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**Strengthening legal protection
for victims of armed conflicts**

Report

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REPORT

**Strengthening legal protection
for victims of armed conflicts**

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Strengthening legal protection for victims of armed conflicts

Executive summary

This report sums up a process of reflection initiated by the ICRC in 2008 to determine whether, and to what extent, international humanitarian law as it exists today continues to provide an appropriate response to the humanitarian problems arising in armed conflicts. In order to answer that question, the ICRC first conducted an internal study of both the reality of contemporary armed conflicts and the content of the applicable international legal framework. It then consulted the States with a view to discovering to what extent the conclusions of that internal study are more broadly shared and to gauge the possibilities for strengthening legal protection for victims of armed conflicts in certain areas. The conclusions presented in this report will be debated during the plenary sessions of the 31st International Conference of the Red Cross and Red Crescent, at which the ICRC will also submit, for adoption, a resolution on strengthening legal protection for victims of armed conflicts.

The principal conclusions of the ICRC study on strengthening legal protection for victims of armed conflicts

With respect to most of the questions examined, the ICRC study showed that international humanitarian law, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. In almost all cases, what is required to improve the victims' situation is stricter compliance with that framework, rather than the adoption of new rules. If all the parties concerned showed perfect regard for international humanitarian law, most current humanitarian issues would not exist. All attempts to strengthen humanitarian law should therefore build on the existing legal framework. There is no need to re-open the discussion on rules of long-established validity.

However, the ICRC study also showed that international humanitarian law, in its current state, was not perfect in every respect and should be developed in some areas. More precisely, the ICRC concluded that it must be strengthened in four main areas.

The first is *protection for persons deprived of liberty*, especially in situations of non-international armed conflict. In some cases, lack of adequate infrastructure and resources hampers the establishment of a proper detention regime; but the dearth of relevant legal norms is just as significant an obstacle to safeguarding the life, health and dignity of those who have been detained. More particularly, there is a need to strengthen the rules on material conditions of detention with a view to ensuring that detaining parties, whether State or non-State, ensure that the people in their power are treated humanely. Another significant issue of humanitarian concern is the insufficient legal protection provided for internees during non-international armed conflicts. Internment is widely practised to detain persons for security reasons without bringing criminal charges against them. Another matter of concern is the protection of detainees transferred from one authority to another, either during or after the transfer. In certain instances, such persons have endured serious violations of their rights: persecution, torture, forced disappearance, and even murder.

The *international mechanisms for monitoring compliance with international humanitarian law and reparation for victims of violations* constitute another area in which legal development should be explored. Insufficient respect for applicable rules is the principal cause of suffering during armed conflicts. In recent years, the emphasis has been on developing criminal law procedures to prosecute and punish those who have committed serious violations of humanitarian law, but appropriate means for halting and redressing violations when they

occur are still lacking. Most of the procedures provided under humanitarian law have not or have almost never been used in practice. What is more, these procedures only apply in cases of international armed conflict. It is true that some monitoring and implementing mechanisms have been developed outside the ambit of humanitarian law, but these mechanisms also have their limitations.

The third area of concern in which, in the ICRC's view, humanitarian law has to be reinforced is *protection of the natural environment*. The serious harm done to the natural environment during numerous armed conflicts has only added to the vulnerability of those affected by the fighting. Human beings depend on the environment for their livelihood and well-being, in some cases even their survival. However, international rules protecting the environment in armed conflicts are either lacking or insufficient.

Lastly, the ICRC believes that the law *protecting internally displaced persons* should also be strengthened. While providing adequate protection for these persons is one of the most daunting tasks in humanitarian work, the relevant legal framework continues to be deficient. For instance, measures should be adopted to enable displaced persons to return to their homes under satisfactory conditions. The law should also be improved so as to preserve family unity and ensure that internally displaced persons can access the documents they need to enjoy their rights.

The consultation on strengthening legal protection for victims of armed conflicts

Generally speaking, the States that took part in the consultation relating to the ICRC study largely confirmed that international humanitarian law remains as relevant today as ever for the protection of victims of armed conflicts. They agreed that, in most cases, the best response to the victims' needs is to strengthen respect for existing rules.

The States consulted also broadly agreed on the analysis of the humanitarian concerns set out in the study; their views on how to address these concerns in legal terms varied, however, and therefore remain open for discussion. All options must be studied, including the preparation of soft-law instruments, the identification of best practices and the facilitation of expert processes aimed at clarifying existing rules.

This being said, the consultation showed that the States were not all entirely convinced that the law needed reinforcement in all the areas identified by the ICRC. They also indicated that it would not be realistic to work simultaneously on all four areas. Most of them would like to see future discussions focus for the time being on two areas, namely protection for persons deprived of liberty and mechanisms for monitoring compliance with international humanitarian law. The ICRC now believes that any future action to strengthen legal protection for victims of armed conflicts should be based on that conclusion.

This report will be deliberated during the International Conference plenary session. It should enable the participants to acquire more detailed knowledge of the ICRC's conclusions in the four areas mentioned above. The deliberations will provide all interested parties – including those that did not take part in the initial consultation – with an opportunity to express their points of view. They will be able to indicate to what extent they agree with the analysis presented in the ICRC study and the choices proposed following the initial consultation.

Strengthening legal protection for victims of armed conflicts

Introduction

This report presents the current status of a process of reflection undertaken by the ICRC on the need to strengthen legal protection for victims of armed conflicts.

Initially, the process was conducted within the ICRC, which carried out an **internal study** that had two main objectives: a) identifying and understanding, more precisely and clearly, the humanitarian problems arising from armed conflicts; b) determining whether, and to what extent, international humanitarian law, as it exists today, provides an adequate response to those problems. The ICRC thus systematically analysed the reality of contemporary armed conflicts, chiefly on the basis of its operational experience, but taking account of the observations of others as well. On the basis of that analysis, the ICRC endeavoured to determine whether the law needs to be reinforced in order to strengthen the protection of victims of armed conflicts.

This internal study was two years in the making. It examined 36 subjects covering most of the areas in which international humanitarian law could potentially be considered to need strengthening. It considered, for example, the protection of civilian populations and objects in the conduct of hostilities, the treatment of those in the hands of a party to an armed conflict (analysing the various categories of persons covered by international humanitarian law), respect for the law and reparation for the victims of violations.

The study was necessary for the ICRC to be able to present results based on an in-depth analysis and hence to formulate proposals for the States. It was motivated by the need to ensure that international humanitarian law continues to provide a response to the humanitarian problems observed in the field. It is grounded in the Statutes of the International Red Cross and Red Crescent Movement.¹ It is nevertheless but a preliminary phase; its conclusions must be shared and discussed more widely.

The ICRC publically announced the outcome of the study on 21 September 2010. On that occasion, it also stated that it intended to consult a representative number of States, while inviting all States wishing to do so to share their views with it.²

With regard to most of the subjects analysed, the study showed that international humanitarian law continues to provide an appropriate framework for regulating the conduct of parties engaged in armed conflicts. It continues to strike a reasonable and pragmatic balance between military necessity and humanitarian requirements. In most cases, what is required to improve the situation of victims of armed conflicts is stricter compliance with the existing legal framework, rather than the adoption of new rules. If international humanitarian law were held in perfect regard by the parties concerned, many current humanitarian issues would not exist. All attempts to strengthen humanitarian law should, therefore, build on the existing legal framework. There is no need to discuss rules – customary or treaty-based - whose validity has been long established.

¹ Under Article 5 of the Statutes of the International Red Cross and Red Crescent Movement, the ICRC's role includes "to work for the faithful application of international humanitarian law applicable in armed conflicts" and "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts".

² *Strengthening legal protection for victims of armed conflicts: The ICRC Study on the Current State of International Humanitarian Law*, Address by J. Kellenberger, ICRC President, 21 September 2010 (available on the ICRC website).

The ICRC considers, for example, that international humanitarian law, in its current state, provides a response to humanitarian issues in areas such as respect for and protection of the sick and wounded, the protection of persons in enemy hands (in particular the prohibition of ill-treatment and torture) and the rules governing the conduct of hostilities (the principles of distinction, proportionality and precaution). In these areas, the protection of victims of armed conflicts requires greater respect for existing rules.

However, the ICRC study also showed that international humanitarian law sometimes falls short of the needs observed in the field. It specifically pointed to four areas in which the legal rules need strengthening: a) the protection for persons deprived of liberty; b) international mechanisms to monitor compliance with international humanitarian law and reparation for the victims of violations; c) protection of the natural environment; d) protection of internally displaced persons.

In a second phase, the ICRC engaged in **dialogue with the States** in order to determine to what extent they agreed with the conclusions of its internal study and to gauge the possibilities for strengthening legal protection for victims of armed conflicts, either in all four of the areas identified or only in some of them.

