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Sixty years of the Geneva Conventions: learning from the past to better face the future

Ceremony to celebrate the 60th anniversary of the Geneva Conventions

Address by Jakob Kellenberger, President of the ICRC

Geneva, 12 August 2009.

Excellencies,

Ladies and gentlemen,

We gather here to mark a significant coming of age. Sixty years ago today, the Geneva Conventions were adopted. This defining event played a central role in expanding the protection provided to victims of armed conflicts. It also expanded the ICRC's humanitarian mandate, and facilitated our access as well as our dialogue with States.

[...]

Without a doubt, the journey so far has not always been plain sailing. The extent to which armed conflict has evolved over the past 60 years cannot be underestimated. It almost goes without saying that contemporary warfare rarely consists of two well-structured armies facing each other on a geographically defined battlefield. As lines have become increasingly blurred between various armed groups and between combatants and civilians, it is civilian men, women and children who have increasingly become the main victims. International humanitarian law, IHL, has necessarily adapted to this changing reality. The adoption of the first two Additional Protocols to the Geneva Conventions in 1977, with the rules they established on the conduct of hostilities and on the protection of persons affected by non-international armed conflict, is just one example. Specific rules prohibiting or regulating weapons such as anti-personnel mines and, more recently, cluster

munitions are another example of the adaptability of IHL to the realities on the ground.

The traumatic events of 9/11 and its aftermath set a new test for IHL. The polarisation of international relations and the humanitarian consequences of what has been referred to as the “global war on terror” have posed a huge challenge. The proliferation and fragmentation of non-state armed groups, and the fact that some of them reject the premises of IHL, have posed another. These challenges effectively exposed IHL to some rigorous cross-examination by a wide range of actors, including the ICRC, to see if it really does still stand as an adequate legal framework for the protection of victims of armed conflict.

In short, the result of this sometimes arduous process was a resounding reaffirmation of the relevance and adequacy of IHL in preserving human life and dignity in armed conflict. However, [...] this is no time to rest on our laurels. **The nature of armed conflict, and of the causes and consequences of such conflict, is continuing to evolve. IHL must evolve too.**

The priority for the ICRC now is to anticipate and prepare for the main challenges to IHL in the years ahead. While these challenges have a legal and often a political dimension, I must stress that our ultimate concern is purely humanitarian; our only motivation is to contribute to achieving better protection for the victims of armed conflict.

I shall refer to some of these challenges and consider some ways in which they might be addressed, including what and how the ICRC, for its part, stands ready to contribute in terms of guidance and advice. It almost goes without saying however that the effort required to address these challenges is the responsibility – be it legal or moral – not just of the ICRC, but of a wide range of actors including States and non-state actors, military forces and legislators.

I shall focus firstly on certain challenges related to armed conflict in general and secondly on those related specifically to non-international armed conflicts.

So what are some of the ongoing challenges to IHL? The first relates to the conduct of hostilities. I referred earlier to the changing nature of armed conflict and the increasingly blurred lines between combatants and civilians. Civilians have progressively become more involved in activities closely related to actual combat. At the same time, combatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms. They mingle with the civilian population. Civilians are also used as human shields. To add to the confusion, in some conflicts, traditional military functions have been outsourced to private contractors or other civilians working for State armed forces or for organised armed groups. These trends are, if anything, likely to increase in the years ahead.

The result of this, in a nutshell, is that civilians are more likely to be targeted – either mistakenly or arbitrarily. Military personnel are also at increased risk: since they cannot properly identify their adversary, they are vulnerable to attack by individuals who to all appearances are civilians.

IHL stipulates that those involved in fighting must make a basic distinction between combatants on the one hand, who may lawfully be attacked, and civilians on the other hand, who are protected against attack unless and for such time as they directly participate in hostilities. The problem is that neither the Geneva Conventions nor their Additional Protocols spell out what precisely constitutes “direct participation in hostilities”.

