A. 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003

[**Source**: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003; footnotes are partially reproduced; available on http://www.icrc.org]

INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS [...]

INTRODUCTION [...]

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. [...]

First, the ICRC believes, [...] 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, [...] some dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. [...] 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 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. [...]

II. INTERNATIONAL ARMED CONFLICTS AND IHL

International armed conflict is by far the most regulated type of conflict under IHL. [...] 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 state 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 state 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 [...]. 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". It is undisputed that apart from loss of immunity from attack during the time of direct participation, civilians, as opposed to combatants, may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant's 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. 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, [...].

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 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. 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, 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. [...]

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. [...]

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. 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 [...] 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", [...].

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.

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, [...].

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. [...]

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. [...]

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 damages of such an operation, which include knock-on effects. [...]

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 [**See** Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)],[...], feasible precautions are those “which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

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 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 [...] may [...] 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, [...]. 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. [...]

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. [...]

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. 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. 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 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. [...]

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. [...]

III. 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 to the Conventions adopted in 1977 (156 state parties to date), by a certain number of other treaties. [footnote 13: e.g. 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. [See Conventions on the Protection of Cultural Property [A.]] as well as by customary international law. [...]]

In the more than twenty-five 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. The forthcoming ICRC Study on Customary International Humanitarian Law Applicable in Armed Conflicts confirms this development. [**See** ICRC, Customary International Humanitarian Law] [...]

IV. IHL AND THE FIGHT AGAINST TERRORISM

The immediate aftermath of the September 11th, 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. [Footnote 15: 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.]

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

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 terrorism 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. [...]

[...] 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. [...]

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 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. [...]

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 [...] 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. [...]

V. 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. [...]

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 [...] 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. [...]

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 actions of 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, organized a series of regional expert seminars to examine that issue. [...]

Scope and Obligation to "Ensure Respect" for IHL

[...] [I]t 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. [...]

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 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. [...]

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 [...]

Regarding [...] 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 seize them, and in particular, the fact that the triggering of most existing IHL mechanisms depends on the consent of the parties to a conflict. [...]

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. [...]

New IHL Supervision Mechanisms: Pro et Contra

In general, participants who supported the idea of establishing new IHL supervision mechanisms agreed that

[...] 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, either independently or as part of an IHL Commission (see proposal below). [...]

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. [...]

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. [...]

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 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. [...]

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. [...]

Closing Remarks

The present Report attempted to highlight several challenges to international humanitarian law posed by contemporary armed conflicts, [...]. 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. [...]

B. 30th International Conference of the Red Cross and Red Crescent, 26-30 November 2007

[**Source**: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, 26-30 November 2007; available at http://www.icrc.org. Footnotes omitted.]

INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

Document prepared by the International Committee of the Red Cross

Geneva, October 2007

[…]

I. Introduction

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

[…]

While the suffering inflicted in war has not changed, the past four years have been characterized by growing public awareness of IHL and its basic rules – and therefore of acts that constitute violations of those rules. IHL principles and standards have been the focus not only of the usual expert debates but also, increasingly,

of intense and wide-ranging governmental, academic and media scrutiny. Heightened interest in and awareness of IHL must be welcomed and encouraged, bearing in mind the fact that knowledge of any body of rules is a prerequisite to better implementation. Moreover, the 1949 Geneva Conventions have now become universal, making the treaties legally binding on all countries in the world. It is hoped that the ICRC's Study on Customary International Humanitarian Law, published in 2005, will also contribute to improved awareness of the rules governing behaviour in all types of armed conflicts.

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

The politicization of IHL, it must be emphasized, defeats the very purpose of this body of rules. IHL's primary beneficiaries are civilians and persons *hors de combat*. The very edifice of IHL is based on the idea that certain categories of individuals must be spared the effects of violence as far as possible regardless of the side to which they happen to belong and regardless of the justification given for armed conflict in the first place. The non-application or selective application of IHL, or the misinterpretation of its rules for domestic or other political purposes, can – and inevitably does – have a direct effect on the lives and livelihoods of those who are not or are no longer waging war. A fragmentary approach to IHL contradicts the essential IHL principle of humanity, which must apply equally to all victims of armed conflict if it is to retain its inherent meaning at all. Parties to armed conflicts must not lose sight of the fact that, in accordance with the very logic of IHL, politicized and otherwise skewed interpretations of the law can rarely, if ever, have an impact on the opposing side alone. It is often just a question of time before one's own civilians and captured combatants are exposed to the pernicious effects of reciprocal politicization or deliberate misinterpretation by the adversary.

