN and other international as well as regional organisations, together with the limitations of their power and the difficulties deriving from how they are perceived by the other actors represent a crucial issue that needs further in-depth discussion. The role of NGOs and the media also deserve particular attention given the special angle from which they observe and report on the respect for and violations of IHL.

Now, let me recall the importance of training and dissemination as a fundamental means for enhancing respect for IHL.

The knowledge of IHL is a precondition for its respect. When States become parties to the 1949 Geneva Conventions and their 1977 Additional Protocols, they commit themselves to disseminating the provisions of those instruments as widely as possible, both in peacetime and in periods of armed conflict, so that they are known to the armed forces and to the population as a whole. The other instruments of IHL also contain an obligation of this nature.

The obligation to spread knowledge of IHL is based on the idea that sound acquaintance of the rules set forth in the law is essential for their effective application and, consequently, for the protection of the victims of armed conflicts.

Generally speaking, this obligation is a corollary to the commitment made by the States Parties to the instruments of IHL to respect and ensure respect for the provisions they contain.

Although it is primarily the responsibility of the States to make the law known, other organisations, such as the ICRC, working in cooperation with the National Red Cross and Red Crescent Societies and their International Federation, have a mandate to assist States in this task and are encouraged to take initiatives to that effect.

In this regard, the Institute has been playing an important role since 1976 by organising a wide range of courses, workshops and training activities.

Nowadays, the Institute's training programme provides a structured approach to building an in-depth knowledge of IHL, addressing different levels of prior experience spanning from foundation to advanced levels with specialised courses to cover specific topics in greater detail. In order to develop continuous dialogue on the complex and evolving subject of IHL, the Institute also conducts several workshops on specific topics of current importance (such as detention, non-international armed conflict, peacekeeping operations and rules of engagement).

These activities bring together leading military experts, academics, civilian and military personnel with a legal or non-legal background and originating from different regions of the world, to discuss the key challenges in a specific area of IHL. They also address the particular considerations regarding the practical application of IHL in the multinational context, ensuring a unique environment with a diverse, challenging and stimulating international perspective.

Our discussion in the next days will be complemented by a close look at the joint Swiss-ICRC Initiative, launched in early 2012 following the 31st International Conference of the Red Cross and the Red Crescent, which aims to explore and identify concrete ways enabling States to engage more regularly and systematically in current IHL issues to strengthen compliance with IHL.

It is often forgotten in practice that the effects of IHL treaties do not cease at the end of active hostilities and that IHL remains applicable until the humanitarian consequences caused by an armed conflict have been alleviated. It would appear necessary to examine the post-armed conflict rules of IHL, how they are implemented in practice, and what may be done to ensure better respect in this area as well.

As we have seen, a number of actors are engaged in the crucial issue of enhancing respect for IHL. I hope that the *fil rouge* of the debates of the Round Table will be on how to foster the engagement of these actors and I am sure that creative suggestions in this regard will arise from the works of the Round Table.

To conclude, IHL is continually challenged by the evolution of contemporary armed conflicts and the need to find concrete measures to foster respect for IHL is currently high. The achievement of reducing human suffering during armed conflict is strictly related to the respect for, implementation and enforcement of IHL and, for this reason, I hope that this Round Table will constitute an important and valuable basis to understand and respond to these challenges, providing an additional platform for dialogue and reaffirming the importance, today more than ever, of the protective function of IHL in situations of armed conflict.

Keynote Address

Christine Beerli
Vice-President of the International Committee of the Red Cross, Geneva

The topic of this year's Round Table, “Respecting International Humanitarian Law: Challenges and Responses”, is one that lies at the centre of ICRC action. The ICRC's operational presence in the context of international and non-international armed conflicts is largely the result of needs created by lack of compliance with IHL.

In Syria, for example, tens of thousands of civilians are living in extremely harsh conditions, and humanitarian organisations cannot reach them. Lack of access is one of the main reasons preventing us from having an independent understanding of what happened recently in relation to the alleged use of chemical weapons but we are appalled by the large numbers of civilian casualties reported. Any use of chemical weapons by any party is a barbarous act and would constitute a serious violation of international humanitarian law (IHL). In the eastern Democratic Republic of the Congo, the violence and suffering inflicted on people have reached a level rarely seen in two decades. Amid almost total indifference, people are enduring violent treatment every day. Civilians are directly targeted in attacks that do not even spare children or elderly people; many medical facilities struggle to treat the wounded and sick, as their supplies are often looted; or because there are armed men on the premises; or because medical staff cannot safely reach their workplace.

Further, there remains an alarming level of sexual violence against women, children and men. In Colombia, where one of the world's longest-running armed conflicts lingers, civilians continue to risk forced displacement and disappearance, sexual violence and summary execution. These are just three brief examples of situations where we continue to see lack of respect for IHL. The list, unfortunately, is very long.

Over the next two and a half days, we will be discussing in depth various challenges regarding respect for IHL. We have a rich programme before us, and I commend the organizers for putting together what promises to be a stimulating few days of discussions.

In my speech, I will first speak about why there is a need to focus on strengthening compliance with IHL at this point in time and some of the weaknesses in the existing IHL compliance mechanisms. For the second part of my speech I will, following the broad structure of the programme of the Round Table, provide some insight into some of the key activities that the ICRC is engaged in to build an environment conducive to respect for

IHL at different stages: during peace-time, before an armed conflict occurs; while armed conflict is occurring; and after it has ended. In doing so I will highlight some of the key challenges the ICRC faces in undertaking these activities.

Why focus on compliance? Putting the IHL compliance issue into a broader international law perspective

At the outset of our discussions, it is important to reflect on why the issue of compliance with IHL is particularly salient at this point in time; in other words, to put the current interest in compliance in the context of general historical trends in the development of international law.

The 19th and 20th centuries were periods of substantial normative development across different fields of international law. One marker of this codification and progressive development of international law is the large number of treaties concluded during these periods. IHL is no exception. As you know, next year will mark the 150th anniversary of the First Geneva Convention, and as we look back, we see great achievements made in developing IHL since 1864 and adapting it to the evolving ways to wage war.

What began with a short treaty to protect the wounded, sick and medical personnel grew progressively into a detailed body of law, with the 1949 Geneva Conventions and their Additional Protocols now comprising a corpus of more than 600 articles, aimed at protecting all victims of armed conflicts. In addition, important norms of customary IHL have crystallized. This is particularly important in relation to non-international armed conflict; even where treaty rules may be insufficient, customary IHL norms have emerged to regulate key aspects of the behaviour of parties to the conflict. All of these developments have contributed to positive changes in the practice of parties to conflicts, by allowing the injection of a much needed measure of humanity into the conduct of military operations. Warfare has evolved, with certain behaviour used in previous conflicts, such as carpet bombing, now clearly regarded as unacceptable. There is no doubt that the idea of what is acceptable conduct has evolved due to IHL norms and the ever-increasing expectations of observance that they bring. In many contexts of armed conflict, IHL norms *have* been respected, which has made a significant practical difference for the protection of people on the ground and has prevented or reduced human suffering.

Of course, although IHL has progressively become more detailed and specific, there remain areas that require further work, in particular, catering for new operational realities as they arise. One example is the need to strengthen IHL regarding detention in non-international armed conflict. In

comparison to the detailed body of treaty rules regulating detention in international armed conflict, the law regarding detention in non-international armed conflict is very limited. This is why the ICRC is currently leading a consultation process with States and other relevant actors, on how to strengthen the legal protection in this area. Strengthening legal protection could take a variety of different forms, including the development of a non-binding standard-setting instrument.

However, what is clear is that, overall for IHL, the main problem is not the lack of rules but the lack of respect for the existing law. Norms cannot, in and of themselves, eradicate abuses or be expected to do so. They need to be complied with. This is a common challenge across other areas of international law. As international law becomes ever more specialised and detailed in substance, it is a natural progression to focus more closely on mechanisms for monitoring and evaluating compliance with those norms. Since the end of the 20th century, we are in a period in which international law is increasingly focused on systems of compliance and accountability. This can also be regarded as a critical step in the process towards strengthening the rule of international law.

One illustration of this focus on compliance and accountability is the enormous growth of international law institutions in recent decades, including courts, tribunals and other bodies. We see this most strikingly in international criminal law, with the development of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. We also see this focus on compliance and accountability in international human rights law, with the development of the UN human rights treaty body system, the UN Human Rights Council and the Special Procedures, as well as increased resort to commissions of inquiry. We also see this in international trade law, with the development of the WTO's sophisticated international dispute settlement system.

However, against this backdrop, IHL stands out in significant contrast. All parties to the Geneva Conventions and Additional Protocol I are bound by the general obligation in Common Article 1 to respect and ensure respect for the Conventions in all circumstances. However, unlike several other areas of international law, IHL lacks effective compliance mechanisms and procedures.

Three compliance mechanisms are envisaged in the Geneva Conventions and Additional Protocol I. First, the Protecting Powers system obliges each Party to the conflict to designate a neutral State, with the agreement of the other side, to safeguard its humanitarian interests and, therefore, to monitor compliance with IHL. However, in practice the Protecting Powers system has been used on very few occasions since World War II, with the last reported instance having occurred three decades ago.

Second, there is the formal Enquiry Procedure, which enables an enquiry to be made into an alleged violation of the Geneva Conventions at the request of a party to the conflict. However, very few attempts to use the Enquiry Procedure have been made and none have resulted in the actual launching of the procedure. And finally, there is the International Humanitarian Fact-Finding Commission. The Commission is competent to enquire into any facts alleged to be a grave breach or other serious violation, or to facilitate, through its good offices, the restoration of an attitude of respect for these instruments. However, the Commission has not been triggered so far, which in large part may be attributed to the fact it can only be used in relation to international armed conflict, where both parties have either made a formal declaration accepting its competence or have given their consent. Overall, these three mechanisms have simply not served the purpose for which they were envisaged. They are of limited scope; they were crafted for international armed conflict only and they have rarely, if ever, been used.

Some compliance-related mechanisms were developed in specific areas of IHL, such as some weapons treaty bodies and the UN Security Council Monitoring and Reporting Mechanism on grave violations against children in armed conflict. However, there are no broader compliance mechanisms covering IHL in general. There is also no universal, dedicated forum where States can meet regularly to discuss IHL implementation and compliance, apart from the quadrennial International Conference of the Red Cross and Red Crescent Movement. At present, this remains the primary international forum in which States and components of the Movement come together to discuss matters of common humanitarian concern, including the prevention of IHL violations.

Given the lack of specific IHL compliance mechanisms, compliance functions in relation to IHL are in practice increasingly being performed by institutions and mechanisms established under other bodies of international law, such as international human rights law. While there are of course important benefits to this, there are also limitations. Indeed, the mechanisms of international human rights law are not necessarily well-adapted for the implementation of IHL. For example, human rights law binds only States, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-state armed groups. This is a significant constraint in an era when non-international armed conflict is the most common kind of conflict. In addition, aside from purely legal aspects, there are practical considerations that restrict the ability of non-state armed groups from applying human rights law. In most non-international armed conflicts, the non-state party lacks the capacity and an adequate apparatus for ensuring the fulfilment of human rights treaty-based and non-treaty standards. Further, sustainable strengthening of IHL cannot be achieved through case-by-case measures

taken by international institutions that are not specifically mandated to undertake IHL-focused work. Such efforts should instead be promoted from within an IHL-specific system.

It is clear, therefore, that regardless of which area of IHL one looks at, a common on-going challenge is implementation and ensuring compliance with IHL. That is, finding ways of encouraging all States and all parties to armed conflicts to observe the rules and implement their obligations under this body of law; to prevent violations from occurring and to stop them when they are occurring.

This is the topic at the heart of our discussion over the coming days of the Round Table: how to improve compliance with IHL norms in practice. And, given that enormous human suffering caused by armed conflict continues, this is not just a legal challenge, but of course poses political challenges too, in terms of building the interest and commitment within the international community to tackle the issue. This weakness in IHL was acknowledged by the 31st International Conference of the Red Cross and Red Crescent in December 2011. Resolution 1 recognised "the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL, with a view to strengthening legal protection for all victims of armed conflict". As you know, Resolution 1 mandated the ICRC to pursue further research and consultation with States and other relevant actors, to put forward options and recommendations to enhance the effectiveness of IHL compliance mechanisms.

The ICRC/Swiss Initiative on strengthening compliance

Pursuant to Resolution 1, the ICRC and the Swiss Government have together been leading a series of consultations since 2011 to examine this issue. So far there have been two consultation meetings open to all States, as well as two preparatory meetings with a smaller, regionally-balanced group of States. States participating in the consultation process have agreed that IHL lacks effective compliance mechanisms and that this is an area needing further work. There is general support for the creation of a platform for regular exchanges among States related to IHL compliance. States have identified three other priority areas for further discussion, namely a periodic reporting system on national compliance with IHL rules; thematic discussions on topical IHL issues; and fact-finding, including possible ways to make better use of the International Humanitarian Fact-Finding Commission.

Further detail about the joint ICRC-Swiss Government Initiative will be provided in a specific session tomorrow. Ambassador Nicolas Lang, Ambassador-at-Large for IHL in the Swiss Federal Department of Foreign

Affairs, will provide you with an update on the consultation process so far, and the planned next steps. My colleague Philip Spoerri, Director for International Law and Cooperation in the ICRC, will then provide you with an overview of the main substantive themes and views that have emerged from the consultation process so far. In the course of these consultations, we are looking closely at the lessons on IHL compliance that can be learned from other systems of international law. I note that this is the focus of a specific session tomorrow, which is focusing in particular on lessons to be learned from international and regional human rights law and compliance mechanisms.

This consultation process on compliance is a very important initiative for the ICRC and an area in which we can anticipate much more work over the years to come. For the remainder of my remarks, however, I will move beyond that specific initiative to take a broader focus, looking at the issue of respect for IHL at different stages in relation to armed conflict. Currently, the ICRC constitutes the only functioning IHL compliance mechanism. Consistent with the Round Table's theme of “Challenges and Responses”, I will highlight some of the current ICRC activities in responding to challenges at each of these stages.

Respecting IHL before, during and after armed conflict

Respect for IHL is needed before, during and after armed conflict. These stages are, of course, not always clearly delineated, but this schema is one useful way of thinking about the different kinds of efforts needed to strengthen compliance. At one end of the spectrum is prevention, which encompasses all activities aimed at creating an environment conducive to respect for the life and dignity of people affected by armed conflict. However, it also includes activities to promote observance of IHL during armed conflict, and then, at the other end of the spectrum, activities to promote IHL after armed conflict has ended. Let me focus first on prevention, which is an important area of the ICRC's work.

Prevention activity in peacetime, before armed conflict

To build respect for IHL, one has first to understand the rules and the rationale that underpins them to create the conditions necessary for them to be applied and effective in practice and to enable their enforcement where needed. This requires a variety of steps by States and other actors, including professional and educational bodies and National Societies, to reach different audiences in all corners of society.

States parties to IHL instruments have clear obligations to undertake action during peacetime, including all relevant measures of implementation, to ensure that IHL rules are known and respected. Prevention action may take many forms. It includes the adoption of domestic laws and regulations implementing IHL treaty obligations; the adequate training of armed forces and integration of IHL within military manuals and operations; the appointment of legal advisers to the armed forces; and teaching and dissemination of IHL to the population at large. Many States - currently over 100 - have established specific bodies called national Committees for IHL, to facilitate this process and advise the relevant authorities on all IHL-related questions.

The ICRC's Advisory Service stands ready to help governments fulfil their responsibility to promote and implement IHL. It supplements and supports governments' own resources, notably by providing specialist advice and technical assistance to States as they adhere to IHL instruments and adopt legal and administrative measures to give effect to their IHL obligations. It also collects and facilitates an exchange of information between States on national IHL implementation laws and other measures.

IHL dissemination, training and education

As you know, IHL dissemination and education will be the topic of a specific session later today. This is a core part of the work of the ICRC and National Societies. For example, the ICRC has education and outreach programmes that aim to build awareness of IHL among diverse audiences.

An important area of ICRC activity in promoting respect for IHL is dialogue with weapon bearers, including States' armed forces, organized armed groups and private military and security companies. For example, the ICRC maintains a working dialogue with States' armed forces around the world, to ensure that they know and are aware of IHL. This, however, is only the starting point, for experience has shown that knowledge alone is no guarantee that IHL will be respected in practice. Therefore, with weapon bearers the ICRC focuses on the concept of integrating the law where the focus is on the four key areas of doctrine, education, training and equipment and sanctions. We call this the 'integration cycle' and thus see the path as a continuous, circular process that prevents violations far more effectively than through teaching or focusing on awareness alone. The ICRC also maintains contacts with non-state armed opposition groups and private military and security companies.

Indeed, the question of how to strengthen respect for IHL by non-state armed groups remains a critical challenge now and for the years to come. Given that non-international armed conflicts are the most common kind of

conflict today, it is crucial that increased emphasis is placed on prevention work with organized non-state armed groups. Here though, the ICRC faces some important practical challenges, such as getting access to such groups and tailoring our key IHL promotion and education messages to the appropriate level for our interlocutors. These are difficult issues, which require a lot of further work in the years ahead.

The ICRC has been continuously developing ways to reach all those with an interest in IHL and humanitarian action, and to ensure that our communications have an impact. This continues today with the ICRC's use of new technologies to convey its messages, including multimedia and virtual reality tools, such as web-based resource centres, online learning modules and training videos. This is a topic which my ICRC colleague, Vincent Bernard, Head of the ICRC's Forum for the Integration and Promotion of the Law, and Editor-in-Chief of the *International Review of the Red Cross*, will be speaking further about in his presentation later today, where he will be showing you some examples of these innovative tools.

Serving as an important source of reference information on IHL

Another important role the ICRC plays in relation to education and outreach is through serving as a critical source of reliable reference information on IHL and its interpretation. To help people understand the existing rules, it is important to ensure their meaning is as clear as possible, and to keep updating our legal interpretation and guidance on these rules. For example, the ICRC Legal Division is engaged on a long-term project to update the ICRC Commentaries to the Geneva Conventions and the 1977 Additional Protocols. The Commentaries have proven to be a valuable tool for all those who apply or study IHL - be they practitioners, lawyers, judges or scholars. They provide guidance on how the provisions of the Geneva Conventions and Additional Protocols are to be interpreted and applied. However, the current Commentaries on the Geneva Conventions date back to the 1950s and those on the Additional Protocols were developed in the 1980s; they are based primarily on the negotiating history of these treaties and on prior practice. We are now updating the commentaries to explain how these treaty rules apply today. Just think, for example, of the Conventions' references to the humanitarian activities that the ICRC and "any other impartial humanitarian organization" may-with the consent of the parties to the conflict-undertake. The context in which this occurs today, in terms of the diversity of actors as well as the challenges for humanitarian action, is very different from when the original Commentaries were written. Another example is Common Article 1, obliging parties "to

respect and ensure respect" for these Conventions "in all circumstances". The international community's understanding of the obligation to "*ensure respect"* for humanitarian law has significantly expanded since the 1950s. The updated Commentaries seek to capture and present this understanding. Against this background, our update of the Commentaries is meant to ensure that they continue to be a valuable guidance tool. And they thereby contribute to the goal of strengthening compliance: if people understand the rules better and the commentaries align better with contemporary practice, it is easier for parties to armed conflicts to apply the rules. Ultimately, this helps secure better protection for victims of armed conflict.

During armed conflict

Let me now mention some of the ICRC's main activities to promote compliance *during* armed conflict. This will be the topic of our next session, where participants will be discussing issues regarding compliance with IHL during a number of recent or current conflicts. During armed conflict, the ICRC carries out a range of activities aimed at improving compliance with IHL and protecting all those adversely affected by armed conflict. This includes collection of information to identify possible violations and enable us to engage in confidential legal operational dialogue with parties to armed conflict. This confidential dialogue aims to encourage parties to develop a better respect for IHL and to sanction violations of IHL where established.

An ongoing challenge: collection of reliable information

We face several challenges in carrying out these activities, one of which relates to the collection of reliable information and the use of new technologies. We live in an era that has seen incredible advances in communications-with all sorts of new technologies enabling the rapid transmission of information, images and video footage during the course of armed conflict. Mobile phones and the Internet are becoming more accessible to many people on the ground. As we can see from monitoring the daily news regarding armed conflicts occurring around the world - whether in Syria, Iraq, Afghanistan or Mali - a huge volume of information is reported not just by the parties themselves, but by individuals, international organizations, NGOs and the media.

The availability of these new technologies has many advantages, enabling a more detailed and nuanced picture of the experiences of people during armed conflict. However, it also poses significant practical

challenges for the ICRC and others working in armed conflict - by making it more difficult to decipher the facts from this wealth of information. With so much information now in the public domain, coming from such a wide variety of sources, it can be very challenging to verify which sources are reliable and to distil the truth from misinformation and disinformation. We need accurate, timely and objective information to ascertain whether violations are about to be committed or have already been committed - and then to prepare appropriate diplomatic and legal responses. This is all part of the challenging work of trying to strengthen compliance and foster accountability in the thick of armed conflict: trying to encourage parties to stop committing IHL violations while they are actually occurring and to prevent imminent IHL violations from occurring. I understand that some of these challenges, in particular, those of fact-finding and the contribution of NGOs to IHL compliance, will be examined in a specific session tomorrow on “The challenge of IHL compliance”.

After armed conflict has occurred

Another area of work in promoting compliance with IHL occurs after armed conflict has ended. Although IHL generally applies during armed conflict, some obligations remain relevant even after the end of conflict and the ICRC works actively to promote implementation of these obligations. Criminal accountability is one important aspect of the work needed to implement IHL and address violations of IHL when they have occurred. This work of course occurs both during and after armed conflict. As I mentioned earlier, criminal accountability has been an area of important progress over the last two decades with significant development of international criminal institutions as well as domestic mechanisms for the determination of individual criminal responsibility. The ICRC contributes to the fight against impunity, for example, by encouraging States to adopt domestic legislation to give effect to their IHL obligation to search for and prosecute persons suspected of having committed serious violations of IHL. However, these domestic and international mechanisms are, of course, focused on individual criminal accountability rather than compliance with IHL by States and non-state armed groups more broadly, and are, therefore, only one part of the work necessary to comply with IHL after the end of armed conflict.

Returning prisoners and restoring family links

Other important aspects of post-conflict work are the release and return of persons detained in armed conflict and the efforts to restore links of families who have been separated. Trying to locate people and put them back into contact with their relatives is a major challenge for the ICRC and National Red Cross and Red Crescent Societies. This work includes exchanging family messages, reuniting families and seeking to clarify the fate of those who remain missing.

Reducing the humanitarian impact of weapon contamination

Diverse activities are needed to rebuild communities affected by armed conflict and other situations of violence. One significant ongoing challenge concerns the reducing of the humanitarian impact of weapon contamination. This can deprive entire populations of water, firewood, farmland, health care and education. It impedes relief work, depriving people of humanitarian aid and aggravating humanitarian problems. After the end of hostilities, ICRC teams are able to clear and make safe key buildings and infrastructure to allow post-conflict rehabilitation to start and essential services to be restored. If clearance is not possible, or is not an immediate priority, these teams can mark off dangerous areas and warn people not to enter them.

This has been just a rapid sketch of some important areas of post-conflict work on promoting respect for IHL. As you know, there is a specific session in the programme on “Implementation of IHL following the end of an armed conflict”, where some of these issues will be discussed in greater depth.

Conclusion

This morning I have given an overview of some of the main challenges for building respect for IHL before, during and after armed conflict, and I have highlighted some key ICRC activities in responding to each of these areas of challenge. It is clear that strengthening compliance with IHL and respect for IHL is a multi-dimensional task. It demands a variety of activities by diverse actors. This includes the ICRC and National Red Cross and Red Crescent Societies, however, the primary role and responsibility here is that of States and non-state armed groups. All these efforts must occur at the domestic level and at the international level. This is going to continue to be a critical challenge for IHL throughout the 21st century.

Above all, strengthening compliance requires persistence and perseverance; creative thinking and collaborative action. We have to be realistic and practical: it is likely to take some time before the international community is ready to agree on the creation of stronger mechanisms of compliance. Until that time, we have to draw on existing resources, tools and mechanisms to help encourage all parties to armed conflicts to respect IHL.

I hope that this Round Table provides an important opportunity for constructive and meaningful discussion of this challenge. Over the coming days, I encourage you all to consider what the legal, political and practical reasons are that currently stand in the way. How we can, altogether, as a community of experts committed to safeguarding IHL, use our creative thinking and collaborative action, our persistence and perseverance to help bring about progress in this area. And more broadly, how the international community can most effectively move ahead together to envisage and start creating an era of stronger respect for IHL.

I began my remarks by situating this issue of compliance with IHL against the backdrop of the development of international law generally. It is to this point that I return, in conclusion. The time is clearly ripe for us all to concentrate with greater determination on building a stronger system of compliance with IHL. Not only will this help us to achieve our common goal of striving for greater humanity in armed conflict, but it is also important more generally for the development of the international rule of law. A strong system of international law requires both normative development and robust, effective mechanisms to ensure compliance with those norms. It is my hope - and that of the ICRC - that through the current efforts to focus more sharply on this issue of compliance, IHL will, over time, join other fields of international law in helping to make the 21st century an era that we will look back upon as being marked by an ever stronger commitment to implementation, compliance and the rule of law.

Keynote Address

Patricia O'Brien
Under Secretary-General for Legal Affairs and Legal Counsel
United Nations

This is a symbolic occasion for me personally as I have just stepped down as Legal Counsel of the United Nations. It is also symbolic that this speech after five years as Legal Counsel is about international humanitarian law (IHL), a subject that I have dealt with extensively throughout my term and which is very close to my heart.

I wish to thank the International Institute of Humanitarian Law for inviting me to this Round Table and for giving me this opportunity to address the distinguished participants.

I am also pleased to see again Ms Christine Beerli, Vice-President of the ICRC. The ICRC is celebrating its 150th anniversary this year and, in this regard, I wish to pay, once more, special tribute to the ICRC and its staff for their tireless work in promoting IHL and in providing such important services to countless people affected by conflict around the world.

The theme of this year's Round Table is, as we can see in the programme, "Respecting IHL: Challenges and Responses". This is very relevant to the recent developments at the United Nations and I would like to say a few words from the United Nations' perspective about the two sides of the coin: United Nations' efforts to ensure respect for IHL by parties to the conflict and respect for IHL by the United Nations itself.

Ensuring respect for IHL by parties to the conflict

The general principle to respect and to ensure respect for IHL is reflected in Article 1 common to the Geneva Conventions of 1949. When States negotiated additional protocols to the Geneva Conventions, they decided to include a unique article which elaborated on the principle to ensure respect for IHL. This is Article 89 of the First Additional Protocol of 1977 by which States Parties undertook to act in cooperation with the United Nations and in conformity with its Charter, in situations of serious violations of the Geneva Conventions and the First Additional Protocol.

This article is a clear reflection that the United Nations can play an important role in inducing parties to the conflict to respect IHL. When we look at the concept of the "Responsibility to Protect", it is apparent that the rules of IHL that I have just mentioned are incorporated in that concept. However, of course, the provisions of the Geneva Conventions and the First

Additional Protocol are stand-alone provisions that are not in any way limited by the concept of the "Responsibility to Protect".

The concept of the "Responsibility to Protect" (R2P) was formally endorsed in 2005 at the High-level Plenary Meeting of the General Assembly marking the 60th anniversary of the United Nations. This meeting was attended by more than 150 Heads of State and Governments.

They declared that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the international community, through the United Nations, has a parallel responsibility to help States to protect populations from those crimes.

In elaborating on the concept, the Secretary-General has articulated a three-pillar strategy:

Pillar I stresses the responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.

Pillar II emphasizes the commitment of the international community to assist States in meeting their obligations to protect its populations. This Pillar seeks to draw on the cooperation of Member States, UN System, regional organizations, civil society and the private sector.

Pillar III involves the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide protection to its population. Possible measures include peaceful means to settle disputes under Chapter VI of the Charter, in collaboration with regional arrangements, or non-military or military actions under Chapter VII of the Charter.

While the topic of my presentation is focused on IHL, and thus focused on what happens during armed conflict, we should be mindful that war-time atrocities are often preceded by and are, therefore, a continuation of egregious violations committed in the period leading to the outbreak of hostilities. In some cases, mass atrocities may be committed without any ensuing armed hostilities.

Accordingly, the United Nations views R2P as part of the larger architecture of norms to protect the dignity and physical integrity of the human person at all times, be it in peace, political crisis in an environment of relative peace or in war. It is important for the international community to be engaged in ensuring observance of IHL during armed conflict, or in intervening accountability for any violations that have already occurred. Equally important, however, is the need to be alert to risks that may lead to generalized violence or other international crimes against civilian populations in the absence of any armed conflict, and to ensure that such risks are addressed before they materialize.

Looking at the practice of the United Nations in relation to situations of armed conflict, it has taken a variety of measures to ensure respect for IHL by parties to armed conflicts.

Perhaps one of the most significant measures taken by the United Nations is the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda by the Security Council. While these Tribunals are now in the course of winding down, they have made a lasting contribution to international criminal justice and, more broadly, they have sent a clear message that serious violations of IHL will not and must not go unpunished. I am confident that the International Criminal Court will build on the experience of the *ad hoc* Tribunals and uphold international criminal justice in the future.

Beyond the former Yugoslavia and Rwanda, the Security Council has been at the forefront in attempting to induce parties to armed conflicts in various parts of the world to respect IHL. While the Council's primary responsibility is far broader - to maintain international peace and security - it has also made it clear that the Council needs to promote and ensure respect for the principles and rules of IHL in resolution 1502 which was adopted in 2003.

In 2013 alone, the Council has so far called upon the national authorities to hold accountable those responsible for IHL violations in Libya, Somalia and South Sudan; condemned all violations of IHL in the Ivory Coast, Mali and the Democratic Republic of the Congo; and called for full respect of IHL throughout Afghanistan.

The Security Council as well as the Human Rights Council have, in the past, also taken more direct measures to ensure compliance with IHL, such as dispatching commissions of inquiry and fact-finding missions. Such bodies were established in the past years in relation to the armed conflicts in Lebanon, Libya, Occupied Palestinian Territories, the Sudan and Syria.

The Secretariat of the United Nations has also taken action to ensure respect for IHL by others. In particular, the Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces is perhaps a clear example in this regard.

This policy applies across the board where the UN is considering or is actually providing some form of support to non-UN security forces. The policy essentially consists of three elements:

1) Where the UN has substantial grounds for believing that non-UN security forces may commit grave violations of IHL, human rights law or refugee law, then the UN is obliged to refrain from supporting them.
2) If the UN goes ahead and provides support to such forces and then receives information that gives it reasonable grounds to suspect that those forces are committing grave violations of IHL, human rights

law or refugee law, the UN must immediately intercede with the command elements of those forces, with a view to putting an end to those violations.

3) If such violations nevertheless continue, then the UN will be obliged to suspend or withdraw support from the forces concerned. This policy is to ensure that support by UN entities is consistent with the purposes and principles of the UN as stipulated in the Charter, particularly with the purpose of promoting and encouraging respect for human rights, including IHL and international refugee law.

The Policy was made available to the public as a UN document in March this year (A/67/775-S/2013/110). Since then, the Security Council has already invoked it in four resolutions concerning United Nations support to the African Union Mission in Somalia, to the Congolese Armed Forces and to the Malian Defence and Security Forces and has recalled it in its recent resolution on sexual violence in armed conflict, there styling it as "a tool to enhance compliance with international humanitarian, human rights and refugee law".

Respect of IHL by the United Nations

The other side of the coin to the principle of ensuring respect for IHL is the respect for IHL by the United Nations itself. The United Nations has consistently been committed to respecting IHL through peacekeeping operations. Status-of-forces agreements (SOFAs) concluded with the host States normally provide that the peacekeeping operation concerned shall conduct its operations with full respect for IHL. The Secretary-General's Bulletin on the Observance by United Nations Forces of IHL, which was issued in 1999 is a further reflection of the United Nations' commitment to respect IHL.

This question has become much more prominent since the United Nations peacekeeping operation in the Democratic Republic of the Congo, MONUSCO, was explicitly authorized to launch targeted offensive operations against armed groups in Security Council resolution 2098.

Resolution 2098 established an Intervention Brigade within MONUSCO and which is under direct command of the Force Commander of MONUSCO. The Brigade is authorized to carry out targeted offensive operations to "prevent the expansion of all armed groups, neutralize these groups and to disarm them", "in strict compliance with international law, including IHL".

My Office has been confronted with a number of legal questions arising out of this resolution, particularly those related to compliance of MONUSCO with IHL.

The question of the applicability of IHL to United Nations peacekeeping operations is not new. However, Council resolution 2098 has highlighted, as perhaps no previous resolution ever has, the possibility that a United Nations peacekeeping operation may become a party to an armed conflict.

It is without doubt that MONUSCO must conduct any military operation in full compliance with IHL if and when it becomes a party to an armed conflict. The Secretary-General's Bulletin on the Observance by United Nations Forces of IHL, which I have mentioned earlier, is a clear expression of the customary rules of IHL which are applicable to United Nations forces.

The Bulletin sets out, among other things, the fundamental principles on the conduct of hostilities such as the prohibition on directing attacks against civilians and the prohibition on indiscriminate attacks. The rules of engagement of MONUSCO have also been adapted to the new mandate of MONUSCO and my Office has ensured that they are in full compliance with the IHL rules relating to the conduct of hostilities. Therefore, we believe that an appropriate legal framework is in place which governs potential military operations by the Intervention Brigade.

Besides the conduct of military operations, another immediate concern for my Office is the situation where members of armed groups are captured by the Intervention Brigade. The Secretary-General's Bulletin and the Interim Standard Operating Procedures (SOP) on Detention by United Nations peacekeeping operations provide minimum rules on the humane treatment of captured persons and humane material conditions of any facility in which captured persons are to be held. However, the Bulletin merely lays down some basic principles; while the Interim SOP on Detention was not crafted with the situation in mind in which a United Nations peacekeeping operation captures persons in the course of an armed conflict.

My Office has, therefore, been working with the Department of Peacekeeping Operations, MONUSCO and the Office of the High Commissioner for Human Rights on generating a dedicated set of standing operating procedures to deal with the specific issue of the handling of persons who might be captured by the Intervention Brigade in the course of its offensive operations.

Obviously, it will be preferable if MONUSCO does not have to hold on to any persons whom it may capture for a prolonged period of time. Indeed, it would be preferable if as many captured persons as possible be channelled as quickly as possible into a disarmament, demobilization and reintegration (DDR) programme or, as the case may be, a disarmament, demobilization, reintegration, resettlement, and repatriation process (DDRRR).

However, such programmes are voluntary in nature: people cannot be forced into them and they cannot be kept in them against their will. And this may pose a potential problem in some cases. It would hardly be consistent with MONUSCO's mandated task of neutralizing armed groups in the eastern DRC or its objective of "reducing the threat posed by armed groups [to] state authority and civilian security" if captured persons were enrolled in a DDR or DDRRR programme, while there are substantial grounds to believe that there is a real risk of them simply abandoning the programme, rejoining their armed groups and resuming fighting.

Where persons cannot safely be diverted into a DDR or DDRRR programme, the preferred route will obviously be to hand over as many captured persons as possible to the national authorities of the DRC. Our concern here is to put in place safeguards that will ensure that captured persons will not face a risk of violations of certain fundamental rights such as the right not to be arbitrarily deprived of their life once they are handed over. To this end, my Office is working on a supplemental arrangement for the MONUSCO status-of-forces agreement, to put in place the legal guarantees and procedural safeguards that the United Nations will need, if it is to be able to lawfully hand over persons it captures to the DRC authorities.

In fact, this is not the first time that we face this question. Over 50 years ago, the same question arose in relation to the United Nations Operation in the Congo, and it is striking to see that my Office was facing exactly the same issues and adopting very much the same position at the time.

Concluding remarks

In this short speech, I have tried to give you an idea of the United Nations' role in ensuring respect for IHL by others as well as the efforts of the United Nations itself to respect IHL.

I understand that the question of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL was one of the areas highlighted by the International Conference of the Red Cross and Red Crescent held in 2011. I am sure that this Round Table will provide an important opportunity to exchange views on the way forward in this regard, including the role of the United Nations.

Keynote Address

Peter Bouckaert
Emergencies Director, Human Rights Watch

This year, as we have already heard, the International Committee of the Red Cross celebrates its 150th anniversary. Its establishment grew out of the horrors Henri Dunant personally witnessed on the battlefield of Solferino, where thousands of wounded combatants were left behind to suffer and die, without any independent organization to look after them. Dunant and his fellow founders of the ICRC sought to inject a basic level of humanity, even in times of war, and to protect civilians from the onslaughts of war, a mission that continues to date.

The mandates of Human Rights Watch and the ICRC are very distinct, although we share the common goal of protecting civilians at times of war through the promotion of the Geneva Conventions. But before I move on, let me just pay tribute to the tremendous courage and dedication of the delegates of the ICRC who work under the most difficult conditions around the world. Much of their work is carried out discreetly and without publicity, but it makes a tremendous difference to alleviating the suffering of countless people around the world, from detained prisoners of war to innocent civilians trapped in an active conflict zone.

My own Solferino moment came fifteen years ago, as I worked documenting the indiscriminate slaughter being perpetrated by Serb forces upon the civilian population of Kosovo. The human rights movement, and Human Rights Watch as an organization, were very different back then, focused more on more traditional human rights subjects such as political repression and torture than on the atrocities of war. As we stood amidst the just-slaughtered corpses of women and children in the fields of central Kosovo, the houses around us still aflame, my colleagues and I decided we wanted to change things. We felt our mission was to try and save lives while the killing was still going on, not to document the killings in reports that would come out many months later. We decided that we had to remain on the ground to keep documenting the atrocities, keeping the same high standard of evidence that has always characterized the work of Human Rights Watch, but to report in real time. We wanted to cut through the fog of war and force the world to confront itself with the reality of what was happening in Kosovo - to force them to confront the question of whether they were really doing whatever it takes to stop the killing.

Our work approach had an almost immediate impact on the decision makers around the world. The massacre we had documented that day ended

up on the front page of newspapers around the world and the late Ambassador Richard Hollbrooke later recounted that the story of the massacre in the New York Times was lying on the table the next day when President Clinton slammed his fist down and declared to his principal advisors that he would no longer stand by watching the horror unfold in Kosovo.

The topic of our roundtable this year is "Respecting international humanitarian law: Challenges and responses." From my perspective as a field practitioner investigating war crimes and crimes against humanity in conflicts around the world, I wanted to share a few of the challenges and developments we have identified.

First, it is important to understand that the development of IHL and, in particular, the development of international criminal law, must be closely linked to fact-based investigations of the conduct of armed forces and non-state armed actions in the field. The laws of war do not develop in an academic or in a judicial vacuum: it is a living law, both as guidance to the conduct of armed actors in the field but also as a response to the investigations we conduct into the violations committed by armed actors. We cannot build solid legal precedents based on shoddy evidence and we cannot afford to base diplomatic or military actions, such as the use of force, on incomplete or inaccurate evidence, as the on-going damage from the misleading weapons of mass destruction allegations over Iraq has shown.

Investigating the conduct of armed actors requires access to the country and the area where the fighting takes place and basic security guarantees for both international investigators and local activists who share information. As we all know, such access is often denied by governments abusing their own people, and both international investigators and local activists are often banned from conducting investigations, threatened, and even killed.

During the last stage of the Sri Lankan civil war, the Sri Lankan authorities forced the United Nations and international humanitarian organizations to withdraw from the Vanni battlefront, effectively removing any international witnesses to a brutal final campaign that resulted in the deaths of tens of thousands of civilians. As the UN's own investigation into its conduct later revealed, the strategy of the Sri Lankan government worked in the short run: it effectively silenced the voice of the international community on what was happening in the Vanni, but in the long run the Sri Lankan government has not been able to avoid consistent calls for a credible investigation into the final stage of the war, and accountability for the war crimes that were committed.

In most war zones, Human Rights Watch is able to send in its investigators to collect evidence, even when the government or armed groups try to keep us out. But the development of new technologies and the growth of social media have given us new tools to investigate crimes that governments try to hide.

The increasing availability of high-resolution commercial satellite imagery has led Human Rights Watch to establish its own satellite imagery program, and it has become an increasingly valuable tool in our investigations. During the fighting in Sri Lanka's Vanni region, satellite imagery not only revealed that hundreds of thousands of civilians were trapped in the so-called No-Fire Zone - a number denied by the government - but it also allowed us to identify the heavy artillery pieces that were firing directly into the No-Fire Zone, as well as the impact craters from their rounds within the densely populated zone. In Libya, we were able to document the almost complete destruction of the pro-Qaddafi town of Tawergha by rebel militias from Misrata, as an act of revenge after the fighting had ended. During the South Ossetia-Georgia conflict, we used satellite fire alerts to be immediately alerted to an ethnic cleansing campaign directed against ethnic Georgian villages inside South Ossetia.

The explosion of social media, particularly YouTube videos but also technologies such as Skype, have brought a whole new source of information to our screens. Social media comes with its own risks of manipulated, unverified information, but by using careful verification techniques we have been able to use social media videos to establish which armed group in Libya was responsible for the execution deaths of some 66 Qaddafi supporters following his capture in Sirte; we have been able to closely monitor and identify the types of weapons being used by the Syrian government against its own people, including in the case of the alleged chemical weapons during recent attacks; and we have been able to establish responsibility for a significant number of videotaped executions carried out by opposition armed groups in Syria.

Collecting information is only a first step, of course. It is equally important to engage in awareness-raising about the laws of war with armed groups and government forces and to have a dialogue with them about the ways in which their conduct can be improved, as well as about the potential consequences of violating the laws of war. Many armed groups, particularly non-state actors, remain wholly uninformed about their obligations under the laws of war, and by educating them on their obligations we improve respect for the law.

In 2007, I was investigating law of war violations in the remotest regions of the deeply impoverished Central African Republic when I ran

into a rebel commander. He explained to me the reasons behind their rebellion and the large-scale abuses that had been conducted against their population by rampaging members of the Presidential Guard. When I asked him if he had any children fighting with him, he enthusiastically replied that almost all the children from his school had joined to fight with him, as he was a former school teacher. I explained to him in response that a Congolese rebel commander, Lubanga, had just been indicted by the International Criminal Court, and that the use of child soldiers was a war crime. He looked at me in shock and became very pensive for the rest of the meeting. The next morning, as we drove down the same road, he came out running with his arms waving to stop us. He explained that he had been up the whole night worrying, and begged us to help him demobilize the child soldiers so he wouldn't end up in trouble. With the help of UNICEF, we ultimately did demobilize those kids.

Similarly, during the Libya conflict, I was one of the first foreigners to arrive in Benghazi in late February and immediately went to see the military leadership of the rebels. In the course of our discussion, I asked them to make a pledge not to use landmines, and we got the pledge on the spot and later again in writing. Throughout the conflict, the Qaddafi forces laid tens of thousands of landmines, but the rebels kept to their pledge and didn't use a single one.