To put it bluntly, this lack of clarity has been costing lives. This is simply unjustifiable. In an effort to help remedy this situation, the ICRC worked for six years with a group of more than 50 international legal experts from military, academic, governmental and non-governmental backgrounds. The end result of this long and intense process, published just two months ago, was a substantial guidance document. This document serves to shed light firstly on who is considered a civilian for the purpose of conducting hostilities, what conduct amounts to direct participation in hostilities, and which particular rules and principles govern the loss of civilian protection against direct attack. [See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

Without changing existing law, the ICRC’s Interpretative Guidance document provides our recommendations on how IHL relating to the notion of direct participation in hostilities should be interpreted in contemporary armed conflict. It constitutes much more than an academic exercise. The aim is that these recommendations will enjoy practical application where it matters, in the midst of armed conflict, and better protect the victims of those conflicts.

[...]

Another key issue here is the increasingly asymmetric nature of modern armed conflicts. Differences between belligerents, especially in terms of technological and military capacities have become ever more pronounced. Compliance with the rules of IHL may be perceived as beneficial to one side of the conflict only, while detrimental to the other. At worst, a militarily weak party – faced with a much more powerful opponent – will contravene fundamental rules of IHL in an attempt to even out the imbalance. If one side repeatedly breaks the rules, there is a risk that the situation quickly deteriorates into a free-for-all. Such a downward spiral would defy the fundamental purpose of IHL – to alleviate suffering in times of war. We must explore every avenue to prevent this from happening.

I would also like to briefly address the humanitarian and legal challenges related to the protection of internally displaced people. In terms of numbers, this is perhaps one of the most daunting humanitarian challenges arising in armed conflicts around the world today, from Colombia to Sri Lanka and from Pakistan to Sudan. This problem not only affects the many millions of IDPs, but also countless host families and resident communities.

Violations of IHL are the most common causes of internal displacement in armed conflict. Preventing violations is therefore, logically, the best means of preventing displacement from occurring in the first place.

On the other hand, people are sometimes forcibly prevented from fleeing when they wish to do so. During displacement, IDPs are often exposed to further abuses and have wide-ranging subsistence needs. Even when IDPs want to return to their place of origin, or settle elsewhere, they are often faced with obstacles. Their property may have been destroyed or taken by others, the land might be occupied or unusable after the hostilities, or returnees may fear reprisals if they return.

As part of the civilian population, IDPs are protected as civilians in armed conflicts.

If parties to conflicts respected the basic rules of IHL, much of the displacement and suffering caused to IDPs could be prevented. Nevertheless, there are some aspects of IHL concerning displacement that could be clarified or improved. These include in particular questions of freedom of movement, the need to preserve family unity, the prohibition of forced return or forced resettlement, and the right to voluntary return.

These various humanitarian and legal challenges exist in all types of armed conflict, whether international or non-international. However, I would now like to highlight some specific challenges concerning the law regulating non-international armed conflicts.

Non-international armed conflicts are by far the most prevalent type of armed conflict today, causing the greatest suffering. Yet there is no clear, universally-accepted legal definition of what such a conflict actually is. Both Article 3 common to the four Geneva Conventions and the second Additional Protocol give rise to certain questions on this. How can a non-international armed conflict be more precisely distinguished from other forms of violence, in particular organized crime and terrorist activities? And what if a non-international armed conflict spills over a State border, for example?

The lack of clear answers to such questions may effectively allow parties to circumvent their legal obligations. The existence of an armed conflict may be refuted so as to evade the application of IHL altogether. Conversely, other situations may inaccurately or prematurely be described as an armed conflict, precisely to trigger the applicability of IHL and its more permissive standards regarding the use of force, for example.

Even where the applicability of IHL in a non-international armed conflict is not in dispute, the fact that treaty-based law applying to these situations is at best limited has led to further uncertainties.

Let us remember however that non-international armed conflicts are not only governed by treaty law. The substantial number of rules identified in the ICRC's 2005 Study on Customary International Humanitarian Law provides additional legally binding norms in these situations.

But while customary IHL can fill some gaps, there are still humanitarian problems arising in these types of conflicts that are not fully addressed under the current applicable legal regime.

IHL applicable in non-international armed conflict contains general principles but remains insufficiently elaborate as regards material conditions of detention and detainees' right of contact with the outside world, for example. Lack of precise rules on various aspects of treatment and conditions of detention and the lack of clarity surrounding detention centres may have immediate and grave humanitarian consequences on the health and well-being of detainees. Therefore, even if the primary humanitarian challenge lies in the lack of resources by detaining authorities and in the lack of implementation of existing general principles, more precise regulation of conditions of detention in non-international armed conflict could usefully complement some of IHL's fundamental requirements.