The States that took part in the consultation largely confirmed that international humanitarian law has lost none of its relevance for the protection of victims of armed conflicts. They agreed that, in most cases, the best means of meeting the victims' needs is to ensure respect for existing rules. They also broadly shared the factual analysis set out in the ICRC study. Most of them recognized that the four areas highlighted by the study were a source of serious practical concerns. They nevertheless also indicated that it would not be realistic to work simultaneously on all four. They believed that priorities should be set in the light of the level of interest expressed by the States in each area. In that regard, the consultation revealed that the dialogue on strengthening international humanitarian law should be pursued on two subjects, namely protection for persons deprived of liberty and international mechanisms for monitoring compliance with international humanitarian law. It was those two topics that attracted the most interest from States. The ICRC announced the results of the consultation on 12 May 2011.³ Its action to strengthen legal protection for victims of armed conflicts will henceforth be guided by those results.

With regard to the outcome of the dialogue, the ICRC considers that all options aimed at strengthening the law must be studied and discussed. The consultation showed that the States wished to examine all possible solutions, including the preparation of soft-law instruments, the identification of best practices and the facilitation of expert processes aimed at clarifying existing rules.

It bears reminding that strengthening the legal framework applying to armed conflicts presupposes that complementary legal regimes – such as human rights law - are taken into consideration. The ICRC believes that the international law of human rights applies both in times of peace and armed conflict. It is therefore essential that any development of humanitarian law avoids all unnecessary overlap with existing rules of international law, in particular human rights law. The added value of developing humanitarian law relates first to the regulation of non-international armed conflicts. Even though human rights law is applicable in such situations, it does not solve all humanitarian questions in practice, as it is only binding on States. International humanitarian law, on the contrary, imposes obligations on all parties to an armed conflict, including non-governmental armed groups. Another essential fact must also be kept in mind: humanitarian law has to be respected in all

³ *Strengthening legal protection for victims of armed conflicts – States' consultations and way forward*, Address by J. Kellenberger, ICRC President, 12 May 2011 (available on the ICRC website).

circumstances, whereas derogation from some provisions of human rights law is permitted during emergencies. The codification of humanitarian law may therefore help to prevent legal gaps in practice.

The discussion will now be pursued at the **31st International Conference of the Red Cross and Red Crescent**. The present report will be deliberated in plenary, allowing all interested participants – including those that did not take part in the initial consultation – to express their points of view. It will provide them with an opportunity to indicate whether and to what extent they share the ICRC's analysis as presented in its study and agree on the options proposed following the initial consultation. They will also be able to suggest the best and most constructive ways of taking the dialogue forward. The ICRC will also submit, for adoption, a resolution on strengthening legal protection for victims of armed conflict.

This report starts by outlining the reasons for which the ICRC internal study concluded that the legal protection of victims of armed conflicts needed strengthening in four main areas. Those areas are examined one after the other (sections 1 to 4). The analysis focuses on the humanitarian concerns to which the existing legal regime, in the ICRC's view, does not provide a response or provides an insufficient response. It does not, however, propose solutions in terms of normative strengthening. Those solutions must be sought and discussed on the basis of a broader process of consultation involving the States and other interested parties. The last section (section 5) presents the results of the consultation of States in greater detail. It explains why the ICRC now considers that future reflection should concentrate on protection of persons deprived of liberty and international mechanisms for monitoring compliance with international humanitarian law.

1. Protection for persons deprived of liberty

Introduction

Detention is a regular and inevitable consequence of armed conflict, regardless of whether the conflict is international or non-international. For the purposes of this document, "detention" refers to the deprivation of liberty of a person for reasons related to an armed conflict. The two main forms of long-term detention in armed conflicts are: i) internment, i.e. administrative detention for security reasons, and ii) detention for the purposes of criminal proceedings. "Internment" is the term used in international humanitarian law term to denote the detention of a person believed to pose a serious threat to the detaining authority's security, without the intention of bringing criminal charges against such person. This document does not deal with internment in international armed conflicts, which is governed in detail in the Third (prisoners of war) and Fourth (protected persons) 1949 Geneva Conventions. Detention for the purpose of criminal proceedings is the deprivation of liberty to which a criminal suspect may be subjected, lasting until acquittal or final conviction on appeal.

Regardless of the duration of or reasons for detention, persons deprived of liberty are vulnerable because they depend entirely on the detaining authority for the satisfaction of their material and non-material needs. When individuals or groups of persons finds themselves in the hands of the enemy in an armed conflict, their vulnerability is all the more pronounced due, inter alia, to the animosities generated by the conflict and to the general deterioration of social and other structures. Thus, material conditions of detention are inadequate in many situations of armed conflict, affecting both detainees' dignity and their physical and mental integrity. Similarly, detainees are often unaware of the specific reasons for their detention or of the steps they may take to make use of their rights. The detainees' anxiety levels are in some cases exacerbated by the prohibition of contact with their families.

The ICRC's visits to hundreds of thousands of detainees each year give it a unique window into the legal and practical problems associated with detention in all types of armed conflicts. While there are cases in which lack of adequate infrastructure and resources constitutes an impediment to the establishment of a proper detention regime, the dearth of legal norms - especially in non-international armed conflicts - also constitutes an important obstacle to safeguarding the life, health and dignity of those who have been detained.

Humanitarian and legal concerns

Based on its operational activities the ICRC has identified specific humanitarian concerns related to deprivation of liberty, some of which are not, or not sufficiently, addressed by international humanitarian law.

- Conditions of detention

The material conditions of detention are the most immediately visible aspect of deprivation of liberty. It goes without saying that poor material conditions of detention may have, and often do have, direct and irreversible consequences on both the physical and mental health of detainees. Detention conditions are often even more difficult for detainees under the control of non-governmental armed groups owing to the groups' lack of means, organization and management capabilities.

This document cannot attempt to describe all the factors that may lead to unsatisfactory material conditions of detention. The most common include lack of adequate food, water and clothing, as well as difficulty in accessing medical care when needed. Similarly, the facilities, in particular the sanitary installations, are often unsuitable. Detainees also tend not to be authorized to establish contact with the outside world, including family members and relatives. Such contacts are in some cases limited, even when no justification for such measures can be found. There is likewise often a failure to register detainees, or to separate the different categories from one another, e.g. criminal suspects from other types of detainees, minors from adults, or to allow detainees of a different faith to practice their religion. Last but not least, overcrowding is a permanent characteristic of many places of detention. While objective circumstances are in some cases the cause, in many others inefficient legal processes unnecessarily prolong detention or even prevent release. These poor conditions are aggravated in some instances by constant transfers from one temporary location to another.

While international humanitarian law contains detailed rules on conditions of detention in international armed conflicts, this is not the case in conflicts not of an international character, especially those governed by Article 3 common to the Geneva Conventions, the minimum norm applicable in all non-international armed conflicts. There is a need to elaborate specific provisions on the various elements that make up a detention regime with a view to ensuring that detaining parties, whether State or non-State, ensure that those who are in their power are treated humanely. While Additional Protocol II provides an essential set of rules,⁴ it would nevertheless be useful to supplement those rules and provide more detail with regard to conditions of detention. The relevant rules of customary law are by necessity formulated in general terms, and thus do not provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated.⁵

- Specific protection

⁴ Art. 5.

⁵ J.-M. Henckaerts, L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, Rules 118-128.

In addition to the general protection applicable to all persons detained for reasons related to a non-international armed conflict, further provisions are needed to address the specific needs of some categories of persons. The situation of women, for instance, requires special attention. When women are detained in the same prison as men, their access to fresh air may be compromised if the courtyard is communal, since mixing with men would put them at risk and may not be permitted for cultural reasons. Likewise, women often remain locked in their cells if prison corridors are open to both sexes. Female detainees have specific health and hygiene needs. Pregnant women and nursing mothers require dietary supplements and appropriate pre- and post-natal care so that they and their babies remain in good health.

Children in detention also require specific protection and care. Prison conditions and facilities are not always adapted to their needs and vulnerabilities, especially in terms of protection against inhumane or degrading disciplinary measures. In addition, in numerous situations, these children are deprived of access to appropriate schooling or vocational training. They may also suffer from a lack of sufficient recreational and physical activity. They rarely enjoy adequate communication with the outside world, including with their parents, which may seriously affect their emotional development.

Most of these concerns, which include the needs of other categories of persons, such as the elderly and the disabled, are not sufficiently addressed under current international humanitarian law governing non-international armed conflicts. Common Article 3 does not provide special protection to particularly vulnerable persons in detention and Additional Protocol II only requires the parties to non-international armed conflicts to separate detained women and men "within the limits of their capabilities". Similarly, under customary law, detained children must be held in quarters separate from those of adults, except when they are accommodated with their family.⁶ Besides these rules, the law applicable to non-international armed conflicts does not provide further specific protection and thus requires supplementing.