Another area where Human Rights Watch concentrates its efforts is in the development of new standards of international humanitarian law. Since the mid-1990s, Human Rights Watch has helped fund three major international campaigns to adopt new conventions addressing some of the most pressing issues in the development of the laws of war: the Nobel-prize winning International Campaign to Ban Landmines, the equally successful campaign to ban the use of cluster munitions, and the campaign to stop the use of child soldiers. Many of these campaigns were initially opposed by major international powers, so instead of relying on their support, Human Rights Watch and its partners built global campaigns of like-minded nations sympathetic to our cause and ultimately succeeded in putting in place widely adhered to standards. While some countries continue to use cluster bombs, including Syria, their use now results in widespread, worldwide criticism and is seen as unacceptable.

I am pleased to let you know that Human Rights Watch has recently helped launch a new coalition, the Global Coalition to Protect Education from Attack, which seeks to protect schools and universities from being used for military purposes during conflict and to protect students' and teachers' safety and the right to education. The Global Coalition has already adopted a set of draft guidelines, known as the Draft Lucens

Guidelines, adopted in November 2012. Some of our participants at the Round Table have been directly involved already; allow me to express our sincerest gratitude to General Hamad al-Bader of the Qatari armed forces, who is here with us today, for his thoughtful and enthusiastic participation in the drafting process.

I realize that I cannot escape discussing the horrific situation in Syria - we simply cannot ignore the fact that twenty years after Bosnia, the world community is once again deadlocked in trying to respond to the vast violations of the laws of war being committed in the Syrian conflict - the majority of them, but certainly not all, by the Syrian armed forces against their own people. We have documented massive torture in detention facilities, widespread summary executions by government forces, massacres of civilians, the terror-inducing bombing of city after city by air-dropped bombs, cluster bombs, incendiary bombs and long-range ballistic missiles.

And now we are confronted with the undeniable fact that the Syrian authorities have used chemical weapons on their own people, resulting in the deaths of many hundreds. As the list of atrocities committed by the government grows, extremist Islamist groups are also gaining an ever-stronger foothold inside northern Syria, adding to the suffering and abuses faced by the population. More than 100,000 are dead, two million Syrians have fled across the border and many more remain inside in desperate conditions, living in constant fear and suffering deep humanitarian deprivation. And yet the crimes in Syria have still not been referred to the International Criminal Court for prosecution because of a certain Russian and Chinese veto, and the international community remains deadlocked. Such inaction is devastating for the people of Syria, as well as for the credibility of international humanitarian law. The situation in Syria threatens to pull the entire region into an even deadlier vortex and we cannot afford the luxury of inaction.

In closing, I am often asked how I can continue to go to war zones, documenting the most atrocious crimes and placing my own security at risk. Don’t you get scared? Don’t you despair? Don’t you feel hopeless at times? Yes, Yes, and Yes. But let me ask you, how can we afford not to do this important work? People depend on us at the darkest moments in their lives and we are often their only hope. We cannot allow that tiny flame of hope to go out. Even in the darkest and lowest of moments like the Syrian conflict, we have to keep asserting the importance of the laws of war and fighting the notion that in war, everything goes. Because that is why the Geneva Conventions were adopted after World War II - to reject the notion of an all-out war where everything goes, and to stand up for the idea of

“Never Again”. Let us not forget that: what we are discussing here isn’t an academic subject: it is a living law that makes a tremendous difference to countless people around the world.

I. Observance of IHL in recent conflicts

Issues concerning observance for IHL in the Afghan conflict

Ján Kubiš
Head of the UN Assistance Mission in Afghanistan (UNAMA)

Let me first introduce some facts and then highlight certain challenges when speaking about the implementation of international humanitarian law and, from a wider perspective, human rights protection and advocacy for human rights as such.

What is the situation? Before going into the explanation of how we deal and implement and operationalize international humanitarian law, I have to start with my mandate. I am very happy that UNAMA's mandate is very strong and rather explicit although it perhaps could be even stronger - that is my first comment; maybe a sort of invitation for the future. Nevertheless, my mandate speaks and gives me the task of monitoring the situation of civilians, of coordinating efforts to ensure their protection and of promoting accountability. This is one part of the mandate but you will find, in many other parts of the mandate, references to children in armed conflicts; women, peace and security; different resolutions and I am very happy to notice that, whenever the Secretary-General delivers a report to the Security Council on the implementation of the mandate of UNAMA, these topics related to the protection of civilians, to international humanitarian law, to human rights, to children's and women's rights figure very strongly, and increasingly strongly, and rightly so, in the discussion among the members of the Security Council. I am very much encouraged by this.

So this is the mandate. I believe that basically it is sufficient and it is more about how we operationalize, and that is the second point I would like to make. This very much depends on how individual Heads of Mission, the political leadership, and then the UN Country Team - because I am now speaking for them on behalf of the United Nations - on how we put this into practice. And it is true that sometimes it is not that easy, because notably, in the height of the counterinsurgency campaign in the country, for example, and at this point in time in Afghanistan it is basically almost over - not over, but almost over - it was not that easy to speak in favour of international humanitarian law or human rights. Sometimes we were challenged by our partners from the international military and we were definitely challenged by the government whenever we came out with points that were related to non-implementation of international humanitarian law.

At this point in time I have to say that we have much better cooperation, I would say an understanding. I would say that, as far as our international

partners - notably the ISAF - are concerned we do understand each other and we have a sufficient degree of mutual cooperation in spite of, sometimes, questions that we have to address to each other. Nevertheless, we have moved to this phase of basic mutual understanding: they understand our mandate, we understand their mandate, we have shared objectives and we try to develop and implement them. This is also something very important because I believe that this kind of situation might happen - *does* happen - also in many other countries. Coming back once again, for example, to the Security Council and to the responsibility of the Security Council, political considerations sometimes overshadow the requirements and imperatives of the protection of human rights and implementation of humanitarian law and other relevant laws.

Secondly, I would just like to recall that Afghanistan, the current Afghanistan, is indeed a party to numerous international conventions and treaties and, therefore, has a lot of obligations. Part of our mandate is to work with them, to help them implement these international obligations. I have to say that while there is basically a good understanding of the measures that are to be implemented locally in the country, putting into practice the international obligations is lagging behind. And again, this is a very complex and comprehensive debate and we do not have time to discuss all the specific topics here. Nevertheless, this is part of the challenges Afghanistan is faced with which will grow because, as mentioned before, international presence, the international military operations, the international attention in general have decreased which means that the government as such is more on its own, with all its willingness but also with all its deficiencies and sometimes even lack of understanding of what is needed in situations like these.

So, the challenge will grow even bigger, notably after the withdrawal of the international forces from Afghanistan, and, therefore, I am coming to point 1 that I made: my mandate, my future mandate and the need to reinforce this, to make it even clearer, as far as the protection of civilians, human rights and humanitarian law are concerned.

How we operationalize it: of course, I'm very happy to mention here that we have a very strong so-called Human Rights Unit in the mission. We have dozens of colleagues who are working not only in Kabul but in, currently, thirteen locations all around the country. They are monitoring, they are collecting information, they are talking to all the parties, they are making analytical assessments and then they are coming back with their reports. And one of our key achievements is the Signature Project: biannual reports about the protection of civilians in armed conflict. It always creates a lot of questions and this is good because if we didn't make it public we would not be able to achieve what we would like to achieve namely,

changes in the way the parties to the conflict address the condition of civilians and the protection of civilians.

I will not speak about what the current findings in our mid-year report are. The only thing that I would like to mention is that, unfortunately, in comparison with a similar period a year ago in 2012, this year we saw a 23% increase in civilian casualties in the first half of the year. And I could give you a lot of details but again, as time is limited, you can find the details on our website[1]. 23 per cent: this is quite a lot. And then there are different categories.

For us, what is critical is to deliver change. It is not just naming and shaming. It is not just reporting. We would like to see a change in attitude. And I am happy again to note that basically we are managing. Of course, it is on the side of the parties where we manage the most in cooperation with our international partners. But there were situations and there are situations, when ISAF, not deliberately, but nevertheless causes, for example, civilian deaths. We are coming to them and it is true that they are changing their attitude, their approach and they have created the necessary structures and are also helping the government to do the same. This is increasingly important because, as you might know, at this point in time the government, at least in principle, has assumed the full responsibility for security throughout the country. We are in the so-called tranche 5 of the operation meaning that the international forces are backstopping, are supporting in case of need, are in the operations, but basically the planning and implementation of military operations against the insurgency are in the hands of the Afghan partners.

And it means, we immediately noted this when we talked about the situation of civilians, an increase of civilian casualties due to the combat activities between the government forces, the Afghan government forces, and the insurgency. That is a marked new element of the situation.

Speaking of withdrawal, another interesting element, is the unexploded remnants of war. There are all sorts of ammunition in different places including in and around military bases that are now being rapidly vacated by the international forces.

And again, when we first mentioned this, this was the sort of response from the international forces: “No, we do everything right”. We came to them and said, “No, guys, not necessarily.” We documented it, and now the response is, “Ok, how can we address it?” And they are addressing it. Again I am very happy to notice this, to know this: this is the right response.

[1] www.unama.unmissions.org/.

So, coming back again to what is important - getting change. We worked very well with our first partner here, notably in this period of transition, indeed, with international partners. The government, I would say, similarly, although it is lagging behind, and sometimes shows lack of understanding. This morning it was mentioned that what is needed is training, education. It is true. But we should not stop at that. But without this first step, of course, there is lack of understanding. We speak past each other sometimes. Not at the central level, not with the commanders, not with ministers and chiefs of staff etc. but definitely if you go down, below the rank of corps commanders of the Afghan National Security Forces, then definitely you see it sometimes; and the lower you go then you definitely notice that there is almost no understanding. So, training is needed, but it is not enough. We can come to this issue at the end of my presentation.

The most problematic part is how we communicate, how we try to interact with the insurgency and the Taliban. It is not that there is no interaction: we are in constant public dialogue, for example; whenever we produce our report on the protection of civilians, basically within 24-48 hours we have a response from the Taliban notably, sometimes from some other parts of the insurgency. Unfortunately, the response is not adequate to the situation. Yet, one must say, in all the major instructions, including internal documents of the Taliban, for example, we see that they pay attention to the issue of civilian casualties. They instruct their commanders to prevent this, they have even created a new structure, a new office that should deal with the situation and in case of violations they definitely - at least, from time to time - take action. Does this change the situation? Absolutely not and there are two reasons why this dialogue at this point in time does not break the ground to improvements: one reason is the definition of civilian. Here, unfortunately, the Taliban and, I believe, the majority of forces that are fighting the government as armed opposition, have a completely different definition of civilian, in comparison to what is stated in international humanitarian law. And I believe that this is the most critical challenge we have and maybe in some other situations where we have a similar environment as the one in Afghanistan. For the Taliban, civilians are indeed grey-bearded people, children and women. For them “civilians” are not government officials, and anyone who is suspected of supporting the government or working for peace and reconciliation under the umbrella of the government structure. I am simplifying a little bit, but this is the essence of it. And, of course, again we see this in the tactics and in the results, because notably, when the Taliban tried to inform the population that the government was not in control while the international forces were withdrawing from the country, they unleashed a terror campaign against civilians, government officials, supporters of peace and whoever were suspected, including tribal elders, of working against Taliban

objectives to show that the government was unable to govern, that they were not delivering and that, basically, they were on the wrong side.

So, here we have a major problem: and unfortunately, of course, all the recent statements that are coming from the Taliban, notably, are just confirming this lack of compliance with otherwise obligatory norms of international humanitarian law. This is one of the biggest challenges and I would like to bring this to your attention for the future. We must do more. Otherwise we will again talk past each other. This is not acceptable.

The second reason - and again one can say that we were successful, but eventually we were not. We were, as UNAMA, continuously speaking against using individual pressure explosive devices that are sort of landmines. And it is true that from the Taliban side we received the messages such as: “Ok, we are not using them”, or “It is the government forces, in their conspiracy against the people of Afghanistan that are using them”, or: “Nevertheless, we registered, I don’t know, maybe 20%, maybe 23% reduction of civilian casualties that were caused by pressure plate explosive devices.” Fair enough. What we noticed is a maybe similar and even bigger increase of victims, civilian casualties, because of the use of remote-control explosive devices.

And again, unfortunately, they are using remote-control explosive devices indiscriminately when they try to attack military or other targets, again in the terror campaign. They do not shy away from using them in places populated by civilians: in markets, in many other places. Again, we have a lot of information on that. So, is it a success or a failure? That is the question. More and more people are being killed including civilians, so reduction in one tactic, and increase - well, more killings because of the use of another device.

I will come to a conclusion by making a couple of points. I still have in my statement more elements but I would like to come to a conclusion by perhaps making some recommendations for the future. Again, as I speak about Afghanistan, I will continue speaking mostly about Afghanistan. First of all, what is the determining situational factor that will also influence how international humanitarian law is implemented in the country? It is the process of transition. It is the withdrawal of the international military. But it also means lack of attention, lack of support to what the government is doing. Not lack of interest: but at the end of 2014 there will be no ISAF in Afghanistan, so there will be no international partner playing at this point in time a critical role in addressing some deficiencies as regards the Afghan National Security Forces.

Secondly, I started with the importance of education, training, courses and advocacy. This is all very valid. What is missing, at this point in time, by and large, is accountability and enforcement. And again, although there is good cooperation between ISAF and the Afghan National Security

Forces, once ISAF depart this cooperation will not be there. Coming back to my original point, reinforcement of the mandate of the United Nations, empowerment of the United Nations that should be recognized in years after 2014, to have this element as one of the core, one of the critical mandates of whatever will be the successor of UNAMA after 2014, because we will - and it is under discussion - we will get a new mandate, with maybe some new elements there.

Third, because of this transition, uncertainty and indeed the intention of insurgency to show that the government is not in control, we also have unfortunately noticed, from time to time, increased attacks on the international humanitarian community. The ICRC has witnessed this. I will not speak of what happened in general but this is a major concern. Only recently, collaborators of the IOM and the International Rescue Committee were killed, murdered by the Taliban - it was acknowledged by the Taliban and put on their website as their achievement. So, simply, by this I am trying to say that we might see very nasty situations that could work against our collective ability to work, notably in this transition period and in the coming two years, as effectively as we were able, at least up until now. With “effectively” in quotation marks, but nevertheless, there are some achievements. We might have more, we might see more difficult situations.

Still, the last point, which is critical both in Afghanistan and from a broader perspective, is to start a dialogue with the Taliban and similar groups on the issue of the definition of “civilian”. It is a complex task, which will be valid and very useful not only in Afghanistan and in the region, but also, I believe, in many other parts of the world too.

The case of Syria

Carla Del Ponte
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Compliance with IHL

The war in Syria is in its third year. Since the situation reached the threshold of an armed conflict in 2012, the Commission of Inquiry for the Syrian Arab Republic has been investigating violations of international humanitarian law (IHL).

This conflict has become one of the greatest challenges of our time. It is a war that is being fought street by street, in trenches, through sieges and starvation. Armed groups and Government forces fight for control over territory, using all available means.

This war is skewed, in terms of resources and capacity, as most non-international armed conflicts. President Assad's forces retain control of the skies, using their aerial advantage to destroy entire towns, drive civilians out of their homes and transform the country into a battlefield. The Syrian Government's recourse to inherently indiscriminate "target area" bombardment on a mass scale has resulted in indescribable devastation. Victims of shelling and aerial attacks have described what they witnessed as akin to a "scorched earth" policy.

Unlawful attacks by Government forces have been documented in almost every governorate. In many areas, most recently in the eastern Damascus countryside, shelling occurs on a daily basis. As the conflict has unfolded, the Government has deployed more imprecise weaponry, such as unguided missiles, cluster munitions and thermobaric bombs. Interviews with defectors suggest that there is a retributive element to some of these attacks, "punishing" civilians for the presence of armed groups in their towns and villages.

A significant proportion of the casualties in Syria are deaths as a result of indiscriminate or disproportionate shelling. Civilians have been killed by mortars landing in the streets; others have been crushed by rubble after their homes were destroyed by barrel bombs. More recently, civilians have been killed when surface-to-surface missiles destroyed not only their houses, but also their neighbourhoods.

Some anti-Government armed groups - notably around Nubul and Zahra in northern Aleppo and Fou'a in Idlib countryside - also indiscriminately shell villages where a significant civilian population resides. Such attacks result in civilian deaths and injuries. Instances of some anti-Government

armed groups warning civilians of intended attacks were recorded but such warnings were not given systematically. Of extreme concern is whether both Government forces and anti-Government armed groups are positioning military objectives within civilian areas, exposing residents to attack by the opposing side.

Government forces, apparently with the support of National Defence Forces, increasingly understood as a paramilitary entity, have employed sieges across the country, cutting off supplies of food, water, medicine and electricity. The prolonged sieges occurring in Dara'a and eastern Damascus governorates have harrowing consequences on the lives of civilians and, in particular, on young children and those requiring medical care. Multiple attacks on food security have been reported: interviewees describe harvests being burnt across Hama, Homs, Aleppo and Idlib governorates. Sieges are also employed by anti-Government armed groups, predominantly in northern Aleppo.

Torture, as documented in our reports, continues to be committed on a widespread and systematic basis, most frequently inside the detention centres of Government intelligence agencies. Torture has also allegedly occurred inside State and military hospitals. Some anti-Government armed groups also torture captured soldiers during interrogations, employing the same methods used by intelligence agencies.

In June, we reported to the Human Rights Council, outlining the first-hand evidence that my team had collected. We determined that Government forces and affiliated militia had committed crimes against humanity. Government forces have perpetrated gross violations of international human rights law and violations of the laws of war that amount to war crimes. We will present our next report in a few weeks' time, informing the Council of our most recent findings.

Anti-Government armed groups, some of whom were named in the report, have also committed war crimes, including murder, sentencing and execution without due process, torture, hostage-taking and pillage. They continue to endanger the civilian population by positioning military objectives in civilian areas. The Commission is gravely concerned about increasing summary executions and hostage-taking by some of the armed groups, particularly in the north and eastern governorates. Anti-Government armed groups are using child soldiers under the age of 15.

As medical aid has become militarized, the wounded and sick are left to languish at checkpoints and are turned away at hospital gates. Both State and field hospitals have come under attack. Medical personnel and ambulances are routinely targeted. Healthcare is utilized to accrue military advantage.

Both Government forces and anti-Government armed groups violate the customary rules of IHL in their conduct of hostilities. The Government

must cease using imprecise weaponry, such as unguided missiles, on civilian areas. When using sieges as a method of warfare, both sides must ensure that basic necessities and humanitarian aid are allowed passage. The parties also violate their unequivocal obligations under Common Article 3 of the Geneva Conventions in the way they treat civilians and persons who are *hors de combat* under their control.

This is a war that challenges us to reassert the original, unequivocal, unambiguous laws of armed conflict.

Enforcement of IHL

Through the establishment of international bodies such as *ad hoc* international criminal tribunals and the International Criminal Court, the international community has concentrated its enforcement efforts on the repression of serious violations of international humanitarian law. But despite advancements in both preventive and repressive measures, there is still insufficient respect for the rules of international humanitarian law during armed conflict. This is the main problem in Syria. The parties to the conflict act in defiance of the law, disregarding the main principles of IHL. How can we strengthen their compliance?

In fact, the question is how do we influence the parties to the conflict in Syria? How do we convince the armed opposition that they should comply with the laws of war? How do we pressure the Syrian armed forces to conduct hostilities within the bounds of the law?

All parties have an obligation not just to comply with the rules of international humanitarian law - but also to ensure compliance in all circumstances. States that exert influence on the parties to the conflict in Syria have an obligation to ensure that those parties behave lawfully.

Let me be frank. The States that fund and support the Syrian armed opposition - namely Saudi Arabia, Qatar, Kuwait and the United States - must ensure that those armed groups that benefit from their money and their arms, conduct their hostilities in line with international humanitarian law. That means, in practice, that they do not use those arms to target civilians, that they do not torture when they detain and that they do not execute those they capture.

Similarly, Russia and Iran must use their leverage to pressure the Syrian Government to reign in their armed forces. They must observe the distinction between civilians and those who are directly participating in hostilities. They must conduct their attacks proportionally. Civilians who are in areas that the Government views as sympathetic to the opposition should not be targeted for their geographic proximity, their sectarian affiliation or their political beliefs.

These States must take it upon themselves to take appropriate action to "ensure respect" for IHL. As members of the IHL international community, we must remind them to do so.

We must also consider what tools we have in our arsenal to influence the parties to the conflict in Syria to adhere to their obligations. There is an emerging norm that arms transfers should not be undertaken where there is a real risk that they will be used in the commission of crimes against humanity, violations of international humanitarian law or war crimes. In Syria, this risk is real. Influential States must recognize that further arms shipments to Syria are likely to be used in the perpetration of violations and crimes both by Government forces and its affiliated militia, and anti-government groups.

There is a devastating human cost to the availability of weapons. There is also a political cost. Weapons fuel the parties' illusion that they can win this war, pulling them farther into battle and further away from the negotiating table. Those who supply arms to the various warring parties are not creating the ground for victory but rather the illusion of victory. This is a dangerous and irresponsible illusion as it allows the war to unfurl endlessly before us. As the conflict extends, it opens the door to further immense human suffering and the possible conflagration of an entire region.

Accountability for war crimes

There is a growing tendency for commissions of inquiry to act as tools of international accountability. This function has evolved in the absence of universal compulsory jurisdiction by international judicial bodies. In the case of Syria, this gives the Commission a degree of added value and significance - both in its ability to act as a catalyst toward international criminal accountability, and in enhancing any future adjudicative process with the body of evidence and information collected under its mandate.

The Commission of Inquiry reflects the promise of accountability. Justice in a political world can be a long game. There may be no referral to justice today or tomorrow but, as courts such as the Cambodia Tribunal make clear, crimes are not forgotten.

Crimes are not forgotten because gross violations of international humanitarian law and atrocities are not spontaneous - there are individuals who are responsible for their perpetration. Wars that go on for years - wars that escalate, wars that are characterized by ruthless bloodshed, are led by individuals who make calculated choices to kill civilians, to torture captured soldiers, to order their subordinates to attack hospitals. Sectarian

hatred and violence is deliberately incited by political and military leaders who battle for authority and control.

In such a context, the removal of leaders and commanders who have a vested interest in the conflict and fuel it through the perpetration of crimes can make a positive contribution to ending the conflict and bringing peace. Not everyone should be at the negotiating table. The worst offenders should not get to set the terms of a future peace.

There must be a referral to justice in Syria. If international humanitarian law is to have any teeth, there must be consequences for conduct that defies its rules.

L’expérience du conflit au Mali

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“Quand les armes parlent, les lois se taisent” nous disait Cicéron. En fait, cette citation n’est heureusement plus exacte depuis longtemps. Et depuis mon arrivée au Ministère de la défense, comme Directrice des affaires juridiques, il y a un an, je constate chaque jour davantage combien le droit est présent au quotidien dans l'action des forces armées, y compris au cœur même des opérations.

Les armées françaises ont intégré le respect des normes juridiques du droit international humanitaire (DIH) et notamment celles liées à l’emploi de la force. J’en veux pour preuve l’implication de mes services, mais également de plusieurs autres entités du ministère de la défense, dans les actions de conseil juridique auprès des états-majors chargés de la planification et de la conduite des opérations. La récente intervention au Mali me permet d'illustrer mon propos pour insister sur le caractère concret des actions de conseil juridique menées, et sur l’importance accordée au respect du DIH, notamment en ce qui concerne la question sensible des personnes capturées au cours des opérations.

La nécessité d'un conseil juridique présent et réactif à tous les niveaux

Au niveau central: deux acteurs complémentaires

Au niveau central, deux organismes sont principalement chargés du conseil juridique auprès du ministre de la défense et de l’État-Major des Armées (EMA). Il s’agit de la Direction des Affaires Juridiques (DAJ) d’une part, et de la cellule “juridique-opérationnelle” de l’État-Major des armées (EMA/JUROPS) d’autre part.

La répartition des rôles, de manière schématique, peut être ainsi résumée. La DAJ assure l'expertise des sujets structurants et des questions de principe et s’occupe du conseil à moyen et long terme: études de fond sur le DIH, caractérisation du cadre juridique du conflit et des normes applicables, élaboration de doctrines juridiques qui sont ensuite déclinées et interprétées par l’EMA/JUROPS.

L’EMA/JUROPS agit au niveau opérationnel et s’occupe du conseil à court voire très court terme, principalement au profit de l’EMA: développement et vérification des règles opérationnelles d’engagement

(ROE), conseil juridique en matière de ciblage et pour toute question urgente émanant des théâtres d'opération.

Lors du déclenchement de l'opération "Serval" au Mali, le 11 janvier 2013, la DAJ, a analysé des conditions initiales de la situation et caractérisé le conflit au Mali comme présentant les caractéristiques d'un conflit armé non international (CANI) entre, d'une part, les autorités maliennes et, d'autre part, des groupes armés, au vu entre autres de l'intensité des combats et des méthodes utilisées, et du contrôle d'une partie du territoire malien par ces mêmes groupes armés. La France est depuis lors intervenue à la demande et en soutien aux autorités maliennes.

Par ailleurs, la DAJ, une fois déterminée la nature du conflit, a rappelé les grands principes et les textes applicables, à savoir l'article 3 commun aux Conventions de Genève (CG) du 12 août 1949 et le II^{ème} Protocole Additionnel (PA II) aux conventions de Genève du 8 juin 1977, qui devaient ainsi guider et encadrer l'action des troupes françaises. Par ailleurs une coordination étroite existe avec les services du ministère des affaires étrangères, notamment pour la préparation et la négociation de l'accord sur le statut des forces françaises (SOFA) et les conditions de leur stationnement.

Parallèlement, l'EMA/JUROPS a développé des projets de ROE destinées aux forces françaises, et a apporté son analyse juridique en participant au groupe de ciblage, chargé de définir la nature et les conditions de frappes sur un certain nombre d'objectifs planifiés (centres de commandement, dépôts de munitions, chefs de groupes armés). Dans toutes ses actions, le souci des juristes a été de vérifier que les ROE et les opérations de ciblage respectaient bien les principes du DIH (discrimination entre objectif militaire et biens civils, proportionnalité des frappes, nécessité militaire et principe d'humanité.

Au niveau local: des LEGAD déployés sur le terrain

Le tableau du conseil juridique au cours d'une opération menée par les forces françaises ne serait pas complet si je ne mentionnais les conseillers juridiques (LEGAD: *Legal Advisors*) placés auprès des forces, et qui conseillent, sur le terrain, les chefs militaires, relayant et précisant ainsi l'action des services juridiques centraux. Nous respectons ainsi nos obligations découlant de l'article 82 du 1er Protocole additionnel, demandant que le commandement puisse bénéficier à l'échelon approprié, d'un conseil juridique, principe que nous appliquons non seulement en situations de Conflit Armé non International (CANI) mais pour toute opération où sont engagés des effectifs conséquents.

Ces officiers juristes étaient placés au sein de l'État-Major dit de niveau "opératif", chargé de la conduite sur place des opérations, ainsi que dans les états-majors terrestres et aériens qui lui étaient subordonnés. Au plus fort des opérations, en début d'année 2013, 4 LEGAD ont ainsi été déployés. Le premier auprès de l'état-major de la composante aérienne, au Tchad, le deuxième auprès de l'état-major de la brigade terrestre, à Bamako puis Gao, le troisième auprès de la composante des forces spéciales, et enfin le quatrième, chapeautant les 3 précédents, auprès de l'état-major interarmées coordonnant l'activité des forces aériennes et terrestres, à Bamako. Ce dernier poste a d'ailleurs été "ouvert" par un agent de la DAJ, le Commissaire en chef de deuxième classe Géry Balcerski, adjoint du Chef de bureau du Droit des Conflits Armés (DCA), présent ici avec moi. Je considère que le départ régulier en OPEX des militaires présents à la DAJ est normal et permet, non seulement de prodiguer un conseil juridique de terrain efficace mais aussi me fournit un retour indispensable à la justesse de nos analyses.

Il revenait aux LEGAD de diffuser les directives juridiques émanant soit de mes services, soit de l'EMA/JUROPS. Ils constituent le premier échelon de conseil et répondent aux questions des opérationnels, notamment en évaluant le caractère légal des options envisagées.

Ceci me permet de souligner que ces officiers font l'objet d'une formation spécifique, constituée de stages pratiques et théoriques, destinés à leur donner une compétence élargie en matière de droit international humanitaire. Ces stages s'effectuent soit au sein des armées françaises, soit auprès d'organismes extérieurs. Mes services sont coresponsables de l'élaboration du cursus de formation des LEGAD. Ils organisent ainsi un certain nombre de stages et participent aussi aux formations au sein des armées (près de 160 heures de cours en 2012, + 30% par rapport à 2011, *cf.* dossier). L'Institut International de Droit Humanitaire de Sanremo (IIDH) figure en bonne place parmi les structures dans lesquelles nos LEGAD se forment. Un partenariat entre l'IIDH et l'Ecole des officiers juristes de Salon de Provence (Ecole des Commissaires des Armées) vient d'ailleurs d'être signé, et des formations annuelles conjointes s'y dérouleront à compter de cette année.

Les armées françaises ont donc non seulement intégré les contraintes juridiques, mais elles se sont en plus dotées, à tous les niveaux, de structures de conseil qui permettent une mise en œuvre réelle du respect du DIH. Quels sont les problèmes juridiques qui se sont posés au cours de l'opération "Serval", et comment y avons-nous répondu?

Des questions sensibles qui ont généré des réponses adaptées à la crise malienne

Le statut des personnes capturées

Dès le début de l'opération, il a été précisé que les personnes qui pourraient être capturées par les forces françaises ne pouvaient prétendre au statut de prisonniers de guerre, puisque nous étions en CANI et que le statut de prisonnier de guerre n'existe qu'en situation de conflit armé international, mettant aux prises un Etat contre un ou plusieurs autres.

Néanmoins, les droits de ces "personnes privées de liberté en raison des hostilités" sont cependant bien précisés par l'article 3 commun aux Conventions de Genève et le II^{ème} Protocole Additionnel: interdiction de tout traitement cruel ou dégradant, de la torture, etc.

Des directives rédigées en coordination entre les services juridiques et les états-majors ont rappelé les principes à respecter et les ont déclinés en directives de plus en plus précises: description des conditions de rétention, nécessité d'offrir aux personnes une nourriture et des soins comparables à ceux dont bénéficiaient les soldats français, encadrement des interrogatoires, afin d'éviter tout risque de mauvais traitement par exemple.

Les conditions du transfert des personnes capturées

Le fondement de notre intervention, c'est-à-dire la demande d'assistance des autorités maliennes, impliquait que nous puissions, dans la mesure du possible, leur transférer les personnes capturées sur leur territoire, afin qu'elles les détiennent et les jugent le cas échéant.

Nous abordons ici un problème central qui n'est pas nouveau (il s'est déjà posé en Afghanistan): celui du transfert des personnes capturées et de leur remise aux autorités locales, dans le respect de nos obligations conventionnelles (DIH, mais aussi CEDH), et constitutionnelles (interdiction de la peine de mort).

Notre souci a été de sauvegarder la sécurité juridique des responsables et militaires français, en s'assurant que les autorités maliennes s'engageraient également à traiter correctement les personnes transférées.

A cette fin, l'accord de statut des forces conclu avec le gouvernement malien, le 8 mars 2013, encadre la possibilité de tels transferts (article 10 de l'accord publié au Journal officiel de la République française du 30 avril 2013), les conditionnant à l'engagement des autorités maliennes d'assurer aux personnes transférées un traitement exempt de tout acte inhumain ou dégradant, et l'interdiction de toute forme de torture. Par ailleurs, les autorités maliennes se sont engagées à ne pas prononcer, ni *a fortiori*

appliquer la peine de mort à l'égard de ces personnes, ainsi qu'à ne pas les extrader vers un pays tiers, qui n'aurait pas souscrit à de telles garanties. Enfin, elles ont accepté que les autorités françaises puissent régulièrement visiter les personnes retenues afin de s'assurer de leur bon traitement après le transfert. La possibilité de faire effectuer des visites par des organisations agréées par les parties maliennes et françaises est également prévue.

Sur le terrain, les conseillers juridiques ont été à la manœuvre, développant des procédures de transfert offrant des garanties suffisantes en termes de suivi et de transparence.

Ainsi, au cours d'une opération de transfert, les personnes retenues sont tout d'abord enregistrées par une équipe du CICR, ce qui permet à ce dernier de suivre ces personnes par la suite.

La présence d'enfants-soldats sur le théâtre

La question des enfants-soldats s'est posée. Nous n'étions pas désireux de traiter de manière indifférenciée ces personnes plus vulnérables, qui sont spécialement protégées par certaines dispositions du DIH (exemple: rétention dans un endroit séparé des adultes) et avons donc convenu, avec les autorités maliennes, que ces dernières remettraient les personnes de moins de 18 ans à l'UNICEF, à charge pour cette dernière organisation de les prendre en charge soit dans des structures hospitalières, soit dans des orphelinats. Bien entendu, la première difficulté était d'établir avec certitude l'âge des individus.

Un bilan provisoire des visites post-transfert positif

Les premières visites post-transfert ont ensuite été menées, et n'ont révélé à ce jour aucun mauvais traitement avéré sur les personnes transférées. Je tiens d'ailleurs à souligner ici la bonne volonté des autorités maliennes, qui ont tout fait pour faciliter la mise en œuvre de ces mesures de transparence. Il va de soi qu'au-delà du respect des normes juridiques en la matière, le fait d'être irréprochable contribue à la crédibilité et à la légitimité de l'opération.

Cependant, pour nous juristes, ce dossier n'est pas terminé. Nous étudions désormais dans quelles conditions et jusqu'à quand ces visites aux personnes transférées devront être poursuivies, notamment avec la décroissance des effectifs de l'opération "Serval".

Le bon déroulement de ces rétentions et de ces transferts s'expliquent par plusieurs raisons:

a) Tout d'abord le faible nombre de personnes concernées: on parle en tout et pour tout de trente à quarante personnes capturées et transférées depuis le début de l'intervention, ce qui a évidemment facilité les aspects logistiques de leur rétention et de leur transfert, en rendant plus aisé leur suivi.
b) La mise en place, très tôt, de directives appropriées insistant sur les risques potentiels (mauvais traitement) et les mesures à prendre pour les éviter. En cela, l'expérience d'autres contingents sur d'autres théâtres nous a été précieuse. Le système britannique de visite des prisonniers transférés aux autorités afghanes en est un exemple.
c) La sensibilisation des troupes et des cadres, à tous les niveaux, au respect des fondamentaux juridiques (pas de mauvais traitement) a facilité les choses.
d) La prise en compte du problème au plus haut niveau, concrétisé par la signature d'un accord entre gouvernements insérant une clause spécifique sur les transferts.
e) La présence de conseillers juridiques formés et prêts à affronter ce genre de problématique a également été un atout.

En conclusion, on vient de montrer, par des exemples concrets, que les aspects juridiques du DIH étaient pris en compte au cours des opérations, notamment grâce à l'existence de structures de conseil juridiques, aussi bien au niveau central que sur le terrain.

Mais le bon respect du DIH est un défi constant car il tient à plusieurs facteurs. Il est donc indispensable de tirer les leçons des déploiements opérationnels et nous le ferons, y compris avec nos partenaires et alliés, le CICR et d'autres.

The Arab Spring and the observance of IHL in recent conflicts

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Introduction

The following briefing note aims to provide the necessary background information on international humanitarian law (IHL) and its relevance during non-international armed conflicts. The objective is to highlight key points that can be used to guide the talking points for Dr. Mohammed Al Maadheed's speech during the 36th Roundtable on Current Issues of International Humanitarian Law focusing on "Respecting IHL: Challenges and Responses."

To this end, the briefing note provides background information on the applicability of IHL during non-international armed conflicts (i.e. internal conflicts) with a specific focus on civilian protection and humanitarian access assistance.[1] It is important to note that the only two Arab Spring uprisings that turned into a non-international armed conflict (as opposed to internal crisis or civil unrest) were Libya and Syria. As a result, these are the only two countries where IHL is applicable. Although IHL is applicable in regions of Yemen where there is currently fighting between government forces and insurgent groups, this conflict is not a result of Arab Spring-related uprisings in Yemen.

[1] Please note that this is not intended to be an official or academic document, and information has been selected and extracted from a variety of documents without proper citation.

Background[2]

International Humanitarian Law and Civil Conflict

International humanitarian law, also referred to as the law of armed conflict or the law of war, comprises a set of rules established by treaty or custom applicable in situations of armed conflict. It is inspired by considerations of humanity and the mitigation of human suffering. The basic rules of IHL are as follows:

1. It is forbidden to kill or injure an enemy who surrenders, or who is *hors de combat* (i.e. a noncombatant);
2. The wounded and the sick shall be cared for and protected by the party to the conflict which has them in its power. The emblem of the "Red Cross," or of the "Red Crescent," shall be required to be respected as the sign of protection;
3. Captured combatants and civilians must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief;
4. No-one shall be subjected to torture, corporal punishment or cruel or degrading treatment;
5. Parties to a conflict, and members of their armed forces, do not have an unlimited choice of methods and means of warfare;
6. Parties to a conflict shall at all times distinguish between the civilian population and combatants. Attacks shall be directed solely against military objectives.

Although the origins of IHL can be traced to at least the nineteenth century, the principles and practices on which it is based are much older. IHL is designed to balance humanitarian concerns and military necessity. It subjects warfare to the rule of law by limiting its destructive effect and mitigating human suffering. IHL covers two key areas:

- Protection and assistance to those affected by the hostilities
- Regulation of the means and methods of warfare

The sources of IHL are the same as those for international law in general. These include:

[2] Information from this section is extracted from: www.gsdrc.org/go/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/-principles-and-legal-provisions/overview-of-international-humanitarian-law#niac; www.icrc.org/ihl/WebART/365-570006; www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument; www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13463; www.hpcrresearch.org/blog/dustin-lewis/2012-03-12/briefing-note-does-ihl-apply-humanitarian-situation-syria.

International conventions

The two main treaty sources of IHL are the Hague Convention (1907), setting out restrictions on the means and methods of warfare, and the four Geneva Conventions (GCs) (1949), providing protection to certain categories of vulnerable persons. These are the wounded and sick in armed forces in the field (GCI); the wounded, sick and shipwrecked members of armed forces at sea (GCII); prisoners of war (GCIII); and protected civilians (GC IV). The Fourth Geneva Convention is particularly relevant to humanitarian protection and assistance. It was established to prevent in future conflicts the scale of civilian suffering experienced during the two World Wars.

In light of the evolving nature and scale of war and, in particular, the increasing number of civil wars in comparison to international wars, new provisions have been added prohibiting certain methods of warfare and addressing issues that are unique to civil wars. The two branches of law covered in The Hague and Geneva Conventions are further developed by the first two Protocols Additional to the Geneva Conventions on the protection of civilians (1977). These are referred to as Additional Protocol I (AP I), governing international armed conflict, and Additional Protocol II (AP II), governing non-international armed conflict.

The four Geneva Conventions have achieved universal applicability as they have been universally ratified. The Additional Protocols, however, have yet to achieve near-universal acceptance. For example, AP II relating to the Protection of Victims of Non-International Armed Conflicts has been ratified by only 160 countries. The United States and several other significant military powers (e.g. Iran, Israel, India and Pakistan) are currently not parties to the protocols.

International customs

A comprehensive study by the International Committee of the Red Cross (ICRC) on IHL and customary law indicates that the majority of rules enshrined in treaty law have received widespread acceptance and have had a far-reaching effect on practice. They thus have the force of customary law. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[1] That is to say, acts must be taken by a significant number of States and not be rejected by a significant number of States. The elements of customary international law include:

- Widespread repetition by States of similar international acts over time (State practice).

- Acts must occur out of sense of obligation (*opinio juris*)

Some provisions in The Hague and Geneva Conventions were reflections of existing customary law, whereas others have developed into customary law. They are, therefore, binding on all States regardless of ratification, and also on armed opposition groups in the case of non-international armed conflict. The application of customary international law is particularly significant for non-international armed conflicts, as treaty law has remained limited in this area.

- General principles of law

IHL recognises a number of jus cogens norms from which no derogation is allowed, for example, prohibitions against genocide and torture.

- Judicial decisions and the teachings of the most highly qualified publicists as subsidiary sources.

International courts have played a role in interpreting and developing IHL (examples are provided in this guide).

I. Application of IHL to Non-International Armed Conflict (NIAC)

IHL applies only to situations of armed conflict and applies to all actors in an armed conflict, including non-international armed conflict. However, a much more limited range of written rules apply to non-international conflicts. By setting limits on how the parties may conduct hostilities and protecting all persons affected by the conflict, IHL imposes obligations on both sides of the conflict equally, though without conferring any legal status on the armed opposition groups involved.

The distinction made by humanitarian law between international and non-international armed conflicts has a political basis. Many were opposed to any international regulation of non-international armed conflicts, despite the humanitarian imperatives. Traditionally, States were reluctant to grant any international legal status to rebels, to recognise rebel movements or to legitimise warfare by anyone other than its armed forces. When rebels took up arms against States, States preferred to deal with them under their national law, trying them as common criminals. In this case, the resort to force itself would be illegal and the rebels would be tried for war crimes even without any other violation of international humanitarian law. International law precluded interference by other States in the internal affairs of other States, and States were allowed to use necessary means to suppress rebellions and preserve the territorial integrity of the State. Further, only States were considered as subjects of international law, and it was not conceived how non-state actors, such as rebels, could derive rights and duties under international law. At the same time, it was clear that the

humanitarian problems created by internal armed conflict demanded some sort of an international response.

Article 3 common to the Geneva Conventions applies in the case of 'armed conflict not of an international character', whether between a State and a non-state armed group or between non-state armed groups. Article 3 states[3]:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for."

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Examples of recent non-international armed conflicts include the hostilities that broke out in northern Mali in early 2012 between armed groups and the Malian armed forces, and the fighting in Syria between armed groups and Syrian government forces. In early May 2012, the President of the ICRC declared that the violence in at least two places had reached the threshold of an armed conflict of a non-international character

[3] See: www.icrc.org/ihl/WebART/365-570006.

governed by international humanitarian law. Jakob Kellenberger said that conflict in Homs and the province of Idlib met the three criteria of a non-international armed conflict: intensity, duration and the level of organisation of rebels fighting government forces.

Additional Protocol II of 1977 was adopted to address some of the deficiencies in the law regarding non-international armed conflicts. As an entire Protocol, as opposed to a single article, it regulates in greater detail than common Article 3 situations of armed conflict within a single State. However, especially in comparison with Protocol I, addressed to international armed conflicts, it is very inadequate. It leaves unaddressed many aspects of non-international armed conflicts, in particular, the permissible methods and means of warfare and it also lacks a criminal enforcement mechanism equivalent to the grave breaches provisions.

In order to be classified as a NIAC - and not simply as a case of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' - the International Criminal Tribunal for the Former Yugoslavia has indicated that two factual criteria must be satisfied:

- The violence must reach a certain level of intensity that distinguishes it from situations of internal disturbances such as riots and isolated acts of violence
- The parties involved must demonstrate a certain level of organisation.