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

First of all, the treaties of humanitarian law, notably the Geneva Conventions and their two Additional Protocols of 1977, supplemented by rules of customary humanitarian law, remain the relevant frame of reference for regulating behaviour in armed conflict. In the ICRC's view, the basic principles and rules

governing the conduct of hostilities and the treatment of persons in enemy hands (the two core areas of IHL), continue to reflect a reasonable and pragmatic balance between the demands of military necessity and those of humanity. As discussed further on in this report, acts of violence with transnational elements, which have presented the most recent overall challenge for IHL, do not necessarily amount to armed conflict in the legal sense. Moreover, IHL is certainly not the only legal regime that can be used to deal with various forms of such violence.

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

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

Lastly, this report examines a number of issues that may be considered to pose challenges for IHL. The selection is non-exhaustive and does not purport to include the full range of IHL-related subjects that the ICRC is currently considering or working on, or to which it may in future turn its attention.

II. IHL and Terrorism

[**See also** Fundamentals of IHL, B. International Humanitarian Law as a Branch of Public International Law, International Humanitarian Law: a branch of international law governing the conduct of States and individuals, 1. Situation of application, C. Other situations, d) Acts of terrorism?]

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

IHL and terrorist acts

An examination of the adequacy of international law, including IHL, in dealing with terrorism obviously begs the question, "What is terrorism?" Definitions abound, both in domestic legislation and at the international level but, as is well known, there is currently no comprehensive international legal definition of the term. The

United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others, whether and how acts committed in armed conflict should be excluded from its scope.

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

[…] **While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime.**

It is a basic principle of IHL that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. The principle of distinction is a cornerstone of IHL. Derived from it are specific rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks and of the use of “human shields,” and other rules governing the conduct of hostilities that are aimed at sparing civilians and civilian objects from the effects of hostilities. IHL also prohibits hostage-taking, whether of civilians or of persons no longer taking part in hostilities.

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

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

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

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

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

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

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

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

Legal qualification

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

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

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

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

The question that remains is whether, taken together, all the acts of terrorism carried out in various parts of the world (outside situations of armed conflict such as those in Afghanistan, Iraq or Somalia) are part of one and the same armed conflict in the legal sense. In other words, can it be said that the bombings in Glasgow,

London, Madrid, Bali or Casablanca can be attributed to one and the same party to an armed conflict as understood under IHL? Can it furthermore be claimed that the level of violence involved in each of those places has reached that of an armed conflict? On both counts, it would appear not.

Moreover, it is evident that the authorities of the States concerned did not apply conduct of hostilities rules in dealing with persons suspected of planning or having carried out acts of terrorism, which they would have been allowed to do if they had applied an armed conflict paradigm. IHL rules would have permitted them to directly target the suspects and even to cause what is known as “collateral damage” to civilians and civilian objects in the vicinity as long as the incidental civilian damage was not excessive in relation to the military advantage anticipated. Instead, they applied the rules of law enforcement. They attempted to capture the suspects for later trial and took care in so doing to evacuate civilian structures in order to avoid all injury to persons, buildings and objects nearby.

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

Status of persons

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

In this context, it bears repeating that *only in international armed conflicts* does IHL provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives. In case of capture, combatants become prisoners of war and, as such, cannot be tried or convicted for having participated in hostilities. The corollary is that captured combatants can be interned, without any form of process, until the end of active hostilities. Captured combatants may, however, be criminally prosecuted for war crimes or other criminal acts committed before or during internment. In the event of criminal prosecution,

the Third Geneva Convention provides that prisoners of war may be validly sentenced only if this is done by the same courts and according to the same procedure as for members of the armed forces of the detaining power. It is often not understood that prisoners of war who have been acquitted in criminal proceedings may be held by the Detaining Power until the end of active hostilities. In case of doubt about the status of a captured belligerent, such status must be determined by a competent tribunal.

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

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

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

[…]

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

safeguards of treaty law and customary international law.

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

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

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

It must be emphasized that no one, regardless of his or her legal status, can be subjected to acts prohibited by IHL, such as murder, violence to life and person, torture, cruel or inhuman treatment or outrages upon personal dignity or be denied the right to a fair trial. “Unlawful combatants” are in this sense also fully protected by IHL and it is incorrect to suggest that they have minimal or no rights. One of the purposes of the law of war is to protect the life, health and dignity of all persons involved in or affected by armed conflict. It is inconceivable that calling someone an “unlawful combatant” (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.