- Procedural safeguards

A particular humanitarian concern related to detention is the lack of procedural safeguards for persons subject to internment in non-international armed conflicts. In contrast to the Fourth Geneva Convention rules governing international armed conflicts,⁷ there are no international humanitarian law treaty provisions on procedural safeguards for internment in non-international armed conflicts. Most conflicts nowadays are non-international and internment is widely practised. In the absence of international norms providing States with guidance on the rules to observe, national law is often inadequate and does not provide internees with sufficient protection. This means, *inter alia*, that in practice internees are not adequately informed of the reason(s) why they are being detained, and that there is no established process for challenging the lawfulness of detention and/or ensuring release if the reasons for detention do not or no longer exist. In some cases, internees are prohibited from having contact with the outside world and are uncertain as to when they will be released. ICRC practice has confirmed that lack of knowledge of the reasons for internment or how long it will last is one of the main causes of suffering for detained persons and their families, as well as the cause of heightened tensions in many detention settings.

The reality and urgency of the humanitarian problem is evident. Some States resort to internment when fighting organized armed groups on their territory. Internment is also employed by States active abroad as part of a multinational coalition (whether established under international or regional organization auspices or not), with a "host" State's consent. Thus, lack of international humanitarian law rules has allowed very divergent approaches to

⁶ *Ibid.*, Rule 120.

⁷ Fourth Geneva Convention, Arts 43 and 78; Additional Protocol II, Art. 75(3).

the procedural rights granted internees who are held by various components of multinational forces. An additional problem is that some of the practical challenges posed by internment by multinational forces find no response in any law, be it international or national.

Customary international humanitarian law prohibits arbitrary deprivation of liberty, but does not provide criteria for determining what is “arbitrary”.⁸ Article 3 common to the Geneva Conventions contains no provisions regulating internment, apart from the requirement of humane treatment. Internment is, however, clearly a measure that can be taken in non-international armed conflicts, as evidenced by the language of Additional Protocol II, which mentions internment in Articles 5 and 6 respectively, but likewise does not give details on how it is to be organized. In 2005, in order to provide its delegations with some guidance for their dialogue with States and non-governmental armed groups, the ICRC adopted an institutional position on the procedural safeguards to be observed with respect to internment/administrative detention.⁹ That document has served as a basis for bilateral discussions in a range of operational contexts in which internment for security reasons is being practised, and is believed to present a workable basis for examining the key legal issues that arise in such circumstances.

- ICRC access to persons deprived of liberty

As mentioned above, any deprivation of liberty is a situation of particular vulnerability for the person or persons affected, but it is even more precarious for those who find themselves in the hands of the opposing side as the result of an armed conflict. Visits to places of detention by a neutral, impartial and independent organization such as the ICRC are known to help detaining authorities identify problems; they also serve as a basis for dialogue on how to improve the treatment of detainees and their material conditions of detention, and contribute to safeguarding detainees' procedural and other rights.

States recognized the humanitarian concerns inherent in detention situations by adopting provisions on the ICRC's right of visit to detainees in international armed conflicts.¹⁰ However, neither humanitarian law treaty rules nor customary law provides an equivalent legal right for the organization to undertake visits in situations of non-international armed conflict, despite the fact that the vast majority of detainees nowadays are captured and held in relation to that type of conflict and that detention-related humanitarian concerns are just as serious in situations of non-international armed conflict, in which visits to detainees by a neutral, independent and impartial body like the ICRC should also be mandatory. The parties to conflicts of this kind often allow the ICRC access to detainees, in recognition of the fact that the institution's nature, know-how and services are an added value. Given the undeniable humanitarian concerns that exist in all cases of non-international armed conflict, it would seem necessary to ensure that States and other actors are willing to accept and facilitate ICRC visits to places of detention and its other activities in favour of persons affected by armed conflict.

- Transfers of persons deprived of liberty

The transfer of persons between States has emerged as one of the defining features of armed conflicts over the past several years, particularly in situations where multinational

⁸ See J.-M. Henckaerts, L. Doswald-Beck (eds), *op. cit.*, Rule 99.

⁹ See J. Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005. This position was subsequently published as Annex 1 to the ICRC's report, *International humanitarian law and the challenges of contemporary armed conflicts*, 30th International Conference of the Red Cross and Red Crescent, Geneva, October 2007.

¹⁰ Second Geneva Convention, Art. 126, and Fourth Geneva Convention, Art. 143.

forces transfer persons to a "host" State, to their country of origin or to a third State. There is cause for concern from a humanitarian standpoint whenever there is a risk that a transferred person may be subject to serious violations, such as arbitrary deprivation of life, torture and other forms of ill-treatment or persecution, upon transfer to the receiving State. The ICRC's focus on the issue of transfers has arisen as a result of, broadly speaking, two operational situations: i) when persons it visits express concern that they will be at risk of arbitrary deprivation of life, torture and other forms of ill-treatment or persecution upon transfer to the receiving State, or ii) as a result of visits to persons who have been transferred, during which the ICRC observes that transferees have been subjected to prohibited treatment upon transfer. The general international law principle prohibiting transfers to situations of abuse is commonly known as the principle of non-refoulement. This principle is not, however, explicitly incorporated into international humanitarian law governing non-international armed conflicts.¹¹

Given the evident challenges faced by persons who might have reason to fear for their safety if they are transferred to another State, it is absolutely necessary to provide legal guidance to detaining authorities in such cases. The lack of legal provisions in the humanitarian law governing non-international armed conflicts suggests that it would be highly advisable to provide for a set of workable substantive and procedural rules that would both guide the actions of States and non-governmental armed groups and protect the rights of affected persons. Current practice, in which more and more non-international armed conflicts involve coalitions of States fighting one or more non-governmental armed groups in a "host" country, indicates that uncertainty about how to organize a lawful transfer regime, including with regard to post-transfer responsibilities, is likely to increase, rather than decrease.

2. International mechanisms for monitoring compliance with international humanitarian law and reparation for victims of violations

Introduction

The principal cause of suffering in armed conflicts remains the inability to respect the law in force, whether for lack of means or political will, rather than the deficiency or absence of rules. The reality of contemporary armed conflicts shows that international humanitarian law is violated daily, either by State forces or by non-governmental armed groups. The consequences in human terms are tragic, as confirmed by the number of civilians killed or injured and of persons who are detained arbitrarily, ill-treated, displaced, separated from their families or unaccounted for. Entire populations have also at times been deprived of the minimum resources they need to survive. It is therefore crucially important to establish efficient means of ensuring that all the parties involved in armed conflicts comply with the rules of international humanitarian law.

Special emphasis has been placed in the last few years on developing the criminal procedures used to punish the perpetrators of serious violations of international humanitarian law. Some States have enacted and implemented domestic legislation through which they can prosecute such people. The establishment of international tribunals and the International Criminal Court is also a significant phase in the measures to combat impunity. The Rome

¹¹ In the event of an international armed conflict, the Fourth Geneva Convention stipulates: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs" (Art. 45, para. 4). In addition, Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention stipulate that prisoners of war and civilian internees "may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention".

Statute now lists war crimes, including those committed in the context of non-international armed conflicts. However, although these efforts are significant, they do not suffice. The criminal punishment of war criminals takes place once atrocities have been committed, and often several years after the events, but the victims' needs are immediate and require that mechanisms be used which can prevent violations and/or halt them during the hostilities. Provision must also be made for procedures guaranteeing that the harm that has been suffered will be recognized and that due reparation will be awarded effectively and rapidly. Unless this is the case, the victims of violations will remain helpless, and in many cases it will be impossible to hold the parties to the conflict to account.

Humanitarian and legal concerns

In view of the above, it appears necessary to strengthen the mechanisms for preventing and stopping violations of international humanitarian law and for making reparation. States have a decisive role to play in this context.

- Halting the violations

Failure to comply with international humanitarian law, whether on the part of State armed forces or of non-governmental armed groups, is among the principal causes of suffering in armed conflicts. The main challenge when it comes to protecting victims in these situations is thus to persuade, or even compel, the parties concerned to comply with the rules by which they are bound. It is therefore imperative to take measures that not only anticipate the risk that violations of international humanitarian law will occur, but also serve to halt them in the midst of the fighting. It is important to consider the possibility of establishing mechanisms that can be used to monitor the conduct of warring parties and as means of persuasion or pressure. Such mechanisms presuppose the existence of bodies to clarify the nature and extent of the violations committed and decide on the most suitable measures for halting them. One of the main weaknesses of current international humanitarian law, however, is that it lacks appropriate means for halting violations when they occur.

It has not, in fact, been possible to meet this requirement with the machinery provided for in the Geneva Conventions and Additional Protocol I – the system of Protecting Powers, the formal enquiry procedure, and the International Humanitarian Fact-Finding Commission. The Commission, in particular, has never been called upon to act, although it has been operational since 1991. The main reason is that the actual operation of these mechanisms is subject to the consent of the parties concerned in each individual case.

In practice, it is mainly the ICRC which carries out certain supervisory tasks (visits to prisons, protection of the civilian population, confidential representations in the event of violations of humanitarian law, and so on). However, there are certain limits to the ICRC's role that are inherent to its mission and working methods. It is not the practice of the ICRC to publicly condemn the persons responsible for violations of international humanitarian law. Except in strictly defined circumstances,¹² the organization focuses on confidential bilateral dialogue with each of the parties to the conflict. Although confidentiality is an important argument for obtaining the best possible access to the victims of current and future armed conflicts, the purpose of the ICRC's representations is to persuade the parties responsible for violations to change their behaviour and to meet their obligations. Lastly, the ICRC does not necessarily have the formal authority to act in every case. In periods of non-international armed conflict, that authority is subject to the consent of the parties involved (offer of services).