For the first criterion, factors to consider include the collective nature of the fighting and resort to armed force by the State, the duration of the conflict, the nature of the weapons, the frequency of attacks and the number of victims. For the second criterion, it is assumed that government forces automatically fulfill the requirement. As for non-state armed groups, elements to consider include the existence of a command structure and/or internal rules, and the ability to recruit and train new combatants. Only if these two criteria are satisfied will a conflict be classified as NIAC under Article 3 of the Geneva Conventions.

However, Article 1 of Additional Protocol II affirms these criteria but sets a higher threshold to fulfill the criteria of parties involved. That is, according to Article 1, NIACs APII applies to armed conflicts which take place on the territory of a High Contracting Party and which involve the armed forces of the State and one or more armed rebel groups. A further limitation on the Protocol's applicability, as compared with common Article 3, is the stated requirement that the rebel groups must operate under a responsible command and control a portion of the national territory. The logic of this requirement is that if the rebel group does not control some territory, then, as a practical matter, it will probably not be in a position to carry out sustained and concerted military operations and to implement the Protocol. However, the control requirement may also make some States

less willing to admit the applicability of the Protocol, since for a State to admit the application of Protocol II is to concede that it has lost control of a part of its national territory.

The Protocol does not apply automatically when the above conditions are met; instead, there is an additional criterion: the armed groups opposing the State must evidence their willingness to be bound by the Protocol (this willingness could be indicated by actually applying its terms or by making a declaration that they intend to be bound). Unless the rebels claim to be the legitimate government, in which case it could bind them automatically even without their consent, the Protocol only kicks in once they demonstrate their willingness to be bound by it.

Protocol II sets out a list of fundamental guarantees in Article 4. It states, as a general principle, (1) that "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."

Although State practice continues to distinguish IHL application between international and non-international conflicts, this has been criticised as arbitrary and impractical due to the nature of modern conflicts. However, the law has developed over the years to provide greater coverage of non-international armed conflicts. Gaps in the regulation of the conduct of hostilities in Additional Protocol II regulating non-international armed conflict have largely been filled through customary international law. Nonetheless, gaps remain in the protection framework in the aftermath of conflict. These can result in challenges in humanitarian protection and in the delivery of humanitarian assistance to populations still in need as a result of internal/civil conflict.

II. Protection of Civilians

Among the rules that the parties to an armed conflict must respect when conducting hostilities, there is the prohibition of direct attacks against civilians; the prohibition of indiscriminate attacks; the obligation to respect the principle of proportionality in attack; and the obligation to take all feasible precautions in planning and executing military operations so as to avoid as far as possible civilian casualties.

While the Fourth Geneva Convention focuses on civilian population, the two Additional Protocols adopted in 1977 extend and strengthen civilian protection in international (AP I) and non-international (AP II) armed conflict, for example, by introducing the prohibition of direct attacks

against civilians. A 'civilian' is defined as 'any person not belonging to the armed forces', including non-nationals and refugees (AP I, Art 50(1)). As such, the following principles are enshrined in IHL today:

The principle of distinction protects civilian persons and civilian objects from the effects of military operations. It requires parties to an armed conflict to distinguish at all times and under all circumstances between combatants and military objectives on the one hand and civilians and civilian objects on the other - and to only target the former. It also requires that civilians lose such protection should they take a direct part in hostilities (AP I, Art.s 48, 51-52, 57; AP II, 13-16). The principle of distinction has also been found by the ICRC to be reflected in State practice and thus an established norm of customary international law in both international and non-international armed conflicts.

Necessity and proportionality are established principles introduced in humanitarian law. Under IHL, a belligerent can apply only the amount and kind of force necessary to defeat the enemy. Further, attacks on military objects must not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated (AP I, Art.s 35, 51(5)). Every feasible precaution must be taken by commanders to avoid civilian casualities (AP 1, Art.s 57, 58). The ICRC has also found the principle of proportionality to form part of customary international law in international and non-international armed conflicts

The principle of humane treatment requires that civilians are treated humanely at all times (GCIV, Art. 27). Common Article 3 of the GCs prohibits violence to life and person (including cruel treatment and torture), the taking of hostages, humiliating and degrading treatment, and execution without regular trial against non-combatants, including persons *hors de combat* (wounded, sick and shipwrecked). Civilians are entitled to respect for their physical and mental integrity, their honour, family rights, religious convictions and practices, and their manners and customs (API, Art. 75(1)). This principle of humane treatment has been affirmed by the ICRC as a norm of customary international law applicable in both international and non-international armed conflicts.

The principle of non-discrimination is a core principle of IHL. Adverse distinction based on race, nationality, religious belief or political opinion is prohibited in the treatment of prisoners of war (GCIII, Art. 16), civilians (GCIV, Art. 13, common Article 3) and persons *hors de combat* (common Article 3). All protected persons shall be treated with the same consideration by parties to the conflict, without distinction based on race, religion, sex or political opinion (common Article 3, GCIV, Art. 27). Each and every person affected by armed conflict is entitled to his/her fundamental rights and guarantees, without discrimination (API, Art. 75(1)). Prohibition against

adverse distinction is considered by the ICRC as part of customary international law in international and non-international armed conflict.

Women and children are granted preferential treatment, respect and protection. Women must be protected from rape or any form of indecent assault. Children under the age of 18 must not be allowed to take part in hostilities (GCIV, Art.s 24, 27; API, Art.s 76-78; APII, Art. 4(3))

III. How are humanitarian principles treated in IHL?

The right to humane treatment is at the core of IHL. It is a basic obligation codified in various provisions of the Geneva Conventions and its Additional Protocols, in particular, Article 27 of the Fourth Geneva Convention protecting civilians and in common Article 3 governing non-international conflicts.

The law of neutrality, which stems from State practice and The Hague Conventions, is defined in international law as 'the status of a State which is not participating in an armed conflict between other States'. It encompasses the right not to be 'adversely affected' and the duty of non-participation. Under The Hague Convention V, humanitarian assistance for the sick and wounded is not considered to be a violation of neutrality even if it benefits only the sick and wounded from one party to the conflict (Art. 14).

In more recent times, there have been concerns that diversion of humanitarian assistance and misuse of aid by parties to international and non-international conflicts can undermine the neutrality of assistance, in terms of non-participation in hostilities (direct and indirect). While neutrality is not specifically mentioned in the Geneva Conventions or Additional Protocols, there are provisions that can relate to aspects of neutrality. Article 23 of the Fourth Geneva Convention obliges a party to allow free passage of goods through its territory intended for the civilians of another party to the conflict. However, this is only enforceable if the obligated party has no reason for fearing that these goods may be diverted or that they may result in a military advantage to the enemy. Proper control by the humanitarian organisation transporting the goods is considered essential to ensure that the goods do not indirectly advance one side of the conflict.

Impartiality is needs-based provision of assistance, incorporating non-discrimination and the absence of subjective distinctions (e.g. whether an individual is innocent or guilty). Various provisions of the Geneva Conventions and Additional Protocols state the importance of equal treatment of protected persons without distinction and entitlement to fundamental rights without discrimination.

IV. How are humanitarian assistance and access treated in IHL: What duties and rights exist?

The Geneva Conventions and Additional Protocols do not define "humanitarian assistance" but provide a basic description of the rights and responsibilities of parties to the conflict and the potential role for humanitarian agencies. The provision of relief to civilian populations during non-international armed conflicts falls within the scope of Additional Protocol II and common Article 3. Since the conventions and protocols are addressed to States, they do not directly confer rights or obligations upon humanitarian agencies. Provisions in the GCs and APs describe situations in which States must allow humanitarian assistance to be delivered to civilians in their power, the forms of assistance that are entitled to protection, and the conditions which States are allowed to impose on their delivery. These provisions are relevant and useful to humanitarian agencies as they provide insight and guidance into the conditions that they must meet should they seek to provide assistance. They also provide tools to argue for and to secure humanitarian access and cooperation from States, other parties to the conflict and countries that fall under the transit route for delivery of assistance.

Under IHL, the parties to the conflict have the duty and primary responsibility to provide humanitarian assistance to civilians and civilian populations under their control. There are, however, also provisions that allow for the possibility (with certain conditions) of humanitarian organisations to undertake relief actions.

The rules on humanitarian access and assistance can be distinguished by type of conflict:

(a) International armed conflict (situations of occupation)

Articles 55 and 56 of GCIV provide that the occupying power has the duty to ensure food, medical supplies, medical and hospital establishments and services, and public health and hygiene to populations in the occupied territory. This duty was extended in AP I to include the duty to ensure bedding, means of shelter and other supplies essential to the survival of the civilian population (Art. 69). Article 59 of the GCIV further states that: 'If the whole or part of the population of an occupied territory is inadequately supplied the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them […] Such schemes, which may be undertaken either by states or by impartial humanitarian organisations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.'

National Red Cross Societies or other relief societies 'shall be able to pursue their activities' in accordance with Red Cross principles or under

'similar conditions' (respectively), subject to 'temporary and exceptional measures imposed for urgent reasons of security' (GCIV, Art 63).

Thus, in situations of occupation, the obligation of occupying authorities to facilitate and cooperate with relief schemes is unconditional. There is a relatively wide space provided to humanitarian organisations, provided that they are impartial and operate in accordance to humanitarian principles. Article 59 of GCIV allows occupying authorities to retain a certain 'right of control', however, such as the right to search the relief consignments, to regulate their passage and to ensure that they are directed at the population in need.

(b) International armed conflict (outside of occupation)

Article 70(1) of API states that if the civilian population under the control of a party to the conflict is not adequately provided with relief supplies, 'relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken'. This is, however, subject to the agreement of the parties concerned with such actions. Additional provisions require that civilians are enabled to receive the necessary assistance. State parties are obligated to allow free and rapid passage of all relief consignments, equipment and personnel, regardless of whether they are being delivered to the civilian population of the enemy (GCIV, Art. 23; API, Art. 70(2)).

(c) Non-international armed conflict

Provisions on humanitarian assistance are the least developed in this context. Common Article 3 simply provides that 'an impartial humanitarian body, such as the [ICRC], may offer its services to the Parties to the conflict'. Article 18(1) of Additional Protocol II adds that domestic relief societies, such as National Red Cross/ Red Crescent Societies, may 'offer their services' as may the civilian population itself. International relief is addressed in Article 18(2), which states that where the civilian population 'is suffering undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies, relief actions […] of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken'. Similar to the international conflicts outside of occupation, this is subject to the consent of the State party concerned. In this context, it entails the State giving consent for assistance to the insurgent side. Although it is difficult to determine the threshold of 'undue hardship', ICRC commentary on the Additional Protocols suggests that the 'usual standard of living of the population concerned' should be taken into consideration (p. 1479).

The combination of statements that relief actions 'shall be undertaken' but with the agreement or consent of State parties has resulted in debate over the extent to which parties to both international and non-international armed conflicts are obligated to accept assistance. State practice, however,

does not emphasise the requirement of consent. The view is that so long as there is humanitarian need and organisations and relief actions meet the requisites of being humanitarian and impartial in character and without adverse distinction, governments cannot arbitrarily refuse assistance. The ICRC's study found that it was a norm of customary international law in international and non-international conflicts that governments cannot arbitrarily refuse assistance. The study also found that parties to the conflict are obligated to allow and facilitate humanitarian assistance in any kind of conflict where civilians are in need (subject to their right to exercise control over relief actions). This is based on practice in the field, various UN resolutions and other sources. While this position has been supported by various scholars, there is still debate on the issue.

IHL offers some specific rules on access and delivery of humanitarian assistance in international armed conflicts. However, there are few treaty rules that address conditions of access and delivery of humanitarian assistance in non-international armed conflicts. Nonetheless, the ICRC's customary law study asserts that there is enough practice to justify extending the requirement that the party in control must facilitate free passage and rapid distribution of relief in situations of internal conflict. It also found that the freedom of movement of authorised relief personnel essential to fulfil their humanitarian functions is also required under customary international law. It is still debatable, however, whether there is enough practice to find a "right to access" under customary law.

V. Penalties for violating IHL during non-international armed conflicts

Unlike the Geneva Conventions and Additional Protocol I, neither common Article 3 nor Additional Protocol II provide for the repression of breaches of the law. Penal prosecutions of nationals are left up to the national authorities. Common Article 3 does not allude at all to how breaches of its provisions should be treated; in this absence, it is assumed that the matter is regulated by national law. Protocol II refers in Article 6 to Penal Prosecutions, but this refers to national prosecutions and merely articulates the rights and duties applicable during national prosecutions of persons for crimes related to the armed conflict. The Article also states that at the end of hostilities, the authorities in power should endeavour to grant the broadest possible amnesty. The amnesty was envisaged for persons whose only crime was to have participated in the conflict. In other words, the act of taking up arms should preferably not itself be punished.

Because of the absence of anything equivalent to the grave breaches provisions, complying the States to prosecute persons who had committed atrocities during non-international armed conflicts, it was long considered

that war crimes, at least if we think of them as international crimes, could only be committed during an international armed conflict. Because no international criminal enforcement mechanism was envisaged for crimes committed in non-international armed conflicts, these were not war crimes strictly speaking-although they were prohibited acts committed during war-but crimes under national law. In an international sense, they could be considered as unlawful acts rather than crimes.

VI. Humanitarian intervention

Humanitarian intervention involves the use of military force by the international community to protect civilians trapped in a humanitarian emergency without the express authorization of the government of the country in which the intervention takes place. The lack of authorization from the government where the humanitarian emergency is taking place implies that a case warranting humanitarian intervention might emerge either in case the government itself is the perpetrator of human rights violations or the government ceases to function, i.e., the country becomes a failed State. Although ideally it would be preferable to develop the international community's strengths in mediating disputes or resolving conflicts through peaceful means, humanitarian intervention is usually treated as the last resort to deal with extreme cases of human suffering. The instances of humanitarian emergency that would justify intervention by the international community usually include egregious violations of human rights resulting in massive loss of life, acts of genocide, ethnic cleansing.

Although there exists no one standard or legal definition of humanitarian intervention, the US Council on Foreign Relations Policy Institute has identified specific characteristics that define a humanitarian intervention.[4] These include:

1. A humanitarian intervention involves the threat and use of military forces as a central feature;
2. It is an intervention in the sense that it entails interfering in the internal affairs of a State by sending military forces into the territory or airspace of a sovereign State that has not committed an act of aggression against another State;
3. The intervention is in response to situations that do not necessarily pose direct threats to States' strategic interests, but instead is motivated by humanitarian objectives.

[4] See, www.cfr.org/humanitarian-intervention/humanitarian-intervention-crafting-workable-doctrine/p.3814.

Therefore, humanitarian interventions generally refer to a State using military force against another State when the chief publicly declared aim of that military action is ending human rights violations being perpetrated by the State against which it is directed. Variations on this definition may limit humanitarian interventions to instances where there is an absence of host State consent or to cases where there has been explicit UN Security Council authorization for action.[5]

The debate over the definition and legality of humanitarian interventions has remained a compelling foreign policy issue and illustrates the tension between the principle of State sovereignty and increasing importance placed on protecting human rights, even with the use of force. The entire UN system (not to mention the global political structure) and international law are rooted in the sanctity of a State's sovereignty over its citizens and territory. Those who aim to preserve the inviolability of sovereignty argue that humanitarian interventions are simply a pretext to cover true military and political agendas.[6] Indeed, many criticized NATO and its allies for intervening in Libya in 2011 to reap material gains from the country's oil fields. However, since the end of the Cold War, there has been a shift in international norms toward prioritizing the protection of human rights over State sovereignty. This was manifested in a number of humanitarian interventions throughout the 1990s rooted in the belief that human rights abuses warrant a collective armed response.

[5] Jennifer M. Welsh. *Humanitarian Intervention and International Relations.* Ed. Jennifer M. Welsh. New York: Oxford University Press, 2004

[6] Marjanovic, Marko (2011-04-04) "Is Humanitarian War the Exception?" Mises Institute.

II. Working towards respect for IHL through training and dissemination

IHL dissemination: the ICRC's evolving experience in prevention

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"If the Convention is to be implemented, its spirit must be introduced into the customs of soldiers and of the population as a whole. Its principles must be popularized through extensive propaganda", Gustave Moynier, 1869.

Introduction

Throughout its 150 years of history, the ICRC has followed the same pattern of actions in its efforts to improve the fate of war victims: It draws from the proximity of the organisation to victims of conflicts and violence, and moves through different stages of influence with a view to ultimately making a difference for them. This process encompasses various steps, such as convening States to develop new rules, disseminating such rules, calling for their implementation in national legislation or integrating them in the training of armed forces, as well as monitoring their correct application and contemplating sanctions mechanisms for addressing violations of the law.

Working on the prevention of violations of international humanitarian law (IHL) is one of the key approaches of the ICRC. The idea echoed by the citation above may not have featured prominently in the original Geneva Convention, but the Second International Conference of the Red Cross (Berlin, 1869) affirmed already the necessity to 'répandre autant que possible, spécialement parmi les soldats, la connaissance des articles de la Convention de Genève.'[1] The same year, the first issue of the Bulletin international des Sociétés nationales de secours aux blessés was published. The Bulletin was the predecessor of today's International Review of the Red Cross.[2] The journal remains an important vector for dissemination of

[1] *Relativement à la guerre sur terre*, I, point 15, IIème Conférence internationale des gouvernements signataires de la Convention de Genève et des Sociétés et associations de secours aux militaires blessés et malades, Berlin, Imprimerie J. F. Starcke, 22-27 avril 1869, p. 248.

[2] In 1919, the *Bulletin* was renamed *Revue internationale de la Croix-Rouge.*Today, the *International Review of the Red Cross* is a peer-reviewed academic journal on humanitarian

international humanitarian law and in a way shares a raison d'être with the International Institute of Humanitarian Law here in Sanremo.[3]

Though the ICRC has engaged in dissemination of the law since its origins, it has intensified its efforts considerably since 1978, following the incident in Nyamaropa, Rhodesia in which three delegates were killed because of ignorance about the Red Cross.[4] Since then, this domain of ICRC's work has continuously developed and has been enriched by the lessons learnt of research and field experiences.

The present talk aims only at sharing succinctly the main features and lessons learned from the ICRC's experience in the area of prevention with a view to highlighting current challenges, presenting our latest tools (in particular in the field of online training and electronic simulations) and stimulating further research in this field.

What does 'prevention' mean for the ICRC? A few preliminary considerations

Armed conflict is an abnormal structural and legal environment

'Prevention', as the ICRC refers to it, means working to prevent violations of the law occurring in the midst of armed conflicts or other situations of violence. It, therefore, differs from other normative systems protecting fundamental rights of persons in peacetime. Hence, the prevention efforts of the ICRC will be strongly influenced by unstable environments where state structures are disrupted and the legal order is put into question.

It is absolutely necessary to prevent violations of international humanitarian law (IHL)

In legal terms, 'ignorance is no excuse' (or 'nul n'est censé ignorer le droit').[5] However, armed conflict is a destructive and disruptive environment, which itself may spur violations of extraordinary scale. This

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law and action published by the International Committee of the Red Cross (ICRC) and Cambridge University Press and distributed in 6 languages in more than 70 countries around the world. See www.icrc.org/eng/resources/international-review/.

[3] 'The main purpose of the Institute is to promote international humanitarian law, human rights, refugee law and related issues', see International Institute of Humanitarian Law, 'About us' section, available at: www.iihl.org/Default.aspx?pageid=page11845.

[4] Marion Haroff-Tavel, '*Histoire de la promotion du droit international humanitaire par le CICR',* forthcoming in *International Review of the Red Cross,* 2013.

[5] In Latin, *ignorantia juris non excusat*. According to this maxim, lack of awareness about the law does not absolve one from responsibility for violating it.

has been proven time and again throughout history, hence, the crucial necessity to put a special emphasis on efforts to *prevent* violations.

States carry the primary responsibility

It is foremost the responsibility of the States Parties to the Geneva Conventions to 'respect and ensure respect for IHL in all circumstances'.[6] In its prevention activities, the ICRC tries to find a way to accompany States to fulfil their legal obligations,[7] without substituting for them.

Legal basis for training and dissemination

In legal terms, the importance of dissemination of IHL was first recognized in the 1906 Geneva Convention.[8] The Geneva Conventions of 1949 contain an obligation for States to:

'undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.'[9]

National Red Cross and Red Crescent Societies have a responsibility to 'disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect'.[10]

The obligation to disseminate IHL is, as stated, also applicable in peacetime. Indeed, dissemination efforts are more likely to be successful

[6] Article 1 common to the four Geneva Conventions.

[7] See the role of the ICRC's Advisory Service, for instance: www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/overview-advisory-services.htm.

[8] Article 26, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906.

[9] In addition, a number of UN resolutions, as well as Council of Europe and the Organization of African Unity, have called on or invited States to disseminate international humanitarian law or to promote the teaching thereof to the civilian population. See Articles 47/ 48/127 and 144 of the four Geneva Conventions, as well as Rule 144 (Dissemination of International Humanitarian Law among the Civilian Population), *Study on customary international humanitarian law*, conducted by the International Committee of the Red Cross (ICRC) and published by Cambridge University Press, available at: www.icrc.org/ customary-ihl/eng/docs/v1_rul_rule143.

[10] See Article 3, section 2, para.2 of the Statutes of the International Red Cross and Red Crescent Movement.

when there is sufficient time and calm to expose different audiences to IHL and humanitarian principles, so that real norm integration can take place.

As similar rules apply in times of international armed conflict (IAC) and non-international armed conflict (NIAC) to the 'parties to the conflict', non-state armed groups are also the addressees of these rules.[11]

Figure 1 - Key articles requiring the adoption of IHL national implementation measures

	1949 Geneva Conventions				*1977 Add. Prot.*		*1954 Hague Conv.*	*1999 Prot.*
	First	*Second*	*Third*	*Fourth*	*AP I*	*AP II*		
Translation	48	49	41, 128	99, 145	84		26	37
Dissemination & training	47	48	41, 127	99, 144	80, 82-83, 87	19	7, 25	30

What is it about? Aiming at behavioural change

'Is dissemination sufficient to promote compliance with International Humanitarian Law?' asks Elizabeth Stubbins Bates in her blog post on Opinio Juris.[12]

From the perspective of the ICRC, '[…] behaviour is shaped in part by specific environmental factors. Acting upon these factors may thus have an

[11] Also see Michelle Mack, 'Increasing respect for international humanitarian law in non-international armed conflicts', ICRC, Geneva, 2008; 'Understanding Armed Groups', *International Review of the Red Cross*, Vol. 93, No. 882, September 2011 and 'Engaging Armed Groups', *International Review of the Red Cross*, Vol. 93, No. 883, December 2011.

[12] Elizabeth Stubbins Bates, 'Emerging Voices: Is Dissemination Sufficient to Promote Compliance with International Humanitarian Law?', in *Opinio Juris*, 13 August 2013, available at: http://opiniojuris.org/2013/08/13/emerging-voices-is-dissemination-sufficient-to-promote-compliance-with-internation al-humanitarian-law/.

influence on behaviour.'[13] This is the underlying premise on which the organisation bases its prevention work. Influencing behaviour represents a discrete and modest, but at the same time an incredibly ambitious objective.

To try to tackle the question 'is dissemination enough?' in 2004 the ICRC conducted a study entitled 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' in order to identify the factors which affect behaviour of combatants in armed conflicts.[14] The basic conclusion of this study was that violations of IHL are not necessarily only due to a lack of training and dissemination. The study made several observations in this regard.

To begin with, the study took note of the fact that war creates a crime-prone environment and generates factors conducive to the violation of IHL. Such factors can include: the deleterious effect of partisan commitment; group conformity; obedience to authority; the spiral of violence, and pathological behaviour. Another aspect the study considered was the combatants' particular attitudes to IHL and more concretely, the gulf between knowledge, attitudes and behaviour, as well as the moral disengagement which occurs when violations of IHL are committed. [15]

The conclusions that the ICRC drew from this study as to the effects of training on combatants' compliance with IHL were the following: First, while ICRC activities may have an impact on the acknowledgement of humanitarian norms, they do not have a similar impact on their application. Second, mere awareness of IHL or favourable attitudes towards it are not sufficient to produce a direct impact on the behaviour of the combatants. And third, the ICRC's operational activities can help strengthen combatants' respect for IHL, provided that a working relationship and individual trust can be established with them.

Hence, disseminating IHL has to be seen as a first step only, but one of crucial importance. Dissemination and information is rarely sufficient on its own, but should be seen as one aspect of a larger effort to build an environment conducive to respect for the law, which includes education, training and integration. Consequently, the ICRC orients its activities towards 'creating an environment conducive to respect for IHL', by seeking to integrate IHL in doctrine, training, equipment and sanctions rather than simply imparting knowledge on IHL.[16]

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[13] See *ICRC Prevention Policy*, ICRC, Geneva, 2010, p. 7 www.icrc.org/eng/resources/documents/publication/p4019.htm.

[14] See Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations', ICRC, 2004.

[15] *Ibid*., pp. 6-10.

[16] See ICRC, *Integrating the Law*, Geneva, 2007, p. 17, available at: www.icrc.org/eng/assets/files/other/icrc-002-0900.pdf.

What are the main challenges in doing prevention work? The ICRC's experience

While the ICRC works to prevent suffering by influencing those who can (directly or indirectly) determine the fate of people affected by armed conflict and other situations of violence, sometimes the circumstances on the ground (active hostilities, increasing fragmentation of armed groups, lack of security guarantees) can make prevention work a highly complex exercise. Misconceptions can equally prove to be an obstacle for effective prevention work. Training in IHL provided to armed forces by an outside actor, such as the ICRC, may sometimes be perceived as 'an interference' with domestic military affairs, while dissemination of IHL outside the military may be perceived as encouraging troublesome behaviour. Engaging with non-state armed groups is seen in several contexts today as a potential breach of anti-terrorist legislation, while training the military is seen by opposition forces as taking sides with the government.

In light of these practical obstacles, how has the organisation adapted and evolved in its methods? Two important steps have been made in the past 15 years. First, the ICRC has adapted its structure and prevention messages to different target audiences. Secondly, it has refined the premise on which it bases its prevention work - moving from a purely education-focused approach towards an approach which encompasses both the education and integration of IHL.

As a matter of fact, one of the principal challenges typical for any type of prevention work[17] is the difficulty to measure impact. 'How much have we done?, 'How efficiently have we prevented human suffering in armed conflict or other situations of violence?' These questions are not easy to answer, beyond the measurement of ICRC's activities direct outputs (number of people reached, number of activities conducted, etc.). [18]

Within the limited scope of this presentation, one can mention the possibility to use quantitative and qualitative research tools in order to measure progress. For instance, a worldwide survey that the ICRC conducted in 1999 on people's views about the rules that apply in times of war showed that while 39% of the overall number of people participating in the survey (coming from war-torn areas) had heard

[17] Note that 'prevention', as used by the ICRC, refers to an approach seeking to avert human suffering caused by armed conflict and other situations of violence. See *ICRC Prevention Policy*, p. 5.
[18] See annex 1 below for ICRC's key figures in the field of prevention in 2012.

about the Geneva Conventions, only 60% of that fraction could provide an accurate description of their actual content.[19]

How does the ICRC do prevention work? A multifaceted approach

The principles guiding the ICRC's prevention approach

The ICRC conducts its prevention work according to several guiding principles, which aim to ensure that its work remains relevant and efficient. Listed below, these include:

1) Contextualizing approaches: concrete realities on the ground shape the ICRC's prevention approach (particular humanitarian problems, analysis of environmental factors influencing the occurrence of such problems at the local, regional & global levels, etc.)

2) Reflecting the multi-dimensional nature of problems: the ICRC strives to engage - simultaneously or successively - a variety of stakeholders situated at different levels of the environment and influencing the occurrence of problems accordingly.

3) Ensuring coherence: the ICRC seeks to ensure coherence within different prevention activities it performs, across prevention strategies (local, regional, global level) and various geographical and organisational levels. At a higher level, and in order to ensure a unified response, the organisation seeks to have coherence between the 4 constitutive approaches developed to fulfil its mandate: prevention, assistance, protection, and cooperation.

4) Results-oriented: The ICRC sets priorities, develops context-specific responses and notes review indicators, such as**:**

- Acceptance*:* positive attitude towards the ICRC, other components of the Movement and the law,

[19] See ICRC, 'People on War: ICRC worldwide consultation on the rules of war', Report by Greenberg Research Inc., ICRC, 1999, p. xvii and p.18, available at: www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf. For this study, the ICRC interviewed more than 20,000 civilians and combatants from seventeen countries from October 1998 until September 1999. Ten years later, a follow-up report was produced, entitled *Our world. Views from the Field. Summary Report: Afghanistan, Colombia, Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines. Opinion survey and in-depth research,* 2009, ICRC/Ipsos, Geneva. For a more recent survey conducted on US perceptions of international humanitarian law, see Brad A. Gutierrez, Sarah DeCristofaro and Michael Woods, 'What Americans think of international humanitarian law', in *International Review of the Red Cross,* Vol. 93, No. 884, December 2011, available at: www.icrc.org/eng/assets/files/review/2011/irrc-884-gutierrez-decristofaro-woods.pdf.

- Ownership*:* obtaining the commitment of key stakeholders in this respect,
- Sustainability*:* strengthening their capacity to assume their responsibilities over time.[20]

ICRC's Health Care in Danger project currently under way serves as a good illustration of the way in which the ICRC engages in prevention. This project first began with the sad realization that violence against patients and health-care personnel, facilities and transport is even more present now than in the past. Subsequently a methodology was developed and refined so as to allow the recording and systematic categorization of incidents affecting health care in situations of armed conflicts and violence.

The ICRC then went on to raise awareness of the issue at the international level and subsequently engage experts and policy makers at the regional and national levels in providing reflections and concrete recommendations that could help secure health-care delivery in the field.[21]

To whom does the ICRC disseminate?

Of crucial importance to prevention work is the need to adapt to different audiences. The ICRC seeks to develop tools, which correspond to the needs of the relevant audience. These could range from books and manuals, to lectures, radio or TV shows, text messaging and social media messaging, comic books, photography, etc.

The ICRC interacts with actors that 'have a significant capacity to influence the structures or systems associated with the actual or potential (humanitarian) problem indemnified'.[22] It is through influencing those actors that the ICRC seeks to bring about the intended change. Such actors can be roughly divided into the following categories:

- State/non-state armed actors: as they have a direct influence on IHL violations,
- Private contractors: much like state and non-state armed groups, some private military contractors can have a direct impact on IHL violations,[23]

[20] See *ICRC Prevention Policy*, p. 15.
[21] For a detailed overview of the Health Care in Danger project, see 'In Conversation with Pierre Gentile', *International Review of the Red Cross,* Vol. 95, No. 888.
[22] See *ICRC Prevention Policy,* p. 8.
[23] See also the Swiss-ICRC Initiative to produce a document (the Montreux Document) that recapitulates the obligation of States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law, available at: www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

- Civilian authorities: they have a direct influence by passing repressive national legislation or harmonising domestic legislation with the international obligations of States Parties to IHL related conventions,
- General population through the media and other actors of influence: the general public is key in building a permanent environment conducive to respect for IHL (as a social norm),
- Humanitarian actors: they exercise influence on humanitarian problems and need to be aware of the principles of humanitarian action and the legal framework applicable to them and their work.

In the effort to engage all of these different audiences, translation and the adaptation of tools are crucial. Thus, in addition to distributing the Geneva Conventions and Additional Protocols, the ICRC also publishes materials that explain and discuss IHL, such as the International Review of the Red Cross, the case book How does law protect in war, or an introductory textbook on IHL, currently in preparation.

Adaptation to local cultures and the identification of common norms and values between humanitarian law and culture or religion is equally important. The ICRC has worked for more than a decade on a better understanding of Islamic law and on finding the points it has in common with international humanitarian law.

Furthermore, in Somalia[24] and in Papua New Guinea,[25] for instance, the ICRC conducted studies which aimed at identifying parallels between the customary rules of warfare, followed by traditional communities, and humanitarian law.

The premise behind such work is that the integration of the respect for IHL requires that local actors develop themselves an ownership of IHL norms and become its main disseminators. Such ownership can be achieved by using lessons learned (adopting a historical perspective) and by referring to adapted domestic legislation or local / cultural norms.

Conclusion: what's next? Innovation in the field of prevention

ICRC's prevention efforts aim at supporting direct actors of influence to fulfil their responsibility and encouraging others to play their part (the media, the civil society, etc.). The ICRC has developed a multifaceted

[24] ICRC, 'Spared from the Spear: traditional Somali behaviour in warfare', Somalia, February 1998.
[25] ICRC, 'Under the protection of the palm - Wars of dignity in the Pacific', Suva, 2009. www.icrc.org/eng/assets/files/other/wars-of-dignity-pacific-2009.pdf.

approach and various skills, expertise, tools and activities within the organisation.

Much remains to be done in seeking and developing complementarity within the various areas and domains of expertise of prevention. Similarly, much remains to be done in developing complementarity with other actors in this field (such as National Red Cross and Red Crescent Societies, other humanitarian actors, civil society, etc.). Thus acknowledging our complementarities, working with partners and connecting agendas is a work in progress.

Prevention is also interdependent with other compliance mechanisms: As ICRC Vice-President Christine Beerli has already mentioned, 'prevention' cannot be seen on its own. With its unique role and assets in the international landscape, the ICRC can support parties to armed conflicts to comply with their legal obligations while keeping them aware of potential consequences of violations and the role of other implementation mechanisms intervening at a later stage through monitoring, state responsibility and criminal repression.

With the developments of international justice and in the post 09/11 environment, IHL has been much more mediatized than before. This is an opportunity that actors working on prevention can seize, as there is increased awareness of IHL's importance and political will to apply it. We need to adapt our prevention efforts to this reality and move from information to debate with audiences already familiar with the law.

Internet is an opportunity for the ICRC to enhance its capacity to reach out to very wide audiences, engage in conversation and debates pertaining to IHL and humanitarian action, and ensure an immediate and measurable effect. The crucial role of Internet as a prevention medium should be reshaping the ICRC's approach by making it necessary to associate with other audiences and to take stock of reactions from online communities (civil society, beneficiaries, video gamers, policy-makers, etc.).

Education should be less "standard" and instead more personal, organic and creative in nature', says Sir Ken Robinson in what has become one of the most popular "Ted Talks" worldwide.[26] While pursuing the rigour required for properly presenting and explaining IHL, the ICRC is currently developing an enhanced training capacity using new technologies and communication tools. Concretely, the ICRC engages in:

- Generating and hosting international debates on humanitarian and legal issues of concern / relevance (both on-site and on-line): this includes webinars of the International Review of the Red Cross; events

[26] See Sir Ken Robinson, 'How schools kill creativity', TED, February 2006, available at: www.ted.com/talks/ken_robinson_says_schools_kill_creativity.html.

at the ICRC's Humanitarium (and elsewhere) around selected themes of interest for the diverse professional communities that make up the International Geneva, as well as online outreach.
- Linking teaching to the discussion and analysis of contemporary armed conflicts, situations of violence, humanitarian and legal issues. This will be done through the ICRC's online IHL courses and thematic modules, as well as through the online version of the case-book: How does law protect in war?
- Engaging with armed forces on IHL dialogue via virtual reality training tools (VRT). These new tools will be available online in 2014.

Annex

Key figures on the activities of the ICRC division for the integration and promotion of the law in 2012

Governments:
- Representatives of governments, academia and civil society from over 100 countries discussed IHL and its incorporation into domestic law during 25 ICRC-organized/supported regional events.
- These activities contributed to 54 ratifications of IHL treaties by 37 countries. In addition, 11 countries adopted nearly 20 pieces of domestic legislation to implement various IHL treaties.

Weapon bearers:
- 32 specialized ICRC delegates conducted or took part in more than 130 courses, workshops, round tables and exercises involving some 12,000 military, security and police personnel in more than 90 countries;
- More than 58 military officers from 38 countries received ICRC scholarships to attend 10 military courses on IHL in Sanremo;
- More than 56 general and senior officers from 45 countries received ICRC scholarships to attend the Senior Workshop on International Rules Governing Military Operations in Kuala Lumpur, Malaysia;
- The ICRC maintained relations with the armed forces of 162 countries and with more than 82 armed groups (in some 45 contexts, mostly undergoing non-international armed conflicts).
- Specialized delegates in Africa, Asia, Europe and North America represented the ICRC and observed the implementation of IHL or international human rights law during some 12 international military exercises.

Academia:

- 12 regional and international IHL training seminars for academics (4 in Africa; 3 in Asia and the Pacific; 3 in Europe and the Americas; 2 in the Middle East), involving over 300 professors, lecturers and graduate students.
- Intensive IHL training courses in Belgium, Kenya and Poland, which approximately 100 competitively selected students and lecturers attended
- 6 regional IHL competitions for students (2 in Africa; 2 in Asia and the Pacific; 2 in Europe and the Americas), involving some 250 students and lecturers.
- The annual Jean Pictet Competition on IHL (www.concourspictet.org), where some 140 students from around the world participated.

Young people:

- More than 10,000 people consulted the Exploring Humanitarian Law Virtual Campus, a web-based resource centre for the programme.

Civil society at large:

- An average of 6,000 persons (armed forces, humanitarian practitioners, policy makers, students, etc.) visit the ICRC and are introduced to the organisation, IHL and specific topics pertaining to humanitarian action and law every year.
- Over 600 people (academics, humanitarian practitioners, policy makers, etc.) benefited from the ICRC Online Course on IHL.

IHL in humanitarian operations

Bruno Jochum
Director General, Swiss Section of Médecins sans Frontières

First of all, it is necessary to remind everybody that in the First Geneva Convention, one of the main achievements sought after was providing care to wounded soldiers and protecting the fact that a wounded soldier was no longer a combatant and thus had to be respected as such. If Parties wanted this provision to be respected for their own soldiers, they had to respect it for soldiers from the other side. 150 years later, this achievement is unfortunately not a given in most conflicts. On the contrary, it is a daily struggle to make one of the primary objectives of the first Geneva Convention respected.

As a medical humanitarian organization the basis of MSF's action is acceptance. Acceptance of and negotiation with States and non-state armed actors or political actors.

It is critical to underline that humanitarian action is always the result of an agreement and is only very rarely the result of enforcement. We believe, as Médecins sans Frontières (MSF), in the value of being able to talk to all sides of the conflict, all stake-holders, whether they are States or non-recognized armed actors, and we believe that the main purpose of the principles of humanitarian action is linked to the way they are actively operationalized. When we refer to independence or impartiality, these words are not simply moral or legal concepts. They represent something in the building of our programs. They aim to relate to all sides, to look at vulnerabilities of the population on all sides. Neutrality as a principle of action gains respect from parties. And the building of trust is, obviously, an essential part of it. One aspect which is often understated is, however, the importance of the effectiveness of aid. It is very difficult to gain respect when humanitarian aid is actually ineffective. And it is probably one of the most unreported aspects in the picture: humanitarian actors are not always up to the level they should be.

If we take a look at the past decade, we faced an environment, in many contexts, where actually talking to all stakeholders was often not permitted or was hampered and cooptation of humanitarian action became a major policy drive, subjecting humanitarian action to political or military objectives. Whilst we do not judge these objectives as an organization, we do observe the effects of such cooptation on the respect for humanitarian workers. Previously, those responsible for UNAMA talked about how some civilians or humanitarian workers were sometimes targeted in Afghanistan. Well, we make the link between certain policies and these actions.

Now belligerents are fundamentally rational actors and what we observe in most conflicts is that the prime objective of belligerents is the control of civilian populations, either to gain their favor or to deprive them of services, or to punish them when they believe the population is closer to their opponent. We cannot talk about respect for international humanitarian law if we do not describe the reality of the environment we operate in. Most belligerents follow a principle of utility - making a distinction between what threatens them or what is useful to them - and it includes their relationship to humanitarian action. They will, at certain stages, either favor services to people or actively deprive them if they believe it is necessary to achieve the objectives they are pursuing.

There are certainly lots of talks about violations of international humanitarian law and the role of dissemination and, in some circumstances, there can be of course an issue of knowledge. But most violations are blatantly deliberate. They are part of a strategy which is not always assumed publically, but quite often political and military strategies are openly permissive on violations and integrate them fully. There cannot be compliance to IHL without questioning some of these fundamental political choices towards civilian populations in situations of conflict.

To people who are very familiar with the Geneva Conventions, providing medical care to the wounded seems obvious, but, as stated previously, in reality it is extraordinarily difficult to achieve or obtain. At the beginning of the 21st century, we are facing many situations where the objective of belligerents is not to allow medical care but to actually deprive the wounded of medical care. This is probably more the case in civil wars or in asymmetric conflicts, but it is a chilling fact. It is also a reality that, in too many situations, having a simple contact with armed groups is perceived as a dangerous provision of legitimacy by a humanitarian actor in favor of these same belligerents. I can give the examples of Ethiopia, of Syria, of Afghanistan at a certain period of time, where making contacts with the opposition side was either not allowed or provoked very strong apprehension, not to say retaliation. There is no way humanitarian actors can conduct meaningful action if the premise needed to reach an agreement is not respected from the start.

I should also mention the critical question of documentation of events in relation to justice. As humanitarian actors, and especially as a medical organization, we have had to be very careful over the last few years not to see our action confused with criminal justice investigations and to make the case that we are, before anything else, a medical organization providing care and alleviating suffering and not documenting or investigating violations. Not that we have anything against these objectives as such, but there is generally no compatibility between humanitarian assistance and documentation of events. And some of the threats or attacks that

humanitarian organizations have been facing in different contexts, for example in Darfur (Sudan), were directly linked to the perception that we could be, at a certain stage, documenting events or violations then used as prosecution material against individuals in positions of authority.

Attacks on medical care are very widespread. Not a week goes by when we do not have incidents, and as the ICRC showed in a recent survey on healthcare in danger, attacks against international actors are only a very small proportion. It is mainly the national medical actors which are taking the brunt of the violence. Not only are these incidents widespread, but they are actually often deliberate and not based on ignorance, to deprive people of certain services, or are within a strategy of punishment of certain populations. It ranges from ordinary disrespect, where you could say we are victims of collateral damage within a general situation of violence, to direct targeting of medical care for what it represents.

Hospitals are often seen by belligerents as state structures where one can screen opponents who are wounded - and this was the case in Libya, Syria, but also in Bahrain during the demonstrations two years ago, - and where we observe that people do not trust going to hospital structures because they are afraid that they will be screened, arrested and sometimes tortured or eliminated. If we look at the pattern of the past two, three years, in many contexts wounded civilians or opponents had no other choice than to resort to clandestine medical structures.

The degree of targeting of medical professionals as such, especially in the Syrian conflict, but not only, has led to the medical act itself being presented as an act of war, as an act of enmity: the one caring for my enemy becomes my enemy. This is why I reiterate that the very basics of the First Geneva Convention, signed 150 years ago, are still not accepted by many belligerents in situations unfolding today.

Of course, this reality seems to be much more the case in asymmetric conflicts, where the state apparatus is confronted with insurgencies and there is ambiguity when a phase of internal instability turns into a civil conflict. At this stage do you leave ordinary criminal law to enter the realm of international humanitarian law?

