International humanitarian law and the challenges of contemporary armed conflicts

Excerpt of the Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003 *

Over thirty years ago the International Committee of the Red Cross (ICRC) submitted a report on the reaffirmation and development of the laws and customs applicable in armed conflicts to the 21st International Conference of the Red Cross held in Istanbul.[1] The purpose of that report was to identify legal issues that, in the ICRC's view, warranted a new effort to codify international humanitarian law (IHL). As is well known, almost a decade later, the texts of the two Protocols Additional to the Geneva Conventions were adopted and opened for signature and ratification. Additional Protocol I, among other things, codified rules on the conduct of hostilities, expanded the protection of certain categories of persons and included, among others, wars of national liberation within the scope of international armed conflict. Protocol II, although more ambitiously envisaged at the start, elaborated on the provisions of Article 3 common to the Geneva Conventions and laid down basic safeguards that must be applied in non-international armed conflicts.

In the time since the 1969 Report was submitted, the world has witnessed dramatic changes on many fronts: political, economic and social, but the reality and, above all, the consequences of armed conflict have, sadly, not changed. Human suffering, death, disfigurement, destruction and loss of

* The full version of this report, with its attached annexes, is a document of the 28th International Conference of the Red Cross and Red Crescent.

hope for the future continue to constitute, as they always have, the immediate and longer-term effects of war on societies and the individuals who make them up. In addition to international and non-international armed conflicts, the world has recently been faced with a surge in acts of transnational terrorism, reopening certain dilemmas about the relationship between State security and the protection of the individual. This phenomenon has also led to a re-examination of the adequacy of international humanitarian law in a way not experienced since the drive to complement the Geneva Conventions with the two Additional Protocols.

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

First, the ICRC believes, as will be discussed below, that the four Geneva Conventions and their Additional Protocols, as well as the range of other international IHL treaties and the norms of customary law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into the hands of a party to an armed conflict. Second, as will also be demonstrated below, some of the dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. Today, the primary challenge in these areas is to either ensure clarification or further elaboration of the rules. Thirdly, international opinion — both governmental and expert, as well as public opinion — remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms. While no one can predict what the future might bring, this report purports to be a snapshot, as seen by the ICRC, of challenges to IHL as they currently stand. Its aim is to reaffirm the proven tenets of the law and to suggest a nuanced approach to its possible clarification and development.

Lastly, and this cannot be emphasized enough by way of introduction, the present report deals with only a limited number of challenges identified

1 Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, report submitted by the International Committee of the Red Cross, (Item 4 a, b and e of the Provisional Agenda of the Commission on International Humanitarian Law and Relief to Civilian Populations in the Event of Armed Conflict), 21st International Conference of the Red Cross, Istanbul, September 1969 (hereinafter "1969 Report").

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

The report is divided into five sections: Contextual Background, International Armed Conflicts and IHL, Non-International Armed Conflicts and IHL, IHL and the Fight against Terrorism, Improving Compliance with IHL.

Contextual background

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

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

While the justifications for and qualifications of some of these situations of violence may be in dispute, there can be no disagreement about the magnitude of human suffering that any armed violence causes. Where international humanitarian law is not respected, human suffering becomes all the more severe and the consequences become all the more difficult to overcome. Deliberate attacks against civilians, indiscriminate attacks, forced displacement of populations, destruction of infrastructure vital to the civilian population, use of civilians as human shields, rape and other forms of sexual

violence, torture, destruction of civilian property and looting have been perpetrated by governmental forces and non-State armed groups around the globe. IHL violations have also been regularly perpetrated against medical personnel, humanitarian workers and detainees. Non-repatriation of prisoners of war contrary to the Third Geneva Convention has, for example, been shown to be a recurring serious violation. Likewise, access to populations in need of humanitarian aid remained a constant problem, aggravating the already desperate plight of millions of people caught up in war.

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

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

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

Another development that should be separately mentioned in terms of its impact on IHL application since the last International Conference is the emergence of transnational networks capable of inflicting enormous injury and destruction. It must be remembered that, whatever the motives, intentional and direct attacks against civilians in armed conflict — including by means of suicide actions — as well as indiscriminate attacks, are strictly

prohibited under IHL. So are acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Outside of armed conflict, acts of violence aimed against civilians are crimes under international and domestic criminal laws.