The preceding observations on the relationship between IHL and terrorism should not be taken to mean that there is no scope or need for further reflection on the interplay between the two legal regimes – IHL and the one governing terrorism – or for clarification or development of the law. Indeed, […] the ICRC has been working on ways of dealing with specific legal challenges that are also posed by acts of terrorism. What is submitted is that **the fight against terrorism requires the application of a range of measures – investigative, diplomatic, financial, economic, legal, educational and so forth – spanning the entire spectrum from peacetime to armed conflict and that IHL cannot be the sole legal tool relied on in**

such a complex endeavour.

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

[…]

IV. The conduct of hostilities

[…]

Asymmetric warfare

[**See also** Implementation of International Humanitarian Law, X. Factors Contributing to Violations of International Humanitarian Law]

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

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

for the continuation of the adversary's military action.

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

The dangers of asymmetry also relate to the means of warfare likely to be used by the disadvantaged forces. It appears more and more likely that States or armed groups that are powerless in the face of sophisticated weaponry will seek to acquire – or construct – chemical, biological and even possibly nuclear weapons (in particular, the "dirty bomb scenario"), against which traditional means of defending the civilian population and civilian objects are inadequate.

A militarily superior belligerent may tend to relax the standards of protection of civilian persons and civilian objects in response to constant violations of IHL by the adversary. For example, confronted with enemy combatants and military objectives that are persistently hidden among the civilian population and civilian objects, an attacker – who is legally bound by the prohibition of disproportionate attacks – may, in response to the adversary's strategy, progressively revise his assessment of the principle of proportionality and accept more incidental civilian casualties and damage. Another likely consequence could be a broader interpretation of what constitutes "direct participation in hostilities" […] [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]. The militarily stronger party may also be tempted to adopt a broader interpretation of the notion of military objective. Such developments would make the civilian population as a whole more vulnerable to the effects of hostilities.

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

Urban warfare

Similar challenges concerning the definition of a military objective and the interpretation of the principle of proportionality and of precautionary measures also arise from the spread of urban warfare. Military ground operations in urban settings are particularly complex: those resisting attack benefit from innumerable firing

positions and may strike anywhere at anytime. The fear of surprise attacks is likely to reduce the attacker's armed forces ability to properly identify enemy forces and military objectives and to assess the incidental civilian casualties and damages that may ensue from its operations. Likewise, artillery and aerial bombardments of military objectives located in cities are complicated by the proximity of those objectives to the civilian population and civilian objects.

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

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

[…]

V. Non-international armed conflicts

[…]

Substantive challenges

Article 3 common to the four Geneva Conventions laid down the first rules to be observed by parties to non-international armed conflicts. […]

Over time, the protections set out in common Article 3 came to be regarded as so fundamental to preserving a measure of humanity in war that they are now referred to as "elementary considerations of humanity" that

must be observed in all types of armed conflict as a matter of customary international law. **Common Article 3 has thus become a baseline from which no departure, under any circumstances, is allowed. It applies to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be held.**

[…]

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

Respect for IHL in non-international armed conflicts

[…]

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

Diversity of conflicts and parties

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

Denial of applicability of IHL

Not infrequently, a party to a non-international armed conflict – either a State or an armed group – will deny the applicability of humanitarian law. Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of "tension" or one that involves banditry or terrorist activities that do not amount to a non-international armed conflict, as recognition that such an armed conflict is taking place would, in their view, implicitly grant "legitimacy" to the armed group. Non-State armed groups might also deny the applicability of IHL on the grounds that it is a body of law

created by States and that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by strong ideology.

Lack of political will to implement humanitarian law

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

Ignorance of the law

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

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

[…]

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

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

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

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

In addition to dissemination and training activities, which are crucial to making the rules of IHL known and to building a foundation for discussions concerning respect for the law, a number of legal tools have been used

by the ICRC and other humanitarian actors in their efforts to improve compliance with humanitarian law by parties to non-international armed conflicts. Such tools do not themselves guarantee increased respect, but they nevertheless provide a basis on which legal representations can be made and on which accountability can be required. These tools, which are inter-related and reinforce each other, include the following:

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

[…]

VI. Regulating private military and private security companies

[**See** The Issue of Mercenaries, Part. D, Report submitted by the Working Group on the Use of Mercenaries. **See also** Montreux Document on Private Military and Security Companies]

[…]

Obligations of States

[…]

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

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

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

States on whose territory PMCs / PSCs operate also have an obligation to ensure that IHL is respected within their jurisdictions. In practice, this can be done by enacting regulations providing a legal framework for the activities of PMCs / PSCs. For instance, States could establish a registration system imposing certain criteria for PMCs / PSCs; or they can have a licensing system, either for individual companies, or for specific pre-defined services, or on a case-by-case basis for each service.