There are also concerns on how far national legislations, which widely use the category of “terrorism” to label armed opposition groups, prevent or forbid from the very start any type of agreement on the conduct of war between belligerents. To what extent does this trend create a fundamental obstacle to any negotiation, any improvement in practices in regards to the limitation of violence against civilians or wounded or respect for humanitarian work? It should be seriously questioned, given the wide usage of these categories in most legal systems today.

In conclusion, I would like to emphasize that law is always the result, the translation of an active political agreement. It does not hold by itself,

and the key importance for political leaders and belligerents to come to the table and negotiate on limitations of violence is probably the premise for any progress in this type of conflict. It will not come from the repetition of legal provisions or humanitarian principles as a mantra. There is a critical responsibility of States in the exemplarity of their actions and attitudes towards these provisions. Each violation is a denunciation of the political agreement from which these provisions originate. This is true for all States as the scope encompasses attitudes of armed forces in hospitals - we had discussions with NATO in Afghanistan ranging from the presence of weapons inside medical structures to direct targeting practiced by certain other actors.

As a last word, there will be no form of progress unless the field is expanded to non-state armed actors and unless there is an active platform for discussion or a political agreement with them. Then there will be a little light at the end of the tunnel.

National Red Cross and Red Crescent Societies and dissemination of IHL

Helen Durham
Director, IHL Strategy, Research and Planning, Australian Red Cross

Today my role is to focus on the fact that National Societies from the Red Cross and Red Crescent Movement, pursuant to the Statute of the Movement, have an obligation to work with their governments in assisting the dissemination of international humanitarian law (IHL). This legal mandate is really important because if you live in a country where there is a turbulent pluralism of different organisations doing all sorts of work, it is important to have clarity of understanding of why your organisation uses the resources, the time and the effort to undertake dissemination.

I wanted to start by giving some examples on the way the Australian Red Cross engages with the decision makers and authorities because, very often when one has a focus, you have to identify the key target audience. As Vincent from the ICRC demonstrated there are a range of audiences, decisions have to be made about which group is going to be the most useful to engage with.

One thing has been very interesting in almost two decades that I have been involved both with the Australian Red Cross and the ICRC is that sometimes we overestimate, at least in my part of the world, how much decision makers actually know about the technical elements of IHL. And one of the things we tend to do in the Australian Red Cross is take some of the really complex and really important information and simplify it down into content that is accessible.

Perhaps at a philosophical level, the most interesting element of dissemination is to find that balance, that proportionality, as we IHL lawyers would say, between something having traction and interest and engagement, but maintaining its integrity, its gravitas and its technical competencies.

Often, in our experience, a bit of a balance between the communications department, who use Twitter, sound bites and e-mails and the whole range of modern communications which often requires a reduction and a compressing of the issues, and the more complex and nuanced and not-able-to-be-put-in-a-sound bite issues. Like the actual principles found in IHL, this constant balance is really important.

One of the things we realized in Australia was that our Parliamentarians in general, apart from the key ones we deal with regularly, often didn't have a good comprehension of IHL. So, working on handbooks that have been created previously by ICRC and the Inter-Parliamentary Union

(www.ipu.org), we created a really simple handbook for Parliamentarians, with simple questions and at the back a summary of the obligations that flow from the ratification of treaties.

This experience within Australia has led to working with colleagues in Solomon Islands, Samoa, Papua New Guinea, National Societies in our region that have had some degree of turbulence in their societies, along with the regional delegation of the ICRC to support these National Societies to create handbooks for their politicians.

The issue of the lack of compliance with IHL is often raised. We hear on the news when these laws are breached, but it is really important to have examples that show when the laws of war do work or when dissemination tools do have an impact.

Last week one of my colleagues from the Australian Red Cross was in Samoa and launched the Samoa Handbook in Parliament and the Samoan Attorney General expressed the interest in creating emblem regulation legislation as he now has clarity around why this is important. If a really simple handbook that is still technically correct, can help governments that sometimes do not have the resources to have a large legal department to wade through 'heavy' legal details, I think it is a great complementary role we play with our colleagues of the ICRC.

In Australia we have also created a cross-party Parliamentary Friends of the Red Cross Group, which gives such a great opportunity to do some presentations on key themes and raise humanitarian issues. Members of parliament come along, we have a topic, thematic topics worked very well, and through that discussion, through having 30 or 40 single Parliamentarians in a room, it is a great way of ensuring that there is a degree of understanding and openness to the laws of war.

Certainly other activities need to be undertaken, in relation to treaty ratification, in providing submissions to joint Standing Committee on Treaties (the parliamentary body that makes such decisions) and general technical engagement with those who are responsible for IHL matters in the Ministries. So, the balance between having a glass of wine and a nice talk on an evening with the Parliamentary Friends where we provide condensed, accessible but technically correct information, and also then providing the high level technical submissions to Parliamentarians is an important combination.

We must continue to get a discourse heard about the extraordinary nature of IHL. The fact that IHL is a pocket of humanity. When talking to the general public the Australian Red Cross stresses the fact that what IHL stands for, the concept that unites us as Humanity is deeper and more profound than what divides us. And, in a time when we often spend a lot of our energy looking at how different we are, the capacity to say these are rules, internationally recognized rules, that clearly state that "no matter

what you are doing on the battlefield there is a pocket of humanity of how people should be treated" is important. So it is a really important message, at the higher philosophical level, to get across more broadly in society.

The author Sally Engles Merry has examined the tension between trying to make things localized with domestic traction and trying to maintain them at the universal level. She wrote: "Rights need to be presented in local cultural terms in order to be persuasive, but they must challenge existing relations of power in order to be effective."

And once again, coming back to that balance between trying to find connections between concepts and stories, history shows that humans learn from stories, every culture passes along meaningful and important messages via oral traditions. There is much psychoanalytic research done supporting the fact that people really only understand new concepts through metaphors, through examining and reflecting upon things they have understood before and building such understandings.

So, the idea of trying to find stories that make wider sense - stories that are not just about glorious Henry Dunant on the battlefield way over in Europe but rather having some sort of connection with the environment around you - is important when you are engaging with authorities of arms bearers in Papua New Guinea. There is not a lot of understanding about where Europe is, let alone what specific historical events from far across the globe mean. There are always local narratives that cover the same concepts that can be drawn upon as well.

One of the projects that we have done in that part of the world is create a handbook about the cultural connections, not at a connective level of actual articles of the IHL treaties, but the philosophical connections found in many of the Pacific warring cultures and the elements of the laws of war. This was raised previously in this event. The issue of locating 'humanity in war' within religious doctrine and finding similar connections with cultural traditions at the broadest philosophical level is also an interesting process. There are dangers in a potential 'cut-and-paste' of cultural experiences, because you can always search and find a story in any culture that suits a particular article in the Geneva Conventions, but if you take that one but do not take the one that is a clear breach of IHL it starts to lack authenticity. There is a need to keep this sort of examination at the highest level rather than claim absolute examples.

So, when utilizing cultural connections, religious connections or using ethical, moral issues to examine IHL norms there has to be a certain amount of caution and clarity about where the danger spots are.

One of the beautiful stories which provides a positive example of how finding the local narrative is useful, can be found in Vanuatu. In this country there was a long history of a particular palm branch (the lycas palm): if you held it up in front of you and didn't carry a weapon, it would

provide you with protection during a battle. The obvious connection with the protected red cross and red crescent emblems was a clear starting point when trying to convince authorities in Vanuatu of the need for implementing legislation to the Geneva Conventions. Being able to demonstrate that the idea of 'humanity in war' is not a Western discourse imposed from far away Geneva but rather something inherent in their own culture.

A booklet about this was produced by the ICRC and I had the pleasure of working on it and this tool is often used by our National Society, especially in the work with our Pacific colleagues.

In relation to other audiences, the need is to identify the most critical message to deliver. The Australian Red Cross, for example, runs a four-day course, a pre-deployment training course, for the military, and it is very interesting to engage with this group on the key issues they believe are the most relevant today during times of armed conflict. We constantly scan for matters that arise and need to be addressed in IHL training. Just before I left Australia, a day and a half ago, there was a lot in the media about the fact that the Australian Defense Force were cutting off the hands of deceased combatants to take back to the base to provide identification via fingerprints. The media focus on these accusations of mutilation was intense and the press was keen to hear the views of Australian Red Cross. As we follow the fundamental principles, in particular neutrality, our preference was not to engage with the issue in a public forum but to ensure we include this during our next training. Responding to operational needs rather than following a set curriculum is key to any useful dissemination process.

A number of years ago the Australian Government was involved in what is called RAMSI, Regional Assistance Mission in the Solomon Islands. RAMSI heralded a new concept of how to deal with security issues in the region, because it was a police-led intervention force, with the police at the front and the military at the back. It was really interesting as an international lawyer, and as a National Society, who had spent many years engaging with the Defence Force to suddenly realize that we had to engage with Federal Police as well.

When the law enforcement paradigm rubs up against the IHL paradigm a range of interesting questions are raised and today the Australian Red Cross also does some pre-deployment training for the Federal Police.

Dealing with our colleagues in the humanitarian/NGO sector is always great fun, we get a whole range of different questions, challenges about both the legal issues as well as the way the International Red Cross and Red Crescent Movement works in conflict zones. We run a four-day course for members of civil society, particularly for our colleagues in more field-

oriented organisations, both before they get deployed and to encourage a wider discourse on policy issues.

As well as the wider civil society sector we also disseminate to Commonwealth government agencies. A group called the Australian Civilian Corps, which is a concept of our former Prime Minister, of sending professionals into low-threshold-intensity armed conflicts, not just the military or police but also members of the judiciary, bankers, bureaucrats and those who can put together the infrastructure of the society. It is a very interesting and engaging two-day course we run, working with these groups, because in many ways they are an arm of the government and their view, that they are humanitarians - when in fact they come with a state-based mandate - involves lots of discussion, and discussions around concepts involved in direct participation in hostilities.

Also, journalists: increasingly we do specific presentations with journalists, because it is incredibly important that journalists can articulate what is really going on on the ground with the right terminology.

There are significant differences if something is reported as a massacre or as genocide. As international lawyers, we know the different obligations that flow from terminology and classification. I must admit, personally, I found the journalists to be the most robust and complex group to engage with, because they can get very angry: “So you can’t tell us the exact number of civilians dead which equals a war crime!”. So trying to explain concepts of proportionality to journalists who are often frustrated in trying to ‘expose’ crimes - is great training for us as well. You have always got to keep training yourself.

Finally, we have implemented a number of campaigns on matters of key humanitarian concern. Working with our colleagues in marketing and communications, we need to balance the messages to get across and ‘cut through’ as well as stay within the neutral, impartial territory that as a National Society we are bound to follow. One of the campaigns we did was to mark the 60th anniversary of the Geneva Conventions. There was, in many countries including Australia, a study done on what the general public thinks about the laws of war. In Australia 34% of the people came back thinking that it was OK to torture individuals in certain circumstances to get evidence. So we started up a campaign, an element of which was “Torture is never OK”, and it was creative and intense. We had seats at all the local big commuter hubs, so at the big railway stations there were seats that were covered in blood with torture items around them and people handing out pamphlets explaining not just the lack of probative value of torture, the practical issues, but the fact that there are very strong laws against torture, in particular found in IHL. Stressing that ‘torture is never OK’ and engaging the public in a discussion. We had many media interviews, articles in the newspapers as well as a number of television

appearances raising these issues. Over 14,000 people went to the relevant web site established on this theme ‘Even Wars Have Laws’ and when asked to vote only 13% still believe torture was appropriate. This assisted us to understand what messages are listened to.

In trying to capture what impact the dissemination of IHL has, the critical questions are obviously about the way dissemination changes behaviour. The Australian Red Cross spends almost a million dollars a year in dissemination with lawyers and teachers on staff and the cost of other activities. The question is how do you capture whether that is working or whether that money should go into something else within the institution? Doing a follow up questionnaire, post training sessions and doing follow up via web site such as we did during the campaigns are some ways to gauge the impact of activities. These are some reflections on the ways a National Society can disseminate and there needs to be more work done globally on examining the impact of dissemination. The Australian Red Cross would welcome further engagement with our colleagues globally on this topic.

Engaging with non-state armed groups: lessons learned

Elisabeth Decrey-Warner
President, Appel de Genève/Geneva Call

The specificity of Geneva Call is to work only with armed non-state actors that we define, in our organization for operational purposes, as groups operating outside effective State control and being primarily motivated by political goals. Such actors include rebel groups, liberation movements, guerillas and the authorities of entities which are not (or only partially) recognized as independent States, thereby lacking the requisite capacity to become party to international treaties. (de facto authorities, like Somaliland, the Sahraoui Republic).

As has been already said today, the current conflicts in the world are no longer interstate conflicts but intrastate conflicts, often involving one or more armed non-state actors. These actors are responsible for many violations of international humanitarian law, which is why this is an important challenge to address.

I was requested to speak about the lessons learned by Geneva Call based on 13 years of activities, having worked with approximatively 80 groups.

Lessons learned

Ownership

Geneva Call has discovered that the question of ownership is key for the respect of IHL by armed non-state actors. As long as you impose norms to armed groups, they will be reluctant. If you negotiate and give them the possibility to take their own engagement, then it will probably work. Geneva Call has adopted an inclusive approach, whereby armed non-state actors have the opportunity - as they cannot sign international treaties - to express their adherence to specific humanitarian norms and to be held accountable for their pledge.

This is done through signing a formal instrument called a “Deed of Commitment”. To date, the organization has developed three such documents: one banning anti-personnel mines, one protecting children in armed conflict and one prohibiting sexual violence and towards eliminating gender discrimination. These three Deeds of Commitment reflect, and in some cases exceed, international standards.

These Deeds are signed by the leaders of the armed group and countersigned by Geneva Call and by the Government of the Republic and Canton of Geneva, which serves as the custodian of the signed documents. The signing ceremony takes place in the Alabama Room in Geneva where the 1st Geneva Convention was signed in 1864.

Accompaniment and support

The signature of a Deed of Commitment is not the end of the process. Training is essential to accompany the group in the dissemination of the engagement to the rank and file, and to support the implementation measures to be undertaken. Geneva Call organizes training for the rank and file or training of trainers for higher-level commanders. There is also a need to develop simple, culturally appropriate educational kits that are easily understood in local languages. This would ensure that all combatants could assimilate and meet their humanitarian obligations.

Engagements are respected: It works!

The experience of Geneva Call - and of other organizations - demonstrates that constructive engagement with armed non-state actors can be effective and can yield tangible benefits for the protection of civilians.

Without seeking to minimise the challenges that compliance presents, Geneva Call's experience shows that commitments made by armed groups should not be automatically dismissed and that they merit consideration in their own right. Since its founding Geneva Call has encountered few allegations of non-compliance. And the in case of accusations, with one exception, no conclusive evidence of violations of the Deeds of Commitment has been found to date. Moreover, most signatories have taken measures to enforce their obligations through orders, training and sanctions in case of non-compliance.

Finally, most signatory groups have conducted or facilitated assistance activities (mine action, child protection) in areas under their control.

For example, with technical support from specialized organizations, various armed non-state actors have destroyed over 20,000 stockpiled anti-personnel mines, along with thousands of improvised explosive devices and abandoned explosive ordnance. They would never have been destroyed without the signature and the follow-up process of the Deed of Commitment.

Monitoring and fact-finding missions are possible!

Another lesson that emerges from Geneva Call's experience is that, contrary to a commonly held view, armed non-state actors are willing to accept external oversight and to cooperate in the scrutiny of their compliance. Nearly all signatories to the Deeds of Commitment have abided by their monitoring obligations, providing information and reports to Geneva Call on their implementation and allowing field follow up missions. No signatory has ever refused to receive a Geneva Call delegation in areas under its control, even after allegations of non-compliance.

Inventiveness and flexibility

Today's conflicts have changed. We see that in Libya, Mali and now in Syria. In Syria the chain of command of the rebellion does not really exist. There are many groups, led by different commanders. Considering this kind of situation, Geneva Call has developed new approaches. In the case of Syria, it was decided not only to train combatants but to also be active in media and social networks. This was the only way to reach people inside the country.

From the Deeds of Commitment to broader IHL norms

The engagement on specific norms often brings the armed group to be interested in IHL, in general. Over time, armed non-state actors have more and more requested Geneva Call to train them on IHL. Geneva Call has developped specific modules for the training of armed non-state actors, based on 15 basic rules of IHL. These modules are developed in 7 different languages, sometimes very local. In these modules, concrete examples and scenarios that fighters can face in their struggle are analyzed and the proper reaction is discussed.

Understanding of the field conditions

It is essential to take into consideration the reality in the field and to get a concrete grasp of the conditions under which struggles are carried out. Recruitment and association of children is a good example. Very often the fighters live all together with their family and their children. A basic right of a child is to live with his parents. In such a situation, will the children be

considered as children “associated” with armed groups? This example shows that this is really important to understand the field situation and to find realistic solutions.

No naming and shaming. Principle of “do” but not only “don’t”

Naming and shaming is a necessary process, but cannot be done by the same organization or structure as the ones doing engagement. You need to build confidence which is not possible if you criticize groups publicly. In the same vein it is important to emphasize the importance of avoiding the “don’t” approach only, but to work also on the “do”. This is a key aspect for armed non-state actors to understand that we are not only on the prohibition page, but are also expecting constructive measures from them. In all three Geneva Call’s Deeds of Commitment, there is a mix of prohibitions as well as positive and constructive obligations.

The collaboration of concerned States is often very strong

In what came as a surprise to many observers, Geneva Call’s experience also shows that opposing States, understanding that this benefits their civil population, may support and cooperate with Geneva Call.

Challenging lessons learned

Step by step approach

It is important to understand that reaching the full respect of norms is not easy for armed groups who feel disadvantaged because of the asymmetry of the war and of their weaponry. Adopting a step-by-step approach is very often the only way to make progress towards a full respect of IHL. This is not always satisfactory from an ethical point of view, since you have to accept “half-measures”

Fragmentation of groups or lack of a chain of command

When a group does not have a strong chain of command or is fragmented, the engagement process becomes very challenging. The agreement of a leader will not mean that the combatants in the field will

respect his decision, or that other groups which have split from this leader, will respect the decision.

In such situations, it is necessary to engage with different people. An interesting option is to work with the civil society organizations around these groups. They can play a very important role in putting pressure on the groups.

Feeling by armed non-state actors of an unequal treatment

Several UN mechanisms are lacking due process such as the right to be heard, for instance, the UN listing process (on child recruitment and child use). Very often these groups are not even informed that they are listed. There is no mechanism where they can ask proof of the allegations against them and how to be delisted.

On the law itself, armed non-state actors, for instance, do not understand - and sometimes do not agree with - the differentiation between “States” and “armed groups”.

States blockage and war on terror

If many States facing internal armed insurgency support the work of Geneva Call, some of them have opposed engagement and have denied or restricted access to areas where these groups operate. Some States have also adopted measures that criminalize dialogue with groups designated as ‘terrorist organizations’ even if the purpose of such dialogue is towards respect of IHL. These restrictions pose serious challenges to engagement work. Some counter-terrorism measures have initiated a process of criminalization of humanitarian workers, (like the US Supreme Court decision in the *Holder Case v. Humanitarian Law Project*). Criminalizing humanitarian workers is a real threat for humanitarian assistance and humanitarian advocacy. The war on terror should not affect the humanitarian space.

Conclusion

Although it is too early to draw definitive conclusions on the basis of Geneva Call’s experiences to date, the lessons described above are instructive. They demonstrate - quite counter-intuitively for many people - that armed non-state actors can play a positive role in contributing to the respect of IHL. Of course, not all of them agree to abide by international

standards or act in good faith towards their commitments. Yet, to view armed groups as perpetrators only and ignore their potential protective role would encourage repressive approaches, miss opportunities for constructive engagement and ultimately fuel more IHL violations.

III. The challenge of IHL compliance

IHL mechanisms in armed conflict: Where is the problem?

Marco Sassoli
University of Geneva

The title of my presentation, "IHL mechanisms in armed conflict: where is the problem?" implies that I focus on the challenges for respect and implementation. Nevertheless, I cannot refrain from also mentioning some possible solutions to the existing challenges.

I would like to start with two preliminary remarks. First, as you all know, international humanitarian law applies to situations of armed conflicts, which are by definition situations not conducive to respect for the law. The mere existence of an armed conflict indicates an initial violation of the most fundamental legal rules: in the case of an international armed conflict, the prohibition of the use of force, and in the case of a non-international armed conflict, the prohibition contained in every State's domestic system to use force against the State or among the inhabitants of a State (which is a key feature of the modern Westphalian State). In addition, the very survival of the individual and of the community is at stake during an armed conflict, making it all the more difficult to ensure compliance with the subsidiary rules regulating such non-desirable situations.

Second, when discussing compliance, one should recall that there is always, in all situations, a certain degree of respect for the law, even in armed conflicts. Respect may of course be insufficient, but we need to avoid giving the impression that armed conflicts are always and inevitably characterized by generalized and widespread violations. Such impression - or, worse, belief - can only lead to a feeling of hopelessness and discouragement and may even convince those who respect the law to no longer comply: no one wants to be the only idiot who respects the law.

International humanitarian law as part of public international law

I will now turn to the core of my contribution, starting with compliance mechanisms provided under public international law that may also apply during armed conflict. Such mechanisms are traditionally based on mutual interest, reciprocity, self-enforcement and horizontal pressures (between those who benefit from the rules and those who have to comply with the rules). While these mechanisms are often already weak in peace time, they are obviously further weakened during armed conflict. Only reprisals remain as horizontal enforcement; however, they have largely been

outlawed because they lead in practice to a competition of barbarism. As in the case of children's quarrels, it is often controversial who started and the evaluation of the respect of the proportionality principle depends very much upon the perception of the injured party, but among their children, parents can stop the escalation of violations once "reprisals" start. However, in armed conflicts, States have no parents superior to them, who could enforce limitations to reprisals among belligerent States and reprisals inevitably hurt innocent individuals.

What is needed is a centralized enforcement system. The United Nations, and more specifically the Security Council, is an embryo of such a mechanism, but presents several limits. First, it is dominated by States and States necessarily take their decisions according to political and, therefore, selective criteria. International law however - like any legal system - needs to be the same for all its addressees if it wants to be credible, according to the motto which was previously written in every Italian courtroom: "La legge è uguale per tutti" (the law is the same for all)[1]. Otherwise, it creates the impression that enforcement of international law follows a double standard. Not only is such an impression fiercely resented by civilians and belligerents involved in an armed conflict, it may also serve as an excuse not to respect decisions of the Security Council where it actually takes action, especially if no action was taken in similar situations elsewhere. Second, the primary concern of the UN Security Council is a *jus ad bellum* one: maintaining or restoring international peace and security.

As a consequence, it is necessarily less interested in ensuring the highest degree of respect for IHL during the conflict, and less able to enforce such respect by both parties equally, the one who respected and the one who violated *jus ad bellum*.

In parallel, one may also look at existing human rights mechanisms. Other presentations will deal with this aspect; therefore, I will only mention that the approach of such mechanisms may not always be adapted to armed conflicts. First, they are addressed only to States and, with the majority of contemporary conflict being non-international in character, we need mechanisms that can address all parties, including armed opposition groups. Second, while they pursue the same objective as international humanitarian law, and may sometimes be even more humanitarian, they are also less realistic during armed conflict. Therefore, because unrealistic rules do not protect anyone, mechanisms specifically dealing with the respect of international humanitarian law are needed.

[1] Such motto was unfortunately abolished in 2002 and replaced by the principle of "La giustizia è amministrata nel nome del popolo italiano" (Justice is administered in the name of the Italian people").

Existing mechanisms aimed at preventing and repressing violations of international humanitarian law

In my opinion, preventive mechanisms, in particular dissemination and training, have made spectacular progress in recent years. The same could be said about the existence of repressive mechanisms, but their results are more equivocal. The international tribunals definitely brought a lot to enforcement; however, they by nature only deal with the very top of the iceberg. At the same time, domestic criminal justice is, most of the time, malfunctioning in the case of international humanitarian law violations.

Furthermore, the principle of universal jurisdiction seems to have fallen in the realm of science fiction. At this point, a decision needs to be made regarding the principle: States have the responsibility to either put it into effect or to abolish it. Remaining in the limbo of international law only serves to undermine its credibility. States - and lawyers - cannot pretend that any State in the world has the obligation to prosecute the perpetrators of grave breaches of international humanitarian law (at least when they are present on that State's territory), without ever following through when this could hurt another State that has not been defeated.

Implementation during armed conflict

Coming to the core of the discussion, one should say that Common Article 1 is one - if not the most - important mechanism. But what does the obligation for all States to respect and ensure respect mean? First, the primary responsibility is for belligerents to respect the law. This presupposes recognition of the applicability of international humanitarian law, i.e. of the existence of an armed conflict: if parties deny that there is an armed conflict, then the discussion about respect cannot even start. Unfortunately, there remain many situations where the parties, especially governments confronted with a non-international armed conflict, do not recognize the existence of the conflict. This needs to be the first step towards respect. At the same time, States must also refrain from applying international humanitarian law when the situation does not reach the threshold of an armed conflict.

Then, all other States have the responsibility to ensure respect. This is a difficult task, one of the reasons being that States have to first determine whether violations are being committed, and second whether such violations are sufficiently serious to require action on their part. In that sense, what would be useful is a centralized mechanism where States could meet and discuss whether their obligation to ensure respect under Common Article 1 has been triggered. This being said, one needs to keep in mind

that many actions under Common Article 1 are often taken in a confidential and diplomatic manner, without them being made public.

The second mechanism specific to international humanitarian law is that of the Protecting Powers thanks to which a third State may act as an intermediary in the name of one belligerent with the opposite belligerent to obtain cooperation in the implementation of international humanitarian law and to monitor its respect. However, this mechanism has not been used since the Falklands-Malvinas conflict, and it is mostly considered as difficult, if not impossible, to implement. First, the three States concerned must agree on the principle, which is understandably difficult when two of them are at war. Second, in a global context where most contemporary armed conflicts are non-international, the fact that the system of Protecting Powers only applies to international armed conflicts unfortunately adds to their obsolescence. Third, the role of neutrality itself is decreasing and neutral States are less and less willing to act as Protecting Powers in an environment where international armed conflicts are most often perceived as international law enforcement operations against international outlaws.

As for the International Committee of the Red Cross (ICRC), it is the one truly efficient mechanism I discuss here. Its mandate includes monitoring respect for international humanitarian law, visiting prisoners of war, protecting civilians during international armed conflict and offering its services during non-international ones. The ICRC can, however, not be the only solution during armed conflict.

Its priority, in my view, shall remain its humanitarian work and securing access to persons and areas affected by conflict. This may sometimes mean that when facing the dilemma of either upholding the law or gaining access, it will choose the pragmatic approach that guarantees access to the victims.

For instance - and this is a hypothetical example as I have no insider knowledge - during the conflict between Georgia and Russia in 2008, if the ICRC had come to the conclusion that South Ossetia was an occupied territory, it probably wouldn’t have shared such conclusion with the Russian Federation in order to preserve its presence and possibility to protect and assist war victims in that region. Law professors may be frustrated by such a position, but more importantly, this also means that no dialogue can be initiated on the substantive rules on occupation contained in the Fourth Geneva Convention, which are protective rules. In most situations, the ICRC still discusses legal issues through a bilateral and confidential dialogue with the authorities. But while this makes a lot of sense when the priority is to preserve access, it also means that other States have no factual basis allowing them to make decisions under their obligation to ensure respect. In addition, even the ICRC cannot always secure access to the victims - whether because of security concerns, or

because of States' obsession with sovereignty does not allow the ICRC, perceived as an external actor, to be present.

Sometimes, the ICRC has even difficulties to have access to the parties themselves - for instance, when the government does not tolerate that the ICRC has a meaningful dialogue with armed groups classified as "terrorist", or when the armed group itself mistrusts the ICRC.

Finally, one should mention enquiries and fact-finding. Fact-finding, an impartial, independent, reliable establishment of facts by a body legitimized by governments could have a crucial impact on better respect of international humanitarian law. As lawyers, we are all fascinated by debates about the law (we can discuss for hours the meaning of direct participation in hostilities, the geographical scope of the battlefield, the concept of military objective, the assessment of proportionality, etc.); however, most controversies arising during armed conflict are not about the law, but about the facts. This is why fact-finding would be so important, by a body with a general jurisdiction, which establishes the facts in an independent manner, every time there is an armed conflict and it is alleged that international humanitarian law is violated. Such work also serves to prevent or suppress rumours, beliefs or even propaganda that international humanitarian law is always violated (which leads to further violations). Such a fact-finding body would also provide third States better information about the situation, hence allowing them to take decisions under their obligation to ensure respect.

However, once again what sounds perfect on paper does not necessarily work in reality. The Geneva Conventions encourage States to agree to fact-finding mechanisms (but they never did), and Additional Protocol I created the International Humanitarian Fact-Finding Commission (IHFFC), which has a general jurisdiction in international armed conflict and yet, this mechanism has never been used. The IHFFC exists, it has members and a secretariat and 72 States have *ex-ante* accepted its jurisdiction. So why hasn't it been used? First, of course, it must be triggered and the enemy belligerent needs to give its consent - and there is an inherent difficulty in securing agreements between belligerents States. Second, like other mechanisms, it unfortunately has no mandate for non-international armed conflict. The IHFFC has indicated its willingness to work in non-international armed conflicts, but this is only possible based upon the consent of both parties. Third, because it was never used, it cannot show its expertise and impartiality and tends to be considered as an obsolete mechanism by many. Fourth, it has no follow-up procedures: unlike *ad hoc* enquiries, the IHFFC is not linked to any international body that could add its report to its agenda and follow-up on its results. Fifth, most importantly, I think that States simply dislike automatisms. States prefer *ad hoc* mechanisms over which they have a certain degree of control. *Ad hoc*

enquiries offer space for such political control - contrary to the IHFFC, over which the only control States may have is to elect its members. This is why, in my opinion, the IHFFC was progressively replaced by *ad hoc* enquiries.

Implementation in non-international armed conflict

I would contend that the only mechanism that officially exists is the ICRC's right of initiative contained in common Article 3, as well as that of other international impartial humanitarian organizations. They may offer their services to all parties and the latter may accept or decline the offer. In my opinion, this means that the ICRC, for instance, could act on the territory of a State without the latter's consent provided that the non-state armed group against which it is fighting gave its consent. But even when they generally respect international humanitarian law, parties always have something to hide and they are naturally more inclined to refuse the offer of services.

And above all - although this is totally wrong - States sometimes fear that to accept the ICRC's services is to admit the existence of an armed conflict and hence to open the door to external interference.

Conclusion

Could we resuscitate some of the mechanisms mentioned in this contribution? Unfortunately, this presupposes that States are ready to trust a third party over such a crucial issue for their very existence as is an armed conflict and the question whether they have violated international humanitarian law in their fighting in that conflict. Whether it be during the armed conflict (when allegations of violations occur) or *ex ante*, agreements between the parties seem to be very difficult to achieve. This is why the international community needs a self-triggering mechanism, which can decide itself when it should be concerned about a specific situation. And here comes the bad news: this too has already failed. Even the European Union, the most harmless military actor possible, could not be persuaded to accept that the IHFFC may spontaneously and even without being triggered by another party look into alleged violations committed by EU military forces. If the EU, which up to now cannot have violated international humanitarian law as it has never been involved in an armed conflict, does not accept a self-triggered mechanism, how can we expect a State to do so?

In conclusion, I would say that existing mechanisms do not function or do not lead to greater respect because belligerents and other States lack the necessary political will. For the same reason, new mechanisms will only work if they allow States to remain in control of their initiation and functioning.

Therefore, I think three features would be essential in any new mechanism. First, States need a place where they can meet and discuss in order to assess when their obligation to ensure respect under common Article 1 is triggered, and to coordinate their response in case of insufficient respect. The second feature would be an independent body with no operational humanitarian role in the field, but with the capacity to trigger itself and to provide States with the necessary information to assess when the law was respected or violated. And of course, thirdly, such mechanism must have the authorization to deal with armed groups - which necessarily means giving them the possibility to voice their positions, problems and aspirations with someone in such a mechanism. This will be the greatest challenge, but a necessary step towards greater respect for international humanitarian law.

In addition, the relationship between such a future international humanitarian law mechanism and the existing human rights mechanisms must be clarified. Indeed, in armed conflicts, most issues are simultaneously covered by international humanitarian law and by international human rights law.

Fact-finding: practice and challenges

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Fact-finding procedures, including independent Commissions of Inquiry, or, in fact, any independent oversight into the acts of warring parties in armed conflict, is an essential tool of implementation. Yet, unfortunately, as has been discussed, despite the inclusion in Additional Protocol of the Independent International Humanitarian Fact-Finding Commissions, such a mechanism does not currently (or may never) function. Does that mean, therefore, that there is no fact-finding done by any international and independent body into international humanitarian law? Of course not. The Human Rights Council and other regional bodies have, in fact, already taken on a very significant role in assessing international humanitarian law. For instance, of the twelve missions completed by the Human Rights Council, all, to some extent, have made reference to international humanitarian law (IHL).

Therefore, it is important that if any future mechanism falling within the institutional framework of IHL is to be developed, that lessons are learnt, both positive and negative, from those bodies which have attempted to assess IHL through a third party investigative process. The successes, challenges and limitations faced by these missions, as well as their impact on securing better adherence to IHL should help to shape future discussions for a pure IHL mechanism.

Before specifics are addressed, it is important to reiterate and clarify a broad understanding of the mechanism of fact-finding itself. Whilst fact-finding missions are important mechanisms concerning the implementation of IHL, we should reflect and understand, as well as embrace, their limitations. There are often huge expectations for commissions of inquiry and fact-finding missions. Yet, they are not an end in themselves. They are simply a preliminary mechanism to put the facts on the table, make initial legal analyses, and hopefully that will lead to the triggering of accountability mechanisms. In short they are there to "raise a red flag."

This understanding is actually one of central importance. If we take the Gaza Fact-Finding Mission led by Justice Goldstone, and reflect upon the statements expressed by Justice Goldstone in his personal capacity -while I am not going to enter into the details of the controversy following Justice Goldstone's article in the Washington Post- there is an important point to draw from this incident. Regardless of the veracity of the statements in the article, the result of the apparent retraction which was based on the content

of subsequent criminal investigations, led to many people calling for the fact-finding mission report to somehow be discredited, to be undermined.

The reasoning is structurally flawed and hence the assertions are completely misplaced. The fact that there were investigations - and of course we can have discussions on the adequacy of such investigations - represents a success in and of itself. That is exactly what a fact-finding mission (FFM) is there to trigger. If that subsequent mechanism, which is much more rigorous in criminal proceedings, with a lot more oversight, comes to a different conclusion, it is by no means inherently problematic- in fact, it should enhance the credibility of the fact-finding mission.

With this understanding in mind, it is important to address the very practical challenges facing such missions. One of the central and primary challenges is the issue of access. At the moment the Human Rights Council has a fifty per cent record, set to fall with the North Korea mission, in terms of gaining access onto the territory where possible violations are taking place. Such an obstacle represents a significant barrier to accurate and credible investigations for any fact-finding process- be it for the Human Rights Council mandated fact-finding missions- as well as any future envisioned IHL mechanism. The case in Syria concerning the use of chemical weapons highlights the general importance of being able to do on-site investigations in order to make factual assertions (and ones which are so central): in this case without having direct access onto the territory would it even be possible to make determinations about who used chemical weapons? Is it easy to make that an authoritative assessment from afar? It would be very difficult to make such a finding in fact, with such huge political implications, through indirect observations.

Yet, it is not, however, the case that it is impossible to make a factual assessment from other locations; refugees are often a great source of information, as well as whistleblowers, all who can be approached outside of the territory in question.

It has been suggested that maybe in the future we need to somehow come to a compromise in order to secure access. In order to gain access we need to give something, we need to give an incentive to warring parties, and that incentive would be confidentiality.

The question is, should this be something that an IHL mission should be willing to sacrifice? I think the Human Rights Council, in engaging in many fact-finding missions and putting together some excellent public reports has shown that it can be done, and to engage in confidential reporting may in fact be a backward step. Confidential processes do exist, and they play their role, yet it remains challenging to encourage warring parties to really respect international humanitarian law. As will be discussed later in the paper, there has been some positive impact of publicly

naming and shaming certain States and warring parties. It is difficult to envisage such impacts if the findings were to be kept confidential.

Access is one thing; cooperation is another. Again, it is not often forthcoming and there is no clear answer to securing good cooperation. Both national, but also regional and local level cooperation from the very parties you are often investigating is rarely a given.

Security is a huge issue. Whenever you speak to those involved with commissions, at the time they might put a brave face on it, but the feedback we have got is that at times there are some serious security considerations: whether or not the UN will always provide armed protection is not a given, and they are very vulnerable in that sense, so if we are serious about fact-finding missions and strengthening their capacities they need to have access not only to the country, but in that country itself they need to be able to safely access areas. And again, that is one of the huge problems.

Standards of proof: this is one of my favorite topics and some of you have heard me speak about standards of proof in fact-finding missions before. I will not bore you too much with this, but let's just say that I was once told that when it comes to the Human Rights Council and also the Secretary-General mandating fact-finding missions, they essentially take the same, very consistent approach. So, like the good lawyer I am, I thought I'd have a little read of the standards that were put on paper, and this is what I found: "beyond reasonable doubt", "sufficient credible and reliable information", "sufficiently substantiated", "overwhelming evidence", "substantial evidence", "concrete evidence", "systematic evidence", "reasonable to assume", "serious and concurring evidence", "less than expected by a criminal trial" (which by the way is one of the favorite phrases which is often used), "an approach proper to judicial standards", "convincing proof", "leaves no doubt"- I could go on. But the point to reiterate is that as these mechanisms, especially at the Human Rights Council, are new and developing, I think it is important that we make sure that the institution of a fact-finding mission is protected: applying clear, realistic and appropriate standards of proof can play a key role in this. As we saw from the fallout of the Goldstone report, if a Commissioner, on a subsequent date, undermines the report, you can simply take a step back and say "No, this report was based on clear standards, we're a preliminary mechanism, these are the sources of information we relied upon". I think you need to strengthen and protect the mechanism, in order for them to be able to withstand criticism, because, of course, any report which looks to accuse warring parties of violating international humanitarian law and also possibly committing international crimes, is always going to be subject to criticism. So, clearer standards across the board are needed.

Another issue with significant implications is the issue of time-frame. These missions often have to complete their work within three months.

Sometimes, if they're lucky, they might get six months. Once you factor in UN bureaucracy, issues of getting visas, hiring staff, there's often not much time at all. And then if you look in terms of the actual time spent on the ground, it's an average of about two weeks, but it is often as little as two or three days.

One interesting factor of fact-finding missions that was also mentioned yesterday is the issue of the identification of individuals. The questions we ask for these missing persons seem to be ever escalating: we are asking them to assess the facts covering large geographical areas, in complex conflicts and situations, to then make assessments of possible violations of international law, and in addition, we now also want them to identify individuals who have possibly committed criminal offenses. Of the Human Rights Council fact-finding missions, four of those missions have looked to undertake such a task. Due to the inherent due process implications at stake, it needs to be handled carefully.

Even when say confidentiality of the names is assured, there remain outstanding questions. For example, one question which I think Human Rights Watch asked in relation to the Ivory Coast was to whom does this list of names belong to? At the moment, they are under the custody of the Office of the High Commissioner for Human Rights. Human Rights Watch was critical of the fact that this list was not provided to the relevant Ivorian authorities to actually undertake some investigations. Such questions result in pointed questions such as who has custody of these lists? The issue of identification of individuals through such processes needs to be handled with care.

If another body under a pure IHL framework creates a fact-finding mechanism, is the identification of individuals something it should or would be willing to do?

Issues concerning the staffing of such missions have been raised. Inherent to the *ad hoc* and responsive nature of the mechanism, it is often a case of bringing in whoever you can, as opposed to the best. I heard many times that you bring in people with the language skills but not with the investigative skills. Yes, it's great that we have people who can speak Arabic for example, as it's very important to have investigators who are able to speak the language, especially so they can communicate with the victims, but if they can't investigate, the information collected maybe of limited use.

Commissioners themselves, as the figureheads of such missions, often take very different approaches from each other, often assuming very different roles. I think it's really positive that we are starting to see that certain commissioners are involved in more than one commission; I think that starts to allow for a certain consistency. However, there are often

concerns, sometimes about the capacity of the commissioners, but also the politicization of the commissioners.

The point to highlight is that this *ad hoc* mechanism has problems and it would be great if we could have a more centralized body with a set staff who has the necessary experience to actually be an asset on these missions. You only have two weeks on the ground so you need to do your job well.

Let me move on to a few general comments about the Human Rights Council (HRC). It has been suggested that the Human Rights Council needs to back off from playing a role in assessing IHL, under the rationale that the HRC derives its authority and mandate from a different body of law: international human rights law (IHRL). This is not something I personally feel is inherently problematic. All missions to the HRC to date have referred to IHL. I think if you look at the landscape of IHL and where we stand we have the IHFFC set out in Additional Protocol One, yet this mechanism doesn't function, and if it did function it would involve confidential reporting processes. On the other hand, we have the Human Rights Council, which is engaging in a public assessment of IHL and can be seen to be promoting accountability. You can criticize it, you can criticize the political nature of some of their other activities, the Israeli bias - seven of the missions have looked to address Israel - but I think maybe this public *ad hoc* process is realistically the best we are going to get, and therefore we would be best putting our energies into strengthening that process and its IHL capacity.

Now, I'm going to conclude by talking about the output and the impact of these commissions of inquiry. Yes, they are limited mechanisms but I think we can actually identify some positive impact. I currently work in the context of the Occupied Palestinian Territories and I think there are two missions which maybe show both sides of the coin: in one case real, practical change can be identified, yet in another case, no change whatsoever.

So, maybe I'll start with the negative first. The Human Rights Council engaged in a fact-finding mission with regards to settlements and the impact that these settlements have on the human rights of Palestinians. A very good report. Has Israel stopped building settlements? No. It's still building them right now, today.

Now, on the other side, if you look at the conduct of the Israeli armed forces during operation "Cast Lead" and you compare that with operation "Pillar of Cloud" or "Pillar of Defense", I think if you look at those operations you can actually see changing behaviour. In the most recent hostilities in November, over 1500 airstrikes were launched into Gaza and those had very few violations of international humanitarian law. If you compare that to "Cast Lead" yes, it's very different in terms of the dynamic of the incursion, but still I think, speaking with colleagues on the ground as

well, there was clear change. Again, it's not always easy to find that direct causal link. Can you really equate the change of behaviour to the report? Maybe not in totality, but there was a substantial amount of attention and publicity with the Goldstone report. It was an issue that was in the news and Israel was criticized severely for what happened in operation "Cast Lead", and I think the Goldstone report really played a significant role in provoking the outcry. As a result we did see change in conduct.

I will just sum up by saying that we have a body in the Human Rights Council that, while being political at times in terms of the countries selected, is engaging in fact-finding of IHL and in general can be seen to be doing a decent job. There are challenges associated with those missions, I think the mechanism needs to be improved, I think it needs to be strengthened. Whether or not a mechanism under international humanitarian law can actually do a better job, I'm still not convinced.