¹² See ICRC, "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393-400.

The mechanisms envisaged in international humanitarian law are not, it is true, the only ones used for protecting people in periods of armed conflict. The United Nations system has for many years been involved in monitoring the parties to armed conflicts, in particular through the General Assembly, the Security Council and the Human Rights Council. Although these mechanisms sometimes presuppose the establishment of independent procedures (commissions of inquiry, special rapporteurs), final decisions are often subject to political negotiation. And while diplomatic channels are one of the necessary means for implementing international humanitarian law, they also have limits. First, it is not certain that these channels are really an alternative to humanitarian law mechanisms. Indeed, violations persist in many cases despite monitoring by the UN bodies. What is more, given their political dimension, these intergovernmental bodies tend to be selective, so that the decisions they take are inevitably liable to be perceived as biased, which of course poses a problem from the point of view of international humanitarian law.

The regional mechanisms for protecting human rights have also helped to meet the needs of the victims of armed conflicts, particularly by ruling on individual complaints. The European and Inter-American Courts of Human Rights have made significant contributions in the form of justice, truth and reparation, but these mechanisms cannot possibly compensate for the absence of a monitoring system specific to international humanitarian law: their jurisdiction is limited to certain geographical zones, and their decisions are in principle based on the human rights conventions they apply rather than on international humanitarian law, which is a different branch of international public law. Furthermore, their jurisdiction does not cover non-governmental armed groups, since, unlike humanitarian law, human rights law does not apply to these groups. The practice of regional mechanisms for protecting human rights can therefore not make up for the absence of a fully effective mechanism specific to humanitarian law. It is liable to call into question the primacy of international humanitarian law as the best law for protecting the victims of armed conflicts, and to weaken its universality and coherence.

So, although the contribution of the United Nations and regional bodies must not be overlooked, the reality of contemporary armed conflicts demonstrates that the issue of sufficient and effective monitoring mechanisms has not yet been resolved. The question thus arises as to how the monitoring system established under international humanitarian law could be strengthened. Should the existing procedures (Protecting Powers, formal enquiry procedure, International Humanitarian Fact-Finding Commission) be changed with a view to ensuring that they operate effectively in all armed conflicts? Is it preferable to create new mechanisms that are better suited to contemporary realities? If so, what parameters should be taken into account to ensure that these mechanisms are effective?

Many proposals have been put forward on the subject in the course of the normative history of international humanitarian law. When the Geneva Conventions were being drafted, it was proposed, for example, that a "High International Committee" be established, which would be in charge of monitoring the Conventions' application.¹³ Some twenty years later, the UN Secretary-General suggested that an "Observer-General" or "Commissioner-General" be appointed who would be in charge of setting up and running a system of asylum or refuge for civilian populations affected by armed conflicts.¹⁴ When the 1977 Additional Protocols were being drafted, the ICRC also put forward several options, pointing to the potential role of existing international or regional organizations or suggesting that an ad hoc commission be set up.¹⁵ More recently, the UN Secretary-General also suggested, in his Millennium Summit report, that a mechanism be established for monitoring the application of the provisions of

¹³ *Final Record of the Diplomatic Conference of Geneva of 1949 (1963)*, vol. 3, annex 21, and vol. 2, sec. B, p. 61.

¹⁴ *Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, A/8052 (1970)*.

¹⁵ ICRC, *Protection of victims of non-international armed conflicts*, Geneva, January 1971, p. 77.

international humanitarian law by the parties to conflicts.¹⁶ And lastly, in 2003, the ICRC launched a wide-ranging consultation process on the subject. The experts, including government experts, invited to take part mentioned the possibility of setting up one or several mechanisms that could carry out new functions to monitor respect for international humanitarian law: *inter alia*, a reporting system, an individual complaints mechanism, fact-finding missions, and the quasi-judicial investigation of violations.¹⁷

Whatever the option selected to improve the system, the body concerned should, in the ICRC's view, be neutral, independent and impartial, and it should be compulsory to initiate the procedure in a given situation. It would furthermore be desirable for the body to have real authority to make legally binding decisions rather simply being able to make recommendations.

- Reparation for the victims

When it is established through a monitoring mechanism that international humanitarian law has been violated, the purpose should not be solely to halt that violation or prevent it from being repeated. More and more victims are now seeking reparation for the harm suffered. This harm can be physical or mental, as with torture; victims sometimes also suffer damages to tangible property, such as the loss of a home or of land. These two aspects often go hand in hand. The victims of anti-personnel mines, for example, are affected both physically and psychologically by the injuries they have suffered, and their ability to generate adequate income is also often impaired. Reparation thus has a dual function. It must, as far as possible, enable the victims both to overcome their trauma and to take up their lives once again. Only then can it begin to meet the requirements of humanity and justice.

International humanitarian law broaches the reparation issue in general terms and in a manner that is incomplete. The relevant treaty provisions (Art. 3 of Hague Convention IV of 1907 and Art. 91 of Additional Protocol I of 1977) do not apply to non-international armed conflicts. As for customary law, although its scope does cover this type of conflict,¹⁸ it is difficult to say whether it concerns the responsibility of all of the parties or only that of the States involved. Furthermore, international humanitarian law does not specify to what extent reparation is to be awarded directly to individual victims or whether it concerns only inter-State relations. And lastly, the question of the nature of reparation is not dealt with. Indeed, reparation does not necessarily consist of awarding financial compensation for the injuries sustained; it can also take the form of other measures such as restitution (measures to restore freedom, resettle victims in their place of residence and return their property, etc.), rehabilitation (medical and mental care, access to legal and social services), satisfaction (verification of the facts and full public disclosure of the truth, public apologies, legal and administrative sanctions, etc.) or the guarantee that the violations will not be repeated. Reparation can also be awarded to individuals or to groups of individuals depending on the extent of the damage suffered.¹⁹

Final remarks on international mechanisms for monitoring respect for international humanitarian law and the reparation of violations

¹⁶ *We the peoples: the role of the United Nations in the twenty-first century, Report of the Secretary-General, A/54/2000*, 27 March 2000, para. 212.

¹⁷ ICRC, *Improving compliance with international humanitarian law*, ICRC Expert Seminar, Geneva, October 2003, pp. 17ff.

¹⁸ J.-M. Henckaerts, L. Doswald-Beck (eds), *op. cit.*, Rules 149 and 150.

¹⁹ These issues are discussed in a non-binding instrument adopted unanimously by the UN General Assembly in 2005: *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*.

Given that the most serious violations of international humanitarian law are recurring on a large scale, further thought must continue to be given to how the means of responding to this intolerable reality can be tangibly improved. The thinking must be comprehensive, combining various complementary approaches. It is important to apply existing measures to ensure the prevention of violations, but it is also urgent for the international community to participate extensively in a debate on how to strengthen monitoring measures applicable to all parties while an armed conflict is ongoing. Lastly, greater consideration should also be given to the follow-up of offences, in particular in terms of reparation for the victims.

3. Protection of the natural environment

Introduction

Armed conflict, whether international or non-international, leads to the degradation, or even destruction, of parts of the natural environment²⁰, including animals, vegetation, soil, water systems and entire ecosystems. Attacks on industrial sites, oil wells or other infrastructure, for instance, have resulted in cases of serious contamination. Massive defoliation campaigns have also been used by belligerents to gain strategic advantages.

Such activities may have dramatic consequences for the environment and natural resources, and may therefore threaten the well-being, health or even survival of local populations. In some situations, the impact may extend over large areas and continue for years or even decades after the hostilities end. While a certain level of environmental damage is inherent in armed conflict, it cannot be unlimited.

Humanitarian and legal concerns

International environmental law has been strengthened in recent decades as a result of growing awareness of the degradation of the planet's natural resources caused by mankind. This development has not, however, been carried over to international humanitarian law, despite the serious impact of warfare on the environment. The ICRC therefore believes that the time has come to address this problem.

- Destruction or degradation of the natural environment threatens the well-being, health and survival of entire populations

The natural environment is vital for the well-being, health and survival of present and future generations. The serious damage to the environment associated with many armed conflicts increases the vulnerability of affected populations.

Destruction of power stations, chemical plants and other industrial sites, drains and sewers, and the mere creation of rubble, may result in the contamination of water sources, arable land and air, affecting the health and survival of entire populations. For instance, during the bombing campaign against the Federal Republic of Yugoslavia in 1999, some areas were seriously polluted following attacks that destroyed dozens of industrial sites, posing a threat to the health of the local population and giving rise to the risk of long-term ecological damage.²¹ Equally, during the armed conflict in Lebanon in 2006, the bombing of the Jiyeh power station led to the release of approximately 10,000 to 15,000 tons of fuel oil into the Mediterranean Sea. This resulted in significant contamination of the shoreline, including a

²⁰ It must be emphasized that the definition of the natural environment is itself a matter of controversy and should be rendered more accurately.