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

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

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

[…]

Discussion

I. General Questions

1. In view of all the challenges mentioned in the texts, do you think that IHL is still relevant to regulate organized violence in the contemporary world? Are some of these forms of violence new? Does, or should, IHL apply to them?
2. How could interpretations of IHL be harmonized? Is there a need to clarify further the rules of IHL?

II. Direct Participation in Hostilities [Parts A and B.]

[**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

1. a. May anyone be outside the scope of IHL? Wouldn't that be contrary to the object and purpose of

IHL? What are the legal arguments, if any, in favour of this interpretation? What are the legal arguments in favour of the second interpretation (according to which only common Art. 3 and Art. 75 of Protocol I apply to civilians directly participating in hostilities)? In your opinion, which rules of IHL apply to civilians who directly participate in hostilities: while they are actually doing so? Once they are in the power of the enemy? (GC IV, Arts 3 and 4; P I, Art. 51(3); P II, Art. 13(3); CIHL, Rule 6)

   b. Does IHL contain any explicit reference to "unlawful combatants"? What is the purpose of some governments in creating such a category of person? [**See** Israel, The Targeted Killings Case, **and** Israel, Detention of Unlawful Combatants] To whom does it refer? What would be the dangers of creating such a category? What are the ICRC's views on that subject?

2. Is it easy to draw a line between taking direct part and not taking part in hostilities? When does direct participation in hostilities start? When does it end? Can the preparation of an attack be considered as direct participation in hostilities? When does a civilian lose immunity from attack? What are the dangers of a blurred definition of direct participation?
3. *[Parts A. and B.]* If civilians directly participating in hostilities fall into enemy hands, according to which status must they be protected? Does the fact that they were participating in hostilities when captured have any consequences for their treatment during detention? Do you agree that "unprivileged belligerents" have minimal or no rights? In international armed conflict, what kind of protection are they entitled to? In non-international armed conflict? (GC IV, Arts 3, 4 and 5)

III. Related Conduct of Hostilities Issues *[Part A.]*

Military Objectives

[**See** Eritrea/Ethiopia, Awards on Military Objectives, **and** United States/United Kingdom, Report on the Conduct of the Persian Gulf War]

1. In your opinion, what does the criterion of "effective contribution to military action" cover? Does it cover all war-sustaining capabilities? Why did the drafters add the second criterion to the definition ("whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage")? What would have been the dangers of defining military objectives solely on the basis of the first criterion? (P I, Art. 52(2) and (3); CIHL, Rule 8)
2. a. Is there a fixed borderline between civilian objects and military objectives? Why/Why not? Are there any lists of military objectives? Why/Why not? Should/could such lists be drafted? (P I, Art. 52(2) and (3); CIHL, Rule 8)
   b. When may a civilian object be attacked? May a civilian object be automatically attacked when it is concurrently used for civilian and military purposes? Are effects upon the civilian purposes of a "dual-use object" incidental effects subject to the proportionality principle? Is incidental damage to so-called "dual-use objects" more easily accepted? [**See** Federal Republic of Yugoslavia, NATO Intervention] (P I, Arts 51(5)(b), 52(2) and (3); CIHL, Rule 8, 9 and 14)

Proportionality

1. a. Does the principle of proportionality give "permission" to cause incidental loss of life among civilians? How do you calculate proportionality? Is it easy to determine at which point an incidental loss of civilian life becomes excessive compared to the concrete and direct military advantage? (P

I, Arts 51(5)(b), and 57(2)(a)(iii), CIHL, Rule 14) [**See** Israel/Gaza, Operation Cast Lead]

b. May the concrete and direct military advantage refer to a campaign of attacks as a whole, or only to individual attacks? (P I, Arts 51(5)(b); CIHL, Rule 13)

2. a. Does the proportionality principle cover the long-term effects of an attack on the civilian population? The long-term military advantages? Could envisaging long-term military advantages justify larger incidental losses of civilian lives? Could long-term effects include knock-on effects on the natural environment? (P I, Arts 35(3) and 55, CIHL, Rules 44 and 45)

b. If the "knock-on effects" are taken into account, does it mean that an attack on a military objective that would cause no civilian loss of life, injury or damage in the short-term may still be unlawful if it is expected to cause damage in the long-term? How long should those effects be taken into account?