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

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

1) The global "fight against terrorism", regardless of how that phenomenon may be characterized in the legal sense, has led to a re-examination of the balance between State security and individual protections, to the detriment of the latter. The ongoing debate on the permissibility of torture is an example. After decades of improvements in international standards governing the treatment of people deprived of liberty, discussions on whether torture might in some situations be allowed have resurfaced, despite the fact that this abhorrent practice is a crime under IHL and other bodies of law and is prohibited in all circumstances. Extrajudicial killings and detention without application of the most basic judicial guarantees have proven to be another consequence of the fight against terrorism. Other examples could be cited as well. In the ICRC's view, the overriding legal and moral challenge presently facing the international community is to find ways of dealing with new forms of violence while preserving existing standards of protection provided by international law, including international humanitarian law.

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

range of international humanitarian law norms in situations where that body of rules was undoubtedly applicable.

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

International armed conflicts and IHL

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

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

It has not been easy to determine which legal issues, among many related to international armed conflict, deserve to be examined within the

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

ICRC's project and to therefore be briefly outlined in this report. The initial choices were made based on the differing interpretations that the relevant norms give rise to in practice and, more importantly, on the consequences that such interpretations have for the protection of civilians. Among them are the notion of direct participation in hostilities under IHL, related conduct of hostilities issues, and the concept of occupation.

Direct participation in hostilities

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

There is currently a range of governmental and academic positions on the issue of the status and treatment of civilians who have directly participated in hostilities and have fallen into enemy hands. At one end are those — a minority — who claim that such persons are outside any international humanitarian law protection. The middle ground is represented by those who believe that "unprivileged" combatants are covered only by Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I (either as treaty or customary law). According to the interpretation espoused

3 Additional Protocol I, Article 51 (3).

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

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

by the ICRC and others, civilians who have taken a direct part in hostilities and who fulfill the nationality criteria provided for in the Fourth Geneva Convention remain protected persons under that Convention.[6] Those who do not fulfill the nationality criteria are at a minimum protected by the provisions of Article 3 common to the Geneva Conventions and of Article 75 of Additional Protocol I (either as treaty or customary law).

The ICRC does not, therefore, believe that there is a category of persons affected by or involved in international armed conflict who are outside any IHL protection or that there is a "gap" in IHL coverage between the Third and Fourth Geneva Conventions, i.e. an intermediate status into which civilians ("unprivileged belligerents") fulfilling the nationality criteria would fall. International humanitarian law provides that combatants cannot suffer penal consequences for direct participation in hostilities and that they enjoy prisoner of war status upon capture. IHL does not prohibit civilians from fighting for their country,[7] but lack of prisoner of war status implies that such persons are, among other things, not protected from prosecution under the applicable domestic laws upon capture. Direct participation in hostilities by civilians, it should be noted, is not a war crime.

Apart from having no immunity from domestic penal sanctions, civilians who take a direct part in hostilities lose immunity from attack during the period of direct participation. Civilians can also be interned by the adversary — subject to periodic review — if the security of the detaining power makes it absolutely necessary.[8] While in detention, they can be considered as having forfeited certain rights and privileges provided for in the

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

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

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

Fourth Geneva Convention within the limits set down by Article 5 of that Convention and customary international law. In the ICRC's view, it is difficult to see what other measures should be applicable to these persons that would not run the risk of leading to unacceptable violations of human life, physical integrity and dignity prohibited by international humanitarian and human rights law.

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

With a view to generating debate on this topic, the ICRC organized a one-day expert seminar in The Hague on the notion of direct participation in hostilities under IHL in cooperation with the TMC Asser Institute.[9] The seminar participants agreed that an effort to clarify the notion of "direct participation in hostilities" was warranted. The view was also expressed that a general legal definition of "direct participation", accompanied by a non-exhaustive list of examples, would be the desirable outcome. The question of what final form future work should result in was left for a later date. The ICRC intends to follow up on the process initiated and, with the assistance of renowned legal experts, propose substantive and procedural ways of moving forward.