²¹ UNEP/UNCHS, *The Kosovo Conflict: Consequences for the Environment and Human Settlements*, 1999, pp. 28-71.

protected ecological reserve. The consequences of this attack were such that clean-up activities exceeded local capacities and thus required intensive international assistance.²²

The consequences of damage to the environment for the civilian population can be dire and include scarcity of food and clean water, loss of arable land and income, or health problems. Damage to the environment often impairs ecosystems and natural resources long after the conflict is over, and may extend beyond the borders of a country. In some cases, people have no choice but to leave their homes during or after a conflict in order to find better conditions for survival.

In some cases, belligerents deliberately target the environment as part of their military strategy. Some of them have used deforestation as a means either to improve their own mobility or to identify the enemy with greater ease in densely covered areas. Another example is the 1991 Gulf War. The deliberate destruction of more than 600 oil wells in Kuwait caused widespread pollution. However, damage to the environment may also simply be an indirect consequence of the hostilities, when the parties target a legitimate military objective and the environment is affected as a collateral outcome of the attack.

The environment enjoys the *general* protection that international humanitarian law confers on civilian objects. That protection applies for as long as the environment cannot be considered a military target. It exists in international and non-international armed conflicts. This means that the rules governing the conduct of hostilities – the principles of distinction, proportionality and precaution – are relevant and that the parties to the conflict must respect them, taking due account of the environment when conducting military operations. The question is, however, to what extent these rules are adequate tools in practice for effective protection of the environment.

International humanitarian law also provides *special* protection for the natural environment. In international armed conflicts, Additional Protocol I prohibits "widespread, long-term and severe damage to the environment".²³ The ICRC considers that thought should be given to whether this provision needs to be strengthened. First, each of the three criteria ("widespread, long-term and severe") establishes a high, yet imprecise, threshold. The meaning of these terms should be clearly defined in order to improve the effectiveness of the norm. Secondly, these criteria apply cumulatively, implying that the norm in question only protects the environment against exceptionally catastrophic events – what may be called "ecocide". The threshold required for environmental damage to be considered as prohibited under international humanitarian law thus seems particularly high.

In non-international armed conflicts, there is no specific requirement under humanitarian treaty law for the parties to protect and preserve the environment when conducting hostilities. Common Article 3 and Additional Protocol II are silent on this point. It is true, however, that international customary law contains some obligations for protection of the environment,²⁴ but their exact extent and implications would certainly need further clarification or development. For instance, it does not seem that customary law governing non-international armed conflicts establishes a clear threshold for prohibited environmental damage. This uncertainty may make it difficult in practice to ensure effective protection. Likewise, it is unclear to what extent parties to such conflicts are bound to adopt precautions in the conduct of military operations in order to avoid or minimize incidental damage to the environment. Given that the majority of armed conflicts today are non-international, it is urgent to address these legal uncertainties.

²² UNEP, *Lebanon: Post-Conflict Environmental Assessment*, 2007, pp. 42-49.

²³ Additional Protocol I, Arts 35 and 55; J.-M. Henckaerts, L. Doswald-Beck (eds), *op. cit.*, Rule 45.

²⁴ See J.-M. Henckaerts, L. Doswald-Beck (eds), *op. cit.*, Rules 43 and 45.

- Lack of mechanisms to address the consequences of damage to the environment

As previously mentioned, damage to the environment due to armed conflicts may be extensive, largely exceeding the actual combat zone. It may also have long-term consequences that continue after the hostilities end. For instance, a considerable amount of environmental damage may emanate from chemicals and other pollutants leaking into the soil and groundwater as a result of military operations. These chemicals and pollutants can come from the destruction of power plants, chemical plants and other industrial installations but also from the rubble left by attacks against other types of military objectives. In some situations, hazardous substances have been abandoned by parties to armed conflict when leaving combat zones. For example, in Astana, a small village in Afghanistan, land on which the inhabitants grazed livestock was polluted for years by hazardous chemicals used to fire missiles, exposing the local population to high risks.²⁵

As a result, the civilian population no longer has safe access to resources that are indispensable to its survival. People may also suffer serious health effects. Extensive thought must therefore be given to possible mechanisms and procedures for addressing the immediate and long-term consequences of environmental damage.²⁶

First of all, such mechanisms should be entitled to monitor the nature and extent of damage to the environment caused by violations of international humanitarian law, whether in international or non-international armed conflicts. They should also be empowered to investigate alleged violations of relevant international rules and to decide on the most appropriate forms of reparation in each situation. This could imply, for instance, an obligation to remove the source of harm from the affected area and to ensure decontamination. Solutions and options in this respect should be considered within the wider framework of improving implementation of international humanitarian law and of providing reparation to victims of violations in general.

Secondly, from a strictly legal point of view, as parties to armed conflicts can be held to account for their acts only if they fail to comply with binding obligations, it would be advisable to consider whether new mechanisms should also assess the environmental damage resulting from lawful activities and how to remedy it. Such mechanisms should provide solutions in terms of victim assistance and restoration of the environment following armed conflict.

Lastly, given the complexity, for example, of repairing damaged plants and installations or cleaning up polluted soil and rubble, it would also be desirable to develop norms on international assistance and cooperation. Such norms could be developed in tandem with new mechanisms or, on the contrary, independently of them. They could apply to environmental damage caused by any military operation, whether lawful or unlawful.

Such norms would open new and promising avenues for handling the environmental consequences of war. A new system could be introduced that is based on similar rules recently created for dealing with the legacy of landmines and other explosive remnants of war.²⁷

²⁵ UNEP, *Ground Contamination Assessment Report, Military Waste Storage Site, Astana, Afghanistan*, December 2006.

²⁶ UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, November 2009, p. 53.

²⁷ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997, Art. 6, and Protocol on Explosive Remnants of War (Protocol V to the 1980 Conventional Weapons Convention), 28 November 2003, Arts 7-8.

- Destruction of areas of major ecological importance

Armed hostilities may have particularly disastrous consequences when they occur in zones of major ecological importance. Areas containing unique ecosystems or endangered species may be completely destroyed if they are not provided with effective and specific protection. There is currently no guarantee that such areas will not become part of a battlefield, with the inevitable damage and long-term environmental impact that this would entail. For instance, Virunga National Park in the Democratic Republic of the Congo, which contains some of the richest biodiversity in Africa, has been affected by armed conflicts for the last twenty years. Due to the direct and indirect consequences of such chronic violence, species are endangered and habitats have been destroyed, thus threatening the survival of local populations.²⁸

To avoid the consequences of hostilities, certain fragile environments or areas of major ecological importance, such as groundwater aquifers, national parks and habitats of endangered species, should be off-limits to any form of military activity. Such areas should therefore be delineated and designated as demilitarized zones before an armed conflict occurs, or at the latest when the fighting breaks out. They could not harbour combatants or military material and could not be used for military action. The establishment of such a system of specially protected areas could be based, for example, on the system of enhanced protection for cultural property. Under that system, cultural property of special significance for humanity is entered on a list and the parties concerned undertake never to use it to back up military operations. The property is thus protected from attack for as long as it is not used for military purposes.²⁹

Since there is at present no means of conferring such internationally recognized protection on specific natural areas, except perhaps by establishing a demilitarized zone (which would require agreement between the parties to the conflict), the law needs to be strengthened with a view to establishing territorial protection applicable to areas of major ecological importance in international and non-international armed conflicts.³⁰

Final remarks on the protection of the natural environment

The protection of the natural environment has gained increasing prominence in the last few decades. States are now aware of the need to confront global warming, deforestation, marine pollution, the depletion of natural resources, and the loss of habitat and extinction of species, among others. As a result of this awareness, international environmental law has expanded considerably.

At the same time, the protection of the environment has also come to be seen as important during armed conflicts, including non-international conflicts. However, the clarification and development of international humanitarian law for the protection of the environment has lagged behind. The ICRC is of the opinion that international humanitarian law in this area should be made more explicit and developed to safeguard the well-being and livelihood of present and future generations.

²⁸ International Institute for Sustainable Development, *MEAs, Conservation and Conflict: A Case Study for Virunga National Park*, Democratic Republic of the Congo, 2008; J. Kalpers, *Volcanoes under Siege: Impact of a Decade of Armed Conflict in the Virungas*, Biodiversity Support Program, 2001.

²⁹ See the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

³⁰ See, for example, UNEP, *Protecting the Environment During Armed Conflict. An Inventory and Analysis of International Law*, November 2009, p. 54.