The contribution of the Oslo Global Conference: "Reclaiming the protection of civilians under IHL"

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Rationale behind the initiative and the process

While international humanitarian law (IHL) establishes a comprehensive legal framework to protect civilians from the effects of military operations, this stands in stark contrast to the situation that civilians in armed conflicts face on the ground.

The focus of this initiative has been on the humanitarian consequences for civilians in armed conflicts and what can be done to improve the situation. Not negotiate new rules, but improve compliance with IHL.

We believe it has been necessary to engage relevant actors who often do not meet so frequently, like government experts, the military, humanitarian organizations, media professionals, in a genuinely global dialogue on how to ensure that all parties to a conflict live up to their obligations under international humanitarian law. The "Reclaiming the Protection of Civilians under International Humanitarian Law" initiative was launched in 2009 to create a forum for such dialogue. Through a series of regional seminars, in such places as Jakarta (2010), Buenos Aires (2011), Kampala (2012) and Vienna (2013), focus has been on the main challenges and on concrete measures that could address them.

This has been a collaborative effort on the part of Argentina, Austria, Indonesia, Uganda and Norway, showing the importance of building on experiences from the field in the different regions, of learning from concrete experiences and of cross regional commitment.

In the regional seminars participants were encouraged to bring concrete experiences from the field to the table. Specific challenges to the particular regions were also highlighted.

For instance, in Jakarta, the importance of ensuring satisfactory IHL training for the military was stressed.

In Buenos Aires, one of the main issues was how to ensure documentation and that those responsible for atrocities were held accountable. Among others, the Argentinean Forensic Anthropologists shared their experiences in this area.

In Kampala, representatives from the humanitarian community and the Ugandan military addressed challenges related to asymmetric conflicts and armed non-state actors.

In Vienna, both human rights and military representatives stressed the relevance and applicability of IHL to modern warfare, also where cyberspace and the use of weaponised drones were concerned.

The Global Conference built on experiences drawn from the regional seminars. It gathered 300 participants, including representatives of 94 States, military experts, the UN, NGOs and the ICRC.

The final outcome document of the conference, a co-chair's summary, contained a list of recommendations in the five areas discussed. I will mention some of the main issues under each - and you will find all the recommendations in the co-chair's summary that has been distributed to you.

Reducing harm to civilians in military operations

Lack of knowledge of or respect for the rules is one reason why civilians are so severely affected. At the same time, in today's complex and asymmetric conflicts, actors who strive to respect humanitarian law may find this challenging.

The recommendations include measures to ensure that all legal obligations are being respected and reflected in all relevant doctrines and procedures, and that relevant personnel are given the education that is needed to ensure that IHL is being respected in practice.

They also focus on practical steps to be taken in military operations to ensure that existing IHL obligations, including the fundamental rules of distinction and proportionality, are respected.

Even in situations where IHL is respected, civilians may be severely affected.

Focus was placed on additional steps that may be taken by parties to conflicts, over and beyond what is strictly required by existing IHL obligations. As someone said; measures may be lawful but awful. The recommendations in this area are based on practical measures that have proved to be effective in order to reduce the harm caused to civilians. Where militaries have introduced policies to protect civilians, casualty figures have dropped dramatically.

One concrete example is from Somalia where The African Union Mission in Somalia (AMISOM) has succeeded in reducing civilian casualties in its more recent operations. The use of indirect fire by all sides placed civilians at a high risk of death, injury and property damage. In 2010 a team from the organization, "Civilians in Conflict", began working with

AMISOM on civilian protection. Together they developed an "Indirect Fire policy" that was adopted by AMISOM. The indirect fire policy solution consisted of three categories, each with specific recommendations to curb civilian harm; avoid civilian harm, attribute responsibility for civilian harm and make amends for civilian harm caused through appropriate response. Gradually civilian casualty rates went down (both due to the policy and also to the changing situation on the ground). Efforts by warring parties to track civilian harm have also been seen in Iraq by US forces and in Afghanistan under ISAF. AMISOM is also working to strengthen the protection provided by humanitarian actors.

The recommendations focus on different ways to ensure that humanitarian actors are given rapid and unimpeded access to all those in need of protection and assistance.

States should take active measures to facilitate humanitarian access, and should not impede humanitarian work by unnecessary bureaucratic burdens or by legal impediments such as counter-terrorism regulations.

In addition, it means that those working to provide much needed humanitarian assistance, are themselves provided the protection they need to carry out their work.

Promoting compliance with IHL during armed conflicts

The focus here was on how to promote compliance with IHL among those parties to conflicts who do not operate in accordance with the rules - be they state or non-state actors.

It was emphasised that States have an obligation not only *to respect*, but also *to ensure respect for* IHL, and that they should do their utmost to encourage States and other parties to armed conflicts to comply with IHL.

States should use their leverage, individually or collectively, to raise the political costs of non-compliance with IHL, for instance, through exerting diplomatic pressure, public denunciations or referral of situations to the International Criminal Court (ICC).

The need to engage with non-state armed groups to promote respect for IHL was also stressed here. Measures such as unilateral declarations by non-state armed groups, special agreements between governments and non-state armed groups as well as so-called "deed of commitments" have been instrumental. States should take active measures to combat sexual violence and gender-based violence. For example, victims should have access to justice and women should be empowered to participate actively in decision-making processes.

Enhancing documentation of the conduct of military operations

A key factor in improving the protection of civilians is documentation. Proper documentation of the conduct of military operations both during and after an armed conflict is essential in the effort to increase transparency. It is necessary in order to prevent further violations, to protect civilians and to promote accountability in post-conflict situations.

The recommendations include measures to ensure that all relevant information on the conduct of military operations is recorded both by parties to a conflict and civilian actors.

Parties to an armed conflict should ensure proper documentation, also by recording the types and locations of explosive weapons used, mapping areas that may be contaminated by unexploded ordnance and conducting systematic casualty recording. Information relevant for post-strike humanitarian efforts should be shared with the humanitarian community. States should promote transparency in sharing the information.

At the same time, documentation is not only collected by the military. Journalists and other civilian actors contribute significantly in this regard. However, this presence also leaves journalists and civilian actors extremely vulnerable. All too often, we see that they are attacked, persecuted or expelled by those who do not want their presence on the ground.

Therefore, it was reiterated that States, as well as other parties to an armed conflict, must ensure that journalists' right to protection as civilians is respected at all times. They should find ways to improve the protection of journalists and other media actors reporting from conflict areas, and respect their right to carry out their work.

The importance of civilian casualty tracking and fact-finding missions was also stressed (e.g.Oxford Research Group casualty tracking, OHCHR - on accountability mechanisms, the role of fact-finding missions.)

Strengthening accountability

Recommendations include measures to ensure that States are able to conduct the necessary criminal investigations and prosecutions against possible perpetrators. The recommendations also include measures to ensure that fact-finding and accountability mechanisms are effective.

How could States possibly contribute to IHL compliance? Most recommendations made were to States. How could the recommendations be moved forward? They were taken forward by Argentina at the PoC debate in August. How can States further engage to promote compliance with IHL and strengthen the protection of civilians?

There is also a process to avoid the use of explosive weapons in densely populated areas and other more thematically focused processes as the Health Care in Danger initiative by the ICRC, the ICRC-Swiss initiative on compliance.

Striving to protect civilians in Afghanistan, respect for international human rights and humanitarian law

Sima Samar
Chairperson, Afghanistan Independent Human Rights Commission

While international and national civil society and NGOs have achieved a lot in the protection of civilians in armed conflict, my presentation would like to bring Afghanistan's experience to the light. This experience will focus both on "humanitarian aid or assistance" and monitoring of human rights.

Since the collapse of the Taliban, Afghanistan have started to realize some of its obligations under international human rights and humanitarian law. The swift spread of national and international NGOs and civil society movements across the country and taking charge of delivering much needed humanitarian services as well as monitoring and reporting human rights and humanitarian incidents or crisis, define the characteristics of the new era of international human rights (IHR) and international humanitarian law (IHL) in Afghanistan.

The first few years, in the absence of functioning government institutions, Afghanistan yielded to the enormous capacity and rapid humanitarian service delivery of NGOs and civil society organizations (CSOs) across the country. It was in the later years that the government institutions began to share the responsibility however partially.

The role of international organizations, the Afghanistan Independent Human Rights Commission (AIHRC), NGOs and CSOs remain vital to the protection of civilians and also to the monitoring of and reporting on breaches of human rights and humanitarian law for some foreseeable future. From the legal point of view the conflict in Afghanistan could be argued as being both an international conflict to some extent as well as an internal conflict. However, IHR and IHL are applicable to both legal status of the conflict. Under Common Article three to the 1949 Geneva Conventions, civilians must be protected by conflicting parties. Unfortunately, this is not an obligation the conflicting parties in Afghanistan would easily honor. According to both the AIHRC and UNAMA report, over 14000 civilians have been killed in the past few years and an even bigger number of people have been injured.

As a good practice the AIHRC and NGOs have been doing two things in Afghanistan: they have been monitoring the state of compliance of both the pro-government forces and the anti-government forces with the provisions

of IHR and IHL, and they have also been active in investigating, registrating and receiving petitions and complaints on violations and breaches of IHR and IHL in the country. Our reports on the number of civilian causalities regularly provide a credible case and account of civilian vulnerability and losses to both public and warring parties. The AIHRC alone has investigated hundreds of civilian casualty incidents in the country and has reported both at *ad hoc* and regular bases on the effect of war on civilian life and infrastructures.

The effects of regular and effective monitoring and investigation of civilian casualties in the country have helped to increase compliance of the international forces with IHR and IHL and have provided a clearer picture of the anti-Government forces accountability and responsibility in carrying out operations that harm civilians. As an example, in 2009, the pro-government and government forces were responsible for over 40% of the overall civilian casualty incidents - this percentage has now decreased to 9%. The role of the AIHRC along with UNAMA and NGOs has been enormous in achieving this result.

The AIHRC have also been actively engaged in war-related detention issues that are carried out by both the international forces in Afghanistan as well as the government forces of Afghanistan. The AIHRC was the first ever Afghan institution to regularly monitor the Bagram detention center, later called Parwan detention center, while it was administered and run by the coalition forces, since 2010. AIHRC also monitored the National Intelligence Directorate (NDS) detention centers countrywide.

The regular monitoring and investigation of alleged cases of torture, ill-treatment and degrading cases in those detention centers led to a decrease of violations of IHR and IHL by the pro-government and government forces and increased a degree of responsiveness and accountability of the said forces.

The AIHRC have also engaged CSOs and NGOs in its effort to work on conflict-related detention issues. In that regard, the AIHRC have brought together NGOs and CSOs along with the UN agencies to participate in a coordination effort for state of war related detainees. The advocacy effort and information sharing mechanism of this coalition and coordination group has enormously contributed to the compliance of pro-government and government forces to IHR and IHL.

This role has not ended here. The AIHRC has also brought to light so many civilian casuality incidents by deploying impartiality, professionalism and expertise by strictly sticking and adhering to the international norms. As an example, in 2009, the pro-government forces bombarded a village in Aziz Abad Shindand in the Hirat Province. The incident was investigated by the Government of the Islamic Republic of Afghanistan (GoIRA) and coalition forces. They presented a disputed account of the incident and the

number and identity of the diseased one. The GoIRA claimed a much higher number of civilians who were killed in the area and cited the incident as deliberately targeting civilians, while the international coalition forces claimed a fraction of what was reported denying civilian deaths. The AIHRC, however, by deploying its staff to investigate the incident came up with the correct number and actual damage in the area, which was later accepted by both victims, GoIRA and international coalition forces.

The above example shows the important role an impartial but expert institution can play, investigating and reporting civilian casualty and by so doing encourage compliance with IHR and IHL.

I would also like to praise the role of NGOs and CSOs in easing the tragic effect of conflict on civilian people. They have been instrumental in Afghanistan. I was running a NGO during the conflict in Afghanistan providing provisions for humanitarian relief, running schools, literacy courses for women, skill training for men, clinics and, as needed, relief items to the different parts of the country. As a NGO, during the visit of the Special Rapporteur for Human Rights in Afghanistan, we were collecting the testimony of victims of human rights violation and information about the violation of IHL to testify to the relevant person, passing all the information about violations of IHR and IHL to different Human rights organizations such as Amnesty International HRW and the UN agencies. And I witnessed the NGO's role in the same way as the UN Special Rapporteur for Darfur in Sudan so they were in that country too. NGOs and CSOs have not only played a crucial role in delivering humanitarian assistance, they have also been effective in monitoring and reporting the compliance and breach of IHR and IHL in these two countries. When I was in Sudan, I was briefed on how local NGOs were reporting on rape and other sorts of human rights violation by the warring parties. As an example, rape as a tool of war used in Darfur, was documented by NGOs, such as MSF, who were running the clinics in the IDP camps there. Similar roles and cases are widely documented and seen by the AIHRC in Afghanistan.

Given my experience and the role AIHRC plays along with NGOs and CSOs, I would like to emphasize that the role of NHRIs, NGOs and CSOs is increasingly vital to hold government and non-government forces accountable to comply with IHR and IHL. The capacity, impartiality and expertise of these institutions are a much needed tool for that purpose. In many instances, it has also been proven that they can be vigilant, quick and efficient in addressing some of the egregious human rights violations in any given war conflict. They would also be able to pursue the government and any warring factions to comply with IHR and IHL.

Further, and more importantly, the NHRIs, NGOs and CSOs could reduce the suffering and the tragic effect of war on civilians by

acknowledging their suffering by investigating and reporting their plight and cases as well as by the direct provision of humanitarian assistance.

Their role could also be instrumental toward more accountability and responsiveness of state and warring factions in a conflict.

In doing so, NGOs and CSOs face enormous challenges and unpredictable risk, however. They not only suffer from the effect of war, but sometimes they are targeted for the very things they are doing, the very services they are delivering or providing and for the responsibility they discharge in a conflict situation.

NGOs can also play a role in raising awareness among the local communities of IHR and IHL. Once the people in the local communities know about their rights and obligations, they can then try to protect and respect other rights and more importantly at least they can raise their voice against the violation in both international laws. By passing the information to the relevant authorities and the UN agencies, the UN Security Council can take action to protect, as we currently see everything by media and civil societies.

Having said that, I strongly believe that the ultimate responsibility, both for the protection of civilians and compliance with IHR and IHL, lies with the State and Governments, and the role of NGOs and CSOs can hardly be seen as an alternative to this responsibility.

I believe a more robust mechanism of State accountability needs to be set up and, within that range, the role of NHRIs, NGOs and CSOs could be defined and further elaborated. Afghanistan would remain a good place for case study to this end, however, tragic events in Syria and elsewhere in the Middle East and Africa require the most attention and active role of all, also involving NGOs and CSOs, to counter and address the shortcomings of the current international accountability mechanism and violations of IHR and IHL.

IV. Lessons on IHL compliance from other systems of international law

The Inter-American System

Rafael Nieto-Navia
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We all know that there are substantive differences between human rights law (HRL) and international humanitarian law (IHL). Although both protect human rights *latu sensu*, human rights law protects fundamental human rights when they are violated by States (as well as probably corporations) and international humanitarian law protects certain human rights of persons who are combatants and also of the civilian population which finds itself in the middle of combat.

IHL has a legal framework of both treaty and customary laws related to war, be it international or, as is more frequent today, civil or internal. Military operations have to be conducted in accordance with international law. Failing to do so implies a personal responsibility falling under the jurisdiction of military tribunals or the International Criminal Court. There are, as well, specialized or *ad hoc* tribunals created with the specific purpose of dealing with the so-called war criminals in certain conflicts, such as the *ad-hoc* Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra-Leone, or the Cambodia Tribunal designed specifically to deal with the Khmer-Rouge atrocities. IHL is an exceptional law of restricted application during armed conflicts.

On the other hand, human rights law can be violated only by States, although, as I have already said, modern concepts on the matter also imply, at least in theory, that certain organizations such as corporations may also be responsible. This is the reason why human rights courts do not deal with individuals but with States. It is applicable in times of normality and peace. In times of war, public danger or other emergency that threatens independence or security, the State may take measures derogating from its obligations to the extent and for the period of time strictly required by the exigencies of the situation. However, certain fundamental rights cannot be suspended or derogated during these situations, like the right to life or the judicial guarantees essential for the protection of such rights.

These substantive differences are regulated, as well, by different treaties. In the Inter-American system we find the American Convention on Human Rights (San José, 1969) but there is no special Convention dealing with violations of IHL. I would like to be clear: there are a lot of conventions that contain provisions on IHL (from the The Hague Conventions to the Geneva Conventions and Protocols and many more until the 1998 Rome Statute), but they are international and not only

specific to the Inter-American system. Apart from the domestic martial courts in many countries, only the International Criminal Court deals with the prosecution and punishment of the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

In an armed conflict people are protected both by the rules of human rights and those of IHL. The provisions enshrined in IHL establish minimum standards of conduct to be adhered to by those involved in the hostilities, in order to limit the negative effects that are generated by an armed confrontation.

In situations in which there is a simultaneous application of both legal systems IHL prevails, because it is *lex specialis*. This was recognized by the International Court of Justice (ICJ) in its Advisory Opinion regarding the use of nuclear weapons. At that time the proponents of the illegality of the use of nuclear weapons argued that its use violated Article 6 of the International Covenant on Civil and Political Rights, which provides that "no person shall be deprived of life arbitrarily."

In its Opinion, the ICJ held that Article 6 recognizes a non-derogable right, also applicable in armed conflicts, and that it is forbidden to take the life of a person "arbitrarily" even during hostilities. But the Court acknowledged the primacy of IHL in armed conflicts, because it is *lex specialis* and the term "arbitrarily" in cases of armed conflict must be defined in light of this ordinance. For example, in a combat situation the protection of the right to life must be analyzed in the light of IHL. Thus, deaths generated by legal acts of war should not be construed as a violation of the right to life. To qualify an act as lawful or unlawful in the conduct of hostilities, we must adhere to the rules of IHL.

So (i) in an armed conflict everyone is protected by the regulatory framework of human rights and IHL but (ii) the latter is *lex specialis* and, therefore, prevails over the general law which is the human rights law.

In this case, the State must consider its obligations under international instruments and its internal regulations and then clearly establish the legal framework applicable to the factual situations arising within its territory. Meanwhile, those involved in the hostilities must identify the legal regulations for planning and executing military operations aimed at neutralizing the opponent.

It is, therefore, possible to conclude that in cases of internal armed conflicts, the applicable law is IHL, which must be interpreted with the help of international human rights law standards but not the reverse as stated by the Inter-American Commission as we will see below.

The organs created by the American Convention on Human Rights have jurisdiction to deal exclusively with human rights. Article 62.3 says that "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are

submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration […] or by a special agreement." A similar wording (violation of a human right set forth in this Convention) is found in Article 45 regarding the competence of the Inter-American Commission.

The rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties provide that treaties be interpreted in good faith in accordance with the ordinary meaning of its terms, taking into account the object and purpose of the treaty. Only when this interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, may recourse be had to supplementary means of interpretation.

I think that "violation of a human right set forth in this Convention" and "interpretation and application of the provisions of this Convention" are not ambiguous or obscure words and I do not think that interpreting these words in their ordinary meaning leads to a manifestly absurd or unreasonable result.

In the case of Las Palmeras the Inter-American Commission requested the Court to conclude and declare that Colombia had violated the right to life, embodied in Article 4 of the Convention and Article 3, common to all the 1949 Geneva Conventions. In view of this request, Colombia filed a preliminary objection affirming that the Court "does not have the competence to apply international humanitarian law and other international treaties" because Articles 33 and 62 of the Convention limit the Court's competence to the application of the provisions of the Convention. Colombia stated that the Court "should only make pronouncements on the competencies that have been specifically attributed to it in the Convention."

The Commission stated that, in the case under consideration, it had *first* determined whether Article 3, common to all the Geneva Conventions, had been violated and, once it had confirmed this, it *then* determined whether Article 4 of the American Convention had been violated. The Commission stated, as a declaration of principles, that the case should be decided in the light of "the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in Article 3, common to all the 1949 Geneva Conventions". The Commission reiterated its belief that both the Court and the Commission were competent to apply this legislation.

In order to carry out the examination, the Court interpreted the norm in question and analyzed it in the light of the provisions of the Convention to decide whether or not a norm or fact is compatible with the American Convention. As the latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with

the Convention itself, and not with the 1949 Geneva Conventions, the Court decided to admit the preliminary objection filed by the State.

Roma locuta, causa finita. At least that is what we thought at that time. Hence, the Commission and the Court are not competent to deal with or apply IHL treaties or conventions. The Commission, however, is not happy with this situation, so it has decided that although it is true that it is not competent, it can interpret the Convention in the light of IHL treaties and conventions.

On October 21, 2010 the Commission declared admissible a request from Ecuador against Colombia. Ecuador alleged that an Ecuadorian citizen, Frank Aisalla, had been extra-judicially executed by Colombian forces participating in a cross-border attack by Colombian forces to a terrorist camp of FARC. Colombia raised as a preliminary objection the incompetence *ratione materiae* of the Commission to discuss the facts and consequences of Operation Phoenix, which are governed by IHL which is *lex specialis* for being a military conflict.

If Aisalla had been a civilian, we could talk of "collateral damage", which is justified in a combat situation, especially when the use of force is proportionate.

But Aisalla was not a civilian. Even Ecuador mentioned that Aisalla was suspected of having links with FARC, in whose camp he finally perished. He was clearly a fighter, not protected by the internal conflict provisions of the Fourth Geneva Convention nor by the Second Protocol or even by common Article 3, which is applicable to internal conflicts but refers only to civilians and non-combatants. Aisalla was killed in combat and such deaths are not violations of human rights.

In its decision the Commission cites the Court which, in the Bamaca case vs. Guatemala, said that "there is indeed similarity between the content of Article 3 common to the Geneva Conventions of 1949 and the provisions of the American Convention and other international instruments on non-derogable human rights (such as the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment)" and "that the relevant provisions of the Geneva Conventions can be considered when interpreting the American Convention".

The Commission added "that although some of the facts alleged had occurred in the context of an armed conflict this does not preclude [the] Commission to rule over them". The Commission concludes that "although IHL is *lex specialis* in relation to events that take place in the context of an armed conflict, this does not mean that international law of human rights does not apply. Rather, what it means is that in applying the law of human rights, for purposes of interpretation of the American Convention, it is necessary to resort to IHL as specific rule governing armed conflict."

This statement involves a fallacy: if IHL is *lex specialis* in cases of armed conflict, is this the one that should be applied because the special law prevails over the general law? The Commission diminished the role of *lex specialis* to that of a simple rule of interpretation.

On the other hand, the Court itself has accepted the Commission's theory. In the Bamaca case the Court stated that "While the Court lacks jurisdiction to declare that a State is internationally responsible for the violation of international treaties that do not confer such jurisdiction to the Court, we can see that certain acts or omissions that violate human rights in accordance with the treaties the Court can apply, also violate other international instruments for the protection of the human person, such as the Geneva Conventions of 1949 and, in particular, common Article 3. In the Ituango case it said: "In the present case, to analyze the scope of Article 21 of the Convention, the Court considers useful and appropriate the use of other international treaties such as Protocol II of the Geneva Conventions of 12 August 1949 on the protection of victims of internal armed conflicts, with the aim of interpreting the provisions [of the American Convention] in accordance with the evolution in this area of International Humanitarian Law."

In the Mapiripán Case the Court decided to interpret the American Convention in the light of the Convention on the Rights of the Child because "these are part of a very comprehensive international corpus juris for the protection of children, States must respect."

In the Santo Domingo Case, in which the agents of the victims did not ask the Court to hold the State liable for alleged violations of IHL, nor had the Commission included such violations in its report, the Court "considered appropriate to interpret the scope of the rules of treaty obligations as a complement to the rules of international humanitarian law, taking account of its specific matter, in particular, the Geneva Conventions of 1949, common Article 3 and Protocol II and […] analyze the facts of the case by interpreting the provisions of the American Convention in the light of the relevant rules and principles of international humanitarian law, namely: a) the principle of distinction, b) the principle of proportionality, and c) the precautionary principle." To do this, the Court used a compilation of the ICRC on customary international humanitarian law.

These are only some examples of how American States that have ratified the American Convention are exposed to the application by the Court of norms that they have not agreed to, such as those contained in the ICRC book - very respectable but with no binding power.

We should now move on to other issues. The first one is to ask: what does "Inter-American System" mean? In general terms, the "system" includes all American Countries: Latin-American, Canada, USA and the Caribbean countries except Cuba. Cuba was expelled from the OAS in

1962 and although the Resolution was revoked in 2009, that State has not returned to the Organization.

Some statistics are not a bad idea. All of the members of the system and Cuba have ratified the Geneva Conventions of 1949. But not all have ratified the first two Protocols (the third one is not important for our purposes). Protocol I has not been ratified by the US and Mexico and the US has not ratified Protocol II.

The 1993 Convention on the Prohibition of the Development of Chemical Weapons has been ratified by all the American countries.

The Convention on the Prevention and Punishment of the Crime of Genocide has not been ratified by Dominica, Dominican Republic, Grenada, Guyana, St. Kitts and Nevis, Saint Lucia and Surinam.

The 1997 Ottawa Convention on mines has been ratified by all the American countries, except Cuba and the US.

Only Haiti has not ratified the 1972 Convention on Biological Weapons.

The ICC Statute has not been ratified by Bahamas, Cuba, El Salvador, Haiti, Jamaica, Nicaragua and the US.

Of 27 Conventions and Protocols analyzed, Costa Rica and Panamá have ratified 25, and Guatemala, Chile, Brazil, Canada and Argentina 24. On the other hand, Haiti has ratified only 6, Bahamas 7 and Saint Kitts & Nevis 9. As a summary, 16 States have ratified 20 or more Conventions, 13 between 10 and 19, and only 3 less than 10. It's not a bad balance.

Now we have to look at compliance with the Jus in Bello in America. Setting aside the US and the 1982 Malvinas or Falkland conflict, there have been no international wars in America for the last 40 years (since the "football war" between El Salvador and Honduras, which lasted only four days). Time does not permit discussion of the two exceptions: the US interventions in Grenada and Panamá, which cannot be truly labeled "wars".

The fight against terrorist groups such as the Tupamaros (Uruguay) and Montoneros (Argentina) or the drug-traffickers in México or the so-called criminal gangs, drug-traffickers as well, in Colombia cannot be considered as armed conflicts, and are not subject to common Article 3.

Let's have a look at this statement. Common Article 3 is applicable to "armed conflict not of an international character". What does that mean? According to the Commentaries of the ICRC, which are accepted as doctrine, if "the Party in revolt against the Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention, we can talk of "armed conflict". It is also required that the Government recognize the insurgents as belligerents in general or for the purpose of the Convention only; or it claims for itself the rights of a belligerent. In these cases Article 3 is immediately activated.

The application of this Article does not affect the legal status of the rebels. Its application does not prevent the government to rigorously apply its internal laws, provided it does so through regularly constituted courts and minimum judicial guarantees recognized in their domestic laws granted to defendants. This Article does not give the rebels the status of prisoners of war, but it gives those who have been placed *hors de combat* the right to be treated with humanity and with respect for their life and not to be subjected to cruel, inhuman or degrading treatment.

What if these conditions are not met or we are in the case of mere tumult, or riot, or unorganized insurrection or even plain banditry? Domestic laws should be applied. It is supposed that these laws respect the international duties of the States regarding human rights. So, we are not talking of "infractions" to IHL, but of domestic crimes that have to be prosecuted according to domestic laws.

In contrast, it is worth mentioning the so-called civil war in El Salvador, between the 1979 coup-d'état and the 1992 Chapultepec Peace Agreement. The Farabundo Marti front, a left-wing guerrilla movement, rose up against the government. During that war death squad killings and disappearances, indiscriminate attacks, kidnappings and assassinations of civilians were common. Finally, a truce was concluded, under the direction of the United Nations, in which the Farabundo Marti was amnestied and transformed itself into a political party. The armed forces were regulated and a civilian police was established. The United Nations calculated around seventy thousand dead or disappeared.

In 1978-1979 the leftist Sandinista National Liberation Front rose up against the Nicaraguan government to violently oust the Somoza regime. Somoza was assassinated in 1980 in Asunción, Paraguay, where he had sought refuge. The new government had to face the Contras, a counter-revolutionary group, in a war that lasted from 1981 to 1990. The Sandinistas were supported by the Soviet Union (but also by Greece, México, Venezuela and Sweden) and the Contras by the US. So, this war was simply a battleground of the Cold War. I invite you to look at the ICJ decision in the case of the Military and Paramilitary Activities in and against Nicaragua.

After approximately ten thousand deaths, the war ended with the signing of the Tela Accord in 1989 and both the Sandinistas and the Contras were demobilized. The following democratic elections were won by the center parties. Afterwards, as it is well known, the Sandinistas won power again in 2007 and have been led by President Ortega ever since.

According to the Peruvian Truth and Reconciliation Commission, Sendero Luminoso (Shining Path) is a branch of the Peruvian Communist Party. It is a subversive organization, which in May 1980 started an armed conflict against the Peruvian State. During this conflict, the most violent in

the history of the Republic, Sendero Luminoso committed serious crimes most of them amounting to crimes against humanity and was responsible for 54% of deaths reported to the Commission which estimates that the total number of fatalities caused by this terrorist group amounted to 31,331.

Sendero Luminoso is characterized by its extreme brutality, including violence applied against peasants, union leaders, popularly elected people and civilians in general as well as attacks on property and national infrastructure (transmission towers, roads, bridges, railways, refineries, etc.). Sendero Luminoso is considered a terrorist organization by Peru, and it is on the lists of terrorist organizations of the European Union, Canada and the United States.

On September 12, 1992 the head of Sendero, Abimael Guzman, was captured and sentenced to life imprisonment. His successor was captured in 1999. Other leaders were sentenced to prison terms of between 25 and 35 years. Since then only a small cell without capacity to act has survived. Last August, its two leaders were killed and the person in charge of financing the group was captured.

As is well known, terrorism was not included in the Rome Statute as a crime under the competence of the International Criminal Court. Although some of the resolutions that appear in the Final Act of the Rome Conference considered that terrorism and drug-trafficking were crimes that affected the international community, they were not included in the Statute, nor have they been included until now. In this case, domestic law should be applied and was applied in countries such as Italy, Germany, Spain, France, Peru.

Finally, I will mention a special case which I know very well: the FARC and ELN in Colombia. These groups (and another that does not exist anymore known as the M-19) started as insurgencies revolting against the central government for political reasons. But in the 80's, they found that drug-trafficking was better business than kidnapping. Both are communist in their origin, although one was inspired by the Soviet Union and the other by Mao's ideas. They combine all forms of struggle, and terrorism is one of them. Civilian population is not respected and bombs are used daily against the national infrastructure. I think that they commonly commit crimes against humanity and I will mention only a few examples: the killing of hostages when attacked by the public force (for example, when in June 2007 they murdered 11 deputies of the regional Valle Assembly in cold blood); the use of bomb-gas-cylinders to attack a church with many civilians in Bojotá in a poor region of Colombia, killing 119 civilians, most of them women and children, in May, 2002; and a bomb that exploded in a social club in Bogotá on February 2003 killing 36 people and wounding more than 200. At the moment of the explosion there were more than six hundred people in the club.

These groups, of course, are an organized military force and use military uniforms and have an authority responsible for their acts but have no control of a determinate territory and do not respect IHL or common Article 3. The Colombian Government considers that they are not a "force" capable of creating an internal armed conflict or a civil war and have no political recognition, although these days in Havana they are looking for a peace agreement with the government. They are considered terrorists.

In December 2005 a group of experts convened by the United Nations recommended a definition of terrorism that was adopted at the Madrid Summit, according to which terrorism is "any act in addition to those specified in the various agreements [...] intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population or compel a government or an international organization to perform an action or refrain from doing so."

Colombia is Party to the Geneva Conventions and Protocols I and II, but the Constitution also has an extensive human rights chapter. Additionally, the Colombian Criminal Code considers as domestic crimes the most serious and non-serious violations of international humanitarian law, such as genocide and the so-called "Crimes against Persons and Property protected by International Humanitarian Law." By persons protected under international humanitarian law the Code means the members of the civilian population; people who do not participate in hostilities and civilians held by the adverse party; the wounded, sick or shipwrecked; those *hors de combat*; medical and religious personnel; journalists in mission or accredited war correspondents; the combatants who have laid down their arms by capture, surrender or other similar cause; those who, before the start of the hostilities, were considered as stateless persons or refugees; any other person having that status under the Conventions I, II, III and IV of 1949 and the Additional Protocols I and II of 1977."

So, the military operations of the Armed Forces and the rebels also, are subject, regardless of IHL, to this criminal regime. Whether there is or not internal conflict in Colombia, IHL is fully applicable throughout the Criminal Code.

As IHL has the characteristic of being asymmetric, government forces are required to apply it even if the enemy does not. Colombian armed forces could not, for example, use poison or contaminated ammunition as does the FARC, or attack civilians with cylinder bombs or kidnap them.

Colombia is a State Party to the 1997 Ottawa Convention on land mines. As the Army and Police quarters and bases are frequently attacked by the enemy, they were surrounded by land mines. The clearance of mines, one of the duties convened in the Convention, was duly accomplished. Today, Colombia is one of the countries that can give technical assistance on

demining to other countries. However, the so-called guerrillas continue to install hand-made mines in areas used by peasants and by kids going to school. From 1990 to July 2013 there were 10,471 mine victims, 38% civilians and 62% military. 781 civilians, of whom 223 were children, died. Between January and July 2013, 87 civilians (of whom 31 children, 5 of whom died) and 152 military (of whom 17 died) were victims of land mines. These numbers are terrible. But it is more frightening, that, while talking of peace in La Habana, the FARC are still planting mines. And they are looking for a complete amnesty of their crimes against humanity.

Now very briefly I have to conclude. War is always brutal and IHL is designed to mitigate its effects. It is impossible to mention the cases in which IHL has been violated and, of course, probably there is a lot of impunity, as even the so-called first world countries know. But what is clear from the described panorama is that, nowadays, countries in America try to abide by their international duties on the matter. I hope I have illustrated this.

The African System

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The African system is the youngest system of all the existing regional human rights systems. Despite the absence of a regional human rights system for Asia, I am confident that, with ongoing efforts by regional governments and civil societies, we will have the Asian regional system as well in the near future. As we all know, Africa has experienced and indeed been traumatized by over five centuries of gross violations of human rights and rules of international humanitarian law (IHL) that are unfortunately still evident today. However, it is important to note that, it is the events that we witnessed in the aftermath of independence in early 1960s to 1970s when a band of dictators such as of Jean-Bédel Bokassa, Macías Nguema of Equatorial Guinea, and also Idi Amin Dada of Uganda, that gave urgency to the need to protect human rights on the continent. It is this part of the history of the continent that finally led the African leaders to resolve and put in place the human rights system starting with the African Commission on Human and Peoples' Rights.

In the late 1970s President Senghor of Senegal sponsored a resolution which was adopted during the Organization of African Unity (OAU) Summit in Monrovia arguing for the establishment of the African instrument to address human rights violations on the continent. Consequently, the African leaders decided that the Secretary-General of the OAU should convene the meeting of experts to look into the issue of human rights violations on the continent. The decision of some of these leaders to accept President Senghor's resolution can partly be attributed to their desire to distance themselves from their colleagues who were committing so many atrocities against their own people.

In their resolution, the African leaders requested the OAU Secretary-General to ensure that those experts who would be appointed for this role be guided by specific principles set in the resolution. Some of these principles included: the so-called positive traditions and principles of African society and the respect for political options. These experts were also required to come up with an instrument providing for the protection and promotion of human rights through a commission. Interestingly, the resolution did not mention or make specific provision of a Court as one of the structures to be put in place to complement the role of the Commission in the promotion and protection of human rights on the continent. The absence of the Court in the resolution was striking precisely because, as I said earlier, some of these leaders were (presiding over) some of the worst

atrocities against their own people. Indeed, as the resolution demonstrated, African leaders were very keen to retain the right to say the last word. This objective was achieved by requiring the Commission to submit its annual report to the OAU leaders for final approval before it was made public. The implication of all this was that it ensured that the system established was very weak to seriously address human rights violations on the continent.

In 1981, the African leaders at their Summit in Banjul, Gambia adopted the African Charter on Human and Peoples' Rights. I can generally say that the Charter adopted was very innovative. It was innovative in the sense that it departed from the traditional human rights instruments which gave prominence to individual rights, it provided for both individual and peoples' rights. And I think the significance of this was to combine the so-called three generations of human rights. Among other things the Charter enshrined the principles of non-discrimination on the ground of race, ethnic group, colour, language or religion. It also guaranteed the right to life and prohibited slavery as well as torture and inhuman and degrading treatment and punishment.

But unlike the European Human Rights Convention, which my good friend Prof. Costa will tell us more about after my presentation, the African Charter did not provide for a derogation clause in times of emergency situations. The basic obligation of the State Parties to the Charter was held out in Art. 1 which provided that "States Parties shall recognize the right, duties and freedoms enshrined in the Charter and undertake to adopt legislative measures to give effect to them". The obligation was complemented by Article 62 whereby States Parties were required to report bi-annually on the legislative and other measures they had adopted to give effect to the rights guaranteed by the Charter. It is, therefore, clear that the implementation of the African Charter was vested in the African Commission which was empowered to promote human and peoples' rights and to ensure their protection throughout the continent.

So, this gave, of course, both promotional and quasi-judicial functions to the Commission. But the African Charter also provided for inter-State and individual complaints (which they referred to as communication) on the violations of human rights recognized by it. So it was only to act on individual petitions at the request of the Assembly of the Head of State and Government of the OAU when they relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights. Measures to be taken in such situations are supposed to remain confidential unless the Assembly otherwise decides. But generally it can be said that a high number of African States have not met their reporting obligations, and on part of the African Commission it is generally agreed that at that time, and I will come back to that later, it performed little of its protective mandate.

And if I may just pause and say how the Commission was made to become an effective actor in human rights protection on the continent, I can attribute that to the constant and sustained pressure exerted by different members of civil society. I remember, (I have Marco Sassoli here to correct me), when we were able to organize every six months, ahead of the sessions of the Commission, meetings bringing all those NGOs to be a kind of gendarmes, to make sure that the Commissioners acted on those issues even when it came to promotional activities.

And it is within that framework that we initiated the famous Resolution on the promotion and respect of international humanitarian law and human and peoples' rights. I remember the ICRC was, also at that time, very much with us and I think that was a breakthrough. Even in that resolution the Commissioners, considering that human rights and IHL have always, even in different situations, aimed at protecting human beings and their fundamental rights, noted the competence of ICRC in promoting respect for International Humanitarian Law; they recalled of course a resolution passed by the Council of Ministers; and finally they invited all African State Parties to the African Charter to adopt measures at the national level to ensure the promotion of the provisions of international humanitarian law and human and peoples' rights, stressing the need for specific instruction and training of military personnel in international humanitarian law and human and peoples' rights respectively. That's why this morning I was really pleased when Marco Sassoli did mention that while at the end of the day we may speak about the ideal world, we also have to put emphasis on strengthening the domestic systems to enforce these norms. I think that is something extremely important if we are to align the ideal world we live in and the norms we develop to cater for this world.

What is interesting is that when we were able to get the Commission moving and passing important resolutions, we also felt that the time had come to establish an African Court, because the idea of having an African Court was not new. Indeed, I should state that the genesis of this idea came to the fore in 1961 during the first Congress of African Jurists which was organized by the International Commission of Jurists in Lagos, Nigeria. Unfortunately, the idea was rejected and was never pursued in this period.

Even in 1980, during the ministerial meeting to approve the preliminary draft of the African Charter, the idea to establish the Court re-surfaced once more, however, as it was in 1961, it was roundly rejected. In 1996 we pressed the idea further and following a discussion I had at that time with the then Secretary-General of the OAU, Salim Ahmed Salim, we agreed that the idea of an African Court was imperative and could not wait any longer. With his support, I was able to produce a draft which culminated in the establishment of the African Court. Subsequently, the Protocol of the Court was adopted in 1998.

This change of attitude of the African States towards the role of judicial institutions in the settlement of disputes around that period can be attributed to different factors. For example, around this period you may have noticed that many African States made declarations of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ), but at the same time if you take the ratio in this period, you would have noticed that out of 26 cases which were brought to the ICJ between 1982 and 1997, the ratio of those in which an African State had been a party was almost 40%. So that shows that there was also a momentum shift towards acceptance of a judicial institution to resolve disputes. But also the events in Rwanda and other ongoing gross violations of human rights on the continent immensely contributed to awaken African leaders of the necessity to have an African institution addressing these challenges.

The Court was established with a membership composed of eleven judges. The Court's jurisdiction extends, of course, to cases that are referred to it by the African Commission or the State which has lodged a complaint with the Commission, by a State agent against which the complaint has been lodged or by a State whose citizen is a victim of HR violations and by an African intergovernmental organization. So, the Court may, therefore, only examine NGOs and individual communication if the State parties involved have recognized the Court's competence to decide that jurisdiction by making a special declaration.

The Court's *rationae materiae* is potentially wide, it extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter. But the Court may also, at the request of a member State of the OAU or the AU itself or any of its organs, and one can consider even the Commission itself as one of the organs, give advisory opinions on legal questions. What is extremely important to know in the Protocol is that the States Parties has an obligation to comply with the judgment of the Court in any case to which they are parties and to guarantee its execution. The Protocol provides that if the Court decides that there has been a breach of any of the rights stipulated, it must rule that the injured party be guaranteed of the enjoyment of those rights denied and, where appropriate, fair compensation or reparation for the breach is effected to the injured or aggrieved party. The Court may also prescribe provisional measures in case of extreme gravity and urgency to avoid irreparable harm to the person, and I will come later to the provisional measures, which I think is extremely important. Of course, within the African regional system, we don't have the same level of jurisprudence as the European Court when it comes to provisional measures, but I think it is something which is worth mentioning.

In short, the Protocol establishing the African Court is much stronger than the African Charter because it has taken advantage of both time and

history and thus filled the various gaps and inefficiencies of the Charter. I will not go into the details of those innovative measures but I can simply say that, for instance, when it comes to the election of judges the Protocol makes specific reference to the gender equality and the requirement that the elected judges should reflect and represent the principal legal traditions of the continent. Of course, this requirement was a response to the reality that the colonial history has left African countries with diverse legal traditions of their different colonial masters.

It can, therefore, be argued that the current regime of human rights protection in Africa is firmly underpinned by the African Charter. The Charter establishes two mechanisms, which include the Court and the Commission, and there are currently efforts underway to establish an African Court of Justice and Human Rights. However, this Court is not yet operational simply because the Protocol which provides for its establishment has not yet entered into force. It is also important to note that this Protocol makes general provisions for the establishment of divisions which have competency in addressing disputes among States and human rights violations. And as you may know there is an ongoing debate regarding the establishment of a third division within the African Court to address international criminal law issues on the continent.