Related conduct of hostilities issues

The package of IHL rules on the conduct of hostilities was one of the crowning achievements of the diplomatic process that ended with the adoption of the 1977 first Additional Protocol to the Geneva Conventions.

9 A summary report of the June 2003 seminar topics and proceedings are attached in annex to the report as circulated at the 28th International Conference of the Red Cross and Red Crescent (Annex 1) and will not be repeated here.

While most of these rules have garnered broad acceptance and become customary law in the intervening years, it is acknowledged that certain ambiguities in formulation have given rise to differences in interpretation, and, therefore, in their practical application. The changing face of warfare due to, among other things, constant developments in military technology has also contributed to disparate readings of the relevant provisions. Among them are the definition of military objectives, the principle of proportionality and the rules on precautionary measures.

- Military objectives

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

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

The definition of military objectives, read together with the principle of distinction, the prohibition of indiscriminate attacks, the obligation to minimize civilian casualties, as well as the principle of proportionality, clearly rejects interpretations advanced formerly in doctrines of "total warfare", which included as military objectives "any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight".[10]

10 Definition of Air Marshall Trenchard from 1928, quoted in Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, HMSO, London, 1961, p. 96.

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

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

- Principle of proportionality in the conduct of hostilities

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

The text of Article 51 (5) (b) of Additional Protocol I as adopted was criticized at the 1974-1977 Diplomatic Conference and subsequently. The criticism was directed particularly at the imprecise wording and terminology and the difficulty in applying the balancing test required. Putting the provision into practice requires complete good faith on the part of the belligerents, as

well as a desire to conform to the general principle of respect for the civilian population.

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

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

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

If the concept of military advantage were to be enlarged, it seems only logical to also consider such "knock-on effects", i.e. those effects not directly

and immediately caused by the attack, but which are nevertheless the product thereof. In the ICRC's view, the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties. This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable incidental civilian casualties or damage of such an operation, which include knock-on effects. Given the increased interconnectedness and interdependence of modern society in fields such as infrastructure, communications and information systems, the question of knock-on effects becomes more and more important.

- Precautionary measures

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

Several of the obligations provided for are not absolute, but depend on what is "feasible" at the time. Thus again, a certain discretion is given to those who plan or decide upon an attack. According to various interpretations given at the time of signature or ratification of Additional Protocol I and the definitions subsequently adopted in the Mines Protocol (in its original and amended version), as well as in the Incendiary Weapons Protocol to the 1980 Convention on Certain Conventional Weapons, feasible precautions are those "which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[11]

In this context it is debatable what weight can be given to the understandable aim of ensuring the safety of the attacking side's armed forces ("military consideration"), when an attack is launched. It seems hardly defendable that it may serve as a justification for not taking precautionary

11 Article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II) to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. See also Article 3 (10) of Protocol II as amended in 1996 and Article 1 (5) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

measures at all and thereby exposing the civilian population or civilian objects to a greater risk. While under national regulations military commanders are generally obliged to protect their troops, under international humanitarian law combatants have the right to directly participate in hostilities, the corollary of which is that they may also be lawfully attacked by the adversary. Civilians, as long as they do not participate directly in hostilities, as well as civilian objects, must not be made the object of an attack. Thus, the provisions of international humanitarian law clearly emphasize the protection of civilians and civilian objects.

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

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

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

In the ICRC's assessment, there is at present not much likelihood that the rules on military objectives, on the principle of proportionality or on precautions in attack, as well as other rules on the conduct of hostilities provided for in Additional Protocol I could be developed with a view to

enhancing the protection of civilians or civilian objects. There are important writings — by both legal and military experts — as well as State practice, that in fact suggest a lowering of the level of protection envisaged by Additional Protocol I. The current challenge is therefore to assess the practical effect that existing rules have in terms of protection of civilians and civilian objects, improve the implementation of the rules, or clarify the interpretation of specific concepts on which the rules rely without disturbing the framework and legal tenets of the Additional Protocol, the aim of which is to ensure the protection of civilians.