4. Protection of internally displaced persons

Introduction

One of the most common consequences of armed conflict today is that so many people are forced to flee their homes. This mass disruption in people's lives is a matter of growing concern on every continent. It is estimated that over 27 million people were displaced worldwide in 2010,³¹ many of them as a result of non-international armed conflicts. A 2009 ICRC survey that interviewed people driven from their homes by a number of conflicts around the world revealed the staggering scale of displacement – more than half of all people affected by armed hostilities are forced to flee³². As the ICRC president put it, "internal displacement poses one of the most daunting humanitarian challenges of today".³³

People displaced within their country, or internally displaced persons (IDPs), are commonly defined as "persons or groups of persons who have been forced or obliged to flee their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural human-made disasters, and who have not crossed an internationally recognized border"³⁴. The ICRC study focused on people displaced within the context of armed conflict.

In the last decade, non-international armed conflicts have caused the majority of new displacements. Today, over half of the world's IDPs are to be found in five countries affected by such strife: Sudan, Colombia, Iraq, the Democratic Republic of the Congo and Somalia. In the course of its operations for IDPs in those countries and others,³⁵ the ICRC has identified recurrent problems of humanitarian concern affecting IDPs. Although international humanitarian law protects these people as civilians, the legal rules clearly do not take account (or take only insufficient account) of those problems. Obstacles to freedom of movement and voluntary return or resettlement, infringements of the civilian character of IDP camps, and the absence of mechanisms for individuals or compensation for lost property, are all problems IDPs face every day and for which international humanitarian law provides the parties to the conflict with few specific guidelines.

There have, it is true, been significant legal developments in protection for IDPs since the end of the 1990s.³⁶ Most of the reference texts are nevertheless weak from the legal point of view. The *Guiding Principles on Internal Displacement*, for example, the main reference text, are non-binding. And while the 2009 *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* represents a huge step forward for the protection of IDPs in Africa, it is regional rather than universal in scope. Customary

³¹ Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Internal Displacement: Global Overview of Trends and Developments in 2010*, March 2011, p. 8.

³² *Our world. Views from the field*, IPSOS/ICRC, 2009.

³³ *Internal Displacement in Armed Conflict – Facing up to the Challenges*, ICRC Report, November 2009.

³⁴ *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998, para. 2.

³⁵ Given its mandate, the ICRC has been present in these countries for years. Its humanitarian work is guided by the degree of vulnerability and the essential needs of all people affected by armed hostilities, including IDPs, who are protected by international humanitarian law as civilians. Protecting and assisting these persons therefore naturally lies at the heart of the ICRC's mandate and activities.

³⁶ Examples are the UN Guiding Principles on Internal Displacement (1998), the universal ratification of the 1949 Geneva Conventions, an increase in ratifications of the main human rights treaties and of the 1977 Protocols additional to the Geneva Conventions, the adoption of the Rome Statute of the International Criminal Court, clarifications of the customary rules of international humanitarian law, and the adoption of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009).

international humanitarian law contains specific rules on internal displacement, but those rules, which are five in number, cannot be considered a sufficient response to all the serious problems of humanitarian concern faced by millions of IDPs.

Before discussing some of the humanitarian and legal concerns, it must be recalled that violations of international humanitarian law are the most common cause of internal displacement in armed conflict. Preventing violations is therefore, logically, the best means of preventing displacement from occurring in the first place. If the parties to conflicts respected the basic rules of international humanitarian law, much of the displacement and suffering caused to IDPs and other people affected by hostilities could be prevented. Nevertheless, the ICRC also feels that the issues listed below are ones for which there is a shortage or total absence of treaty rules and that they give rise to specific protection problems affecting IDPs.

Humanitarian and legal concerns

- Freedom of movement

Displacement can be a way of coping with the consequences of armed hostilities. Frequently, however, although people want to flee the fighting or violations of international humanitarian law, the warring parties do not allow them to leave. While not necessarily unlawful, some restrictions of movement (e.g. curfews) can make flight difficult; often, however, the obstacles placed in the way by the parties to the conflict are arbitrary and put the people concerned in danger. Also, once people are displaced, they may be confined to a camp, a village or another area, and thus be prevented from moving further away from the conflict, or from going about their daily lives and finding work. Moreover, IDPs are often relocated while displaced, or forcibly returned to their homes without being given adequate information or meaningful options.

International humanitarian law does not contain a general right to "freedom of movement". The prohibition on forced displacement set down in Article 17 of Protocol II additional to the Geneva Conventions concentrates on the right *not to be compelled* without justification to leave one's place of residence or one's country. It does not contain a right to leave one's place of residence or to move to another part of the country, and yet that right is essential to allow people to flee combat zones.³⁷ Furthermore, there are no provisions guaranteeing the right to freely enter and leave camps or other restricted areas. It would therefore seem necessary to draw up specific provisions on freedom of movement in order to allow civilians to flee from the consequences of armed hostilities and, though displaced, to continue leading a life that is as normal as possible.

- Family unity

Displacement, particularly when triggered by armed conflict, causes disruption, and new or exacerbated vulnerabilities. In particular women, children, the elderly and disabled people are more vulnerable to acts of violence when separated from family and community.

While international humanitarian law protects IDPs from all acts of violence, Article 3 common to the Geneva Conventions and Additional Protocol II does not stipulate that, in the event of transfer, members of the same family are not to be separated. Provisions protecting family unity would allow each family to play its vital role in the emotional and material support of its members as they confront the challenges of displacement.

³⁷ Freedom of movement exists in international human rights law (see Article 12 of the International Covenant on Civil and Political Rights), but it is subject to a number of limitations. It may be derogated from in time of armed conflict and is binding only on States.

- Return or resettlement (voluntary and forced)

The plight of IDPs can be further exacerbated when they are displaced for many years and cannot return to their homes or places of usual residence, or find another lasting solution. Their property may have been destroyed or taken by others, their land may be occupied or unusable as a result of the hostilities, or they may fear reprisals if they return. Integration into the community where the IDPs have been staying might be problematic if they face hostility there or if they are not allowed by the authorities to remain there. It can happen that IDPs are sent back to their homes, even though the situation might still be dangerous for them. Some people do not want to return but rather to relocate to another place, but are not allowed to do so. In the ICRC's opinion, it is essential in such situations for the authorities to take the necessary measures, within the limits of their means, to facilitate all possible solutions.

Although treaty law governing non-international armed conflicts does not contain an explicit right to return, a rule of customary international humanitarian law accords this right.³⁸ This customary rule notwithstanding, the legal framework needs to be supplemented on this point. There is no mention of a positive duty on the part of the parties to conflict to take all feasible measures to facilitate voluntary, dignified and safe return. Depending on the circumstances and the capacities of the parties to the conflict, such measures could include mine-clearance, restoration of essential services, aid to meet urgent needs (shelter, food, water, medical care), the provision of construction tools, household items, farm implements and seeds, the repair of schools, health care facilities and markets, occupational training programmes and allowing visits prior to return. While forced returns or resettlement are certainly in many cases contrary to certain rules of international humanitarian law, they are not explicitly prohibited by the law.

Given the urgent need to find a lasting solution for the constantly growing number of persons displaced by armed conflicts, specific rules of international humanitarian law on return and resettlement would appear to be the best means of providing the parties to conflicts with clearer guidelines and thereby contributing to better protection for this extremely vulnerable group.

- Civilian character of IDP camps

While camps might be an appropriate response to massive flows of IDPs, the ICRC believes that they should be avoided as far as possible. Indeed, camps often create new needs and dependencies because people cannot provide for themselves. They may be the object of direct attacks, infiltration by armed groups, or the victims of extortion, among other things. This has been widely observed in refugee camps, and international organizations involved in displacement issues endorse the policy of maintaining the civilian character of refugee camps.³⁹

In some cases, however, IDPs will continue to be housed in camps, especially in acute crises in which large numbers of displaced people arrive at one location. In such instances, the above-mentioned risks must be proactively managed. Of course, under general international humanitarian law, IDPs are already protected as civilians and IDP camps are protected as civilian objects, so long as they are not used for military purposes. Nonetheless, it would be advisable to set out more specific rules or standards to safeguard the civilian character of IDP camps.

- Documentation

³⁸ J.-M. Henckaerts, L. Doswald-Beck (eds), *op. cit.*, Rule 132.

³⁹ *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, UNHCR (September 2006).

Displaced persons often do not have or have lost certain papers. This can lead to all sorts of problems: they cannot prove their identity or claim property, they cannot move freely or receive social or humanitarian aid. In many situations, IDP access to benefits and legal rights depends on documents such as identity cards, passports, birth and marriage certificates, educational diplomas, certificates of health and welfare rights and property deeds. Missing documents also present an obstacle to return and to other lasting solutions, for example, in the case of disputes over property and inheritance rights. This can perpetuate the vulnerability of groups such as female-headed households and ethnic minorities whose members may traditionally be less likely to possess documented rights.

While the rules of international humanitarian law governing international armed conflicts address certain aspects of this problem, in particular with regard to children,⁴⁰ the rules governing non-international armed conflicts do not. There is thus a need to draw up specific provisions on documentation, which will greatly diminish the range of difficulties faced by IDPs. Such provisions could require parties to armed conflicts to facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, such as passports, personal identity documents, birth certificates or marriage certificates.