Precautionary Measures

[**See** Case Study, Armed Conflicts in the former Yugoslavia]

1. According to the ICRC, in striking a balance between the protection of armed forces and the protection of civilians, which protection counts more? Should the safety of the armed forces be taken into account at all? In the proportionality evaluation of whether an attack has excessive incidental effects on civilians? In evaluating the feasibility of precautionary measures? Is it realistic to say that it should not? (P I, Arts 51(5)(b) and 57; CIHL, Rules 14-21)
2. Is the obligation to take precautionary measures greater for the attacker than for the defender? If the defender fails to take the required precautions and, for instance, locates military objectives within civilian areas, does this relieve the attacker of the obligation to take precautionary measures? (P I, Arts 51(7) and (8), and 58; CIHL, Rules 14-24)
3. What are the attacker's legal responsibilities if the defender uses civilians or civilian objects to shield military objectives? When is the attack prohibited? Which additional measures must be taken? (GC IV, Art. 28; P I, Arts 51(7) and (8) and 58; CIHL, Rules 14-21 and 97) [**See** Israel/Lebanon/Hezbollah, Conflict in 2006]

Asymmetric and Urban Warfare *[Part B.]*

1. What do the concepts of "asymmetric warfare" and "urban warfare" refer to? Is IHL still relevant to regulate such situations? Are such situations "new"? Do these "new" situations not reveal the limits of IHL?
2. Is respect for IHL subject to reciprocity? Do the repeated violations of IHL by one party lessen the other party's obligation to respect IHL? How should a party react to repeated violations of IHL by its enemies?

IV. The Concept of Occupation *[Part A.]*

[**See** Israel, Applicability of the Fourth Convention to Occupied Territories, **and** Eritrea/Ethiopia, Awards on Occupation]

1. What are the traditional conditions for a territory to be considered occupied? (HR, Art. 42; GC IV, Art. 2) Are the conditions of applicability different for occupation law norms contained in the Hague Regulations and the Fourth Geneva Convention?
2. a. What is the exact meaning of "effective control" for the purposes of occupation? At which point may

a party to a conflict be considered to have effective control over the other party's territory? Is effective control required for the provisions contained in the Hague Regulations to apply? For the provisions of Convention IV to apply? (HR, Art. 42; GC IV, Art. 2)

b. To what extent does the "functional approach" to occupation reinterpret the criterion of effective control of the territory? What is the ultimate purpose of this approach? What are the consequences for the protection of civilians?

c. According to the functional approach, when would a territory be occupied? Is it occupied as soon as the enemy forces enter the territory? Or is it necessary that they "exercise complete and exclusive control over persons and/or facilities in that territory over a certain period of time"? Can some provisions of Convention IV relating to occupation be implemented as soon as the enemy forces enter the territory? If yes, which ones?

d. If Part III, Section III, of Convention IV on occupied territories is not applicable during an invasion phase, are enemy civilians arrested by invading forces nevertheless protected civilians? Are they covered by Section II? Can there be protected civilians covered neither by Section II nor by Section III, but only by Section I? By no substantive rules of Part III?

3. a. Is the law of occupation appropriate to UN operations? Do they fulfil the same goals? Is that relevant for the applicability of the law of occupation? [**See** Iraq, Occupation and Peacebuilding]

b. Would it be necessary to reinforce, clarify or develop the rules of occupation, or even to create a new set of rules exclusively for "occupation" by UN multinational forces? Why/why not?

V. Non-International Armed Conflict and IHL [Parts A. and B.]

1. *[Part B.]* Is common Art. 3 now considered as part of jus cogens? If it is, what are the consequences? (GC I-IV, common Art. 3)
2. Is the ICRC's customary law study sufficient to improve the law applicable to non-international armed conflict? What could the next step be to improve the law applicable to such conflicts? [**See** ICRC, Customary International Humanitarian Law]

VI. IHL and the Fight Against Terrorism *[Parts A. and B.]*

[**See** United States, The September 11, 2001 Attacks, **and** United States, The Schlesinger Report]