Other areas that suffer from a lack of legal clarity include procedural safeguards for people interned for security reasons. In an effort to clarify minimum procedural rights, in 2005 the ICRC issued a set of procedural principles and safeguards applicable to any situation of internment, based on law and policy. The ICRC has been relying on this position in its operational dialogue with detaining authorities in a number of contexts around the world. Adequate protection could nevertheless be better ensured if procedural safeguards were put on a more solid legal footing by States.

Humanitarian issues arise in other areas as well, in part because of a lack of rules, or because the rules are too broad or vague, leaving much to subjective interpretation. These areas include access to populations in need of humanitarian assistance, the fate of missing persons and protection of the natural environment. And this list is not exhaustive.

To address these humanitarian and legal challenges, the ICRC has been intensively engaged for the past two years in a comprehensive internal research study. The study aims firstly to explain in simple terms the scope of application of the law to the whole range of aforementioned humanitarian concerns arising in non-international armed conflicts, including the challenge of improving compliance with the law by all parties to such conflicts. On the basis of this, its second aim is to evaluate the legal responses provided in existing law to these humanitarian concerns. Based on a comprehensive assessment of the conclusions of this research, which is still underway, a case will be made for the clarification or further development of specific aspects of the law. The research will be followed by proposals on how to move forward, both substantively and procedurally.

Within the scope of this study, the ICRC is also looking at aspects of Article 3 common to the Geneva Conventions that need to be further clarified. Article 3 is widely regarded as a mini Convention in itself, binding States and non-state armed groups; a baseline from which no departure, under any circumstances, is allowed. It applies minimum legal standards 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. We are preparing a

consolidated reading of the protective legal and policy framework applicable in non-international armed conflicts that meet the threshold of common Article 3.

The ICRC has a responsibility in ensuring that the Conventions will continue to stand the test of time. Of course it is the political and legal responsibility primarily of States, which have universally ratified the Conventions, to ensure that they are implemented and enforced.

Ideally of course, all parties to an armed conflict, whatever they call themselves or each other, would appreciate that it is in their own best interest to apply the legal restraints provided by IHL. After all, combatants on both sides have obligations as well as rights. On the other hand, failure to prevent abuse against others ultimately removes the safeguard against similar abuse in return. The result, simply put, is spiralling human suffering.

However, **the lack of respect for existing rules remains, as ever, the main challenge**. I hardly need to remind you of the catalogue of flagrant violations of IHL frequently witnessed in armed conflicts around the world today. This situation – sadly – is compounded by a prevailing culture of impunity. True, there have been significant positive developments towards strengthening accountability for war crimes through various international tribunals and the International Criminal Court. National legislators and courts are also finally starting to live up to their respective responsibilities of ensuring that domestic legislation recognises the criminal responsibility of those who violate IHL, and of actually enforcing such legislation.

Public pressure and international scrutiny of conduct in an armed conflict are also significant factors in improving compliance with IHL. This presupposes adequate knowledge and training in IHL not just by lawyers and military commanders, but by wider sectors of the public at large. After all it was public pressure – and the collective shame of governments in failing to stop the atrocities in the former Yugoslavia and Rwanda – that led to the establishment of the ad-hoc tribunals for those countries in the mid-1990s.

Ignorance of the law is no excuse. At least the guidance, clarification and proposals coming out of the various ICRC initiatives I mentioned will make recourse to this excuse by parties to a conflict even less credible.

The ICRC can only contribute one part of what must be a concerted international effort to improve compliance with IHL. On the 60th anniversary of the Geneva Conventions, I make a heartfelt plea to States and non-state armed groups who are also bound by their provisions, to show the requisite political will to turn legal provisions into a meaningful reality. I urge them to show good faith in protecting the victims of armed conflicts – conflicts that in view of the challenges I have mentioned today are likely to become ever-more pernicious in the years to come.

Sixty years ago, the Geneva Conventions were born out of the horrors experienced by millions of people during the Second World War and its aftermath. **The essential spirit of the Geneva Conventions – to**

uphold human life and dignity even in the midst of armed conflict – is as important now as it was 60 years ago. Thank you for doing all you can to keep that spirit alive.

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