- Individual mechanisms, including compensation for lost property

As stated earlier, current international humanitarian law does not contain any mechanisms such as the right to a remedy against violation of the law and the right to individual reparation. This is a general shortcoming that affects not just IDPs but also other victims of violations of the law. Nor does international humanitarian law provide for other mechanisms that could help mitigate the loss and suffering of IDPs and find a solution for what are sometimes large groups of people. One of the serious consequences of displacement in humanitarian terms is the loss of property. Violations of people's rights in the realm of housing, land and other property often accompany displacement. The loss of their homes and land actually deprives IDPs of their shelter and sources of livelihood. Not being able to recover their houses and their land or not being compensated for their loss clearly constitutes an obstacle to a lasting settlement.

While current international humanitarian law is silent on these issues, it is worth noting that many agreements and national laws stipulate the right to bring claims and the right to compensation. Mechanisms for the restitution of property are often post-conflict initiatives and involve both parties to the conflict. And some rules of international humanitarian law govern the period that follows a conflict, for instance regarding the search for the wounded, sick and dead (e.g. Art. 8 of Additional Protocol II) and amnesties (Art. 6(5) of Additional Protocol II). It is therefore conceivable for an instrument of international humanitarian law to create a mechanism that would be put in place after the conflict in order to facilitate lasting settlements.

Final remarks on the protection of IDPs

Violations of international humanitarian law are the most common cause of internal displacement in armed conflict. Preventing violations is therefore, logically, the best means of preventing displacement from occurring in the first place. If the parties to conflicts respected the basic rules of international humanitarian law, much of the displacement and suffering caused to IDPs and other people affected by hostilities could be prevented. Nevertheless, the ICRC also feels that the issues listed above are ones for which there is a shortage or total absence of treaty rules and that they give rise to specific protection problems affecting IDPs. On the basis of its work in behalf of IDPs in connection with armed conflicts, the ICRC

⁴⁰ See Art. 50(2) of the Fourth Geneva Convention and Art. 78(3) of Additional Protocol I.

believes that developments in international humanitarian law concerning displacement will have the effect of enhancing protection for IDPs. Work to that end should be undertaken with a view to strengthening existing rules and standards and should supplement the *Guiding Principles on Internal Displacement*, which are gaining in recognition.⁴¹

5. The consultation on strengthening legal protection for victims of armed conflicts

As stated in the introduction, the ICRC study on strengthening legal protection for victims of armed conflicts is the outcome of an internal process of reflection prompted by the need to ensure that international humanitarian law continues to provide a response to the problems of humanitarian concern observed in the field. The study constitutes a first step, a basis for broader discussion. To that end, the ICRC decided to launch an in-depth dialogue comprising three main stages: a) first, and as a priority, it wished to engage the States in a process of bilateral consultation, as the States must be closely associated with any undertaking to strengthen international humanitarian law; b) the dialogue will now be pursued at the 31st International Conference of the Red Cross and Red Crescent, which affords a platform for all States to express their views in a multilateral setting and will open the debate to all the components of the International Red Cross and Red Crescent Movement; c) lastly, it will have to be determined, together with the International Conference participants, in what form that dialogue should be continued with a view to obtaining proposals for tangibly improving the plight of victims of armed conflicts.

This final section concentrates on the first stage of the dialogue. It presents the results of the consultation and announces the conclusions the ICRC wishes to draw for the future.

During this stage, the ICRC took the initiative to forge bilateral contacts with a group of governments' representative of all the world's regions. It was open to engaging in dialogue with any other government wishing to take part in the process. Its aim was to determine to what extent the States shared the conclusions of the ICRC study on strengthening legal protection for victims of armed conflicts, and to collect proposals for the process by which to provide a more appropriate response to the humanitarian needs brought to light by the study.

The issues broached in the course of the consultation sparked great interest on the part of the States that took part in the exercise. Most of them provided the ICRC with in-depth comments, often in writing, on matters of both substance and process. The results of the consultation are thus a good basis for further thought at the International Conference and beyond.

As stated in the introduction, the States that participated in the consultation generally confirmed that, overall, international humanitarian law continues to provide appropriate responses to the humanitarian needs arising in armed conflicts. They agreed that, in most cases, the best means of meeting the victims' needs was to guarantee compliance with the law. Most of the States consulted also agreed on the problems of humanitarian concern set out in the ICRC study. They recognized that the four areas highlighted in the study gave rise to serious concern in practice.

Views differed, however, on the best way to meet those concerns in legal terms, and the discussion on that point therefore remains open. Some of the States consulted were in favour of developing new treaty rules. They consider that only legally binding rules in the form of international treaties will allow for genuine improvement in the situation of victims of armed conflicts. Other States, however, expressed reservations on that approach. They stressed that treaty-based rules were not necessarily the best suited for all areas and that

⁴¹ E/CN.4/1998/53/Add.2, *op. cit.*

other approaches, in which the priority is to strengthen international humanitarian law gradually, also had to be explored. The consultation therefore did not indicate a consensus on this point.

The States participating in the consultation also clearly indicated that it would not be realistic to work simultaneously on all four areas identified, and that priorities should be set. In their view, future discussions should concentrate on the topics able to spark the greatest interest among States. The results of the bilateral consultation should therefore be scrutinized with an eye to each of the areas proposed by the ICRC.

a) Almost all the States consulted clearly recognized that international humanitarian law had to be strengthened to provide better *protection for persons deprived of liberty*. They acknowledged that the legal rules, as they currently exist, do not provide a response to all the humanitarian needs arising in contemporary armed conflicts. Several of those States stressed the need to ensure better legal protection for persons detained for security reasons in non-international armed conflicts. Clear legal guidelines are needed to prevent arbitrary detention; those guidelines should stipulate the grounds on which such measures can be taken in a non-international armed conflict and the applicable procedural guarantees. With this in mind, several States referred to the principles and safeguards proposed by the ICRC in 2005, on the basis of international humanitarian law and international human rights law, and indicated that those principles and safeguards could constitute an adequate basis on which to start strengthening the law on those points in the future. Some States also recognized that it was time to examine the risks to which detainees were exposed when they were transferred from one authority to another. Others expressed an interest in taking account of the specific needs of certain categories of people in detention, such as women, children, the elderly and the disabled.

The consultation also served to confirm that certain fundamental questions will have to be discussed during the process of strengthening international humanitarian law in the area of detention. First, the rules and standards of international human rights law will have to be taken into account. Several of the States consulted emphasized the need to ensure that the two legal systems were coherent and that advances in one did not call into question the achievements of the other. Some of those States insisted on the need to take account not only of international and regional human rights treaties, but also the practice of treaty bodies and the relevant soft-law instruments.

As stated in the introduction, the ICRC is aware of the need for adequate links between international human rights law and international humanitarian law and to make sure the two bodies of law do not overlap. However, international human rights law cannot entirely make up for the deficiencies that may exist in international humanitarian law, and the ICRC remains convinced that the latter, as a universal legal regime that is binding on all the parties to a conflict and from which there can be no derogation, must be adapted as such to meet the challenges of contemporary armed conflicts.

Another fundamental question broached during the consultations on this point relates to consideration of non-governmental armed groups. Several States indicated that, by strengthening the provisions of international humanitarian law relating to detention, it should be possible to clarify the obligations of all parties to conflicts, including such groups. Some States suggested that minimum standards of protection should be drawn up that it would be possible to apply realistically to all the parties.

It is true that international humanitarian law concerns both States and armed groups, which can be very different in nature. Some such groups are highly organized and control territory, while others have rudimentary structures and limited means. It may therefore appear difficult to strengthen international humanitarian law in such a way that it would apply to all of them. If

the legal regime drawn up is too detailed, the risk is that requirements will be established that most non-governmental armed groups are unable to meet, in particular those that do not have the capacity to control territory or run government institutions. On the other hand, if the rules and standards applicable in non-international armed conflicts are made so flexible that they can be adapted to the capacities of all armed groups, including the least organized, the risk is that the resulting level of protection will be insufficient.

This is not a new challenge, however, and similar considerations have been borne in mind in past efforts to develop international humanitarian law. Experience has shown that the legal system allows some account to be taken of the differences between governmental and non-governmental parties. The obligations arising from this legal system are not all worded in absolute terms and even afford, in certain cases, some flexibility.⁴² This could also be the case for the future strengthening of international humanitarian law, if necessary.

The consultation also brought to light that future discussions on detention should, obviously, take account of other ongoing processes on the same subject, so as to ensure that different initiatives complement each other. Some States mentioned the Copenhagen Process on the Handling of Detainees in International Military Operations.⁴³ The process is coordinated by the Danish government and brings together a group of States and organizations directly concerned by the matter. Its aim is to draw up shared legal and operational standards for protection of persons detained as a result of international military operations while guaranteeing that the operations remain effective.