In fact, some people think that this third leg was dictated by the indictment and the issuing of an arrest warrant against Hassan Bashir, the President of Sudan, by the ICC, but contrary to this belief, the idea to have an African Court dealing with criminal jurisdiction existed before. Indeed, those who were involved in the Rome Statute negotiations would remember that, during the negotiations process, there were groups of NGOs which strongly argued that the fraudulent enrichment of top State officials was detrimental to the public interest. In other words, they wanted corruption sanctioned by political leaders and other top State officials to be considered an international crime. But of course, this idea did not catch on during the negotiations.

When I chaired a group of experts drafting the Protocol for the merger of the Court, the idea of an African Court with jurisdiction over criminal matters was rejected before reaching the ministerial conference. But unfortunately, perception is worse than reality and the perception today is that the idea of incorporating within the African Court a division with criminal jurisdiction is an answer to the ICC which is only seen as targeting Africans. Yet, these critics tend to forget that the idea of an African Court with criminal jurisdiction existed even before the negotiations and eventual adoption of the Rome Statute. As a matter of fact even those who have been brought before the ICC in The Hague were brought at the request, with two exceptions, of the African States themselves. The two exceptions are the Darfur situation and the Libyan situation. In the Kenyan situation, as you

may know, the Wako Report had offered the possibility for those people who had allegedly committed crimes in the aftermath of the disputed elections, to be tried in Kenya. As such the intervention of the ICC was a result of failure by the Kenyan authorities to exercise accountability for the alleged crimes committed in the country during this period.

Now, if I can comment briefly on the nexus between African institutions and IHL, I can state that IHL mainly deals with the protection of individuals or groups in times of war. It aims to ensure less inhumane warfare whether of an international or non-international character. Ultimately both IHL and HR serve the same objective: protection of the dignity and humanity of everyone. Africa's contribution to the development of IHL cannot be underestimated. Apart from legal instruments adopted by the OAU and later AU and some decisions of the Rwanda Tribunal which have immensely contributed to IHL development on the continent, some African judicial institutions have also played a key role in this development. To illustrate my argument I would cite the case submitted by the African Commission of Human Rights to the African Court against Libya in 2011.

During the mass uprising against the government of Col. Gadhafi, it was alleged that the government security forces were engaged in excessive use of heavy and lethal weapons including aerial bombardments and extrajudicial killings against peaceful protesters. The Commission, therefore, sought the intervention of the Court to compel Libya to stop the killings and other massive violations of human rights consistent to its obligations. Responding to the application of the Commission specifically the Court noted that "Libya must immediately refrain from any action that would result in a loss of life which could be a breach of the provisions of the African Charter and international humanitarian law". Of course, while the aftermath of this application and what happened in Libya is history, my emphasis is on the contribution of the Court in recognizing the obligation of States to respect IHL in the use of force against civilians.

While the number of cases brought before the Commission and the Court to specifically address the violation of IHL, has been minimal, I am confident that this state of affairs will gradually change. This optimism is premised on the reality that currently Africa is grappling with several conflicts where the violation of the IHL continues unabated. Taking into account the fact that the ICC can hardly address all these violations on its own, it is then natural that the African Courts and other sub-regional institutions will move in to fill this void. Indeed, we have recently seen concerted efforts from African States to bestow jurisdiction on the African Court to try atrocity crimes such as war crimes, crimes against humanity and genocide. In fact, this should be considered a welcome initiative because not only will it reinforce the complementarity principle enshrined

in the Rome Statute but it will enable African judicial institutions to address these crimes committed on the continent and that have for too long gone unpunished. I should also state that the commitment demonstrated by African States to reject impunity through the Constitutive Act and other instruments, will undoubtedly help reinforce the core attribute of IHL which is the obligation of belligerents to respect the rules of engaging and conducting wars.

Increasingly, the Court has assumed a prominent position in addressing human rights violations on the continent. While it is evident that human rights violations continue on the continent, it is important to underscore that the Court has made a significant contribution in addressing these violations. For example, earlier this year the Court made a ground-breaking ruling compelling the government of Tanzania to take necessary measures to ensure that independent candidates could run for public office without being sponsored by a political party. This is a reaffirmation of the right to participate in public affairs guaranteed under both the Universal Declaration of Human Rights and the African Charter. The Court has also made different rulings which have made a significant contribution to the upholding of human rights on the continent.

Ultimately, decisions made by the Commission or the Court must be enforced by State Parties. However, this enforcement is dependent on the political will of the concerned State Party and the willingness of other members to sanction States for such violation or refusal to enforce orders of the Commission or the Court. On different occasions, States have flatly rejected to enforce orders of the Court, a scenario which has eroded the ability of the Court as an active player in human rights protection on the continent. It is, therefore, essential that for an effective implementation of human rights, States take their obligation seriously to ensure full and adequate compliance with the Court's or Commission's decisions.

Perennially the Commission and now the Court have suffered inadequate and insufficient resources. This scenario is based on the reality that their budgetary allocation depends on the member State contribution to the OAU and now AU. Unfortunately, this contribution is inadequate to meet the growing needs and obligations of these institutions. It is, therefore, this situation which has greatly hampered the capability of these institutions to hire well-qualified professionals to enable them to perform their functions. Hopefully efforts have been made recently to increase the resources of the African Court.

Perhaps one of the greatest challenges to these institutions is the individual access to the Court and the Commission. Access is limited to individuals whose States have lodged the declaration as provided for in the Protocol accepting the jurisdiction of the Court for its citizens. Indeed, out of more than twenty-five countries that have ratified the Protocol only

seven countries have lodged the Declaration [Rwanda, Burkina Faso, Ivory Coast, Ghana, Mali, Tanzania and Malawi]. This scenario makes it difficult for ordinary people to access the Court even when they have legitimate cause of action. As such, to the millions of people denied access to the Court, its existence is another false promise for full and unhindered access to human rights institutions in Africa.

There is a great need for African States to ratify growing bodies of human rights instruments on the continent. Most of these instruments lie without being ratified which prevents them from coming into force. It is, therefore, essential that for the full realization of human rights on the continent, State Parties commit themselves to ratify and implement relevant human rights instruments.

A continental Court on human and peoples' rights can contribute positively towards cementing this new accountability culture. If respected by the leadership and presided by high-level individuals whose human rights record is unquestionable, there is no doubt that it is likely to contribute significantly to the entrenchment of a human rights culture in our continent. That is a culture of non-personalized political leadership, good governance, rule of law and transparency and limited leadership, a leadership which respects its people as the basis and source of their legitimacy and power.

It is essential to repeat and underline the fact that the adoption of the Protocol establishing the African Court of Human and Peoples' Rights was a significant milestone in Africa. However, it is evident that the restrictive access to this Court can ultimately undermine its utility. This restrictive approach defies the *raison d'être* of international human rights law namely to protect individuals or groups against inimical conduct of the State. It is, therefore, essential that the current African Court is enabled to effectively complement the Commission as a strong and legitimate avenue to dispense justice on behalf of the marginalized African people as envisaged by its founders.

To conclude let me simply stress what we heard about the Latin-American system and state that there is room for the regional human rights bodies to do more when it comes to the promotion of IHL. And I think even in the case of Libya, if the Court’s mere observations as to the violations of the IHL was to be a step forward, one can see that there is room for the Court to also debate on the possibility of addressing the non-state actors or the non-states parties who were involved in that conflict. We were reminded in the Latin-American system of a case which was rejected in 2012 by the United States, as the US was of the view that the Commission was going too far by taking those measures and had to remain simply within the Convention.

I think for the African regional system, the AU Peace and Security Council (AUPSC) could play a greater role in strengthening the observance of IHL and HR. While looking for a political solution in the Libya crisis, the AUPSC should have nevertheless encouraged the using of the legal machinery in the follow up of the provisional measure which was announced.

Finally, may I suggest that the Presidents of the three regional human rights courts, the UN *ad hoc* international criminal tribunals, the International Criminal Court and the International Court of Justice get together to exchange views on how they can collectively create and support linkage between IHL and human rights. But we should never forget that it will be up to the people on the ground to continue putting more pressure on their respective governments to ensure that they comply and respect IHL and human rights in general. And I strongly believe that civil societies can play a key role to accomplish this noble objective.

Le système européen

Jean-Paul Costa
Président, Institut international des droits de l'homme

Je suis très heureux de participer pour la première fois à une Table Ronde de l'Institut International de Droit Humanitaire, qui est en quelque sorte le cousin de l'Institut International des Droits de l'Homme, et je remercie vivement pour son invitation le Professeur Fausto Pocar, avec qui je suis lié depuis plusieurs années.

Mon but est de vous parler, brièvement, de l'apport que peut fournir au respect du droit international humanitaire (DIH) la jurisprudence de la Cour Européenne des Droits de l'Homme (CEDH, ou la Cour), dont j'ai été membre pendant huit ans, puis président pendant cinq années.

Une remarque, d'emblée: si on m'avait demandé de faire un exposé sur ce thème il y a quinze ans, quand je suis devenu juge à Strasbourg, je n'aurais probablement pas eu grand-chose à dire. Sans doute y avait-il peu, voire pas du tout, de jurisprudence pertinente de la Cour européenne; mais peut-être le droit international humanitaire était-il aussi moins développé, en tout cas de façon concrète, c'est ainsi. Probablement l'affaire la plus importante jugée par la Cour avant l'entrée en vigueur en 1998 du Protocole n°11 à la Convention européenne des droits de l'homme (la Convention), et qui aurait pu se fonder d'une façon ou d'une autre sur le droit international humanitaire, était l'affaire Loizidou, sur fond du conflit entre la République de Chypre et la Turquie, remontant à 1974 ; mais précisément aucun recours au DIH ne fut fait par la Cour à l'appui de son raisonnement et de ses conclusions dans cette affaire[1]. Cette attitude fut en substance confirmée par la Cour dans l'affaire interétatique Chypre c. Turquie[2].

Je voudrais vous montrer que, dans un premier temps, qui a été long, la Cour de Strasbourg (comme avant elle la Commission européenne des droits de l'homme, supprimée en 1998 du fait de l'entrée en vigueur du Protocole n°11 à la Convention Européenne des Droits de l'Homme), n'a pas fait appel au droit international humanitaire, bien qu'elle protégeât déjà efficacement les droits de l'homme contre des violations graves; et que, dans un second temps, qui a commencé beaucoup plus récemment, elle a été conduite à puiser dans le DIH pour mieux trancher des affaires souvent importantes et graves. Je note sur un plan personnel que plusieurs des arrêts

[1] L'arrêt (questions préliminaires) est du 23 mars 1995. L'arrêt sur le fond est en date du 18 décembre 1996.
[2] L'arrêt est du 10 mai 2001.

ou décisions qu'elle a rendus au cours de cette deuxième période l'ont été par des formations de jugement que j'ai présidées. N'y voyez aucune relation de causalité, mais permettez-moi juste de dire que j'ai eu la chance d'être un témoin et un acteur de ce virage historique, qui est probablement irréversible, mais j'y reviendrai dans ma conclusion. Par parenthèse, j'ai été aussi confronté à une situation de conflit armé. En août 2008, lorsqu'a éclaté le conflit entre la Géorgie et la Fédération de Russie, la Géorgie a déposé devant la Cour un recours interétatique contre la Russie, assorti d'une demande de mesures provisoires sur le fondement de l'article 39 du Règlement de la Cour. Au nom de celle-ci, j'ai dû décider d'enjoindre de telles mesures aux deux parties, sur la base de la Convention, mais les violations éventuelles concernaient évidemment aussi le DIH.[3]

I. Une longue période de non-recours de la Cour Européenne des Droits de l'Homme au DIH

Pendant près de cinquante ans, la Cour de Strasbourg, si elle n'a pas ignoré le DIH, du moins n'a pas éprouvé le besoin ou trouvé la possibilité de s'appuyer sur lui. Il y a à cela des raisons complexes, les unes plus explicables que les autres. La probable raison principale est que la Cour a alors estimé que le DIH, et principalement les quatre Conventions de Genève de 1949 et leurs Protocoles additionnels, lui échappaient ; non pas tant parce qu'elle n'avait pas le droit de s'en inspirer, comme elle le fait par exemple pour la Convention relative aux droits de l'enfant et d'autres instruments internationaux, mais surtout parce qu'elle considère que le domaine par excellence du DIH est celui des conflits armés internationaux, celui des guerres au sens classique du terme, même si celles-ci sont juridiquement (et seulement juridiquement, hélas!) en voie de disparition.

Or elle a toujours eu de grosses difficultés à définir ce qu'est la guerre au sens de la Convention. Ce n'est pas trop grave quand il s'agit de vérifier si un Etat a légalement, ou non, pu déroger à certains droits garantis par la Convention; car on sait que l'article 15 de celle-ci le permet non seulement en cas de guerre, mais aussi en cas "d'autre danger public menaçant la vie de la nation"[4], ce qui laisse une porte ouverte au contrôle au-delà de la guerre *stricto sensu*. Cela aurait pu être plus grave pour l'abolition de la

[3] Voir le communiqué n° 581 du Greffier de la Cour, en date du 12 août 2008. Ma décision est à rapprocher de l'ordonnance (mesures conservatoires, Géorgie c. Russie) que la Cour internationale de justice a prise, sur un fondement conventionnel différent, le 15 octobre 2008 (CIJ, Recueil 2008, p. 353).

[4] Cette notion a été interprétée - assez largement - par la Cour dans son premier arrêt, *Lawless c. Irlande*, en date du 7 avril 1961 (arrêt sur le fond).

peine de mort qui, selon l'article 2 du Protocole n°6 à la Convention, peut être écartée par la loi nationale en temps de guerre ou de danger imminent de guerre, mais heureusement cela n'a jamais joué, et à présent la grande majorité des Etats ont ratifié le Protocole n° 13, qui abolit la peine de mort en toutes circonstances. Quant à l'article 2 de la Convention, sur le respect de la vie, dont la combinaison avec l'article 15 a pour effet qu'il est (ou était) dérogeable au sens de celui-ci pour les décès résultant d'actes licites de guerre, cette exception n'a pas eu non plus l'occasion de jouer; la jurisprudence a pu protéger le droit fondamental au respect de la vie sans recourir au DIH.

Une seconde raison, complémentaire, est que la Cour a considéré, au moins implicitement, que ce dernier constituait une *lex specialis,* par rapport au droit international des droits de l'homme (DIDH). On sait que ce raisonnement a été renforcé par la position de la Cour internationale de Justice (CIJ)[5].

Il y a vraisemblablement un troisième motif à cette prudente abstention : la volonté d'appliquer toute la Convention et rien que la Convention dans un domaine délicat et controversé, où ce sont les Etats qui sont défendeurs et où les requérants sont, le plus souvent, des personnes privées, ce qui peut soulever des problèmes "politiques". Mais je crois que plus fondamentalement la Cour de Strasbourg, jusqu'à une époque récente, avait, suffisamment dans sa boîte à outils, suffisamment d'outils pour ne pas faire appel à celui du DIH, encore que certains auteurs, et même des juges, l'aient regretté publiquement.

Quelques exemples peuvent le montrer. Ils concernent pour l'essentiel des opérations de lutte contre le terrorisme, comme dans l'affaire Mc Cann c. Royaume Uni[6], qui concernait des membres de l'IRA suspectés de perpétrer une action terroriste à Gibraltar, ou dans les affaires Ergi c. Turquie[7], ou Issaieva c. Russie[8], sur fond de conflit kurde ou tchétchène. Il est vrai que dans ces trois cas, la Cour a trouvé dans la Convention elle-même et notamment dans sa jurisprudence sur les articles 2 et 3, y compris quant aux obligations positives des Etats, notion qu'elle a dégagée elle-même de façon prétorienne, le moyen de condamner les Etats défendeurs à raison de violations graves des droits de l'homme.

Un premier tournant me semble s'être au moins esquissé avec les affaires concernant les dirigeants de l'ex-RDA, qui avaient ordonné de tirer

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[5] Par exemple, Avis consultatif du 8 septembre 1996 de la C.I.J. sur la licéité de la menace ou de l'emploi d'armes nucléaires, C.I.J., Recueil 1996, p. 226.
[6] Arrêt du 5 septembre 1995.
[7] Arrêt du 28 juillet 1998.
[8] Arrêt du 24 février 2005.

sur des fugitifs cherchant à franchir le Mur de Berlin[9]. Pour estimer que l'article 7 n'avait pas été violé par l'Allemagne réunifiée, autrement dit que les peines qui leur avaient été appliquées après 1989 étaient légales et non rétroactives, la Cour s'est notamment fondée sur la législation est-allemande antérieure à la chute du Mur. Elle a toutefois dit que la responsabilité des requérants aurait pu être recherchée sur le plan du droit international, du chef de crimes contre l'humanité, même si elle a estimé que, compte tenu de ses conclusions, il lui était superflu de se livrer à cet examen. Mais un premier pas était franchi avec cet *obiter dictum.*

II. Une période récente de recours croissant au DIH

On peut se demander de nouveau pourquoi la Cour EDH a cru bon ou jugé nécessaire de changer d'attitude et, d'une certaine façon, de raisonnement.

Là encore, la réponse n'est pas toute simple. Probablement la Cour a considéré qu'il lui fallait répondre à l'appel de ceux qui plaidaient dans ce sens, et qui faisaient notamment remarquer que le DIHn'a pas en son sein de mécanisme international de contrôle, en tout cas juridictionnel, et que la Cour de Strasbourg pouvait, dans quelques cas au moins, pallier cette carence, comme elle l'a fait pour la Convention de Genève de 1951 relative au statut des réfugiés, ou pour celle de La Haye de 1980 sur les aspects civils de l'enlèvement international d'enfants. Et puis le contentieux a créé le besoin. Certaines affaires sont venues montrer que la guerre est de moins en moins souvent déclarée, que la notion de conflit armé, interne ou international, est parfois imprécise, que la protection des victimes justifiait de puiser dans le droit international général, et dans le DIH en particulier.

C'est là une illustration de la convergence - ou à tout le moins de complémentarité-des différentes sources ou branches du droit international. À mon avis ceci est un facteur de progrès du droit international.

Les exemples sont récents, mais importants et de plus en plus fréquents. Il n'est guère surprenant qu'ils soient souvent relatifs à des crimes internationaux.

Quatre exemples méritent d'être mis en avant, car ils se sont manifestés en moins de trois ans, entre 2007 et 2010.

Le premier cas est relatif à la notion de crime de génocide. Par un arrêt Jorgic c. Allemagne[10], la Cour a considéré que l'interprétation par les juridictions de ce pays de la notion de génocide et son application au

[9] Arrêt *Streletz*, *Kessler* et *Krentz* c. *Allemagne* du 22 mars 2001.
[10] Arrêt du 12 juillet 2007.

requérant, à raison de faits commis en Bosnie-Herzégovine lors du conflit de l'ex-Yougoslavie, n'était ni illégale ni imprévisible, et elle a rejeté le grief du requérant tiré de l'article 7 de la Convention.

Le deuxième cas est relatif au crime contre l'humanité, imputé au requérant à raison de ses actes lors de l'insurrection de Budapest de 1956[11]. Cette fois, la Cour a condamné la Hongrie pour violation de l'article 7, car elle a estimé, contrairement aux juridictions hongroises, que le requérant n'avait pu être condamné de ce chef sur le seul fondement de l'article 3 commun aux quatre Conventions de Genève; il eût fallu que s'y ajoutent des critères tirés du droit international applicable à l'époque, et qu'en particulier il soit établi que la victime de l'homicide commis par le requérant entrait dans une catégorie de "non-combattant" au sens de l'article 3 commun.

Le troisième cas est d'autant plus emblématique qu'il concerne, comme Loizidou, les conséquences de l'invasion de la partie Nord de l'île de Chypre et de la partition de l'île. Il s'agit de l'affaire Varnava c. Turquie[12]. Dans cette importante affaire, la Cour s'est appuyée sur la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées, ainsi que sur les quatre Conventions de Genève et sur les trois Protocoles de 1977 et de 2005; et finalement elle a condamné la Turquie pour violation continue de ses obligations procédurales d'enquête (obligations positives) au regard des articles 2 et 3 de la Convention.

La Cour a en particulier affirmé que "l'article 2 de la Convention doit être interprété dans la mesure du possible à la lumière des principes du droit international, et notamment des règles du DIH., qui jouent un rôle indispensable et universellement reconnu dans l'atténuation de la sauvagerie des conflits armés". Cette citation me paraît remarquable: elle montre le lien étroit que la Cour établit, avec vigueur, entre le droit européen (et international) des droits de l'homme et le DIH Cette phrase n'est pas, elle, un obiter dictum: elle fait partie de la *ratio decidendi* de l'arrêt Varnava, et elle renforce puissamment le raisonnement et les conclusions de la juridiction de Strasbourg.

Le quatrième cas, qui suscita maintes polémiques, touche à la définition du crime de guerre, à propos de faits commis en 1944 lors des combats contre les nazis dans un village de Lettonie. Il s'agit de l'affaire Kononov c. Lettonie[13]. Se référant au droit international des conflits armés, tel qu'il existait avant et après la seconde guerre mondiale, la Cour a considéré que les tribunaux lettons avaient pu, sans commettre de rétroactivité ni

[11] Arrêt *Korbély* c. *Hongrie* du 19 septembre 2008.
[12] Arrêt du 18 septembre 2009.
[13] Arrêt du 27 mai 2010.

enfreindre la prescription, condamner pour crimes contre l'humanité le requérant, qui avait causé la mort de personnes dont on pouvait dire qu'elles étaient soit des combattants soit des civils ayant participé aux hostilités. L'arrêt fait référence aux Conventions de Genève, bien qu'elles soient de cinq ans postérieures aux faits, en tant qu'elles codifient des règles coutumières de droit international humanitaire. J'avoue, mais je m'incline devant la majorité, que l'ensemble de l'arrêt Kononov ne m'a pas juridiquement convaincu, ce pour quoi j'ai rédigé une opinion dissidente[14].

Dans la période la plus récente, le recours de Strasbourg aux instruments et à la pratique du DIH n'a fait que s'accentuer. J'en citerai seulement trois exemples, d'une grande importance juridique et politique.

Dans l'affaire Al Skeini (et Al Jedda) c. Royaume Uni[15], la Cour a cité longuement la jurisprudence de la CIJ sur la prise en considération à la fois du DIH et du droit international des Droits de l'Homme, notamment l'affaire Ouganda c. Congo[16], ainsi que l'avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire de la Palestine occupée[17]; elle en déduit en particulier qu'il est possible de faire une application extraterritoriale de ces deux branches du droit combinées, ce qui lui permet de se déclarer compétente pour des agissements qui se sont produits en Irak et ont mis en cause des soldats britanniques.

Dans l'affaire El Masri c. "FYROM"[18], concernant les prisons secrètes de la CIA., la Cour fait encore application du DIH pour renforcer ses constations de violation par l'Etat défendeur de l'article 3 de la Convention, ce qui ne lui aurait sans doute pas paru indispensable il y a une douzaine d'années.

Enfin, dans un tout récent arrêt du 17 juillet 2013[19], la Cour se penche à nouveau sur la notion de crimes de guerre. Mais, à la différence de l'affaire Kononov et comme dans l'affaire Korbély, elle condamne la Bosnie-Herzégovine, Etat défendeur, pour violation de l'article 7, pour avoir appliqué rétroactivement aux requérants le code pénal de 2003 définissant et punissant les crimes de guerre.

[14] A laquelle se sont joints mes collègues Mme Kalaydjieva et M. Poalelungi.
[15] Arrêts du 7 juillet 2011.
[16] Arrêt du 19 décembre 2005, C.I.J. Recueil 2005, p. 168.
[17] Avis du 9 juillet 2004, C.I.J. Recueil 2004, p. 136.
[18] Arrêt du 13 décembre 2012.
[19] Arrêt *El Maktouf et Damjanovic c. Bosnie-Herzégovine.*

Conclusion

Il me semble clair que l'évolution va dans le sens d'une prise en compte croissante, quantitativement et qualitativement, du droit international humanitaire par la jurisprudence de la Cour européenne des droits de l'homme. Cette position a des avantages et des inconvénients, mais plus d'avantages à mon sens. Elle permet en effet de trouver en faveur des requérants - ou plutôt des victimes[20] - des violations des droits de l'homme, *pro libertate* en somme, alors que le texte de la Convention, souvent imprécis, n'aurait probablement pas dans tous les cas conduit à une telle conclusion. Elle a aussi, peut-être et en étant évidemment plus optimiste que cynique ou résignée, une influence dissuasive sur les violations du DIH par les Etats, qui trouvent ainsi un juge pour les condamner. Elle renforce enfin le DIH, en lui donnant une effectivité accrue: c'est là un domaine de plus dans lequel des normes internationales, conventionnelles ou coutumières, trouvent grâce à la Cour de Strasbourg un juge international que ces conventions ou ces coutumes n'avaient pas institué ; on ne peut pas ne pas penser au droit d'asile et au droit des réfugiés.

Il y a certes aussi des inconvénients. Certains Etats contestent au plan des principes une extension du champ de compétences de la Cour EDH, qui selon eux enfreint le principe de subsidiarité. Je récuse personnellement cette assertion, qui me semble contestable moralement et en droit: la subsidiarité ne doit pas aboutir, dans un domaine aussi sensible humainement, à l'impunité. Par ailleurs, le fait qu'une cour régionale, telle que la Cour européenne, ait à intervenir dans une matière universelle par définition, ne manque pas de soulever des questions, dont les difficiles problèmes de compétence extraterritoriale de la Cour sont une illustration, sans parler des risques de divergences entre les différents tribunaux régionaux existant dans les différentes parties du monde. Enfin la connaissance du DIH par les juges de Strasbourg et par les membres du Greffe n'est peut-être pas encore tout à fait suffisante, et les points de référence manquent, faute d'une Cour mondiale du DIH.[21] Mais sans

[20] Les victimes des violations des droits de l'homme et du DIH n'ont pas toujours, loin de là, la qualité de requérants devant la Cour, comme le monter l'exemple des dirigeants de l'ex-R.D.A. ; en tout cas ce ne sont pas les *mêmes* droits dont la violation est alléguée par les requérants : le problème de l'article 7 de la Convention est topique.

[21] Bien sûr, la Cour internationale de Justice constitue une telle cour mondiale, même dans ce domaine spécifique ; mais assez peu nombreuses sont les affaires qui lui sont soumises, par voie contentieuse ou consultative, et qui sont relatives à la méconnaissance du DIH On a d'ailleurs vu qu'elle s'efforce de combiner le DIH et le droit international des droits de l'homme et d'en faire la synthèse. En outre, on peut tirer des leçons des principes établis par la CIJ, mais il ne faut pas sous-estimer le fait qu'elle juge des affaires interétatiques, non des recours individuels.

manquer au respect je dirai que parfois les spécialistes du DIH ne sont pas toujours eux-mêmes assez au fait du droit international des droits de l'homme.

Mais si l'on fait la balance, les avantages de l'immixtion de la Cour EDH dans le DIH sont, je le répète, supérieurs aux inconvénients. Cette plongée dans un droit pour l'essentiel étranger à la Convention EDH, qui est le texte de base pour la Cour de Strasbourg, comble au moins en partie un vide juridique hautement préjudiciable.

Je dirai pour finir que ce processus, que j'ai vu se dérouler sous mes yeux à Strasbourg lors des audiences et dans les délibérations, me semble irréversible. Il ne cessera de se développer, du moins tant qu'il n'y aura pas une ou des juridictions internationales spécialisées dans le droit international humanitaire. Celui-ci est et sera de plus en plus invoqué par les requérants et par leurs avocats, et de moins en moins écarté ou ignoré par les juges. Il est d'ailleurs excellent que des passerelles soient jetées entre le DIH et le Droit des droits de l'homme, comme entre l'Institut International de Droit Humanitaire et l'Institut International des Droits de l'Homme, sans oublier le précieux Comité International de la Croix Rouge. Et puisque je pense, comme je viens de le dire, que ce phénomène est positif, permettez-moi en terminant de me réjouir qu'il soit appelé à se développer.

Lessons on compliance with IHL drawn from human rights monitoring systems: a view from the Office of the High Commissioner for Human Rights

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In February 2013, during the high-level segment of the 22nd session of the Human Rights Council, the following statement was made by a prominent diplomat, and I quote him: "For the good of the victims, and if we are to be better equipped to respond to their needs, we can no longer settle for systems that work in isolation. Rather, we must try to find the most appropriate means of cooperating fully with each other, while acknowledging the complementarity of our distinct missions and our differences, and turning them to advantage."

This statement could have been made by a high-level diplomat working in the field of human rights. It was delivered in fact by Peter Maurer, the President of the ICRC, and who happens to be one of the key diplomats who also negotiated the creation of the Human Rights Council.

As most of you know, the Human Rights Council is an intergovernmental body which was created in 2006 to replace the former and most criticized, UN Human Rights Commission. It has been assigned multiple tasks, such as addressing situations of gross and systematic violations of human rights, and making recommendations thereon. Among the instruments provided to the Council by the General Assembly, one has to cite the Universal Periodic Review, which aims to review the fulfillment by each State party to the UN Charter, and not to the Human Rights Council itself, of its human rights obligations and commitments and I will come back to this later.

In addition, as was mentioned by Professor Françoise Hampson before, there are the Special Procedures, which I will not talk about; the possibility to hold Special Sessions and to adopt country-specific resolutions which are particularly relevant for the topic of our Round Table.

So, let me first address the cases of country situations where international humanitarian law (IHL) issues were raised. UN General Assembly Resolution 6251, which created the Human Rights Council, does not refer to IHL, but links all tasks and activities of the Council to international human rights law. Nevertheless, the Council, like its

predecessor, the Human Rights Commission, regularly invoked IHL when dealing with situations of countries involved in an armed conflict. While this is not questioned, in general, by States, the United States starting in 2003 repeatedly contested the competence of the Human Rights Commission and Council and its Special Procedures to address issues arising under the Law of Armed Conflict. Recently, however, the US did not oppose the inclusion of references to IHL in resolutions adopted by the Council, for example, the resolution on the situation of human rights in the Ivory Coast and the co-sponsored resolution on the situation of human rights in Libya.

The Council addresses country situations particularly in the context of Special Sessions. Out of the 16 Special Sessions which were held between June 2006 and April 2011, all, except five, concern serious human rights situations in countries with an armed conflict. With one exception, which dealt with the issue of the financial crisis, all resolutions on this situation contained explicit references to IHL. For instance, the resolution on the grave situation of human rights in Lebanon, caused by Israel's military operation, which was adopted during the second Special Session of the Council, is particularly interesting as the Human Rights Council expressed its approach to the concomitant application of human rights law and IHL, by emphasizing that human rights law and IHL are complementary and mutually reinforcing.

Another interesting case is the Council's approach to the Darfur crisis. In 2006 it expressed its deep concern regarding the seriousness of the ongoing situation of human rights and international humanitarian law in Darfur, including armed attacks on the civilian population and humanitarian workers, widespread destruction of villages and continued and widespread violence, in particular, gender-based violence against women and girls. One can note here that the language is not necessarily all IHL and human rights law but also has a connotation of international criminal law. Other general references to IHL were made in relation to the conflict in the DRC, Ivory Coast, Myanmar and Somalia.

As we have mentioned this morning, another particular feature of this resolution is the fact that, in several cases, the Human Rights Council set up commissions of inquiry and fact-finding missions or tasked a group of Special Rapporteurs to report on the situation. I will not address this issue now.

The Human Rights Council occasionally but not systematically referred to IHL in resolutions on thematic issues. It urged, for example, States to ensure that measures taken to counter terrorism comply with IHL and human rights law and to respect fair trial procedures as guaranteed by both bodies of law.

Many similar examples could be added, both these examples, in fact, show that references to IHL in thematic resolutions adopted by the Council are usually very general in nature and are always made in conjunction with evocations of human rights law.

I will now talk, if I may, very briefly about the Universal Periodic Review. The Human Rights Council is tasked with undertaking a Universal Periodic Review (UPR), which is based on objective and reliable information, on the fulfillment by each State of its human rights obligations. This mechanism ensures that all member States of the UN, and not only, again, those of the Human Rights Council, are periodically reviewed in terms of their human rights obligations. This examination works as a peer-review process, by providing other States with an opportunity to express concerns and make recommendations.

So, what are the benchmarks for review for the UPR? As one can expect, the base for review are relevant standards of the UN Charter, the Universal Declaration of Human Rights and human rights treaties to which the State concerned is a party. That said, interestingly enough, the Human Rights Council decided to add another base for review, and I quote now the Institution Building document ("United Nations Human Rights Council: Institution Building" A/HRC/RES/5/1 of 7 August 2007), which says that "given the complementary and mutually interrelated nature of international human rights law and international humanitarian law the Review shall take into account the applicable international humanitarian law".

While one country, the UK, despite this clear wording did not accept IHL as a basis for review, issues related to IHL are quite regularly taken up by States during the UPR. In this context, States primarily provide information or are asked about the following issues: national commissions on IHL, national action plans and policies on human rights law and IHL. They are asked about measures such as training and investigations to ensure that their security forces respect IHL and human rights law during armed conflict, they call for ratification of the 1977 Additional Protocols and the Rome Statute, they call for a strict adherence to human rights law and IHL in the fight against terrorism, they express concerns about impunity of ongoing violations of IHL, and they ask for the ending of ongoing occupations where they exist.

That said, overall, only relatively few questions and recommendations do focus on violations of IHL, and concerns which are raised are done in a relatively general manner. One can conclude that during the UPR the main emphasis of remarks and recommendations made by States is on the dissemination of IHL rather than an analysis of the respect of the norms.

So, what are the conclusions that we can draw from the practice of the Human Rights Council in relation to IHL implementation? Perhaps one of the main strengths of this process is that, given the fact that other

mechanisms of enforcement of IHL are, as of today, either non-existent or ineffective for the reasons we have talked about during our workshop, and that international criminal courts only establish the responsibility of individuals and not the responsibility of States, the Human Rights Council and its mechanisms have become, *de facto*, a major forum in which governments are most likely to have to account for abuses committed in the context of an armed conflict and where they are called upon to justify their conduct publicly.

However, I can see at least two particular weaknesses of this arrangement. One is well known: it lies in the essential political character of the Human Rights Council, as an intergovernmental body. As such, it will have the tendency to approach situations of IHL violations selectively and one-sidedly. In fact, it has been accused of doing so, in particular with regards to Israel. Selectivity is problematic in the long run insofar as the legitimacy and authority of IHL, in particular, but for public international law in general, including, of course, human rights law, risks being undermined by one-sided criticism.

It is right to say that there will always be a risk of politicization in any governmental body discussing any branch of international law, may it be international humanitarian law, human rights law, but even international environmental law, as we have seen how difficult it is to achieve consensus on environmental issues. Now, I think that everything also depends on what we expect of the Human Rights Council. The Human Rights Council is a political forum and, as such, we should not expect it and nor should it, to my mind at least, assess the legal responsibility of States for violations of human rights and international humanitarian law. In that sense, here one should differentiate the work of quasi-judicial bodies such as the Human Rights Committee or the Committee against Torture.

One should not forget that in the Council another weakness is also, often, the invocation and application of IHL which is done in a very superficial manner. But if these superficial references to IHL do not give justice to the detailed account of the law applicable in armed conflict, it can also be a good thing. A good thing because it sets the debate at another level which is, as we have also talked about this morning, the level of accountability of States for violations of international law rather than the establishment of the legal responsibility and liability issues for violations of those norms. To my mind, accountability has a broader scope and a more political application than, of course, legal responsibility.

We also talked this morning of the risk that human rights bodies entail a problem of analyzing IHL from a human rights law perspective, and I totally agree with this. One could perhaps be reminded here of the well-known bias in international law, which has been expressed by critical legal studies authors when they say “What you see depends on where you sit”.

As raised this morning by Professor Garraway, it can be problematic - this may entail a risk to reach legally different conclusions on similar facts. That said, I don't really know how this impacts on the Human Rights Council approach to IHL. The bulk of the Human Rights Council's work is political discussion among diplomats. Some of these diplomats may very well be assigned to deal with IHL and human rights law in the same file in their everyday work. And this is especially true with some small delegations which cannot afford to have a battery of seventeen lawyers in their delegation.

So, one of the risks and challenges which is linked to the creation of yet another intergovernmental body to discuss solely IHL issues is to end up with exactly the same diplomats sitting in both bodies, and as a consequence, simply duplicate the work rather than bringing anything new.

If I may, I wish now to finish my presentation on the positive contribution of the Human Rights Council to the implementation of IHL. I think it is fair to say that the proactive role of the Council and its general mechanisms - Special Procedures and commissions and so on - provide States with an important opportunity not only to show that they respect IHL but also to ensure respect of IHL as required by article 1 common to the Geneva Conventions, a duty which implies that States parties engage with other States that do not respect their obligations. This is not only true for members of the Human Rights Council, but for each member State party to the UN Charter and participating in the Universal Periodic Review.

Of course, it remains to hope that in the long run, all actors participating in the work of these bodies take an objective and principled approach to international law to contribute, rather than undermine, the authority and credibility of both IHL and human rights law.

The Swiss/ICRC Initiative on strengthening compliance with IHL

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States have confirmed on many occasions that international humanitarian law (IHL) is, by and large, an appropriate legal framework to regulate the conduct of parties to armed conflict. Yet it is being seriously and frequently violated in present-day armed hostilities, both by regular armed forces and by non-state armed groups.

In other words, the main problem is not lack of available rules, but a serious lack of respect for the existing norms. Hence what is needed are effective measures to ensure better observance of the law in force.

Ensuring compliance has always been the challenge of IHL - for obvious reasons. It is in the very nature of war that the rules that are meant to limit its disastrous effects tend to be flouted. Disregard of IHL, however, causes devastation and terrible suffering for the victims.

What makes such violations all the more reprehensible is that suffering could be avoided if the pertinent rules were observed.

Both in terms of prevention and repression, impressive progress has been achieved in the recent past. As for halting violations when they occur, however, the situation has always been and still is very unsatisfactory. 150 years after its codification began, humanitarian law still lacks minimal tools to influence the behaviour of parties to on-going armed conflicts - a glaring failure of the law's aspiration to have a protective effect while hostilities occur.

Yet, no law can preserve its credibility if frequent and serious violations do not prompt adequate responses, and halting violations when they happen is precisely what the persons affected by armed conflict expect from IHL.

Between 2008 and 2010 the ICRC conducted an important study to determine whether, and to what extent, IHL continued to provide an appropriate response to the humanitarian problems arising in armed conflicts. It came as no surprise that the study found that in certain specific areas there were lacunas in which legal development should be explored. One of those areas concerns the mechanisms for monitoring compliance with IHL. Insufficient respect for the applicable rules is the principal cause of suffering during armed conflicts.

The worrisome lack of compliance with IHL rules by the parties to contemporary conflicts was also a prominent topic at the conference on the

occasion of the 60 years' jubilee of the Geneva Conventions in 2009. At this event, many delegations stressed the importance of a process to give new momentum to the effort of collective thinking on strengthening respect for IHL. In particular, the exchanges showed general agreement on the need to have a closer look at the mechanisms and procedures of application and monitoring of the Conventions. In light of this conclusion, Switzerland signalled its availability to facilitate further discussions among States on a possible way forward.

Follow-up discussions to the jubilee conference and the consultations subsequent to the said study by the ICRC prompted a growing awareness that, firstly, better implementation of IHL had to be a priority, secondly, that IHL implementation needed to be improved, thirdly, that existing IHL compliance mechanisms had proven to be inadequate, and finally, that further reflection on how to strengthen them was necessary.

In its Resolution 1, the 31st International Conference of the Red Cross and the Red Crescent of late 2011 recognized the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL. It also acknowledged the need to identify ways to reinforce dialogue on IHL issues among States. Moreover, the Conference invited the ICRC to pursue further research with a view to proposing options and recommendations for possible solutions to the 32nd Conference. The Resolution also expresses its appreciation to Switzerland for its commitment to identify concrete ways to strengthen the application of IHL and reinforce dialogue on IHL issues among States.

Since the 31st International Conference, Switzerland and the ICRC have undertaken a joint initiative to facilitate implementation of the Resolution. After consultations among a regionally balanced group of States, the initiative was effectively launched on 13 July 2012, when a first informal meeting of States was convened in Geneva. This first meeting provided an opportunity to appraise the situation regarding the lack of compliance with IHL. It was also meant as a contribution to building the confidence that is indispensable for this endeavour to succeed. The meeting showed that there was general and serious concern about the widespread disregard of IHL, and also that there was broad consent on the need for more frequent discussions among States with a view to devising appropriate solutions.

Following the meeting in July 2012, Switzerland and the ICRC continued discussions and consultations with a broad range of States in order to identify the main substantive issues of relevance to moving the process forward.

In the fall of last year, the consultations were focused on a review of existing IHL compliance mechanisms, the reasons why they did not work, and whether some could be resuscitated.

Lessons that could be learned from other bodies of law for the purpose of envisaging an effective IHL compliance system were also examined. There were likewise preliminary discussions on the functions that such a system would need to have, regardless of what its eventual institutional structure might be.

The discussions that ensued in the spring of this year were aimed at examining the possible functions of a compliance system in more depth. An important topic was the format that a regular dialogue on compliance among States should have, given that the lack of an appropriate forum was underlined at the 31st International Conference and at the meeting of States held in July last year.

As is well known, other IHL-related treaties like, for example, the arms treaties, are equipped with rather elaborate compliance systems comprising a number of mechanisms tasked with different functions, and which interact and complement each other. These mechanisms are often part of an institutional framework which includes a forum where States parties regularly meet to discuss matters concerning the implementation of the convention in question. This forum, i.e. the conference of the States parties to the convention concerned, assembles in most cases annually.

Not so for the Geneva Conventions system. Not only do its mechanisms stand alone and not only does their triggering depend on consent - Philip Spoerri will elaborate on this - but States do not enjoy an opportunity to debate IHL matters regularly. The only opportunity they have to meet and exchange views and experiences on IHL implementation is the International Conference of the Red Cross and the Red Crescent.

The International Conference is, no doubt, a hugely important event for the Red Cross and Red Crescent Movement and the humanitarian cause as a whole, but also for States. It is a unique *sui generis* gathering, bringing together every four years all States and all national societies for important discussions on key humanitarian topics. It gives the Movement impetus, direction and a sense of togetherness.

There are a number of IHL issues, however, which States should be able to debate much more often than at four-year intervals only; implementation and compliance belong to this category.

The resulting compliance vacuum has led to a situation where international institutions established under other bodies of law are increasingly focussing on IHL - in and of itself a positive development in the sense that it shows a growing awareness of the international community of the importance of IHL. The measures they adopt, however, do not always sufficiently address the specificities of IHL. This is a potentially problematic situation in terms of the acceptance of IHL by its main stakeholders.

At the 2nd meeting of States in the context of this process which took place on 17-18 June of this year, delegations reiterated the need for States to have a regular and structured dialogue on IHL issues and expressed strong support for the joint Swiss-ICRC Initiative.

Based on the presented overview of the discussions and consultations that have taken place thus far, they recognised the potential usefulness of a regular meeting of States as a platform for such a dialogue and as a point of achorage for specific IHL mechanisms.