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

The concept of occupation

There is no doubt that the rules on occupation set forth in the Fourth Geneva Convention remain fully applicable in all cases of partial or total occupation of foreign territory by a High Contracting Party, whether or not the occupation meets with armed resistance.[12] It is acknowledged that those rules encapsulate a concept of occupation based on the experience of the Second World War and on the Hague law preceding it.[13] The rules provide for a notion of occupation based on effective control of territory and on the assumption that the occupying power can or will substitute its own authority for that of the previous government. They also imply that the occupying power intends to hold on to the territory involved, at least temporarily, and to administer it.

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

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

13 Hague Convention IV, Annexed Regulations, Article 42.

supplanting any domestic authority (because such authority does not exist or is not able to exercise its powers).

Another issue deserving examination would be the protection of persons who find themselves in the hands of a party to the conflict due to military operations preceding the establishment of effective territorial control or in situations of military operations that do not result in occupation in the traditional sense. The aforementioned question of the protection that applies to civilians who have taken a direct part in hostilities and who are captured in an area that is not considered "occupied" in the traditional sense would form part of this reflection.

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

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

Non-international armed conflicts and IHL

The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Internal armed conflicts are covered by Article 3 common to the Geneva Conventions, by Additional Protocol II adopted in 1977 (156 State Parties to date), by a certain number of other treaties,[14] as well as by customary international law. As is well known, the drafting process leading up to Additional Protocol II envisaged a considerably more comprehensive instrument, but lack of political agreement in the final days of the 1977 Diplomatic Conference did not enable such an outcome. Additional Protocol II was, nevertheless, groundbreaking in that it was the first separate

14 Such as the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its Protocols; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

treaty setting down standards for the protection of persons and basic rules on methods of warfare applicable by both States and non-State armed groups involved in internal armed conflict.

In the more than 25 years since the Protocol's adoption it has become clear that, as the result of State and international practice, many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law.[15] The forthcoming ICRC Study on customary international humanitarian law applicable in armed conflicts (Study) confirms this development.

The Study was initially suggested at the January 1995 meeting of the Intergovernmental Group of Experts for the Protection of War Victims that met in Geneva, at which a series of recommendations aimed at enhancing respect for international humanitarian law were adopted. Among them was an invitation to the ICRC to prepare, with the assistance of experts, a report on customary rules of IHL applicable in international and non-international armed conflicts. In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare such a report.

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

The Study has revealed the tremendous amount of practice in the area of international humanitarian law — from military manuals and national legislation to action by the United Nations and the International Red Cross

15 For a review of current thinking on ways of improving compliance with IHL in non-international armed conflicts see pp. 24-25 of the present report and Annex 3 attached to the report as circulated at the 28th International Conference of the Red Cross and Red Crescent.

and Red Crescent Movement. It has also confirmed the deep impact and overall acceptance of the rules of the Additional Protocols. The Study has shown that 25 years after their adoption, the essential rules of the Protocols have become part of customary international law and bind all States and all parties to all armed conflicts.

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

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

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

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

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

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

IHL and the fight against terrorism

The immediate aftermath of the 11 September 2001 attacks against the United States saw the launching of what has colloquially been called the global "war against terrorism". Given that terrorism is primarily a criminal phenomenon — like drug-trafficking, against which "wars" have also been declared by States — the question is whether the "war against terrorism" is a "war" in the legal sense. To date, there is no uniform answer.[16]

Proponents of the view that a "war" in the legal sense is involved essentially believe that 11 September 2001 and ensuing events confirmed the emergence of a new phenomenon, of transnational networks capable of

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

inflicting deadly violence on targets in geographically distant States. The transnational, rather than international, nature of such networks is evidenced by the fact that their activities, which are also geographically dispersed, are not, as a rule, imputable to a specific State under the international rules on State responsibility.

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

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

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

The counterarguments may be, also briefly, summarized as follows: terrorism is not a new phenomenon. On the contrary, terrorist acts have been carried out both at the domestic and international levels for centuries, resulting in a series of international conventions criminalizing specific acts of ter-

rorism and obliging States to cooperate in their prevention and punishment. The non-State, i.e. private character of this form of violence, usually pursued for ideological or political reasons rather than for private gain, has also been a regular feature of terrorism. The fact that persons or groups can now aim their violence across international borders or create transnational networks does not, in itself, justify qualifying this essentially criminal phenomenon as armed conflict.