Although it shares this concern, the ICRC remains convinced that, no matter what the results of the ongoing processes, it is indispensable to continue giving thought to the protection for persons deprived of liberty. The scope of the ICRC initiative is broader than that of the Copenhagen Process, in that it covers all forms of non-international armed conflict, not only those involving the participation of multinational forces. Furthermore, the ICRC considers that certain problems of humanitarian concern cannot be properly dealt with in practice simply by reworking shared legal and operational standards. Some of the gaps in the existing applicable law require the preparation of new legal solutions. The ICRC initiative and the Copenhagen Process therefore complement each other.

b) Most of the States that took part in the consultation also indicated that *monitoring compliance with international humanitarian law* should also be discussed in depth, with a view to strengthening the law. Insofar as those States concede that failure to respect existing rules is one of the main causes of the suffering inflicted in armed conflicts, they feel it is essential to improve the mechanisms for inciting the belligerents to meet their obligations - the credibility of international humanitarian law is at stake. Those States also recognize that most of the mechanisms established under this legal framework have so far proven to be inadequate. They observed in particular that the procedures for supervising the parties to armed conflicts have rarely been used in practice. They also admitted that the mechanisms set up under legal frameworks other than international humanitarian law also have their limits.

In terms of possible solutions, it has been recalled on several occasions that all options should be closely studied. Some States consider that the tools already existing in international humanitarian law should be strengthened, in order to ensure that they function properly. Such could be the case of the International Humanitarian Fact-Finding Commission

⁴² Additional Protocol II, for example, sets forth a list of obligations that must be respected by the authorities responsible for the internment or detention of persons deprived of their liberty for reasons related to a non-international armed conflict as defined in the Protocol. The Protocol specifies that the authorities are bound "within the limits of their capabilities" (Art. 5(2)).

⁴³ A Danish government initiative.

established in application of Article 90 of Additional Protocol I. Others believe that alternative solutions could be studied, including the possibility to set up a new mechanism. The question then is that mechanism's institutional point of attachment; while the bodies in charge of ensuring respect for human rights were developed in the framework of international and regional organizations, this has not been the case traditionally for the mechanisms of international humanitarian law.

No matter what option is decided on, the States that took part in the consultation stressed that any mechanism to monitor compliance with international humanitarian law should be independent with regard to its working procedures and the adoption of its conclusions. The politicization of procedures is perceived in many quarters as a major risk to the credibility and effectiveness of international humanitarian law. It has also been mooted that it should be possible to open a procedure independently, i.e. without the consent of the parties to conflicts. This would eliminate the risk of the procedure being blocked from the word go.

The States that took part in the consultation also raised questions that require further consideration in the light of future research and consultation on the matter of monitoring respect for international humanitarian law. Some of them insisted on the need to explore the impact that strengthening international humanitarian law in this regard would have on respect for State sovereignty. Others asked for more substantive discussion of the implications for non-governmental armed groups.

This interest in reinforcing monitoring of compliance with international humanitarian law nevertheless does not seem to extend to *reparation* for the victims of armed conflicts. Several States, it is true, considered that the subject raises major humanitarian issues and acknowledged that the existing law is insufficient. They underscored that consideration should be given to the various forms of reparation that could be made following violations of the international rules applicable in armed conflicts. They confirmed that financial compensation was not the only possible solution, but that other options should also be considered (satisfaction, reintegration, etc.). They also specified that it was not always possible to award individual reparation and that the possibility of providing for collective remedies should therefore be explored. Lastly, they recalled that any initiative on the matter should be based on existing rules and standards, in particular the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁴⁴ These States thus confirm the essential points made in the conclusions on this subject in the ICRC study on strengthening legal protection for victims of armed conflicts.

Other States, on the other hand, expressed clear reservations about reparations and do not appear to consider that this is presently a priority when it comes to developing the law. They appear to favour a more pragmatic approach to the question, and insist on the need for the States to have some leeway when it comes to taking account of the harm caused by armed conflicts. Some States that took part in the consultation believe, moreover, that the question of reparation should be dealt with first and foremost in national procedures, particular in the case of armed conflicts that are not international in nature.

c) Views differ on *protection of the natural environment* in armed conflicts. The consultation brought to light no clear trend in favour of one or the other possible options. The reactions fall into three main groups.

- Several States agreed with the ICRC: they feel that this is a fundamental subject whose humanitarian aspects concern not just the populations directly affected by armed conflicts, but potentially the future of humanity. Some of them showed a clear interest in strengthening

⁴⁴ United Nations General Assembly resolution 60/147 (2005).

international humanitarian law on this point, and in some cases even spoke of the possibility of developing treaty rules.

- Other States, however, expressed reservations. Some feared that overly specific rules would undermine the capacity of their armed forces to conduct their missions. Some also considered that the establishment of demilitarized zones aimed at protecting areas of major ecological importance would be abused by belligerents to shield themselves from enemy attack.

- A number of States adopted an intermediate position. Some of them felt that the humanitarian aspects and risks arising from the impact of armed conflicts on the natural environment are not yet sufficiently well known. They believe it is important to obtain a better understanding of that reality before considering the possibility of strengthening the international legal framework, and therefore suggest that meetings be organized at some future date so that specialists from various fields can share their knowledge. The aim would be to obtain a clearer reading of the results of the empirical research conducted to date. Lastly, some States consider that the relevant rules exist - and that it is therefore not necessary to adopt new ones - but that the question of compliance with those rules bears further examination. They recommend that room be made for reflection by the various players concerned, allowing them to share their concerns and exchange their impressions with a view to identifying best practices liable to be repeated in different contexts. It was suggested, for example, that the States be given the opportunity to share their experience of environmental protection in military operations.

In short, the consultation showed that the States were apparently not yet ready to undertake an exercise aimed at strengthening the international law protecting the natural environment in time of armed conflict. For the time being, it is important to continue researching the issue with a view to acquiring better knowledge of its implications in humanitarian terms and of practices at operational level.

d) Lastly, the consultation showed that the question of *internally displaced persons* is a source of major concern to the States, most of which stressed that better account had to be taken of the matter at international level and that work had to be done to reinforce the protection of the people concerned. This implies the introduction of measures to prevent internal displacement, respond to the protection and assistance needs of the people concerned and provide lasting solutions able to bring a halt to the phenomenon in satisfactory conditions.

Some of the States consulted agreed with the ICRC's conclusion that the effort should involve reflection on how to strengthen existing rules. They underscored that a process of discussion should focus on mechanisms for facilitating the return or resettlement of IDPs, the preservation of the civilian character of IDP camps and compensation for loss of material goods as a result of displacement.

However, an important number of States indicated that strengthening the applicable legal framework was not a priority at this stage, but that efforts to enhance the protection of IDPs should focus on promotion of existing rules, including the relevant international humanitarian law and human rights rules, and of the 1998 *Guiding Principles on Internal Displacement*.

Given the results of the consultation, the ICRC considers that the next stage of the dialogue on strengthening legal protection for victims of armed conflicts should give precedence to *protection for persons deprived of liberty* and *international mechanisms for monitoring compliance with international humanitarian law*. Those are the two subjects that sparked the greatest interest among the States. The ICRC will base its future work on this project on this conclusion. It is ready to engage in dialogue with all the parties concerned and to make its

expertise available to them. It is also willing to facilitate more in-depth reflection and to participate in other ongoing processes aimed at strengthening international humanitarian law.

As to the dialogue's outcome, the ICRC believes that all options for strengthening the law should be examined and discussed in the light of the areas considered. The possibilities include developing treaty law, drawing up soft-law instruments, identifying best practices and facilitating expert processes aimed at clarifying existing rules. The consultations have shown that, at this stage, no specific option is clearly preferred. In-depth discussion will therefore have to be continued after the International Conference; it should focus on analysis of the problems of humanitarian concern arising in armed conflicts and the best way to respond. It should also identify avenues for strengthening the law and improving its application.

Conclusion

This report contains food for thought on which to engage a substantive debate on the strengthening of international humanitarian law. It is essential for the law to continue playing its role by providing realistic solutions to the matters of most serious humanitarian concern in armed conflicts.

The ICRC believes that stronger rules are required in the four areas identified in the course of its internal study. Its operational experience shows that those areas are the source of several major humanitarian problems and that existing international humanitarian law is not always able to provide a completely satisfactory response. Given the magnitude of those problems, the participants at the 31st International Conference must be afforded the opportunity to engage in in-depth dialogue on the legal loopholes and shortcomings that remain and the best means of remedying them.

The ICRC is, furthermore, fully aware that any undertaking to strengthen international humanitarian law will only be successful if it enjoys broad support from the international community. It is especially important for the States to be closely associated in any dialogue aimed at attaining that objective. This is why the ICRC recommends that future deliberations focus on the two areas that received the broadest support from the States participating in the bilateral consultations, namely protection for persons deprived of liberty in time of armed conflict and international mechanisms to monitor compliance with international humanitarian law.

By undertaking this endeavour, the States and the components of the International Red Cross and Red Crescent Movement will send a strong message in favour of the victims of armed conflicts. They will acknowledge that the suffering inflicted in armed conflicts is intolerable and will show that they are able to propose ambitious responses to bring such suffering to an end.