Moreover, they acknowledged that compliance systems under other bodies of international law cannot fill the IHL compliance system gap due to their focus on different sets of norms and the lack of requisite IHL expertise.

As regards the content of the dialogue, delegations expressed the view that it should enable exchanges of experiences among them in IHL implementation, allow the sharing of best practices and highlight the need for capacity building where it exists. The dialogue should also include issues related to the challenges faced by States in implementing their IHL obligations.

It also became clear from the discussions in the run-up to the second meeting and at the meeting itself that the process must be premised on a number of principles. Above all, States need to have ownership of the process and its smooth sailing requires for politicisation to be avoided. In addition, solutions to be envisaged must be effective, avoid unnecessary duplication and duly take into account resource considerations. Many participants in the meeting emphasized the importance of an IHL compliance system also being applicable to non-international conflicts, the vast majority of present-day armed conflicts.

Humanitarian law is the expression of the will of States to uphold fundamental values of humanity even in armed conflict. As is clear from its mission, IHL is universal and States are primarily responsible for ensuring that it is respected. The question of how to strengthen compliance is obviously central for the future of humanitarian law and hence it concerns all States. Consequently, this process must be open, transparent and inclusive, so that all States can commit to it. The options to be submitted to the 32nd Conference will, therefore, have to be consulted with all States.

It is in this spirit of transparency and inclusiveness that Switzerland and the ICRC have chosen to convene yearly meetings of all States until the Conference of 2015, and beyond if possible. In addition to debating possible solutions for consideration at the 32nd Conference, these all-states-meetings will serve to enhance the collective awareness of the problem of pervasive flouting of IHL and of the damaging effect on the credibility of this body of law.

Furthermore, they are meant to showcase the usefulness of a regular dialogue among States on IHL issues.

With their acceptance of the Swiss-ICRC Inititative, States acknowledged that they see the need for a change of trend with regard to IHL compliance. Aimed at enabling them to exchange information more often on IHL issues in general and on compliance in particular, the process has the potential to bring about the necessary collective awareness from which real progress can emerge. The establishment of a forum, that is, a conference of the States parties that assembles yearly, will be pivotal in this regard. The process to take us forward will comprise the yearly meetings of States and the accompanying consultations which we are planning to hold until 2015 and beyond. It is our hope that these regular meetings of States will, over time, become an important part of a permanent compliance system for IHL.

In 2015, a report will be prepared with options and recommendations for the way forward, for consideration by the 2015 International Conference of the Red Cross and Red Crescent. Of course, the work towards the goal of strengthening compliance will need to continue beyond 2015 but, in the meantime, the coming two years of consultations will be very important - enabling States to share their views on how they can work together to advance this important humanitarian goal.

The Swiss/ICRC Initiative on strengthening compliance with IHL

Philip Spoerri
Director for International Law and Cooperation,
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This issue - improving compliance - is the main overall focus of ICRC work on the ground. Our operational presence in the field, like that of other humanitarian organizations, is in large part due to the lack of compliance with international humanitarian law (IHL) by the parties to armed conflicts. Our everyday engagement, in addition to providing protection and assistance to persons affected by armed conflict, aims to encourage the parties involved to better comply with this body of rules. In addition, all of our work in the legal domain, which started with the drafting of the first Geneva Convention of 1864, is ultimately aimed at enabling better compliance with IHL for the benefit of civilians and others who suffer the ravages of war.

Starting in 1864, and periodically since, great strides have been made in developing IHL, thus allowing the injection of a much-needed measure of humanity into the conduct of military operations. States have adopted numerous IHL treaties and important norms of customary IHL have likewise crystallized. Many aspects of the conduct of hostilities and the protection of persons in enemy hands have been codified and basic legal principles guiding behaviour have been laid down. Discussions on clarifying and strengthening IHL to meet the challenges of modern day armed conflicts are ongoing as we meet today. Among them are debates on the relationship between IHL and terrorism, the applicability of IHL to multinational forces, new types of weapons and the possible conduct of hostilities in cyberspace.

In addition to dealing with specific new legal challenges IHL also has to adapt to certain changes in the nature of warfare. Chief among them, as has been mentioned, is the current prevalence of non-international armed conflicts, both within the territories of single States, as well as those in which multinational forces are engaged in an armed conflict in the territory of a host State against a range of organized non-state armed groups. Asymmetrical conflicts involving parties of significantly different strength and technological capacity are also on the rise, as are conflicts which involve a variety of armed actors with different levels of organization, command structures and knowledge of IHL.

I will submit to you that the changing nature of warfare and the specific legal questions it poses have been a constant to which IHL has had to adapt.

I would also submit that it has generally done so fairly well at the normative level.

The area in which much more needs to be done, and which is at the centre of our meeting, is how to improve compliance with IHL norms in practice. Given that enormous human suffering caused by armed conflict continues, this is a legal as well as an ethical and political challenge.

We are witness to continued daily violations of IHL, including deliberate attacks against civilians, the destruction of infrastructure vital to the civilian population, the forcible displacement of entire communities from their habitual places of residence and various forms of sexual violence inflicted against vulnerable individuals and groups. Persons deprived of liberty in armed conflict are likewise frequently subject to appalling behaviour by their captors, including murder, torture and other forms of ill-treatment, inhuman conditions of detention and denial of procedural safeguards and fair trial rights. Medical personnel and humanitarian workers are also an increased target of attack. The law tries to prevent or put a stop to suffering and to deter future violations, but it must be observed in order to make a difference in practice.

For the reasons that have been explained, the joint Swiss-ICRC Initiative is not focused on further elaborating ways of prevention of IHL violations or on *ex post facto* criminal repression, but on enhancing the efficacy of IHL compliance mechanisms.

In the process thus far we have examined 3 issues with States. The first was an overview of the existing IHL compliance mechanisms and of their inadequacies. In this respect it was noted in the consultations that, contrary to most other branches of international law, IHL has a limited number of mechanisms to ensure compliance with its norms. In addition, their configuration and remit are such that they do not allow for a comprehensive approach to ensuring compliance. Existing IHL compliance mechanisms likewise lack attachment to a broader institutional compliance structure. The Geneva Conventions and their Additional Protocols are an exception among international treaties in that they do not provide that States will meet on a regular basis to discuss issues of common concern and perform other functions related to treaty compliance. The absence of such a structure means that specific compliance mechanisms lack the institutional support that may be necessary to ensure they are utilized, to facilitate the performance of their tasks and to assist in any follow-up that may be appropriate.

In this context it was also noted by States in the consultations that the Protecting Power system and the Enquiry Procedure provided for in the 1949 Geneva Conventions remain available to States in situations of international armed conflict only. Doubts were voiced whether the two mechanisms would be relied on in the future. It was pointed out, among

other issues, that they could not be easily reconstituted for use in non-international armed conflicts in which humanitarian needs are currently in greatest evidence. As a result it was stated that the process of strengthening IHL compliance mechanisms should not focus on ways of "reforming" the Protecting Power system or the Enquiry Procedure.

Many States were of the view that it would be worth examining how the International Humanitarian Fact-Finding Commission (IHFFC) could be put to better use so as to serve as part of an effective compliance system. A range of proposals for further examination were put forward based on the fact that the IHFFC is in existence, that regular elections for its members take place, and that the Commission is ready and willing to perform the functions assigned to it, that is, fact-finding and good offices. It was said that ways could be found to enable the Commission to exercise its mandate, while not re-negotiating Article 90 of Additional Protocol I to the Geneva Conventions. The Commission's remit could be expanded to include situations of non-international armed conflict. Additional tasks could be given to it by States on a voluntary basis. A Meeting of States could be authorized to trigger the Commission. A Meeting of States could also recommend to the parties to an armed conflict to avail themselves of the Commission's services. It was considered that, in addition to the Commission's mandate and trigger mechanism, it would be necessary to examine further issues related to the Commission's possible effectiveness going forward. They include its capacity to perform its tasks in terms of composition, the requisite balance of expertise and resource considerations.

The possible functions of an IHL compliance system is the second issue that was examined in our process. The functions dealt with in the discussions were: periodic reporting, fact-finding, early warning and urgent appeals, country visits, non-binding legal opinions, good offices, State inquiries, dispute settlement and examinations of complaints. There was broad agreement that reporting, thematic discussions and fact-finding (as mentioned above) should be given priority in further deliberations within the Swiss-ICRC facilitated process and that discussions should focus on examining the various aspects of these functions. Some States were of the view that a good offices function would also be useful, and others that an early warning function would be desirable. Country visits were likewise mentioned as deserving of further attention. Still other States were open to examining all the compliance functions listed above.

It was pointed out that reporting on national compliance serves as a basis for self-assessment by States, but also provides a baseline of information that allows for exchanges with other States on compliance issues. A reporting function should not entail a detailed overview of States' implementation of the applicable IHL treaties according to their provisions, but could be more focused, for example, grouped according to topics or

issues. It should be structured so as to allow the sharing of relevant information on questions related to prevention such as IHL dissemination, the incorporation of IHL into domestic law, the training of armed forces and others. It should enable exchanges among States on their practical experiences and challenges in IHL implementation, as well as best practices. It was also noted that further consideration could be given to whether non-governmental organizations should be involved in the preparation of reports. In addition, it was noted that the inclusion of non-state armed group actions should be the subject of further examination and that reporting should not create new legal obligations.

Another function identified for further consideration was discussions of States on thematic IHL issues. This would, among other things, allow for exchanges of views on policy-related concerns common to States that could foster better understanding of certain legal and practical challenges in IHL implementation and allow for reflection on whether and how they could be addressed.

A range of other aspects related to the reporting and fact-finding functions deserving of attention in the process was noted. These include the body to which these functions would be attached, their periodicity, the public or confidential nature of the function, voluntariness, sources of information relevant to the function, resourcing, interfacing with other actors including NGOs and civil society. As regards fact-finding, it was pointed out that this function may or may not be linked to conclusions about the legal consequences of the facts established. These and other topics will be the subject of deliberations within the process in the months ahead.

The third issue examined by States in our joint process are the possible tasks and features of a Meeting of States. The Second Meeting of States held in June this year - and referred to by Ambassador Nicolas Lang - affirmed that there was strong general support among States for establishing a forum for a regular dialogue on IHL, that is, a regular Meeting of States. Such a Meeting would enable States to examine a range of issues related to implementation and compliance with IHL, and also be a venue for thematic discussion on IHL issues. It was also suggested that a Meeting of States could serve as an anchor for other elements of an IHL compliance system. The Meeting of States could also complement and inform the discussions at the quadrennial International Conference of the Red Cross and Red Crescent. Several States also noted the desirability of ensuring, as far as possible, coherence and complementarity between an IHL compliance system and other international and regional fora that address IHL issues.

A range of aspects related to the Meeting of States was noted as meriting further consideration. They include the periodicity of the

meetings, the possible means of initiating and institutionalizing the meetings, and whether a body could be created, such as a Bureau and/or a Secretariat, that could serve to prepare the Meetings and perform possible intersessional and administrative functions. Other issues identified for further examination included the method of selecting topics for discussion, the outcomes of the Meetings, the means by which a Meeting could include engagement with international organizations, non-governmental organizations and civil society, and the question of resourcing. It was also noted that, given the prevalence of non-international armed conflict, further consideration needed to be given to appropriate means of addressing the issue of compliance with IHL by non-state armed groups, to ensure their perspectives were taken into account.

It was felt that the function of periodic reporting should be linked to the Meeting of States, regardless of its exact configuration. Another issue raised as meriting further consideration is the relationship a Meeting of States could have with fact-finding functions, including the International Humanitarian Fact-Finding Commission. It was generally emphasised that the potential role the ICRC could play as an expert body in the Meeting of States should also be considered further.

As regards next steps, pursuant to the mandate given by Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent and based on the Second Meeting of States, Switzerland and the ICRC will devise, in continued discussions and consultations with States, concrete proposals and options notably regarding:

- the form and content of a periodic reporting system on national compliance;
- the form, content and possible outcome of thematic discussions on IHL issues;
- the modalities for fact-finding, including possible ways of making use of the IHFFC;
- the tasks and features of a Meeting of States.

Prior to the next meeting of all States to be held in the summer of 2014, there will be two preparatory meetings in Geneva in November 2013 and in the spring of 2014, open to all States, to further exchange views on concrete aspects of the topics mentioned above. The November preparatory meeting will be held on November 25 and 26, 2013 in Geneva, whereas the spring 2014 meeting is likely to take place in April.

Allow me to reiterate in closing that the ICRC and Switzerland remain available for bilateral talks with interested States, National Societies, NGOs and civil society organizations at all times and will continue to inform the International Red Cross and Red Crescent Movement, National Committees for the Implementation of IHL, as well as international and regional organizations, and others, on the development of the initiative.

V. IHL implementation following the end of an armed conflict

IHL obligations that survive an armed conflict: the legal framework

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1. Introductory Remarks

As a rule, international humanitarian law (IHL) applies during armed conflict. Nevertheless, some IHL obligations remain applicable after the end of a conflict and must be performed accordingly. Furthermore, a number of IHL provisions come into effect at, and because of, the end of an armed conflict. While the legal framework and principles related to international armed conflicts (IACs) are more comprehensive than those applicable to non-international armed conflicts (NIACs), the role of human rights is critical in both cases. This contribution focuses on IHL obligations which remain applicable after the end of an armed conflict and it will give an overview on those which take effect because of the end of the conflict.

2. Obligations which continue to apply after the end of an armed conflict

2.1. International armed conflicts

Traditionally, IACs were terminated by a treaty of peace between the belligerent States. Current practice, however, offers only a few examples, such as the peace treaties concluded by Israel with Egypt in 1979 and with Jordan in 1995.[1] Presently, even when an armed conflict is formally terminated by a treaty, reference is not made to the end of war, but instead to the 'permanent termination of hostilities' between parties.[2] Armistice, formerly a type of suspension of hostilities, has become a method for terminating IACs e.g., the Arab-Israeli War of 1948 and the Korean War of 1950-1953.[3] Hostilities may also be temporarily suspended by various

[1] 18 ILM (1079) pp. 362-393; 34 ILM 43 (1995) pp. 43-66.
[2] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of 12 December 2000 (U.N. Doc. A/55/686-S/2000/1183, Annex) Art. 1.
[3] See L.C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Juris Publishing, Manchester University Press, 2008) pp. 106-108.

types of ceasefire agreements, which may or may not last until an armistice or peace agreement is reached.[4]

The end of applicability of IHL does not automatically result from the existence of one or another of the instruments mentioned above. As the *Tadić* Decision clearly stated, as far as IACs are concerned, the application of IHL 'extends beyond the cessation of hostilities until a general conclusion of peace is reached' (emphasis added).[5] Accordingly, a mere cease-fire or even an armistice could not suspend or limit the applicability of IHL when armed confrontation continues or resumes. For example, after US President Bush declared an end to major combat operations in Iraq on 1st May 2003, armed clashes nevertheless persisted between coalition forces and Iraqi opposition fighters.[6] As a consequence, the UNSC, while recognizing the role of the United States and the United Kingdom as Occupying Powers, nevertheless called upon all parties ('all concerned') to 'comply fully with their obligations under international law', mentioning not only the Geneva Conventions but also the 'combat law' as codified in the 1907 Hague Regulations.[7]

2.1.1. Protection of the Wounded and Sick

The rationale of the Geneva Conventions provides for a functional termination of applicability, depending on the situation of the protected persons.[8] For example, according to Article 5 of Geneva Convention I , the Convention is applicable until the 'final repatriation' of the protected persons. As long as some wounded and sick are retained by the adverse party (e. g. for medical reasons) after the end of hostilities, they continue to enjoy the protection provided by the Convention, which remains applicable despite the end of the armed conflict.[9] Nevertheless, '[w]hile in enemy hands, the wounded and sick - who are also prisoners of war - enjoy protection under both the First and the Third Conventions. Once they have

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[4] See Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2005) pp. 50-56.
[5] ICTY, *The Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal, IT-94-1-A-R72, 2 October 1995, at para. 70.
[6] See S. Borman, CRS Report for Congress. Iraq: U.S. Military Operations, RL31701, 15 July 2007 p. 7 (available at www.fas.org/).
[7] S/RES/1483 (2003), 22 May 2003, at para. 5.
[8] See R. Kolb, *Ius in bello. Le droit international des conflits armés. Précis* (Bruxelles: Bruylant, 2003) p. 107.
[9] See J. Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949, Vol. I*, Geneva, 1952 p. 65.

regained their health, only the Third Convention, relative to the treatment of prisoners of war, applies.'[10]

2.1.2. Treatment of Prisoners of War

Article 5 of Geneva Convention III prescribes that the Convention remains applicable until the 'final release and repatriation' of POWs. POWs who are not repatriated and those who are, or were, subject to judicial proceedings remain under the protection of the Third Convention, whose obligations thus survive the end of the armed conflict. Article 122 of the Convention, providing that the National Information Bureau (which must be established at the beginning of any conflict or occupation by belligerents and by neutral States having belligerents in their care) must forward all personal valuables left by POWs who have been repatriated to the State in whose armed forces they were serving, may also require implementation after the end of hostilities.

It has been argued that 'after the end of the hostilities, the Third Geneva Convention can no longer be considered a valid legal framework for the detention of persons who have not been released or imprisoned as a result of a criminal process.'[11] Therefore, their condition should be regulated by human rights law (HRL) and domestic law. Nevertheless, the retention of POW status has important advantages. Firstly, it entails the discharge of all obligations of the detaining power under the Convention. Secondly, it enables the ICRC to carry out its visits. Last, but not least, it may result in allowances and/or pensions after repatriation. Be it as it may, the choice between the two regimes should be made in view of what is in the best interests of the person(s) concerned.

2.1.3. Protection of Civilians

Article 6 of Geneva Convention IV stipulates that the Convention ceases to apply at the 'general close of military operations' in the territory of States parties to the conflict, while in occupied territories the term is extended to 'one year after the general close of military operations'. The Convention does not explain the concept of the 'general close of military operations.' The current interpretation holds that the expression has a wider

[10] Ibid.
[11] See J. Pejic, "Terrorist acts and groups: a role for international law?", 75 *BYIL* (2004) 71-100 p. 78.

meaning than the 'end of active hostilities.' While the latter refers to the mere termination of fighting, the former entails a complete cessation of all military movements by all belligerents.[12]

The last sentence of Article 6 of the Fourth Geneva Convention prescribes that protected persons whose release, repatriation or re-establishment is delayed[13] continue to benefit from the Convention while in the hands of a detaining or Occupying Power. Likewise, Article 75 para. 6 of Additional Protocol I establishes that persons deprived of their liberty for reasons related to the armed conflict enjoy the protection provided by the Article 'until their final release, repatriation or re-establishment, even after the end of the armed conflict.' The legal framework of IHL, however, may seem inadequate to regulate the condition of civilian internees after the end of hostilities, whose protection should be better guaranteed by the general framework of Human Rights Law.[14]

2.1.4. Occupied Territories

The end of applicability of Geneva Convention IV in occupied territories one year after the general close of military operations contradicts customary law on belligerent occupation, which is based on the principle of effectivity, as embodied in the Hague Regulations. Historical and political reasons explain the derogation, since the application of the Convention for a longer time appeared unjustified in situations like those of Germany and Japan after World War II.[15] However, a number of obligations related to the protection of civilians are listed which survive as long as the Occupying Power 'exercises the functions of government' in occupied territory. These are the general obligations laid down in Part I of the Fourth Convention, [16] those on the status and treatment of protected persons,[17] the prohibition of depriving protected persons of the benefits of the Convention,[18] the prohibition of forced transfers and forced labour in the armed or auxiliary

[12] See Green, *supra* n. 3 pp. 104-107.
[13] Internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same applies to internees who have been previously sentenced to a punishment depriving them of liberty. See Art. 133 of Geneva Convention IV.
[14] See Pejic, *supra* n. 11 p. 81.
[15] See Pictet, *supra* n. 9 p. 63.
[16] Geneva Convention IV Art.s 1 to 12.
[17] Ibid. Art.s 27 and 29 to 34.
[18] Ibid. Art. 47.

forces of the occupying State,[19] the right of workers to apply to the representatives of the Protecting Powers,[20] the prohibition of the destruction of real or personal property,[21] the duty to supply relief to the population of the occupied territory,[22] the operation of the penal laws in the occupied territory,[23] and the right of representatives or delegates of the Protecting Powers to visit places of internment, detention or work of protected persons.[24]

Article 3 of Additional Protocol I replaces the one-year term of applicability in case of occupation by either the 'termination of occupation' (effectivity) or the 'final release, repatriation or re-establishment' of protected persons (functional termination of applicability). Presently, all States parties to the First Protocol remain bound by Geneva Convention IV in whole, as well as by the Protocol itself, as far as an occupation actually lasts, irrespective of the end of active hostilities or the general close of military operations. Scholars' opinions tend to argue that all substantive rules contained in the Fourth Convention apply throughout the entire period of occupation, as indicative of customary international law.[25] The *Wall* Opinion of the International Court of Justice, however, suggests that States non-party to Additional Protocol I are not bound by the Fourth Geneva Convention in its entirety, as far as an occupation actually lasts, but only by those listed in Article 6, para. 3.[26]

2.1.5. Repression of grave breaches

Individual criminal responsiblity for grave breaches and for all acts contrary to the Geneva Conventions and Additional Protocol I is firmly established both in international law and in domestic legislations. While the set of obligations related to the repression of grave breaches of IHL is applicable during an IAC and survives its end, in practice the prosecution

[19] Ibid. Art.s 49 and 51.
[20] Ibid. Art. 52.
[21] Ibid. Art. 53.
[22] Ibid. Art.s 59 and 61 to 63.
[23] Ibid. Art.s 64 to 70.
[24] Ibid. Art. 143.
[25] See R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Bruxelles: Bruylant 2009) at p. 164; V. Koutroulis, *Le début et la fin du droit de l'occupation* (Paris: Pedone, 2010) p.181.
[26] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, at para. 125. See Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009) pp. 280-283.

of persons accused of such violations takes place after the close of hostilities. The Geneva Conventions and Additional Protocol I prescribe that States Parties must search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the Conventions and the Protocol. A State is under the obligation to bring such persons, regardless of their nationality, before its own courts, unless it hands them over for trial to another State Party which so requires having made out a *prima facie* case.[27]

In recent years, the task of prosecuting persons responsible for serious violations of IHL has been increasingly assigned to international criminal tribunals, on the assumption that bringing to justice such persons would contribute to the restoration and maintenance of peace. However, amnesty laws contained either in domestic legislation or in political agreements, as well as other state practices, intended to preclude the prosecution of persons suspected or accused of war crimes, evidence the tension between the imperatives of justice and the interests of peace. A restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law and complementary in initiating investigations and prosecutions, has been suggested as the more appropriate model to deal with this complex issue.[28]

2.2. Non-international Armed Conflicts

Coming to the IHL obligations that survive a non-international armed conflict, neither Common Article 3 of the Geneva Conventions nor Additional Protocol II define the beginning or the end of applicability of the respective obligations. In the silence of treaty provisions, the end of a NIAC should be assessed with regard to factual criteria such as the decreasing intensity of armed clashes and the disbanding of armed groups. Although they are grounded on the principle of effectiveness, these criteria prove difficult to use in practice. The *Tadić* Decision held that in the case of internal conflicts, IHL applies until a 'peaceful settlement is achieved.' The classic way to reach a 'peaceful settlement' is through a formal agreement sanctioning the definitive cessation of hostilities. As a rule, this category of agreement includes, or is complemented by, stipulations establishing national human rights institutions and incorporating

[27] See Geneva Convention I, Art.s 49-50; Geneva Convention II, Art.s 50-51; Geneva Convention III, Art.s 129-130; Geneva Convention IV, Art.s 146-147; Additional Protocol I, Art. 85, para.s 1-2.

[28] See Y. Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition', 85 *IRRC* 851 (2003) 583-626.

transitional justice elements. Therefore, the end of application of IHL progressively gives way to the full applicability of HRL.

2.2.1. Protection of persons taking no active part in the hostilities

The provisions laid down by Common Article 3 'reflect ... elementary considerations of humanity' and they are unanimously recognized as being part of customary international law.[29] Thus, they are deemed to continue applying as long as persons taking no active part in the hostilities are in need of protection. Article 2(2) of Additional Protocol II on the personal field of application prescribes that persons who have been deprived of their liberty or whose liberty has been restricted during or after the conflict, for causes related to the conflict, continue to benefit from the protection of the Protocol until their final release. Moreover, Article 25(2) of the same Protocol provides that the said persons continue to benefit from the protection of the Protocol until their final release, even upon denunciation by the State Party. Nevertheless, when hostilities have ceased it is doubtful whether Common Article 3 or Additional Protocol II can offer better protection to detainees than the existing human rights framework.[30] Even more problematical is the continuing protection of persons in the hands of a non-state organized armed group (OAG). Common Article 3 clearly states that its provisions are binding on all parties to a NIAC, i.e. on the opponent armed group or groups as well. As a consequence, they are binding on all States, irrespective of their participation in the Geneva Conventions, as well as on OAGs. In spite of that, a detailed list of legal obligations binding upon the organized armed groups in a non-international armed conflict (let alone those continuing to apply after its end) would be rather difficult to establish.

3. Obligations which come into effect at the end of an armed conflict

3.1. International armed conflicts

The most important obligations coming into effect at the end of an international armed conflict relate to the repatriation of prisoners of war,

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[29] ICJ, *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, 27 June 1986, at para.s 218, 220; US Supreme Court, *Hamdan v Rumsfeld et al*., Judgment, 26 June 2006, 548 US (2006) pp. 66-68.
[30] See E. David, *Principes du droit des conflits armés* (4ème éd., Bruxelles: Bruylant, 2008) p. 265.

the cessation of internment, the return of the internees and the search for missing persons.

3.1.1. Repatriation of Prisoners of War

Article 118 of Geneva Convention III prescribes that POWs must be repatriated 'without delay after the cessation of *active hostilities*.' This obligation comes into effect as soon as actual fighting ends, provided that a lasting cessation of hostilities is indicated by significant facts such as an unconditional and unlimited cease-fire or an armistice. Failing such agreements, only the principle of effectivity may determine whether actual fighting has really ended or not.

The language of Article 118 GC III is categorical and the related obligation is unconditional and unilateral. State practice, however, demonstrates that release and repatriation of POWs often takes a long time. Striking examples are the lengthy process of repatriating POWs from the 1980-1988 Iran-Iraq war[31] as well as from the 1990-1991 Gulf War[32] and (to a lesser extent) from the 1998-2000 Eritrea-Ethiopia war.[33] Reciprocity considerations have often been alleged in order to delay repatriation and have been condoned by the recent case-law.[34] Although reciprocal implementation may be politically useful, reciprocity is clearly incompatible with the absolute obligation laid down by Article 118. A strict interpretation of the rule is also preferable because unilateral implementation may better contribute to build confidence between the former enemy States and to facilitate the transition to peace.

The relevance of the refusal of POWs to be repatriated remains a matter of controversy: opinions differ on whether it prevails over the State obligation to repatriate. In the past, serious difficulties of interpretation arose concerning the voluntary repatriation of POWs. On the one hand, Article 7 of Geneva Convention III stipulates that POWs "may in no circumstances renounce in part or in entirety the rights secured to them" by the Convention. On the other hand, States have obligations under human rights law and Refugee Law, which prohibit the return of an individual to a country where he or she faces the risk of torture, cruel, inhuman or degrading treatment. These obligations are also absolute and they are deemed to correspond to peremptory norms of international law. In the

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[31] See ICRC *Annual Report* 2004 p. 278.
[32] See ICRC *Annual Report* 2011 pp. 381, 410.
[33] See ICRC *Annual Report* 2002 p. 74.
[34] See Eritrea Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claims 17, July 1, 2003, para.s 144-163.

light of the above, the prohibition of torture and inhuman treatment and the principle of *non-refoulement* bar forcible repatriation of POWs. Two major problems arise in regards to this proposition. Firstly, how can the risk of ill-treatment be evaluated? The case-law of human rights bodies demands that the detaining power consider all relevant factors and circumstances specific to the case at hand.[35] Secondly, how can the objection to repatriation by a POW be assessed as genuine? Practice shows that the will of a POW not to be repatriated is respected when it is expressed to the ICRC, but this should not be the sole criterion to assess whether the objection to repatriation is genuine or not.

3.1.2. Cessation of internment and return of the internees

1. Article 133 of Geneva Convention IV stipulates that internment must cease as soon as possible after the close of hostilities. Article 134 of the same Convention further prescribes that upon the close of hostilities or occupation, the parties must endeavour (an obligation of means) to ensure the return of all internees to their last place of residence, or to facilitate their repatriation. Civilians, however, are protected from forcible return to a country where they may have reason to fear persecution for their political opinions or religious beliefs (Article 45 of Geneva Convention IV).

2. The Pictet *Commentary* argues: "In general, States have tended to intern nationals of enemy Powers in their territories automatically. In the long run, many of these internments have entailed heavy expense for the Detaining Power and have inflicted useless suffering on individuals, since, with some exceptions; public safety was not threatened by the persons interned. The real interests of the Detaining Powers often, indeed, coincide with respect for humanitarian principles and thus enable internees to be released from detention in agreement with their country of origin." [36] Despite this, it is unfortunate that the principle of voluntary transfer laid down by Article 45 was not repeated in regard to the repatriation of internees.[37]

Like in the case of release and repatriation of POWs, the return of

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[35] *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006, at para.s 11.3-11.5 (available at: www.refworld.org/docid/47975afa21.html, accessed: 15 October 2013); *Saadi v. Italy*, Appl. No. 37201/06, European Court of Human Rights, 28 February 2008, at para.s 147-148 (available at: www.refworld.org/docid/47 c6882e2.html, accessed: 15 October 2013).

[36] J. Pictet (ed.) Commentary on the Geneva Conventions of 12 August 1949, Vol. IV, Geneva, 1958 pp. 511-512.

[37] Ibid. p. 514.

internees often takes a long time. For example, repatriation of Azerbaijani civilians interned in Armenia and of Armenian civilians interned in Azerbaijan in connection with the 1992 Nagorny Karabakh conflict has been going on until recently under the auspices of the ICRC.[38]

3.1.3. Search for missing persons

Articles 119 of Geneva Convention III and 133 of Geneva Convention IV provide that after the close of hostilities the parties to the conflict may establish by agreement special commissions for the purpose of searching for dispersed prisoners of war and for dispersed internees, respectively. The obligation established by Article 26 of Geneva Convention IV, to facilitate enquiries made by members of families dispersed because of the war and to encourage the work of organizations engaged in this task, may also require implementation after the end of hostilities.

Article 33 para. 1 of Additional Protocol I on missing persons prescribes detailed obligations on the search for persons who have been reported missing by an adverse party, to be performed 'as soon as circumstances permit, and at the latest from the end of active hostilities.' Information must be transmitted either directly or through the Protecting Power, the Central Tracing Agency of the ICRC or national Red Cross/Red Crescent Societies. The ICRC Central Tracing Agency provides a range of tracing services both in time of armed conflict and in peacetime, that enable detainees and civilians affected by conflict, disaster and other situations to restore contact with members of their families.[39]

3.2. Non-international armed conflicts

Treaty law does not offer specific examples of IHL provisions coming into effect at the end of a NIAC. However, customary international law has expanded the field of application of some of the rules applicable after the end of an international armed conflict (IAC) to include post-NIAC scenarios.

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[38] See www.icrc.org/eng/resources/documents/news-release/2012/11-30-armenia-azerbaijan-civilian-internee.htm, and www.icrc.org/eng/resources/documents/news-release/2013/03-20-azerbaijan-armenia-repatriation.htm (accessed 4 August 2013).
[39] See www.icrc.org/FAMILYLINKS.

3.2.1. Search for missing persons

Unfortunately, it was not possible to lay down detailed rules on the search for missing persons in the specific circumstances resulting from non-international armed conflicts, in Additional Protocol II. Yet in internal armed conflicts above all, it is important for families to be informed of the whereabouts of their missing relatives. In fact, the obligation to account for missing persons in both international and non-international armed conflicts is contained in a number of national laws and military manuals, as well as in agreements between parties to armed conflicts and in various resolutions of international organizations and conferences.[40] This obligation is based on the right of families to know the fate of their missing kin, which is also supported by a number of international instruments. Thus, international practice suggests that an obligation to account for missing persons has been established as a rule of customary international law applicable in all types of conflicts. The responsible authorities should, as far as possible, inform families about the fate of their relatives, or when appropriate facilitate the task of the ICRC in this field, which is a fundamental humanitarian activity for the benefit of the victims of armed conflicts of any kind. [41] Once more, however, the binding effect on other armed groups of such an obligation is hard to prove.

3.2.2. Repression of violations of IHL applicable in NIACs

Although individual criminal responsiblity for violations of Common Article 3 or Additional Protocol II is not established by IHL treaties, serious violations of IHL applicable in internal conflicts are deemed to constitute war crimes under customary international law and they have repeatedly come under the scrutiny of the international criminal tribunals. In the Rome Statute of the International Criminal Court, the category of 'other serious violations' in Articles 8 para. 2 lett. b) and 8 para. 2 lett. e) includes many identical definitions. Nevertheless, Article 6 para. 5 of Additional Protocol II prescribes that 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty

[40] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. II (ICRC and Cambridge University Press, Geneva, 2005) Ch. 36.
[41] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (ICRC and Cambridge University Press, Geneva, 2005) Rule 117, Accounting for Missing Persons: 'Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.'

to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' Rule 159 of the ICRC Study aptly explains that an exception is to be made for "persons suspected of, accused of or sentenced for war crimes." In the latter case, the principle of universal jurisdiction should apply accordingly.[42]

4. Concluding Remarks

IHL does not immediately cease to apply as soon as an armed conflict ends. Instead it gradually gives way for the operation of the whole body of Human Rights Law, while all parties are still bound to perform a number of IHL obligations. These are more inclusive in relation to international armed conflicts than to non-international armed conflicts. The most important categories of obligations surviving or coming into effect at the end of an international armed conflict relate to the treatment and repatriation of prisoners of war and of civilian internees, while the obligation to account for missing persons has been established as a rule of customary international law applicable in all types of armed conflicts.

The prosecution of persons responsible for grave breaches or other serious violations of IHL in both international and non-international armed conflicts gives an important contribution to the restoration and maintenance of peace. Restorative justice, including limited amnesties and focusing on the normative rather than the punitive objectives of criminal law, should complement investigations and prosecutions in post-conflict scenarios.

[42] T. Graditzky, 'Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts', 80 IRRC 322 (2003) 29-56.

Improving post-armed conflict implementation of IHL

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The wars in the former Yugoslavia in the 1990s and, in particular, the conflict in Bosnia and Herzegovina (BiH), on which I would like to focus, have left one of the most challenging post-conflict environments in political, security and humanitarian terms.

Settling the 1992-1995 conflict in BiH required a complex political and security arrangement between the International Community and national as well as regional leaders. The Dayton Peace Agreement provided, and still provides, the general framework for peace in BiH. It is a political and security arrangement which also includes the constitutional architecture of Bosnia and Herzegovina.[1]

At the same time, the International Community has established for BiH one of the most layered and ambitious arrangements for prosecuting the perpetrators of the serious and extensive violations of international humanitarian law committed during this conflict. The *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) was created in 1993 to deal with the genocide, crimes against humanity and war crimes perpetrated during the Balkan conflict.

I am not an expert on international humanitarian or criminal law, therefore, my perspective and the main focus of my contribution today is that of a professional who has spent the last four years working in Sarajevo with the OSCE, one of the central organizations of the Dayton architecture.

The broad approach to post-conflict stabilisation and democracy-building taken by the OSCE Mission to Bosnia and Herzegovina reflects the equally broad OSCE concept of "comprehensive security." Hence, the work of the Mission for the last almost 20 years has focused on the areas of democratization, human rights, rule of law and politico-military stabilisation. These areas are still at the core of the Mission's work today.

For the purpose of this presentation, I would like to concentrate on two key aspects of international action (OSCE in particular): 1) the support to the prosecution of violations of international humanitarian law; 2) defence reform in BiH, including the work on arms control, disarmament at national as well as regional level.

[1] www.oscebih.org/dejtonski_mirovni_sporazum/EN/.

I will shortly outline activities and progress in both areas. I will also address the remaining challenges and try to provide some lessons learned from the BiH case.

Since 2005, conscious of the need to conclude its work, the ICTY has referred war crimes cases regarding middle and lower-level perpetrators to the countries of the Western Balkans for completion.[2] Bosnia and Herzegovina have taken up this task with diligence: completing the trials of ten indictees referred by the ICTY and taking over the investigation of dozens more case files from the Office of the Prosecutor. Yet these cases represent only a fraction of the caseload concerning war-time criminality that the BiH criminal justice system is confronted with.

As the ICTY is concluding its final cases, closing the impunity gap is a task that falls chiefly on national jurisdictions in the region of the former Yugoslavia. Owing to the fact that many of the crimes were committed on the territory of BiH, it is its domestic legal system that now shoulders the main responsibility for dealing with the legacy of war crimes.

An ambitious rule of law reform process had been initiated in BiH already before the decision of ICTY to transfer some of its caseload to national jurisdictions in the Western Balkans. This led to the establishment, in 2000, of the Court and the Prosecutor's Office of BiH, as the first institution at state level competent to address certain types of criminal offence on the entire BiH territory.

In 2003, the adoption of the Criminal Code and the Criminal Procedure Code of BiH defined the crimes under the competence of the Court of BiH and the procedure to be applied by it. Section I for War Crimes within the Court of BiH and the Special Department for War Crimes within the BiH Prosecutor's Office were eventually established as integral parts of those respective institutions, becoming fully operational in 2005. They are among the strongest institutions in the region with jurisdiction and capacity to deal ith war crimes cases.

The creation of these two institutions, however, also resulted in a complex framework for allocating cases between the State and the entity level jurisdictions. In 2004, the introduction of the Book of Rules on the Review of War Crimes provided a mechanism for the BiH Prosecutor's Office to review war crimes cases initiated at the entity level with a view to retaining the very sensitive ones. However, coordination between

[2] Although the ICTY has primacy over war crimes, its jurisdiction is concurrent rather than exclusive. War crimes trials took place in BiH both during the war and its aftermath. In order to ensure coordination among local courts and the ICTY, and also to ensure minimum fair trial standards, the *Rules of the Road* procedure was established in 1996 (Rome Agreement of 18 February 1996), giving the ICTY a mechanism to review prosecutions undertaken by the authorities in BiH.

prosecutions at the state and entity level under this arrangement proved to be inefficient.

Therefore, a need to devise a more effective way of dealing with the huge war crimes caseload and to ensure that the Court of BiH and BiH Prosecutor's Office play a central coordinating role in how war crimes cases are processed in the country was identified. This brought, at the end of 2008, the adoption of a National Strategy for War Crimes Processing.

The Strategy confirmed the key role of the entity level judiciary in processing less complex war crimes, notably those involving direct perpetrators. The significance of trying war crimes perpetrators before courts located in the same area where the crimes actually occurred cannot be underestimated. This is vital not only to closing the impunity gap by ensuring a sufficient volume of trials, but also for strengthening the rule of law in BiH.

the Third Conventions. Once they have regained their health, only the indicated that, following an initial peak, the number of accused brought to trial at the Court of BiH remained stable, but there was a marked drop in the number of cases initiated at entity level. In other words, statistical data indicated that BiH will only be able to meet the goals of the National Strategy through a more harmonized approach, involving better coordination and cooperation among the state and entity judiciary and institutions.[3]

The report identified a number of obstacles to a more efficient and harmonized war crimes processing, among which:

- low public confidence in the judiciary;
- political opposition from certain quarters to an integrated and cohesive judicial system;
- a fragmented legal and institutional framework for war crimes cases;
- poor investment in human and technical resources;
- lack of availability of suspects, physical evidence and witnesses willing to testify;
- a caseload of 1,326 trials and unknown scope, scattered between prosecutor's offices around the country.

The current situation is that between 2004 and 2012, 206 war crimes cases were completed in BiH. A total of 229 persons were convicted and sentenced to a combined total of 2,224 years imprisonment. Despite these achievements, a backlog of approximately 1,320 war crime cases (approximately half of them at state level) still remains to be processed.

[3] *Delivering Justice in Bosnia and Herezegovina*, An overview of War Crimes Processing from 2005 to 2010, www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf.

The fragmentation of the BiH legal and institutional framework was further complicated by the lack of coordination among the various international organizations dealing with justice sector reform in BiH. In order to address such challenges, including war crimes processing, and to overcome serious political obstacles, the EU recently took a leading role by launching a comprehensive, negotiated approach, the so-called Structured Dialogue on Justice Reform. Bilateral in nature (EU-BiH), such approach enjoys nonetheless the technical support of the entire international community in BiH.[4]

As a result of the Structured Dialogue, the EU decided to help BiH tackle the challenges of war crimes processing by allocating EUR 15 million through its IPA (Instruments of Pre-Accession) funds. As such funds will not be available until 2014, the OSCE has designed a 'bridge' War Crimes Processing project to bolster the capacities of the BiH judiciary and address the most urgent staffing and training needs of courts and prosecutors' offices at various levels of BiH jurisdiction.[5]

In conclusion, the political importance, in a post-conflict situation, of addressing war crimes processing should be further underlined. In particular, the role of the OSCE has been significant in:

- closing the impunity gap;
- reinforcing international humanitarian law;
- addressing conflict prevention;
- promoting reconciliation.

Another area of action for improving the implementation of international humanitarian law has been, as indicated before, defence and security sector reform, including compliance with regional arms control agreements and disarmament initiatives.

Since the inception of the OSCE Mission to BiH, a core part of its work has been focused on the implementation of the OSCE Code of Conduct and its principles (see Appendix 1). The Mission supports BiH efforts to deliver on its CoC commitments, to include its obligation to raise awareness of the CoC's fundamental principles particularly among its security bodies. The CoC represents commitments that all 57 OSCE participating States, including BiH, have made for the greater security of the individual States and the OSCE area collectively.[6]

As a result of the comprehensive defence reform that was conducted in Bosnia and Herzegovina, two fundamental laws were passed: the Law on Defence and the Law on Service. Both the Defence and Service Law in

[4] www.delbih.ec.europa.eu/Default.aspx?id=87&lang=EN.
[5] www.oscebih.org/Default.aspx?id=70&lang=EN.
[6] www.osce.org/fsc/41355.

their respective Chapters on Office of the Inspector General and the Standards of Conduct stipulate obeisance to international humanitarian law. The BiH Armed Forces Code of Ethics subsequently issued by the Minister of Defence further elaborated on this obligation of all Armed Forces' personnel.

The OSCE has also supported the establishment and capacity building of mechanisms for democratic oversight, such as the Office of the Parliamentary Military Commissioner, who serves as an Ombudsman for the protection of the human rights of members of the Armed Forces. This institution serves, among other things, to ensure that members of armed forces can enjoy and exercise their human rights and fundamental freedoms. This provision reflects the belief that those whose rights are protected will be more apt to respect the rights of others and is of particular relevance in BiH where three wartime armies were brought together into one Armed Forces BiH under a unified Ministry of Defence.