1. What is the difference between lawful acts of war and acts of terrorism? May States label as "terrorist" all acts of warfare committed by organized armed groups not belonging to a State? (GC IV, Art. 33; P I, Arts 37, 48, 51, 52, 57, 58, 85; P II, Arts 4(2)(d) and 13(2); CIHL, Rules 1-21, 57, 106)
2. Why, as a rule, are terrorist activities not imputable to a State under international rules on State responsibility? In which cases can a terrorist act be imputable to a specific State? [**See** International Law Commission, Articles on State Responsibility]
3. *[Part A.]*
   a. Do you agree with the argument that the law enforcement paradigm is not adequate to combat terrorist acts? Does it mean that all acts of terrorism should come within the scope of IHL? Would that be legally possible?
   b. Do you agree with the view that transnational violence fits neither the definition of international armed conflict nor that of non-international armed conflict? Cannot a conflict between a State and an armed group operating from outside that State be considered as a non-international armed

conflict? Do you think a new category should be created under IHL?

4. *[Part B.]* Does the notion of "global war on terror" consider the world as a global battlefield? That acts of violence perpetrated around the world can be attributed to one global non-state party? What is the geographical field of application of the IHL of international armed conflicts? Of the IHL of non-international armed conflicts? Would it be appropriate to apply IHL to any act performed during the global armed conflict? At least if committed by a member of the global non-state party? What are the dangers of such a concept for the protection of human rights? What approach does the ICRC take to qualifying acts of transnational terrorism and the responses thereto? [**See** ICTY, The Prosecutor v. Tadic, A. Appeals Chamber, Jurisdiction, para. 68] (GC I-IV, common Arts 2 and 3; P I, Art. 1; P II, Art. 1)
5. What does the notion of "enemy combatant" refer to? Does this "status" apply independently of the qualification of the situation of violence? What kind of protection does it grant? Can IHL be applied "à la carte" for "enemy combatants"? (GC III, Arts 1 and 4; GC IV, Art. 4)

VII. Improving Compliance with IHL *[Part A.]*

1. What kind of action does Art. 89 of Protocol I provide for? Does it include reprisals? Why has Art. 89 not been resorted to consistently? How could it be better utilized?

Scope of the obligation to ensure respect for IHL

[**See** UN, Resolutions and Conference on Respect for the Fourth Convention]

1. Since it is acknowledged that common Art. 1 lays down a responsibility for third States to ensure respect for IHL by parties to a conflict, what kinds of action does this entail? What are the lower and upper limits to action under Art. 1? Does it allow interference in the internal affairs of another State? May force be used to fulfil the obligation? (GC I-IV, Arts 47/48/127/144 respectively; P I, Arts 6(1), 80, 82, 83 and 87(2))

Existing IHL mechanisms and bodies

1. Considering the lack of effectiveness of existing mechanisms to date, what could be done to make the existing mechanisms established under IHL more acceptable to parties to an armed conflict? (GC I-IV, Arts 8/8/8/9, 10/10/10/11 and 52/53/132/149 respectively; P I, Arts 5 and 90)

New IHL supervision mechanisms: *pro et contra*

1. What would be the political and legal feasibility of an individual complaints mechanism for violations of IHL? What would be the advantages and disadvantages of such a mechanism compared with a periodic reporting system? What would be the political and legal feasibility of an International Court of IHL? Of an International Commission of IHL? Would the politicization of mechanisms such as a "Diplomatic Forum" help improve compliance with IHL? How could such politicization be reduced?

Improving compliance in non-international armed conflict *[Parts A. and B.]*

[**See** Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personal mines]

1. Can IHL be adapted to provide better incentives for armed groups to comply with the rules? Do all existing rules of the IHL of non-international armed conflict set realistic standards of conduct for armed

groups? Are the legal tools designed to improve compliance with IHL effective? In your opinion, are States willing to accept such measures?

2. How can existing IHL mechanisms and bodies be used in non-international armed conflicts? Is there a need for specific supervision, enquiry or fact-finding possibilities?

PMCs / PSCs *[Part B.]*

[**See** Montreux Document on Private Military and Security Companies]

1. Are PMCs defined under IHL? What is the status of PMCs? Are PMCs' employees operating in an armed conflict bound by IHL? On which basis? Who is responsible for ensuring that they are aware of IHL rules and that they respect them? How? What is the legal basis for such an obligation?
2. When is a contracting State responsible for violations of IHL committed by a PMC/PSC? When is their home State responsible? When is the territorial State (i.e. where the violations were committed) responsible? Does the responsibility of such States include an obligation to prevent violations? How can they ensure better compliance with IHL by those companies?