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

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

As already publicly stated by the ICRC on various occasions, the ICRC believes that international humanitarian law is applicable when the "fight against terrorism" amounts to, or involves, armed conflict. Such was the case in Afghanistan, a situation that was clearly governed by the rules of international humanitarian law applicable in international armed conflicts.

It is doubtful, absent further factual evidence, whether the totality of the violence taking place between States and transnational networks can be deemed to be armed conflict in the legal sense. Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties. A party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.

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

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

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

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

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

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

The San Remo Round Table

With a view to generating debate on some of the outstanding legal issues related to current situations of violence, including the "fight against terrorism", the ICRC and the International Institute of Humanitarian Law have devoted the 27th Round Table on current problems of international humanitarian law to "IHL and other legal regimes: interplay in situations of violence". The Round Table took place in San Remo, Italy, in September 2003. Due to various deadlines attached to the production of documents for the International Conference, a report on the proceedings of the Roundtable is made available to delegates at the Conference itself.[17]

As indicated in the title, the primary aim of the Roundtable was to examine the interplay of various bodies of law: IHL, international human

17 Annex 2 to the report as circulated at the International Conference provides the Roundtable agenda.

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

Roundtable participants also had an opportunity to reflect on the law applicable to so-called extraterritorial "self-help" operations, on rules applicable under different legal regimes to the detention of persons and the relationship of such rules, as well as on IHL and human rights law provisions pertaining to judicial guarantees. Further expert consultations on some of the specific issues involved, with the aim of clarification of the law, are envisaged.

Improving compliance with IHL

Insufficient respect for the rules of international humanitarian law has been a constant — and unfortunate — result of the lack of political will and practical ability of States and armed groups engaged in armed conflict to abide by their legal obligations. This, admittedly, is not only a problem of international humanitarian law, but may be also said to characterize other bodies of international law aimed at the protection of persons. As guardian of IHL with a special mandate under humanitarian law treaties the ICRC has, over a long period of time, developed a variety of operational and other activities aimed at improving respect for IHL both in peacetime as well as in armed conflict. This goal will remain a permanent institutional priority.[18]

Over the years, States, supported by other actors, have devoted considerable effort to devising and implementing in peacetime preventive measures aimed at ensuring better respect for IHL. Dissemination of IHL generally, within academic circles and among armed forces and armed groups has been reinforced, and IHL has been increasingly incorporated into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted, and the necessary structures put in place to give effect to the rules contained in the relevant IHL treaties. In many States specific

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

advisory bodies, such as national IHL committees, have been established and IHL is increasingly being considered as part of the political agenda of governments. At the same time, by encouraging the national prosecution of war crimes and, more significantly, by the establishment of international bodies such as the ad hoc international criminal tribunals and the International Criminal Court, the international community has concentrated its efforts since the early 1990s on the repression of serious violations of international humanitarian law.[19]

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

In 2003, the ICRC, in cooperation with other institutions and organizations,[20] organised a series of regional expert seminars to examine that issue. Regional seminars took place in Cairo, Pretoria, Kuala Lumpur, Mexico City, and Bruges (Belgium). Participants included government experts, parliamentarians, academics, members of regional bodies or non-governmental organizations, and representatives of National Societies of the Red Cross and Red Crescent. The general subject of all the seminars was "Improving compliance with international humanitarian law". The goal was to focus, in

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

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

particular, on ways in which Article 1 common to the Geneva Conventions, i.e. States' obligation to "ensure respect" for international humanitarian law could be operationalized and how the potential of Article 89 of Additional Protocol I could be better utilized. Emphasis was also placed on the specific problem of improving compliance with international humanitarian law by parties to non-international armed conflicts.