Since the signing of the Dayton Agreement, the OSCE has worked to support arms control in BiH and in the region and sub-region. This support, at the outset, focused on implementation of Articles within Annex 1-B of Dayton, which was mandated to the OSCE, namely Article II and Article IV.[7]

However, with the successful implementation of these two Articles, today, the problem of a massive amount of arms and ammunition left over after the war in the country still remains, continuing to pose both a security and a humanitarian risk. There are approximately 17,000 tons of surplus ammunition awaiting disposal, more than 80% of which is over 20 years old, being stored in military storage sites under conditions that in many cases do not fulfill basic international standards for safety and security. Should this old and in some cases unstable ammunition explode, it could cause many human casualties both of personnel working at the sites and civilians living in the vicinity, and cause serious long-term damage to the environment.

In addition, any thefts of the current 40,000 pieces of surplus weapons in storage sites due to inadequate security infrastructure at the locations

[7] Article II of the Dayton Peace Accords provided a framework for negotiations of an agreement on confidence- and security-building measures (CSBMs) in Bosnia and Herzegovina. The Agreement was concluded in Vienna on 26 January 1996 and deemed successfully implemented and completed in 2004. Article IV provided the framework for negotiations of a sub-regional arms control agreement, which was concluded in Florence on 14 June 1996. It engaged the three parties within Bosnia and Herzegovina as well as Croatia and Serbia and Montenegro. An OSCE Personal Representative of the CiO was established for Article IV implementation support with an office in Vienna, which is due to close in 2014 with complete handover of responsibilities to the Parties to the Agreement.

could lead to illegal use and proliferation either in BiH or abroad, which also have humanitarian consequences particularly in countries undergoing turmoil.

The OSCE Mission to Bosnia and Herzegovina has been dedicated to advocating for removal of the administrative, technical and political obstacles to destruction of these dangerous materials, and has launched projects to improve the infrastructure of storage sites to increase storage safety and security.

To improve work with the BiH authorities, the OSCE has just signed a Cooperative Agreement with BiH which sets a general legal framework for cooperation in the field of security and defence. This was a requirement for implementation of a specific project on upgrading of ammunition storage sites, but also sets a legal framework for other projects between OSCE and BiH in the field of security and defence. The Agreement was approved by the BiH Council of Ministers and the Presidency on Tuesday 3 September 2013.

For almost 20 years now, the Western Balkans, and BiH in particular, have strived to overcome the legacy of a past security system that had inadequate democratic controls and emphasis on rule of law, which contributed a great deal to the grave humanitarian law violations of the 1992-1995 conflict.

A constant element of the efforts to improve the respect and application of international humanitarian law in post-conflict situations has been the need for strengthening democratic institutions, rule of law and a system of checks and balances between the different pillars of the State.

In a constitutional architecture such as the one established in Dayton, the emphasis had been generally more on stopping and preventing further conflict, rather than on creating a viable state system that would ensure democracy, economic prosperity and respect for the rule of law.

For this reason, the political difficulties that all efforts to improve respect for humanitarian law and its embedment into the state legislation and institutional practice have been more challenging than elsewhere.

Therefore, in my concise (and necessarily incomplete) conclusions, I would like to focus on some lessons learned from the political impact and consequences that a specific peace agreement such as Dayton, and its subsequent application, has had on the efforts to establish democratic control and the rule of law. Such conclusions reflect my observations in BiH and represent my personal views, not necessarily those of the OSCE.

Conclusion

- When settling a conflict, try to establish mechanisms for the revision of peace agreements and provisions, possibly through regular review processes;
- involve international and national constitutional lawyers in case the peace settlement includes creating a new constitution;
- involve international humanitarian law experts and practitioners to ensure that the right provisions in this area are imbedded in the peace settlement;
- concert and coordinate efforts by the International Community during the post-conflict period, but try to refrain from creating complex and overlapping international agencies, which run the risk of becoming quasi-colonial structures;
- help post-conflict countries establish solid, independent and well-funded institutions in a context of democratic oversight and accountability;
- work as early as possible on preparing the local ownership of reforms and institutional settings (reforms imposed by the International Community do not last long if not embraced and shared by national leaders).

To conclude, one fundamental question is how the implementation of international humanitarian law can lead to a stable outcome of the post-conflict settlement, with a clear development path for the countries in conflict. In the case of the Western Balkans, and BiH in particular, that path is represented by the EU integration process, which has taken onboard the challenges of implementing international humanitarian law. In other post-conflict situations, that question is still open.

Annex

The OSCE Code of Conduct in BiH

The OSCE Code of Conduct (CoC) on Politico-Military Aspects of Security contains politically binding rules on the role of armed forces in democratic societies and on politico-military relations between countries. The CoC is a fundamental document on which the Mission bases its support aimed at better security governance in BiH. The CoC, which came into force on 1 January 1995, is one of the OSCE's most important normative documents.

With its comprehensive objective based on the rule of law, the CoC goes beyond the OSCE's politico-military dimension, thus linking the security and human dimensions of the OSCE *acquis*. It contains politically binding rules on the OSCE participating States' deployment of armed forces both at home and abroad and, in particular, on the democratic control of armed forces to include all armed state organs. It also lays down guidelines for participating States to ensure personal accountability and responsibility of armed forces' members for respecting international law.

The Articles of note in the OSCE Code of Conduct on Politico-Military Aspects of Security (http://www.osce.org/fsc/41355) for this specific theme are Articles VII and VIII, wherein, among other things, it is stated that participating States will make provisions to ensure respect of international law and will train their armed forces in "international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are individually accountable under national and international law for their actions".

The CoC's main tools for the overall OSCE area are the annual exchange of information using comprehensive questionnaires, through which participating States share standardized implementation reports, and also regularly held CoC review conferences through which participating States jointly analyze and discuss future progress in implementation and reporting on the CoC.

The lessons to be learned related to the CoC are especially relevant and crucial in the post-conflict context of BiH. In establishing mechanisms to implement the Code's regulations, BiH strives to overcome the legacy of a past security system that had inadequate democratic controls and emphasis on rule of law, which contributed a great deal to humanitarian violations.

Closing Remarks

Fausto Pocar
President, International Institute of Humanitarian Law, Sanremo

As in past years, this annual Round Table has gathered eminent experts and all its panels have been undoubtedly successful and stimulating. Our discussions have unveiled, as always, a number of open-ended issues that should be addressed, which will form an invaluable basis for further research and a contribution to the debate at appropriate levels.

I would first like to thank all distinguished speakers coming from different backgrounds - academics, experts in international humanitarian law, international criminal law and human rights law, practitioners and representatives of international organisations and NGOs - for their extraordinary insight and engaging presentations. I would also like to warmly thank all the participants for their precious input to the panel debates and for having so actively attended this important event. Once again the International Institute of Humanitarian Law of Sanremo has proven an excellent platform for dialogue and confrontation, and I trust that all of you enjoyed participating in our interesting discussions these past days, on a topic - fostering respect for IHL - which is of increasing concern for all of us in light of the continuous and current violations of this important body of law.

The Round Table has identified a number of challenges and has taken into consideration possible responses to meet them.

A first matter of concern is represented by dissemination and training, in relation to which progress has been made but still much remains to be done. New trends have emerged, in particular, in regards to means and mechanisms of dissemination, which have to deal with an increasing level of complexity. The multiplication of active operators, the frequent absence of well-established chains of command, the influence exercised by religious groups and other constituencies behind combatants, and the ever more widespread use of new technologies and means of communication call for the adoption of a flexible approach in order to adapt to the environment in which hostilities are taking place.

Once a conflict has arisen, non compliance of States with IHL raises a number of challenges, which deserve careful analysis.

First of all, it is necessary to establish the relevant facts in order to assess violations and responsibilities. Despite the increasing recourse to the establishment of fact-finding missions, their operations are still hampered by a series of political and legal constraints. The main limitation is represented by the lack of access to the territory of the State concerned, which prevents on-site interviews with witnesses and the gathering of first-

hand evidence. Furthermore, the adoption of guidelines could increase consistency in standards of proof and methods of investigation. In this perspective, it is of a major importance to focus on the strengthening of investigative bodies, in order to improve their effectiveness and foster their prompt operation, also reflecting on their connection with international criminal justice.

The need to ensure compliance with IHL still poses some critical challenges once the conflict has terminated.

We need to determine which rules remain applicable in post-conflict scenarios and which come into effect at the end of an armed conflict. In this view one may think, for instance, of the obligation to repatriate prisoners of war and the balancing of the imperatives of justice with the need for peace and reconciliation.

Beside the aforementioned issues, the Round Table has highlighted the importance of engaging non-state actors in different phases of the implementation of IHL, as called for by the evolving features of contemporary armed conflicts.

A further challenge that has been dealt with is the controversial relationship between international humanitarian law and human rights law which, in recent years, have become increasingly intertwined. This is demonstrated by the case law of human rights courts which, both at the universal and at the regional level, no longer refrains from addressing human rights protection in the context of armed conflicts and from referring to norms and categories pertaining to international humanitarian law. This phenomenon has various important consequences.

On the one hand, it calls for a more integrated knowledge of the two bodies of law, which can no longer be perceived as completely separated systems. On the other hand, as a consequence of the interplay between human rights law and international humanitarian law, the latter is playing a growing role within monitoring mechanisms that have originally been designed for protecting human rights. It is doubtful whether the existing tools are still effective in coping with the problematic features arising from this new trend. Surely we will need an overall reassessment of the structure and functions of the current mechanisms. In this respect the consolidated model of human rights law can prove a useful source of inspiration, but is clearly insufficient as such to ensure respect for IHL.

Rather, the relationship between the two systems should be the object of a common strategy aimed at strengthening their complementarity.

Obligations deriving from international humanitarian law could form the object of periodic reports by States as is already the case with procedures of the Human Rights Council. Despite the reluctance that States may have in admitting that an armed conflict is taking place on their territory, this solution could be useful in contexts where the conflict has not yet arisen, in

order to enhance compliance with international humanitarian law, in particular as far as national legislation, dissemination and training of armed forces are concerned.

Indeed, it is paramount to launch a comprehensive dialogue on the above-mentioned proposals. In this perspective we warmly welcome the Swiss-ICRC Initiative on strengthening compliance with IHL, as it allows States to engage in discussions and confrontations on such a vital issue.

For this purpose, among the many organisations and institutions, I am glad to suggest that the International Institute of Humanitarian Law of Sanremo may play a role.

Closing Remarks

Philip Spoerri
Director for International Law Cooperation, International Committee of the Red Cross, Geneva

We have had a rich two and half days of discussions on respecting IHL: a topic that is crucial to the victims of armed conflict, but also central to the parties waging armed conflicts and to the range of humanitarian and other actors involved in providing protection and assistance to persons affected by armed conflict. I will not aim in these closing remarks to comprehensively summarize what we have heard, but simply to highlight a few salient points related to the questions posed at the opening session by the Vice-President of the ICRC, Mme Beerli: what are the legal, political and other challenges that stand in the way of better respect for international humanitarian law (IHL) and how can experts and the international community more broadly start creating an era of enhanced compliance with IHL.

The start of the roundtable provided a sobering reminder of the reality of ongoing armed conflicts in Syria, Afghanistan, Mali and Somalia, and drew attention to the fact that tremendous suffering of the civilian population - due to disrespect for IHL - remains a constant feature of war. It was both stated and implied throughout our discussions that lack of political will to implement IHL norms both by the parties to an armed conflict and by States that have a duty under common article 1 to the Geneva Conventions to ensure respect for IHL, remains an abiding challenge.

Not surprisingly, neither this roundtable nor any other meeting or single event can hope to change that state of affairs; it is and will remain a multifaceted and painstaking process. What is important is that all actors with a role to play in increasing respect for IHL continue to persevere in performing their respective tasks and in finding ways of expanding the protective reach of this body of norms. This is, of course, the responsibility of States and non-state parties to armed conflicts, but is also facilitated by the United Nations, regional and other organizations, the ICRC, National Red Cross and Red Crescent Societies, NGOs, civil society, the media, and others. I hope you share my view that the presentations we have heard provide us with very useful insights on the ways in which some of these actors approach IHL implementation in their everyday work.

It was stressed that training and dissemination of IHL remain a key legal and practical prerequisite for IHL compliance. Their aim must not only be to inform the parties or potential parties to an armed conflict of their IHL obligations, but to ensure that awareness of IHL norms and of the

humanitarian consequences of disrespect for IHL are integrated by the parties in a way that will produce results on the ground. This means, among other things, that training and dissemination must be designed having in mind the specific audience engaged, that they should be culturally adapted and relevant, that they should produce acceptance and ownership of the relevant IHL rules and enable their sustained implementation over time.

Engagement with non-state armed groups poses particular additional challenges in this regard, as well as in others. Integration of IHL norms will be difficult the more unstructured or fragmented a non-state armed group is. There are also challenges related to access to the country in which armed groups operate and access to the groups themselves, as well as issues arising from the serious security challenges faced by outside actors seeking to engage with such groups in some contexts. This is nevertheless an effort that must be continued. As was repeatedly noted, most armed conflicts nowadays are non-international in nature and the gravest civilian suffering arises precisely in these types of armed conflicts.

While it is true that in reality the greatest controversies linked to IHL lie actually less in the interpretation and application of the law and more in establishing the facts on the ground. It was also recognized that there is a lack of appropriate IHL compliance mechanisms. Aside from the ICRC, which is an operational humanitarian organization with a specific mandate and a specific working method, the compliance mechanisms provided for in the Geneva Conventions have never or rarely been used and are limited to possible action in international armed conflict only. It was noted that an effective IHL compliance system would, among other things, require the establishment of a regular platform for dialogue among States on IHL issues and would need to include examination and reaction to IHL violations by non-state armed groups, as well as engagement with them on improving respect for IHL.

In this context the importance of an IHL fact-finding function was referred to by many speakers. Challenges linked to fact-finding were discussed as well. They include access to and obtaining cooperation from the relevant parties, ensuring security for fact-finding mission members, the length of fact-finding mandates, sufficient legal expertise and staffing, and establishing the applicable standards of proof. Different views were expressed as to whether it would be desirable to have international guidelines on the various aspects of fact-finding missions or even a permanent and centralized international fact-finding body. Given that efforts are underway to draft standardized international fact-finding guidelines, this will certainly be an issue that will be followed with great interest by many in this room, and more broadly.

Our discussions have also reflected the ongoing and wider debate about the relationship between IHL and human rights (HR) law and have given

rise to different opinions on the effects that the increased attention being paid by human rights bodies to situations of armed conflict, and thus to IHL, is having. It has been said that while IHL and HR are complementary and in some respects mutually reinforcing, they are different branches of international law, dealing with different situations, whose interplay requires a careful situation-by-situation assessment. This means that in certain instances IHL is and should be applied as the *lex specialis*. It was likewise pointed out that most human rights bodies do not have an explicit IHL mandate, that they often lack the necessary expertise in this body of norms, and that they are burdened by politicization and selectivity with regard to certain contexts. It was, nevertheless, stressed that while human rights bodies need to better understand the IHL framework the same is true in the reverse sense, i.e. that the community of IHL practitioners and experts needs to know better and understand the human rights paradigm.

Given that Ambassador Zellweger will focus his closing remarks in a moment on some of the lessons to be drawn from our discussions for the joint Swiss-ICRC Initiative on improving compliance with IHL, I will not dwell on that session of the roundtable. I would, nevertheless, simply say that we are pleased by the positive reactions evidenced by some of the participants with regard to this process that were expressed in the plenary, and, if I may add, on the sidelines of the roundtable as well. As regards the ICRC's role in a possible new IHL compliance structure, allow me to reiterate what I already expressed yesterday evening, that our operational work and our standard working methods will not be compromised. While the ICRC's link to any compliance structure that may be established will be the subject of further reflection, I can preliminarily say that we see ourselves as performing tasks of an expert and facilitating nature.

Our last panel of this morning reminded us that IHL implementation does not end with the close of active hostilities in an armed conflict and that this body of law contains numerous rules that continue to be in force in order to ensure protection until humanitarian concerns created by an armed conflict are resolved. In this area as well there are significant challenges but, as has been just illustrated by the examples related to the situation in Bosnia and Herzegovina, perseverance and flexibility can help overcome some of the problems flagged.

I would like to close by taking up a comment made by one of our panellists on the first day which may seem obvious but it is deeply true and that is IHL is not only an academic subject but a living body of law which, when respected, makes a difference to countless people in the world. I trust that our exchanges at this roundtable have reinforced our understanding of the importance of working for better IHL implementation, our willingness to continue to work towards this goal in a complementary manner, and our openness to new ideas about ways of ensuring compliance with IHL.

Closing Remarks

Valentin Zellweger
Director, Directorate of International Law, Swiss Federal Department of Foreign Affairs

I think this year's Roundtable has been very useful to enrich the ongoing debate on strengthening respect for international humanitarian law (IHL). I would like to focus on four key elements mentioned in our discussions that are of particular relevance for the joint Swiss/ICRC Initiative on Strengthening Compliance with IHL[1].

First, throughout our discussions it has been repeated that, while IHL can sometimes serve the same objective as human rights law, we should avoid talking about convergence.

There is clearly room for different fora that fulfill different functions. The Human Rights Council will continue to deal with situations of armed conflict and to call on States to uphold the human rights of individuals under their jurisdiction, while another forum could address more specific issues with regard to compliance with IHL by all parties to the conflict.

It has also been mentioned that increasingly IHL is seen through the prism of international criminal law, focusing on individual criminal responsibility. International tribunals are of course an important tool to ensure respect for IHL but this is not sufficient - also because international tribunals often lack jurisdiction.

Despite these important mechanisms, we still lack a forum or a mechanism whose primary concern and task is to ensure compliance with IHL, notably to devise concrete proposals and to take measures in order to improve compliance with IHL. Such a system would be complementary to existing mechanisms.

Second, as many of you have mentioned, respect for IHL by non-state armed groups needs to be taken into account by any IHL mechanism.

We are not and should not be afraid to tackle that issue. Of course, there are political limitations and it would hardly be acceptable for States to have a non-state armed group sitting next to them for an IHL discussion but there are many other possibilities to engage with them. Let me take fact-finding commissions as an example: It is uncontroversial that any fact-finding mechanism competent to deal with non-international armed conflict can investigate allegations of violations committed by all sides, be it by States or by non-state actors.

[1] www.eda.admin.ch/eda/en/home/topics/intla/humlaw/icrc.html.

When it comes to reporting, non-state armed groups might raise some more sensitive issues but I believe that creative solutions can be found. For example, with regard to children and armed conflict, the mechanism established under Resolution 1612 (2005) of the Security Council enables the UN system to deal with States and non-state armed groups with different modalities. I am sure that there are other examples and mechanisms that we can learn from.

Having said that, our initiative is a process and as any process it is important to discuss issues that are conducive to consensus and building trust and not dividing States. But practical solutions can be found.

Third, there is need for enhanced dialogue among States on matters pertaining to IHL. I would like to come back to a comment made yesterday that we should not only focus on situations where IHL is violated but also on situations where it is respected. We think it is crucial to show that it is possible to respect the rules of IHL and to discuss how this can be achieved.

I think, for example, of the efforts mentioned by our French colleague, to clarify the legal status of captured persons in Mali or of the measures to ensure the respect of the principle of non-refoulement, taken by the French authorities, when transferring individuals to the Malian authorities. A forum for dialogue on IHL and compliance among States would provide for the opportunity to share and thus consolidate such "best practices". There is no such forum at present.

Fourth, what functions could be dealt with by a meeting of States? I would like to focus on two that are in our view most relevant to our work: reporting and fact-finding.

We acknowledge the legitimate concern about reporting fatigue. We are of the view that we should not devise an IHL reporting system that would aim to deal comprehensively with all national implementation issues, but rather to focus on specific matters. The aim would be to allow for an informed debate on specific issues to be defined by States, based on information submitted by them.

We agree that more attention needs to be devoted to fact-finding. Many challenges were mentioned, in particular, the lack of common principles for all fact-finding missions. In that context, several initiatives are under way. Apart from the Harvard Group of Professionals on Monitoring, Reporting and Fact-finding that was mentioned[2], I think, for example, of the Siracusa initiative led by Cherif Bassiouni. The Office of the United Nations High

[2] Cf. also „Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions", Geneva Academy of International Humanitarian Law and Human Rights, 2012.

Commissioner for Human Rights will also convene a meeting in November 2013, with the support of Switzerland, to see what could be done to strengthen the work and the mandate of fact-finding commissions. We will follow these discussions closely with a view to integrate pertinent elements into the framework of our initiative on strengthening compliance with IHL.

The more pressing question, however, will be as mentioned by Charles Garraway, the Vice-President of the International Humanitarian Fact-Finding Commission, i.e. how the Commission could be integrated in a wider IHL compliance system and how that could be achieved without changing the text of Additional Protocol I.

These four key elements will have to be discussed among States with a view to devise concrete proposals to strengthen compliance with IHL. I am looking forward to the third Meeting of States in June 2014, which will bring us - hopefully - closer to the establishment of an IHL compliance system.

Closing Address

Mario Giro
Sottosegretario di Stato, Ministero degli Affari Esteri, Italia

È per me un vero piacere poter essere presente alla sessione di chiusura di questa importante Tavola Rotonda, organizzata congiuntamente - secondo un'ormai consolidata tradizione - dall'Istituto Internazionale di Diritto Umanitario e dal Comitato Internazionale della Croce Rossa, con il patrocinio del Ministero degli Affari Esteri italiano che oggi qui mi onoro di rappresentare.

Vorrei innanzitutto estendere a Voi tutti il più caloroso saluto da parte della Signora Ministro, Emma Bonino, che purtroppo non ha potuto partecipare personalmente ai lavori ma che nondimeno teneva particolarmente ad esprimerVi il suo vivo apprezzamento nei confronti di questa iniziativa, dedicata - con eccezionale autorevolezza, professionalità e ricchezza di contenuti - ad un tema affascinante, complesso e - ahimè - drammaticamente attuale, quale è quello del rispetto del diritto internazionale umanitario, che come tutti sapete è a Lei molto caro.

Peraltro, per quanto mi riguarda, anche in virtù della mia lunga esperienza personale di impegno a favore della pace, spesa soprattutto nell'opera di mediazione per la risoluzione dei conflitti nel Continente africano, io non posso che condividere il grande interesse del Ministro Bonino per gli importanti sviluppi che il diritto internazionale umanitario ha conosciuto in questi anni e che si è realizzato anche grazie al personale impegno di voi tutti e, in particolare, dell'Istituto Internazionale per il Diritto Umanitario e della Croce Rossa Internazionale.

A questo proposito, non posso esimermi dal rilevare, se mai ce ne fosse bisogno, che la Farnesina non cessa di dedicare grande attenzione all'operato dell'Istituto di San Remo che, nel corso dei suoi oltre quarant'anni di attività, ha saputo ritagliarsi un ruolo fondamentale nel campo della definizione e dell'evoluzione del diritto internazionale umanitario, assurgendo al rango di centro d'eccellenza di livello mondiale nel campo della formazione, della ricerca e della diffusione della conoscenza in questa materia. Basti citare l'esempio del Manuale di Sanremo sul diritto internazionale applicabile nei conflitti armati in mare, per far comprendere il valore aggiunto che questo Istituto fornisce in settori di sempre maggiore interesse per la comunità internazionale.

Dico questo con profonda convinzione, pur nella consapevolezza che, purtroppo, le esigenze dettate dalle note ristrettezze di bilancio con cui ormai da diversi anni deve confrontarsi la nostra Pubblica Amministrazione si ripercuotono anche sull'entità dei contributi che il Ministero degli Esteri è in grado di garantire all'Organizzazione sanremese. Tuttavia, sebbene la

difficile congiuntura economica ci costringa a diminuire il nostro supporto in termini finanziari, ciò non inficia assolutamente il costante sostegno che a livello istituzionale - e, nel presente caso, anche a livello personale - l'Amministrazione degli Esteri vuole continuare a garantire all'Istituto ed alla sua preziosa opera di promozione del diritto internazionale umanitario.

In questo spirito, vorrei rivolgere uno speciale ringraziamento al Presidente dell'Istituto, il Prof. Fausto Pocar che, insieme ai suoi validissimi collaboratori, svolge un ruolo di primo piano nel far sì che l'IIDU mantenga il suo profilo di eccellenza e la sua leadership morale e materiale nell'ambito di quei processi volti alla promozione e diffusione, mediante il diritto internazionale, dei diritti e delle prerogative che sono parte della natura stessa dell'uomo - la vita, l'integrità fisica, la libertà e la dignità morale - e che si devono applicare ovunque e in ogni circostanza, in pace e in guerra, in tempi normali così come nelle emergenze dovute a disordini e tensioni politiche interne o causate da calamità naturali.

E mi preme sottolineare che in questa opera, difficile e importantissima, il Prof. Pocar può e potrà sempre contare sulla vicinanza della Farnesina, con cui egli continua a collaborare ormai da molti anni - e qui mi riferisco anche alla preziosa attività di consulenza da egli prestata al nostro Servizio per gli Affari Giuridici - e con cui egli è riuscito a cementare una relazione che va al di là degli incarichi formali e delle contingenze di una particolare fase storica. Parimenti, a ulteriore testimonianza della solida tradizione umanitaria che l'Italia può vantare, mi sembra altresì opportuno rilevare la nostra lunga storia di collaborazione con il Comitato Internazionale della Croce Rossa - di cui l'Italia è uno dei primi 10 contributori - che si esplicita anche nelle nostre risposte ai singoli appelli di emergenza in caso di conflitti armati e tensioni interne.

La Tavola Rotonda che vi ha visto qui impegnati in questi giorni costituisce un'occasione fondamentale di riflessione e confronto sull'evoluzione che il diritto internazionale umanitario sta vivendo in questi anni. Come è noto, infatti, ci si sta ormai muovendo dalla nozione classica del diritto internazionale umanitario inteso essenzialmente come *ius in bello* verso una sua più moderna concezione che arriva a comprendere, da una parte, la prevenzione del conflitto (attraverso gli strumenti di soluzione pacifica delle controversie, quali la mediazione e l'attivazione di corti internazionali) e, dall'altra la tutela dei diritti umani in generale.

Negli ultimi anni, poi, il DIU si è anche dedicato alla legittimità dell'uso della forza nei confronti dei Paesi responsabili di gravissime violazioni dei diritti fondamentali, tema che ha dato vita ad un intenso dibattito volto a ricercare un corpus di norme che possano definire le condizioni e le modalità con cui gli Stati possono utilizzare la forza armata per fini umanitari, in contrapposizione al principio di non ingerenza negli affari interni degli Stati. All'inizio degli anni '90, nell'occasione dell'intervento

in Iraq a protezione delle popolazioni sciite e curde, il Consiglio di Sicurezza delle Nazioni Unite stabilisce un legame diretto tra gravi emergenze umanitarie e minaccia alla pace e alle sicurezza internazionale, dichiarandosi dunque legittimato a fare ricorso alle misure previste dal capitolo VII della Carta delle Nazioni Unite, comprese quelle implicanti l'uso della forza armata, quando ciò sia necessario per porre fine a gravissime violazioni dei diritti umani.

Fa dunque la sua comparsa sulla scena internazionale un nuovo e rivoluzionario principio, per il quale la tutela dei diritti fondamentali delle popolazioni civili cessa di essere interesse esclusivo dello Stato in cui esse risiedono, per divenire interesse di cui si fa portatrice l'intera comunità internazionale. Qualora lo Stato non riesca - o si rifiuti di - assicurare l'incolumità della propria popolazione, sorge in capo alla comunità internazionale la responsabilità di sostituirsi ad esso, superando i limiti posti dal concetto classico di sovranità. Il concetto di sovranità come impunità, che aveva caratterizzato gli anni della Guerra fredda, entra definitivamente in crisi e diviene sovranità responsabile, sostanziandosi in un obbligo di fare la cui violazione può provocare il ricorso all'uso della forza da parte della comunità internazionale.

L'evoluzione del principio viene, nel World Summit del 2005, riportato nella formula "Responsibility to Protect (RtoP)". Essa poggia su tre pilastri: ogni Stato ha la responsabilità di proteggere la propria popolazione da genocidio, crimini di guerra, pulizia etnica e crimini contro l'umanità (I pilastro). E' preciso impegno della comunità internazionale aiutare ed incoraggiare gli Stati nell'esercizio di tale responsabilità, attraverso il ricorso a strumenti persuasivi di natura non coercitiva (II pilastro). Tuttavia, qualora le autorità nazionali si dimostrassero incapaci o si rifiutassero di esercitarla, sorgerebbe in capo alla comunità internazionale l'obbligo di assicurare una rapida ed effettiva protezione della popolazione, con la possibile adozione delle misure previste dal cap. VII della Carta ONU, incluse quelle implicanti l'uso della forza armata (III pilastro).

Sulla scia del rapporto del 2009 del Segretario Generale delle Nazioni Unite, Implementing the responsibility to protect, il dibattito si è quindi concentrato sulle possibili applicazioni pratiche nelle quali tradurre la dottrina della Responsabilità di Proteggere, in particolare con riferimento al III pilastro - quello della risposta della comunità internazionale - senza tuttavia riuscire ad offrire un contributo decisivo per farne avanzare l'attuazione, anche a causa di un clima internazionale in quel momento non particolarmente favorevole (basti pensare all'esperienza della crisi in Libia, dove l'applicazione del principio della RtoP è stata oggetto di forte contestazione).

Le persistenti difficoltà di tradurre in termini pratici la dottrina della RtoP hanno di conseguenza influenzato la scelta alla base del rapporto

2013, State responsibility and prevention, nel quale il Segretario Generale dell'ONU ha posto l'accento sulla necessità di valorizzare a pieno il ricorso alla c.d. diplomazia preventiva, intendendo con questa espressione il ventaglio di strumenti che la comunità internazionale può attivare al fine di prevenire la commissione di gravi violazioni dei diritti fondamentali. Il rapporto 2013 dedica in primo luogo ampio spazio all'analisi dei diversi fattori che, se presenti, accrescono il rischio che vengano commesse atrocità di massa: tra i c.d. "risk factors", il rapporto include le discriminazioni (inclusa quella religiosa) o le violazioni di diritti umani di lungo periodo nei confronti di un determinata parte della popolazione, le eventuali motivazioni di stampo razzista o discriminatorio dietro tali azioni, l'esistenza di gruppi armati o milizie, la debolezza delle istituzioni e dello Stato di diritto.

Sono tutti fattori cui la comunità internazionale deve costantemente prestare la massima attenzione: per poter dispiegare a pieno i propri effetti, è necessario infatti che la diplomazia preventiva possa intervenire nella fase iniziale della crisi. Il ricorso al terzo pilastro, ed in particolare l'utilizzo della forza armata, non può infatti che rappresentare l'*extrema ratio*, dovendo il meccanismo di tutela offerto dalla RtoP concentrare le proprie energie innanzitutto sulla prevenzione delle violazioni. Anche il ricorso o la minaccia del ricorso allo strumento delle sanzioni - politiche e/o economiche può costituire, naturalmente - e specie nei correnti rapporti interstatali - un importante meccanismo di diplomazia preventiva.

Sulla base di queste considerazioni e valutato realisticamente il dibattito finora svoltosi nelle diverse sedi istituzionali, l'Italia sottolinea con forza il ruolo cruciale che può essere svolto da un efficace meccanismo di monitoraggio, disegnato per avvisare in tempo utile la comunità internazionale circa il possibile sorgere di una situazione di pericolo per le popolazioni civili. In questa prospettiva, il nostro Paese collabora intensamente con l'Ufficio dello UN Special Adviser per la prevenzione del genocidio, Adama Dieng, al fine di portare a termine entro il mese di settembre il processo di adeguamento del Meccanismo di Allerta Precoce: si sta al momento definendo un documento unico (framework), nel quale riportare una rassegna degli indicatori comuni alle atrocità di massa in generale, cui seguono capitoli dedicati agli indicatori specifici per il genocidio, i crimini contro l'umanità ed i crimini di guerra. Come richiesto dal nostro Paese, nel documento in elaborazione trova un'adeguata attenzione il fattore religioso, declinato nei suoi vari possibili aspetti.

Concentrandosi poi sulla dimensione nazionale della prevenzione, il rapporto 2013 illustra inoltre alcune "policy options", suddivise in misure "strutturali" e "operative" a disposizione dei singoli Stati per mettere in atto efficaci misure di prevenzione. Il riferimento a tali misure nazionali di prevenzione mette in luce un aspetto di primaria importanza: è necessario

portare il dibattito sulla prevenzione della commissione di atrocità di massa "fuori da New York", per coinvolgere i Parlamenti nazionali, le istituzioni accademiche e think tanks e, soprattutto, la società civile. E' dalla coscienza collettiva, infatti, che può muoversi il forte impulso necessario alle decisioni politiche degli Stati e, quindi, al conseguente ruolo - imprescindibile ai giorni nostri - che su queste tematiche possono giocare le Organizzazioni regionali.

Le strategie di prevenzione delle atrocità di massa non possono inoltre prescindere da un più diretto coinvolgimento delle organizzazioni regionali, quali l'Unione Europea, l'Unione Africana, la Lega Araba, e dalla loro maggiore cooperazione con le Nazioni Unite. Le organizzazioni regionali devono essere in grado di svolgere un ruolo di primo piano nell'attuazione della RtoP, consolidando le basi democratiche e di rispetto dei diritti umani. Esse possiedono infatti una serie di capacità e strumenti, che spaziano dalla diplomazia preventiva al sostegno dello sviluppo economico e della costruzione di stabili istituzioni democratiche.

Il focus del rapporto 2013 sulla diplomazia preventiva, se da un lato conferma la necessità di adottare un approccio progressivo e proporzionale, che consideri l'intervento armato come l'*extrema ratio* cui fare ricorso solo una volta esauriti gli strumenti di soluzione pacifica delle controversie, dall'altro dimostra come, superato lo slancio iniziale, oggi la dottrina della RtoP si confronti con i limiti delle crisi politiche in atto. Contrariamente a quanto auspicato nel World Summit del 2005, non si è infatti potuti pervenire all'unanimità di vedute all'interno della comunità internazionale, soprattutto per quanto attiene alla traduzione pratica dell'obbligo di proteggere. Sono anzi numerosi i Paesi - in prima fila, le realtà emergenti - a temere che la nuova dottrina della responsabilità possa divenire uno strumento delle "grandi potenze" per interferire nei loro affari interni, aggirando i limiti imposti dai principii di sovranità e di non ingerenza.

La responsabilità di proteggere resta dunque in divenire ma, nonostante questo, è divenuta nel frattempo parte integrante del dibattito giuridico internazionale. Ne sono testimonianza l'attività diplomatica che ha salvato centinaia di vite in Kenya nel 2008, o gli imponenti sforzi internazionali e regionali durante le elezioni presidenziali in Guinea alla fine del 2010. Oggi, tuttavia, la comunità internazionale guarda impotente alle atrocità commesse dal regime siriano. L'Italia, coerente nel suo sostegno alla tutela dei diritti umani, condivide il monito del Segretario Generale nella conclusione del rapporto 2013 sulla responsabilità di proteggere, in cui egli evidenzia come "l'inaccettabile sofferenza in Siria sia un tragico avvertimento delle conseguenze del fallimento, in primo luogo da parte degli Stati e conseguentemente da parte della comunità internazionale, di far fronte alle proprie responsabilità a tal riguardo".

In caso di assenza di unanimità all'interno del Consiglio di Sicurezza, diventa impossibile l'attivazione della responsabilità degli Stati a tutela della popolazione siriana. Il Governo italiano è pronto a fare la sua parte per agevolare la soluzione della questione, come ha fatto e fa già altri scenari di crisi: non va infatti dimenticato che l'Italia svolge un ruolo di primo piano in questo settore, sia a livello finanziario, quale settimo contributore al bilancio delle attività di peacekeeping, con una quota del 4,5% circa, che di risorse umane, con circa 6.000 italiani a diverso titolo impegnati nelle missioni di pace all'estero (missioni ONU, NATO, UE). L'Italia è tuttavia consapevole dell'importanza che l'assistenza data alla popolazione avvenga nel pieno rispetto dei principi stabiliti dalla Carta delle Nazioni Unite, a tutela delle persone e degli equilibri di quel Paese: un eventuale impegno italiano in Siria non potrà dunque dispiegarsi in assenza di un chiaro mandato del Consiglio di Sicurezza, l'organo cui è demandato il delicatissimo compito di garante supremo della pace e della sicurezza internazionale.

Le Nazioni Unite devono pertanto restare il quadro di riferimento giuridico per un'eventuale azione militare per porre fine alle gravissime violazioni dei diritti fondamentali perpetrate dal regime siriano. Non vi è dubbio, tuttavia, che questa particolare situazione costituisca un banco di prova particolarmente significativo del livello di maturità raggiunto dalla nozione di "Responsibility to Protect" e del grado di diffusione, consolidamento e condivisione a livello internazionale delle più recenti evoluzioni del diritto umanitario. Da questa lezione saremmo tutti chiamati a trarre un opportuno insegnamento.

Per concludere, voglio congedarmi con una frase che fu pronunciata dal compianto Papa Giovanni Paolo II proprio di fronte ai membri dell'Istituto Internazionale Umanitario, nell'ormai lontano 1982: "Il diritto internazionale umanitario è a disposizione dell'intera umanità sofferente: dei feriti, prigionieri, deboli, indifesi, poveri, oppressi. La sua osservanza o inosservanza è un test reale per il fondamento etico e per la ragione stessa dell'esistenza della comunità internazionale". Spero che queste parole possano servire a noi tutti da sprone nel perseguimento di questi nobili fini e che, sempre citando il Papa, esse possano ispirare anche molti altri a lavorare generosamente e con entusiasmo per questa causa tanto importante.

Acronyms

AIHRC	Afghanistan independent Human Rights Commission
AMISOM	African Union Mission in Somalia
APII	Additional Protocol II to the 1949 Geneva Conventions
AU	African Union
AUPSC	African Union Peace and Security Council
BiH	Bosnia-Herzegovina
CANI	Conflit Armé Non-International
CEDH	Cour Européenne des Droits de l'Homme
CG	Conventions de Genève
CIJ	Cour Internationale de Justice
CiO	Chairperson-in-Office
CoC	Code of Conduct
CSOs	Civil Society Organizations
DAJ	Direction des Affaires Juridiques
DCA	Droit des Conflits Armés
DDR	Disarmament, Demobilization and Reintegration
DDRRR	Disarmament, Demobilization, Repatriation, Reintegration and Resettlement
DIDH	Droit International des Droits de l'Homme
DIH	Droit International Humanitaire
DIU	Diritto Internazionale Umanitario

DRC	Democratic Republic of Congo
ELN	Ejército de Liberación Nacional
EMA	Etat-Major des Armées
EMA/JUROPS	Cellule Juridique-Opérationnelle de l'Etat-Major des Armées
FARC	Fuerzas Armada Revolucionarias de Colombia
FFM	Fact-Finding Mission
GC I	1949 Geneva Convention I
GC II	1949 Geneva Convention II
GC III	1949 Geneva Convention III
GC IV	1949 Geneva Convention IV
GoIRA	Government of Islamic Republic of Afghanistan
HR	Human Rights
HRC	Human Rights Council
HRL	Human Rights Law
IAC	International Armed Conflict
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law

IIDH	Institut International de Droit Humanitaire
ISAF	International Security Assistance Force
LEGAD	Legal Advisor
MONUC	United Nations Organization Mission in Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the DRC
NHRIs	National Human Rights Institutions
NIAC	Non-International Armed Conflict
NU	Nations Unies
OAG	Organized Armed Group
OAS	Organisation of American States
OAU	Organization of Africa Unity
OHCHR	Office of the High Commissioner for Human Rights
OPEX	Opérations Extérieures
OSCE	Organization for Security and Co-operation in Europe
PA I	Protocole Additionnel I aux Conventions de Genève de 1949
PA II	Protocole Additionnel II aux Conventions de Genève de 1949
PoC	Protection of Civilians
PoW	Prisoner of War
RAMSI	Regional Assistance Mission in the Solomon Islands

SOFA	Status of Forces Agreement
SOP	Standard Operating Procedure
UE	Union Européenne
UNAMA	United Nations Assistance Mission in Afghanistan
UNICEF	United Nations Children’s Fund
UNSC	United Nations Security Council
UPR	Universal Periodic Review

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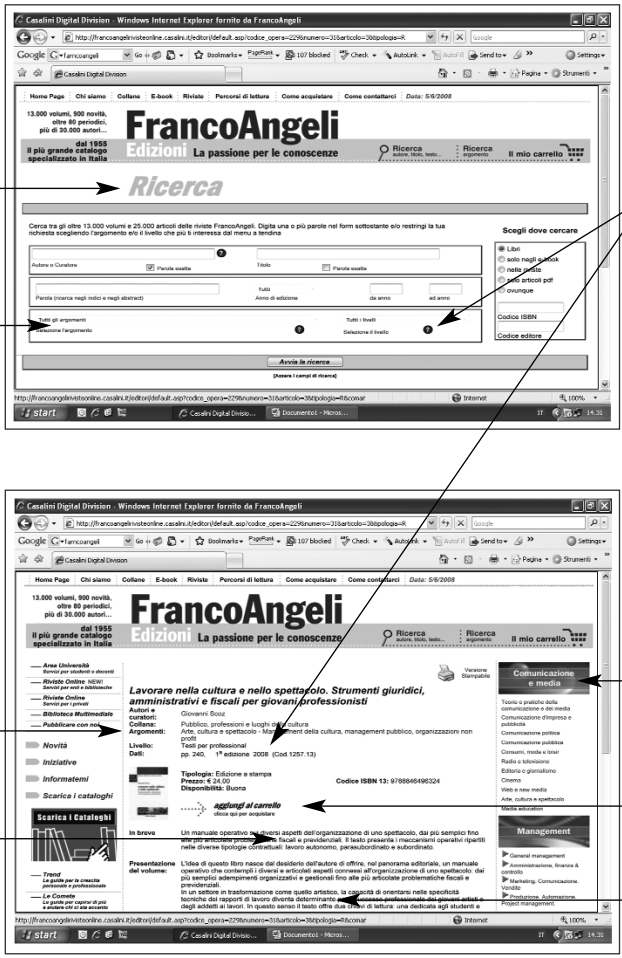

Respecting International Humanitarian Law: Challenges and Responses

Improving respect for International Humanitarian Law (IHL) is a necessary prerequisite to enhance the protection of persons and populations affected by armed conflicts.

There is the general acceptance that IHL implementation by States, as well as by non-State actors involved in situations of armed conflict is often unsatisfactory; consequently, there is the need to better understand the legal, practical and policy measures that could contribute to strengthening observance of this important body of international norms.

How to respond to the lack of respect for IHL, while both international and non-international armed conflicts are ongoing, currently appears to be the main legal and practical challenge. Therefore, it is necessary to review the state of existing IHL compliance mechanisms in situations of armed conflict and to identify legal, political and practical reasons for their inadequate use.

This collection of contributions made by international experts and practitioners in the field of IHL through presentations and discussions at the Sanremo Round Table, addresses the question of which specific measures and mechanisms could enhance respect for IHL before, during and after an armed conflict, shedding light on the role that various actors play – or can play – in striving toward full IHL implementation.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of International Humanitarian Law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.

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