It was anticipated that the debates would generate creative thinking about existing or new procedures and possibly new mechanisms of IHL supervision that could have a concrete impact on respect for the law.[21]

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

Scope and obligation to "ensure respect" for IHL

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

Seminar participants also acknowledged a positive obligation on States not involved in an armed conflict to take action against States that are violating IHL, in particular to use their influence to stop the violations. It was generally agreed that this forms a legal obligation under common Article 1. It was not considered an obligation to reach a specific result, but rather an "obligation of means" on States to take all appropriate measures possible, in an attempt to end IHL violations. Possible measures a State may consider taking against violators of IHL include scrutiny of sales of arms, denial of

21 A summary report outlining the results of the five seminars held to date is attached as Annex 3 to the report as circulated at the 28th International Conference of the Red Cross and the Red Crescent.

over-flight rights, freezing of assets, and requiring compliance with IHL as a condition for receiving intergovernmental aid or development assistance.

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

Existing IHL mechanisms and bodies

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

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

There was unanimous agreement that existing IHL implementation mechanisms suffer from a lack of use and from a lack of effectiveness, although it was also noted that lack of use in practice makes it impossible to properly evaluate the efficiency of the various IHL mechanisms. From agreement on lack of use and lack of effectiveness, however, the participants at the seminars were considerably divided as to what should be the proper response. Although many participants submitted ideas for new mechanisms, others forcefully voiced a preference for focusing efforts on the reform or re-invigoration of existing mechanisms, declaring that only through use of the mechanisms will they be able to prove their effectiveness.

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

Regarding existing supervision mechanisms or bodies of other branches of international law, it was generally agreed that existing human rights bodies — and in particular the regional bodies — have been useful in their consideration of IHL. However, given their lack of express competence to examine issues of IHL and the potential risk of obscuring the distinctions between the two bodies of law, some participants cautioned against actively encouraging this growing practice.[22]

New IHL supervision mechanisms: *pro et contra*

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

Some of the new mechanisms suggested were a system of either ad hoc or periodic reporting and the institution of an individual complaints mechanism,

22 A detailed summary of the discussions in this regard is contained in annex 3 to the report as circulated at the 28th International Conference of the Red Cross.

either independently or as part of an IHL commission (see proposal below). Many questions were left unanswered, however, concerning the political and legal feasibility of an individual complaints mechanism, its procedures, subject-matter jurisdiction, the issue of the exhaustion of local remedies, and its impact on ensuring compliance during an armed conflict.

The idea was also put forward of creating a "diplomatic forum", that would be composed of a committee of States or a committee of IHL experts, similar to the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights. According to participants, many of the above-mentioned mechanisms could be placed within an IHL Commission or an Office of a High Commissioner for IHL that would be created as "treaty body" to the Geneva Conventions and the Additional Protocols. Its functions could include examination of reports, the examination of individual complaints, issuance of general observations, etc.[23]

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

Improving compliance in non-international armed conflicts

Discussions at the regional expert seminars confirmed that improving compliance with IHL in non-international armed conflicts remains a challenging task. Among the general obstacles mentioned were that States often deny

23 A detailed account of the various proposals on this and other mechanisms is contained in Annex 3 attached to the report as circulated at the 28th International Conference of the Red Cross and the Red Crescent.

the applicability of IHL out of a reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. It was emphasized that foreign interference in many internal armed conflicts also creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. In addition, armed groups lack sufficient incentive to abide by IHL given that implementation of their legal obligations under this body of law is usually of little help to them in avoiding punishment under domestic law.

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

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

It was suggested that the ICRC undertake to prepare a study of practice in non-international armed conflicts with a view to identifying situations in which something similar to combatant status was granted to armed groups and to summarize the "lessons learned". It was thought that such a study should also focus on the motives that led armed groups to respect IHL when they did so.[24]

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

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

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

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

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

Closing remarks

The present report attempted to highlight several challenges to international humanitarian law posed by contemporary armed conflicts, to outline the ICRC's position on most of them, and to provide information on intended ICRC activities in addressing those challenges in the time ahead. In the ICRC's view, the overall picture that emerges is one of a well-established and mature body of law whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their initial purpose — which is to

regulate the conduct of war and thereby alleviate the suffering caused by war. The implementation and development of international humanitarian law has, over time, contributed to saving countless lives, to protecting human integrity, health and dignity and to raising consciousness about the basic principles on which our common civilization is founded.

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